Court of Appeal for Saskatchewan
Docket: CACV4223

Citation: ***Achter Land & Cattle Ltd. v South West Terminal Ltd.*****, 2024 SKCA 115**

Date: 2024-12-16

Between:

Achter Land & Cattle Ltd.

Appellant (Defendant)

And

South West Terminal Ltd.

Respondent (Plaintiff)

And

Syngrafii Inc.

Intervenor (Non-Party)

Before: Leurer C.J.S., Caldwell and Barrington-Foote JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Chief Justice Robert W. Leurer
In concurrence: The Honourable Justice Neal W. Caldwell
Dissenting reasons by: The Honourable Justice Brian A. Barrington-Foote

On appeal from: 2023 SKKB 116, Swift Current
Appeal heard: March 5, 2024

Counsel: Jean-Pierre Jordaan for the Appellant
Joshua Morrison and Michael Marschal for the Respondent
Jocelyn Turnbull Wallace and Milica Pavlovic for the Intervenor

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Leurer C.J.S.

I. INTRODUCTION

[1] Section 6(1) of *The Sale of Goods Act*, RSS 1978, c S-1, directs that a contract for the sale of goods of the value of $50 or more “shall not be enforceable by action” unless there is part performance of it or “unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf”. The principal issue in this appeal is whether the signature requirement found in this provision was satisfied by a text message containing a thumbs up emoji (👍). It is my conclusion that it was.

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[2] Achter Land & Cattle Ltd. [ALC] and South West Terminal Ltd. [SWT] disagree as to whether they are parties to an enforceable agreement relating to the sale of grain. The putative contract is said by SWT to have been formed out of an exchange of two text messages. In the first, an employee of SWT sent to Chris Achter, the principal of ALC, a picture of the front page of a proposed agreement with the accompanying words “Please confirm flax contract”. Mr. Achter replied to that message with a thumbs up emoji but with no other accompanying words or symbols.

[3] SWT has sued to enforce the contract it says was formed by this exchange. For its part, ALC asserts that there is no agreement but, if one exists, it is unenforceable because of s. 6(1) of *The Sale of Goods Act*.

[4] A Court of King’s Bench judge found in favour of SWT and granted it judgment for damages: *South West Terminal Ltd. v Achter Land & Cattle Ltd.*, 2023 SKKB 116, [2023] 10 WWR 717 [*Chambers Decision*]. ALC appeals from that decision.

[5] ALC’s appeal must be dismissed. The judge did not err when he found that a contract arose between the parties and that Mr. Achter’s text message satisfied the requirements of s. 6 of *The Sale of Goods Act*, including the need for a signature. My reasons follow.

II. BACKGROUND

A. The putative contract

[6] ALC is a farming corporation. It grows and sells grain. ALC is owned and operated by Mr. Achter. Mr. Achter's father is also involved in the farm's operations.

[7] SWT is in the commodities business. It has been buying grain from ALC for some time.

[8] It is an agreed fact that SWT had purchased grain from ALC "through various deferred delivery grain contracts since approximately 2012". Over the years, ALC and SWT entered and completed approximately fifteen to twenty such contracts. These agreements were all in SWT's standard form "Deferred Delivery Purchase Contract". This standard form contract consists of two sides of a single sheet of paper.

[9] The front of the standard form has a place for the completion of details such as the type of grain, the price and delivery dates. This information is to be filled in at the time each contract is consummated. The front page also contains a place for a representative of the "Producer" to initial to confirm that they have "read and understood the terms and conditions (Please see reverse side for contract terms and conditions)" and a further place for representatives of the Producer and SWT to affix their respective signatures.

[10] The back of the standard form contains 14 "General Terms and Conditions". The first of these requires the Producer to "deliver and sell the quantities of the type of grains, at the delivery location and within the delivery periods listed in the Contract". It also compels SWT to "accept delivery and purchase the grain that, before cleaning, meets or exceeds the grade and qualities specified in the Contract and pay to the Producer the applicable price listed in the Contract, subject to any charges or deductions provided for in this Contract".

[11] Beginning in 2020, ALC and SWT entered into several contracts in the terms of this standard form through text messages exchanged between Mr. Achter and Kent Mickleborough, an employee of SWT. I will discuss this course of dealings later in these reasons. For the moment, it is sufficient to observe that at the heart of this appeal is the question as to whether another such contract was entered into in March of 2021.

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[12] On March 26, 2021, Mr. Mickleborough sent a text message to producers with whom he was then dealing. Mr. Mickleborough's text message stated:

> All Divisions - - Kent Mickleborough – Flax Prices : Flax 1Can(max 6% dockage) $22.50/bu Apr. $17.00 Oct/Nov/Dec del

[13] The text message amounted to an invitation to treat to producers indicating that "SWT would pay $17 per bushel for flax with a maximum of 6% dockage and with a delivery period of between September and November 2021". In this context, dockage refers to any undesirable material intermixed with a quantity of grain.

[14] Shortly after Mr. Mickleborough sent this text message, he spoke separately with both Mr. Achter and Mr. Achter's father. Mr. Mickleborough's evidence was that, in his discussion with Mr. Achter, he reached a verbal agreement for the sale of flax, and that he had told Mr. Achter that he "would write up the contract and send it to [Mr. Achter] by text message". The parties agree that, after the call between Mr. Mickleborough and Mr. Achter, Mr. Mickleborough "had a contract drafted for [ALC] to sell SWT 87 metric tonnes of flax to SWT [*sic*] at a price of $17.00 per bushel (which amounts to $669.26 per tonne) with a delivery period listed as 'Nov'". Mr. Mickleborough also says that he asked Mr. Achter "to confirm the contract via text when it came through, which [Mr. Achter] agreed to do". Mr. Achter acknowledges that he spoke with Mr. Mickleborough but denies that he agreed to the terms of a contract.

[15] The document Mr. Mickleborough prepared was in SWT's standard form of "Deferred Delivery Purchase Contract" which, as mentioned, had been used in the previous transactions between the two companies. As noted, the front page of Mr. Mickleborough's draft contract identified that ALC would sell 87 metric tonnes of flax to SWT at a price of $17.00 per bushel with a delivery period listed as "Nov".

[16] Mr. Mickleborough applied his manuscript, or "wet ink", signature, as SWT's representative, on the front page of the contract he had prepared. After he had done this, Mr. Mickleborough took a photograph of the *front* of the double-sided document using his cellphone. Mr. Mickleborough then sent this photograph via text message to Mr. Achter's personal cellphone number. Accompanying the photograph was the message "Please confirm flax contract". Mr. Mickleborough did not text a photograph of the back page of the contract to Mr. Achter.

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[17] Mr. Achter received Mr. Mickleborough's text message, with the photograph of the front page of contract and the request that he "confirm flax contract", on his cellphone. He replied with a text message that contained only a thumbs up emoji. It had no accompanying text. Although the printed copy of the text message contained in the appeal record does not show this, ALC agreed in its factum that the information Mr. Mickleborough received back from Mr. Achter in the reply text message included "the Emoji and Mr. Achter's cellphone number and other identifying information (metadata)".

[18] As noted, the communications surrounding the putative contract formation took place before spring seeding. At that time, ALC did not have in its possession flax of the quantity that was contemplated to be sold by it under the putative contract. ALC subsequently sowed flax, but the crop failed. Mr. Achter's evidence was that ALC "did not harvest a single bushel of flax".

[19] On November 17, 2021, Mr. Achter advised Mr. Mickleborough that ALC did not consider itself bound to deliver flax to SWT because he had not signed the alleged contract.

[20] ALC did not deliver 87 metric tonnes of flax to SWT in November of 2021. The spot price at which flax was trading on November 30, 2021, was $41.00 per bushel (or $1,614.09 per tonne).

B. The action and the summary judgment application

[21] SWT commenced an action against ALC seeking damages for breach of contract based on the difference between the November spot price for flax ($1,614.09 per tonne) and the price indicated on the putative contract ($669.26 per tonne).

[22] In its amended statement of defence, ALC admitted that it had not delivered any flax to SWT, but it denied any liability to SWT. ALC raised two defences.

[23] ALC's first defence was centred on the fact that Mr. Mickleborough had not sent the general terms and conditions (i.e., the back page of the standard form contract) in his text message. Based on this, ALC pleaded that "the alleged agreement is, therefore, void for uncertainty of terms or, in the alternative, unenforceable due to lack of consensus ad idem". Associated with this plea, ALC also asserted that, had it received the general terms and conditions as set out on the back of the contract form, it would not have entered into the contract because it did not include an "Act of

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God" clause. Its contention was that because the flax had not then been grown, without such a clause, the risk of ALC being unable to deliver under the contract rested solely with it and it would not have agreed to the contract without protection against this risk.

[24] ALC's second defence was grounded in s. 6 of *The Sale of Goods Act*. Based on that provision, ALC asserted that if a contract existed, it was not enforceable.

[25] After pleadings closed, SWT applied for summary judgment of its claim. ALC agreed that the matter was suitable for summary determination but submitted that judgment should be granted in its favour, dismissing SWT's action.

[26] The parties filed an agreed statement of facts as well as a joint book of documents. Both sides also filed affidavit evidence. For its part, SWT submitted affidavits sworn by Mr. Mickleborough and its grain manager, Justin Isherwood. Mr. Achter provided an affidavit to which Mr. Mickleborough and Mr. Isherwood replied.

[27] Mr. Mickleborough's first affidavit provided much of the evidence of the historical commercial dealings between the parties, which history is not challenged by Mr. Achter's evidence. This included the other instances before and after March of 2021 in which arrangements for the sale and purchase of grain had been made via text messages exchanged between Mr. Mickleborough and Mr. Achter.

[28] Mr. Achter's affidavit did not take issue with many of the details surrounding these other contracts. However, he emphasized that "most" of the instances where delivery had been made involved grain that had already been grown. He also said that, whenever ALC entered into a contract where the grain still needed to be grown, he always insisted on the inclusion of an "Act of God" clause because he did "not want to be bound to deliver grain that [he] cannot produce due to circumstances outside [of his] control". In connection with the putative contract in this case, he stated that he expected it would be a "production contract with an Act of God clause, which [would have protected him] if the crop gets hailed out or gets damaged by drought". He also gave the following evidence about his intentions when replying to Mr. Mickleborough's March 26, 2021, text message with a thumbs up emoji:

> 8. I confirm that the thumbs up emoji simply confirmed that I received the Flax contract. It was not a confirmation that I agreed with the terms of the Flax Contract. The full terms

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> and conditions of the Flax Contract were not sent to me, and I understood that the complete contract would follow by fax or email for me to review and sign. Mr. Mikleborough [*sic*] regularly texted me, and many of the messages were informal. Attached as Exhibit "A" is one example of many jokes that Mr. Mikleborough [*sic*] would send me. I deny that he accepted the thumbs up emoji as a digital signature of the incomplete contract. I did not have time to review the Flax Contract and merely wanted to indicate that I did receive his text message.
>
> 9. I did not and would not have entered into the Flax Contract without first reviewing the terms and conditions with specific reference to the Act of God clause.

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[29] Both Mr. Mickleborough and Mr. Achter gave evidence in relation to a visit by Mr. Mickleborough to the ALC farm on September 22, 2021. The disagreement in the evidence of the two men was largely over what Mr. Achter had told Mr. Mickleborough about the state of ALC's flax crop at that time.

[30] Mr. Isherwood filed two affidavits in reply to Mr. Achter's evidence. In the first, he stated that "[a]ct of god clauses in grain contracts are rare across the industry" because they entail shifting risk from the seller to the buyer. He explained the difference between deferred delivery contracts, where "the buyer contracts to purchase a specific volume of grain at a specific price from the seller at a fixed time in the future" and so-called production contracts where "the buyer is buying a particular crop to be grown" with rights to additional tonnage grown on specified acres. He acknowledged that production contracts "do typically contain an act of god clause" but described that type of contract as being "rare in the industry". He explained that a production contract would include such information as seeded acreage, land locations, the nature of other crops seeded in that year by the producer, existing inventory, contracts with other grain buyers, commitments on overages, and information about crop insurance. He stated that ALC "has never entered into a production contract with SWT". He also provided evidence as to how a farmer might mitigate risk associated with entering into a deferred delivery contract for grain that had not yet been grown.

[31] In his reply affidavit, Mr. Mickleborough emphasized that neither Mr. Achter nor his father had indicated during the exchanges of March 26, 2021, that the contract being discussed was to be different than any of the others previously entered into between ALC and SWT. The point Mr. Mickleborough was making was that those were all deferred-delivery contracts (as the contract form that Mr. Mickleborough had photographed and sent to Mr. Achter was labelled to be) and none of these contracts contained an Act of God clause of the type that Mr. Achter now insists that he would have required before agreeing to sell flax to SWT. Mr. Mickleborough also said that he

had not sent Mr. Achter a copy of the back page of the contract containing the terms and conditions "as they are the same across all SWT contracts, which [Mr. Achter] had seen many times". He also explained that before a grain company would enter into a production contract, much more information would be procured from a producer than was obtained in this case.

[32] All three affiants were cross-examined on their affidavits.

C. The *Chambers Decision*

[33] After providing a brief introduction, the judge explained why he was dismissing an application by ALC to strike parts of Mr. Isherwood's affidavit. ALC initially appealed from this finding, but it did not pursue this issue in the appeal hearing and I understand the ground to have been abandoned. The judge then reproduced the agreed statement of facts that had been filed before him. Having laid this groundwork, he turned to discuss four issues.

[34] First, the judge considered whether a trial was required to decide the controversy between the parties. He observed that the parties had agreed that the case could be decided summarily. The judge also found that he was able, based on the information before him, to make a fair and just determination of the issues in dispute. For these reasons, he found that the matter was suitable for summary disposition. ALC did not appeal on this issue.

[35] Second, the judge discussed whether a "valid contract [had been] formed between SWT and [ALC] to deliver 87 tonnes of flax in November 2021 for a price of $669.21 [*sic*] per tonne?" He divided this into two sub-issues, being "Was there a consensus *ad idem*?" and "Was there certainty of terms?" (at para 16(b)). The first subsidiary question invited an examination of whether the parties intended to form *any* binding agreement. The second inquiry considered whether, assuming the parties had meant to form a contract, they nonetheless had failed to reach an agreement on the terms that were essential for a binding contract to exist, largely because Mr. Mickleborough had not attached to his text message the terms and conditions found on the reverse of the contract form. The judge answered both subsidiary questions affirmatively, leading him to conclude that a valid contract had been formed between the parties. After reaching that conclusion, the judge found that "under these circumstances a [thumbs up] emoji is 'an action in electronic form' that can be used to allow to express acceptance as contemplated under *The*

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Electronic Information and Documents Act, 2000, SS 2000, c E-7.22 [*EIDA*] as per s. 18" (at para 37).

[36] The third issue that the judge identified was whether the requirements of s. 6(1) of *The Sale of Goods Act* had been met. On this, the judge identified the "only issue in this case is the 'note or memorandum in writing and signed by the party' element" (at para 53). He found that "the flax contract was 'in writing' and was 'signed' by both parties" for the purposes of *The Sale of Goods Act* (at para 61). He concluded that "the signature requirement was met by the [thumbs up] emoji originating from [Mr. Achter] and his unique cell phone … which was used to receive the flax contract sent by [Mr. Mickleborough]" (at para 62).

[37] The fourth issue related to the appropriate measure of damages. The judge assessed these to be $82,200.21, plus interest, and he awarded costs to SWT. ALC does not appeal against the quantification of damages or the costs award, should this Court uphold the judge's conclusion that a valid and enforceable contract exists between the parties.

III. ISSUES

[38] The outcome of ALC's appeal is determined by the answers to these questions:

(a) Did the judge err in finding that the parties had entered into a contract?

(b) Did the judge err in finding that the exchanged text messages met the requirement for there to be "some note or memorandum in writing of the contract" within the meaning of s. 6(1) of *The Sale of Goods Act*?

(c) Did the judge err in finding that Mr. Achter's text message with the thumbs up emoji met the requirement that a contract be "signed by the party to be charged or his agent" within the meaning of s. 6(1) of *The Sale of Goods Act*?

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IV. ANALYSIS

A. There is a contract

[39] As I have noted, s. 6(1) of *The Sale of Goods Act* states that a "contract for the sale of goods of the value of $50 or upwards *shall not be enforceable by action*" unless the described prerequisites exist (emphasis added). It has long been settled that the emphasized words mean that, s. 6(1), when applicable, makes valid contracts *unenforceable* in proceedings in the courts. The provision does not say that such contracts have not been formed, are invalid, are void or voidable, or do not exist. See: *In re Hoyle; Hoyle v Hoyle*, [1893] 1 Ch 84 (CA) at 97; and John D. McCamus, *The Law of Contracts*, 3d ed (Toronto: Irwin Law, 2020) at 191 [McCamus].

[40] Here, the judge concluded, first, that the parties intended to form a binding agreement and, second, that they had agreed on the essential terms of their agreement. Based on these two findings, the judge determined that a contract existed between the parties. ALC asserts that the judge erred in both conclusions. I will examine them separately but, as a bottom line, in my view, the judge committed no palpable error in his analysis of the parties' intentions at the time of the purported contract formation and whether they had agreed to the essential terms of the contract.

1. Intent to contract

[41] A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration" (*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at para 35, [2021] 1 SCR 868 [*Aga*], citing *Scotsburn Co-operative Services Ltd. v W.T. Goodwin Ltd.*, [1985] 1 SCR 54 at 63).

[42] The judge emphasized that the inquiry into whether the parties had intended to form a contract is focused not on the parties' subjective intentions but rather on how their words and actions would be viewed to an objective outside observer. The judge referred to *Aga* and then provided the following summary of the law:

> [18] … The test for agreement to a contract for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract (*Aga* at para 36). The question is not 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 (*Aga* at para 37). …

[43] After establishing this basic legal framework, the judge conducted a careful review of the evidence pertaining to the history of the parties' dealings with each other prior to March of 2021, the circumstances surrounding the March 26, 2021, communications, as well as the parties' conduct after that date. He then concluded that, when considering all of the circumstances, the sending by Mr. Achter of the thumbs up emoji "meant approval of the flax contract and not simply that he had received the contract and was going to think about it" and that "a reasonable bystander knowing all of the background would come to the objective understanding that the parties had reached *consensus ad idem* – a meeting of the minds – just like they had done on numerous other occasions" (at para 36).

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[44] ALC has not identified any extricable error of law in this part of the judge's analysis. Certainly, the judge properly oriented himself in the law by asking whether an objective reasonable bystander viewing matters in the context of the relevant circumstances would conclude that an agreement was reached. In this regard, in *Aga*, Rowe J. emphasized that the "common law holds to an objective theory of contract formation", meaning that, "in determining whether the parties' conduct met the conditions for contract formation, the court is to examine 'how each party's conduct would appear to a reasonable person in the position of the other party'" (at para 35, citing *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp.*, 2020 SCC 29 at para 33, [2020] 3 SCR 247 [*Crystal Square*]). Justice Rowe went on to explain at paragraph 36 of *Aga* that the requirement of an intention to create a legal relationship "can be understood as an aspect of valid offer and acceptance, in the sense that a valid offer and acceptance must objectively manifest an intention to be legally bound", also citing *Crystal Square* at paras 49–50. There is no doubt that the judge understood these principles.

[45] The judge also found that Mr. Achter's text message was "an action in electronic form" that could be used to express acceptance as contemplated under s. 18 of *EIDA* (see para 37). That provision states as follows:

> **Formation and operation of contracts**
>
> **18**(1) Unless the parties agree otherwise, *an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed*:
>
> (a) by means of information or a document in an electronic form; or
>
> (b) *by an action in an electronic form, including* touching or clicking on an appropriately designated icon or place on a computer screen or *otherwise*

> *communicating electronically in a manner that is intended to express the offer, acceptance or other matter.*
>
> (2) A contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation.
>
> (Emphasis added)

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[46] ALC has not identified a legal error in any part of this further analysis. ALC also does not take issue with the use to which the judge put the parties' dealings before and after entering into the putative contract when grounding his conclusions respecting their objective intentions.

[47] Given the absence of an extricable error of law underpinning the judge's finding that a contract was formed, ALC is left to argue that the judge's conclusion – that, from an objective perspective, the parties had intended to enter into a contract – is palpably wrong as fact. In this regard, ALC asserts that Mr. Achter "never intended to convey acceptance of the agreement by sending the [thumbs up] emoji but merely intended to communicate receipt of the agreement". In advancing this argument, ALC submits that there is inherent ambiguity in a thumbs up emoji. It emphasizes that the common meaning of the thumbs up emoji is not simply to convey acceptance. In its factum, it quotes the following passage from the online dictionary, Dictionary.com:

> *The thumbs up emoji also frequently punctuates text, sometimes in strings for additional emphasis, to indicate positivity, agreement, approval, encouragement, or assurance, an equivalent to "Awesome!" or Great job!". Someone might comment "That looks great!👍" to celebrate a piece of online artwork. Another person might post "Please subscribe to my channel if you like my content!👍" to solicit support or to say thanks. As with much of language, the thumbs up emoji can also be used sarcastically: "Way to ruin the party👍."*
>
> (Emphasis as found in ALC's factum)

[48] ALC also refers to several cases and extrajudicial writings that have commented on the inherent ambiguity associated with emoji communications in general and the thumbs up emoji in particular. See, for example, *Bardales v Lamothe*, 423 F Supp 3d 459 (MD Tenn 2019); and *Lightstone RE LLC v Zinntex LLC*, 2022 NY Misc LEXIS 5925 (Sup Ct). Some of these authorities join their observations with arguments as to why emojis should not be recognized as meeting the signature requirements found in statutes like *The Sale of Goods Act*, an issue discussed later in these reasons. See, Moshe Berliner, "When a Picture is Not Worth a Thousand Words: Why Emojis Should Not Satisfy the Statute of Frauds' Writing Requirement" (2020) 41:5 Cardozo L Rev 2161.

ALC argues that recognizing "unclear and ambiguous language as an acceptance of an agreement or a signature will open Pandora's box and cause a significant amount of litigation".

[49] However, there is some distance between, on the one hand, saying that a communication – whether it be by word, gesture or symbol – does not bear a universal meaning and, on the other hand, asserting that it is *incapable* of having a particular meaning ascribed to it in a specific circumstance. In this case, the judge's reasons were limited to examining how an objective reasonable bystander, viewing all of the relevant circumstances, would have understood Mr. Achter's text message. Adopting the language of *Crystal Square* (at para 33), the issue before the judge was how Mr. Achter's conduct would appear to a reasonable person in the position of Mr. Mickleborough.

[50] The judge would have committed error had he approached his decision by suggesting that a thumbs up emoji invariably means "I agree" or always bears something akin to that meaning. But he did not do that. Rather, the judge was careful to consider only how an objective observer, who was aware of the relevant circumstances *in this case*, would interpret the text message and, in particular, if that observer would conclude that an agreement was intended and reached. In doing so, the judge reviewed the evidence of the history of the parties' commercial dealings with each other, including the other instances where the contracts for the sale of grain had been entered into by them through the exchange of text messages between Mr. Mickleborough and Mr. Achter *before* and subsequent to March of 2021.

[51] In this regard, on July 14, 2020, after discussing and agreeing on a contract with Mr. Achter, Mr. Mickleborough prepared a deferred delivery contract for the sale of a prescribed quantity of durum wheat for a specified price. Mr. Mickleborough manually signed that contract and took a photograph of the first page of it using his cellphone. He then sent the photograph via text to Mr. Achter together with the message, "Please confirm terms of durum contract". Mr. Achter texted back that it "Looks good" and "I haven't been back to the house, and I can't figure out how to sign on my new phone". A similar set of events occurred on September 11, 2020, and again on October 21, 2020. Mr. Mickleborough's September 11, 2020, text contained a photograph of the first page of the contract and the message "Please confirm terms of durum

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contract" and Mr. Achter's reply text simply said "Ok". On October 21, 2020, Mr. Mickleborough wrote, "Please confirm terms of Oct durum contract" and Mr. Achter's reply was "Yup".

[52] The judge summarized his conclusion regarding the evidence of these prior dealings as follows:

> [21] So in short, 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 on a number of occasions. It is important to note that each time [Mr. Mickleborough] added to the offered contract "Please confirm terms of durum contract" and [Mr. Achter] did so by succinctly texting "looks good", "ok" or "yup". The parties clearly understood these curt words were meant to be confirmation of the contract and not a mere acknowledgement of the receipt of the contract by [Mr. Achter]. There can be no other logical or creditable explanation because the proof is in the pudding. [Mr. Achter] delivered the grain as contracted and got paid. There was no evidence he was merely confirming the receipt of a contract and was left just wondering about a contract.

[53] Although, under cross-examination, Mr. Achter initially denied that contracts had been formed on these occasions, in this appeal, ALC no longer disputes this fact or the further fact that it fulfilled its obligations under those agreements. This is the case even though on the first of these occasions Mr. Achter had indicated that he could not "figure out how to sign" on his phone. In substance, as the judge pointed out, each time, the parties had proceeded on the basis that Mr. Achter's communication of assent by way of text message formed a contract between ALC and SWT.

[54] The judge treated this prior course of dealings as foundational to understanding what had occurred on March 26, 2021. He concluded that when, on that date, Mr. Achter sent the thumbs up emoji, he was not merely indicating that he had received the face page of the contract. Instead, Mr. Achter was communicating his acceptance of its terms, as he had done on previous occasions with the words "looks good", "ok" and "yup".

[55] The judge did not simply rest his decision on these findings. He also reviewed the details of the communications that had passed between the parties on March 26, 2021, and Mr. Achter's evidence that the exchanges on that date should be considered in a different light than the previous dealings between the parties because, on this occasion, the grain that was to be sold was not then available for delivery. The judge stated that it was "important to note that [Mr. Achter] acknowledges that he did not tell [Mr. Mickleborough] anything about production contracts" (at para 26). Following this, the judge conducted a careful review of Mr. Achter's affidavit evidence

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and reproduced a large segment of his cross-examination. He concluded this portion of his analysis by observing that, in any event, "it is not what [Mr. Achter] may or may not think a [thumbs up] emoji means". Rather, it "is what the informed objective bystander would understand" (at para 29).

[56] The judge acknowledged that Mr. Achter had taken the position that he was "generally unaware of what a [thumbs up] emoji means". He observed that the parties had engaged in "a far flung search for the equivalent of the Rosetta Stone in cases from Israel, New York State and some tribunals in Canada, etc. to unearth what a [thumbs up] emoji means". He stated that these cases, "to the small degree they are helpful are all distinguishable". He then said he preferred "a simpler approach" (at para 30) and quoted an online dictionary that provided that a thumbs up emoji is "used to express assent, approval or encouragement in digital communications, especially in western cultures". The judge noted that he was "not sure how authoritative" that dictionary was, but he found the definition "seems to comport with my understanding from my everyday use – even as a late comer to the world of technology" (at para 31). With this, he turned to Mr. Achter's previously quoted evidence, contained in paragraph 8 of his affidavit, that, by using the thumbs up emoji, he was simply communicating receipt of the contract but not that he had approved it. The judge observed that this was "somewhat self-serving" (at para 32). The judge also observed that, from that point on, Mr. Achter had never contacted SWT "to discuss the flax contract further except for a brief discussion about a possible crop failure in September 2021" (at para 33).

[57] The judge then turned to consider Mr. Achter's contention that "during the crop growing season he believed there was no flax contract with SWT" (at para 33). The judge rejected this suggestion, stating as follows:

> [34] The facts seem to be somewhat different. [Mr. Achter] responded to the offer to contract – [Mr. Mickleborough] called him because through Bob Achter ([Mr. Achter]'s father) [Mr. Achter] had expressed interest in a flax contract. There would be no other purpose for [Mr. Mickleborough]'s telephone call on March 26, 2021 to [Mr. Achter]. During that call [Mr. Mickleborough] and [Mr. Achter] talked about the flax contract and just like in previous occasions with the durum contracts a deal appears to have been at least verbally struck. This was followed up by [Mr. Mickleborough] sending a screenshot of the clearly titled Deferred Delivery Production contract [*sic*] indicating the product (flax), price and the parties just as they had done on numerous occasions before without any issues. [Mr. Mickleborough] added "Please confirm flax contract" – just as he had done in the past with the exception of the word flax instead of durum was used. [Mr. Achter] responded from his cell phone with a [thumbs up] emoji.
>
> [35] I prefer [Mr. Mickleborough]'s evidence that the above had been discussed. The court does not accept [Mr. Achter]'s version (para. 8 of [Mr. Achter]'s affidavit) because

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> the circumstances leading up to the conversation (multiple previous contract negotiations resulting in contracts) support [Mr. Mickleborough]'s recollection – indeed [Mr. Mickleborough] ultimately sent the texted contract offer shortly after the gentlemen ended their telephone call. Even though this is a summary judgment application, I am satisfied that I can resolve this evidentiary dispute on the affidavit evidence without the necessity of a trial.

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[58] ALC suggests that an objective observer would have been aware that flax was not then "in the bin". However, the judge clearly considered this fact and rejected it as being determinative on the question as to whether the parties had come to an agreement. In my view, he was entitled to make that finding of fact based on the evidence before him, including the form of contract used in this case and the parties' past dealings.

[59] The fact that goods that are the subject of a contract have yet to be grown does not preclude the formation of a contract to sell them. To the contrary, the "goods that form the subject of a contract of sale may be either existing goods owned or possessed by the seller or future goods" (s. 7(1), *The Sale of Goods Act*). Indeed, s. 6(2) states that s. 6 applies "notwithstanding that the goods … may not at the time of the contract be actually made, procured or provided or fit or ready for delivery or that some act may be requisite for the making or completing thereof or rendering the same fit for delivery". Therefore, although the fact that the grain had yet to be produced is relevant, it is but one of the circumstances that would bear on how an objective third-party observer would assess whether the parties had intended to enter a contract. As I have mentioned, the judge approached his fact-finding in exactly this way.

[60] It was only after considering the entirety of the relevant context, including that an objective observer would have been aware that the flax was not yet grown, that the judge determined that there existed *in the circumstances of this case* a mutual intent to enter a binding contract for the deferred delivery of flax:

> [36] I am satisfied on the balance of probabilities that [Mr. Achter] okayed or approved the contract just like he had done before except this time he used a [thumbs up] emoji. In my opinion, when considering all of the circumstances that meant approval of the flax contract and not simply that he had received the contract and was going to think about it. In my view a reasonable bystander knowing all of the background would come to the objective understanding that the parties had reached *consensus ad idem* – a meeting of the minds – just like they had done on numerous other occasions.

[61] As I see it, the judge's reasons appropriately reflect the reality that human communication is often subtle. Words, phrases, gestures and symbols may carry more than one meaning. All of

this gives rise to the potential for ambiguity and uncertainty and, indeed, litigation. The law has long accommodated for this, and courts are often called upon to determine the legal import of a multitude of communication types between individuals. The fact that, in this case, one part of the communication comprised an emoji simply provides a modern twist to this otherwise rather unremarkable observation.

[62] This case also illustrates why the factual matrix is important. “Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because *words alone do not have an immutable or absolute meaning*” (*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 47, [2014] 2 SCR 633, emphasis added). The principles are not different simply because the issue here is one of contract formation or because the mode of communication was electronic, involving a photograph of a document and a symbol delivered digitally with accompanying metadata, and not words uttered or written on paper. Surrounding circumstances are equally relevant in determining the meaning of non-verbal, electronic communication of the kind at issue here.

[63] ALC submits that, if Mr. Achter had simply intended to acknowledge receipt of a draft contract from Mr. Mickleborough, “it is hard to imagine what other emoji would have been more apt”. However, the premise of this submission is that Mr. Achter was limited to communicating by way of emojis. It was Mr. Achter who chose to use the thumbs up emoji, when in the past he had used words like “looks good”, “ok” and “yup” in a similar situation to form binding contracts. ALC’s submission does not establish error in the inquiry that the judge was called upon to make, which was to ascertain the objective meaning of Mr. Achter’s communication by emoji on this occasion. Furthermore, the submission does not meet the appellate standard of establishing palpable error in the judge’s finding that a contract had been formed in the circumstances of this case.

[64] More fundamentally, ALC’s argument ignores that uncertainty in communication is not a phenomenon that is restricted to situations where parties do so by way of symbols and not letters or words. An “X” can mean many things. It can represent the writer’s testing of the pen that is used to mark it. Depending on the circumstances in which it is written, it can be a mark of

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disagreement. Yet, as I will shortly discuss, it has also been found to be a mark communicating agreement, as a form of signature.

[65] Bringing all of this together, while a thumbs up emoji is certainly *capable* of being a message of mere acknowledgment of receipt, the question that the judge was called to confront was whether a reasonable observer, knowledgeable of the relevant circumstances, would conclude that Mr. Achter's use of the thumbs up emoji constituted acceptance of the contract with the intention to create a legal relationship. As I read the *Chambers Decision*, this is exactly the analysis the judge undertook in this case.

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[66] The ultimate obstacle standing in the way of all of ALC's arguments is that there was no material omission in the judge's consideration of the evidence. He carefully assessed whether, in the context of the complete factual matrix of the surrounding circumstances, including the fact that the flax had yet to be grown, the parties had displayed an objective intention to enter into a contract. The judge concluded that they had. On the bottom line, I see no legal error in the judge's analysis leading to this conclusion and no palpable and overriding error of fact in the conclusion itself.

[67] In short, the judge did not err in finding that ALC and SWT intended to enter into a contract when Mr. Achter replied to Mr. Mickleborough's texts with a thumbs up emoji.

2. Agreement on the essential terms of the contract

[68] ALC's second argument relating to contract formation is that, even if a mutual intent to enter a binding agreement existed, the parties had failed to agree on the essential terms of the contract.

[69] I take no issue with the general point that the creation of a valid contract requires the parties' agreement on its essential terms; it is not enough that they believe an agreement has been entered. See *Harle v 101090442 Saskatchewan Ltd.*, 2014 SKCA 6 at para 41, [2014] 4 WWR 783; and *Consulate Ventures Inc. v Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324 at para 81, 282 DLR (4th) 697, leave to appeal to SCC refused, 2007 CanLII 45678. However, I concur with the judge that, here, there was agreement on all the terms that were essential for the formation of a contract for the sale of flax.

[70] ALC offers two main reasons why this Court should find error in that finding of fact. First, it points out in its factum, as it did to the judge, that the draft contract that Mr. Mickleborough sent to Mr. Achter states the delivery date to simply be “Nov”. The suggestion is that, because no delivery year was indicated on the contract, the contract failed for uncertainty. The judge rejected this argument, stating as follows:

> [50] I will briefly discuss the defendant’s contention that the listing in the flax contract of a “Nov” delivery date is too vague. This in my view is a red herring. The parties would have known based on their previous dealings and the context in which the flax contract was discussed that this meant November 2021 delivery date. ([Mr. Mickleborough]’s September 14, 2022 affidavit paras. 8, 10 and 11 set out above). This is the only logical interpretation. There is no uncertainty as to the delivery date in my opinion.

[71] As this passage implies, and as the judge correctly observed elsewhere in the *Chambers Decision*, the parties’ intentions are to be determined from the words they used as objectively understood in the context of the relevant circumstances surrounding the making of the contract. These circumstances include that, prior to the contract being written, Mr. Mickleborough and Mr. Achter had specifically discussed delivery of flax for November of 2021. To this might be added that, on previous occasions when the parties entered into contracts via exchanged text messages, the month of the proposed delivery or an abbreviation thereof was listed but not the year, yet those contracts were fulfilled without dispute.

[72] Considering this clear evidence, I see no basis to find palpable and overriding error in the judge’s analysis on this point. The formation of a contract in this case does not fail because the year for delivery was not specifically set out on the contract document.

[73] ALC’s second argument under this heading is that the judge erred in failing to find that there was an absence of agreement on the essential terms of contract because Mr. Mickleborough’s text message contained a photograph of only the face page of the two-sided contract form and not its reverse. On this, after reviewing some foundational principles of law, the judge wrote as follows:

> [48] I will now apply the law to the factual matrix in this application. The parties had a long standing business relationship leading up to March 2021. [ALC] had entered into many deferred delivery purchase contracts with SWT leading up to March 26, 2021. The terms and conditions were set out repeatedly in these contracts. [Mr. Achter] may have been thinking about a form of production contract but he never told [Mr. Mickleborough]. A reasonable, objective bystander aware of all of the previous contractual history would believe the same contract was being entered into – a deferred delivery production contract [*sic*]. The terms and conditions had never changed on the standard boiler plate reverse of

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> the document. [Mr. Achter] received the front of the deferred delivery contract. The fact that he did not receive the reverse does not in my opinion invalidate the contract for uncertainty. The reality of the situation informs the court that [Mr. Achter] would have known from the many previous contracts what the terms and conditions on the flax contract would be since the front page was clearly titled "Deferred Delivery Production Contract" [*sic*]. [Mr. Achter] argues that he wanted a production contract with "an act of God clause" that favoured the producer. However, that was never conveyed to [Mr. Mickleborough] and it does not matter under these circumstances what [Mr. Achter] may have thought. Accordingly, the defendant's argument that the absence of the "Terms and Conditions" boiler plate creates an uncertainty is not persuasive.
>
> [49] I agree with [SWT]'s approach that even if the general terms and conditions are not part of the flax contract – the essential terms of the flax contract are contained in the first page of the contract that was texted to [Mr. Achter] and to which he confirmed. The question is whether the contract as presented disclosed the substance of the parties' agreement. The agreement did convey with sufficient clarity the essential terms in agreement being the parties (SWT and [ALC]), the property (flax) and the price ([*101034761 Saskatchewan Ltd. v Mossing*, 2022 SKQB 193, 49 RPR (6th) 51] at paras 112-113). It is understood that courts will not enforce an agreement where an essential term is too uncertain – but nevertheless every effort should be made to ascertain the substance of the agreement (*Mossing* at para 115). In my view there are no missing or unascertainable essential terms in the flax contract – the parties, property and price were crystal clear.

[74] ALC advances what amount to two different lines of attack against this reasoning. First, in an echo of the submissions it offered as to why this Court should find that no intent to contract existed, it says that the judge failed to consider that this was the first and only occasion on which it had agreed to sell grain that was not in the bin. This, ALC says, renders the fact that it had previously seen the terms and conditions printed on the back of SWT's standard form contract irrelevant. It positions this alleged failure to consider evidence as an error of law, which this Court must review on a correctness basis. Alternatively, it says that the purported failure to consider evidence means that the judge's finding concerning formation of an agreement on the terms and conditions printed on the back of the contract form is palpably wrong.

[75] I am satisfied that the judge *did* understand and account for the fact that this may have been the first occasion on which ALC had contracted to sell grain yet to be grown when he made his finding as to what a reasonable, objective observer would conclude in the circumstances. The point was foundational to Mr. Achter's evidence that he thought he was agreeing to a production and not a deferred delivery contract – evidence that the judge reproduced verbatim in the *Chambers Decision* (see paras 25–27) and which evidence the judge explicitly rejected (see para 35).

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[76] Also, contrary to ALC's assertions otherwise, the fact that this may have been the first occasion on which ALC had agreed to sell grain yet to be grown does not render the other evidence to which the judge referred irrelevant to the determination of what a reasonable, objective observer would conclude had been agreed to. Quite the contrary; the uncontradicted evidence was that: (a) the contract that Mr. Mickleborough photographed and sent to Mr. Achter was clearly labeled as a deferred delivery purchase contract; (b) the contract form stated that it had terms and conditions printed on its reverse; (c) the contract form had previously been used by the parties in all their prior dealings; and (d) Mr. Achter was familiar with the terms and conditions that were printed on the reverse of the contract form.

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[77] Regardless of how the alleged error is characterized by ALC, I see no basis for this Court to interfere with the judge's factual conclusion that "a reasonable, objective bystander aware of all of the previous contractual history would believe the same contract was being entered into – a deferred delivery production contract [*sic*]" (at para 48). As such, there is no reason to address ALC's allegations of error in the judge's alternative reasoning that a contract had been formed even if it was unclear as to what terms and conditions had been agreed to between the parties in addition to those shown on the front page of the deferred delivery contract.

[78] I would make one last point about ALC's argument that the contract failed because of the absence of an agreement as to an essential term. In this case, the only clause that ALC maintains is "essential" that was not found on the front or reverse page of the contract document at issue is one that would address the producer's obligation to make delivery even in the event of a crop failure. In its factum, ALC placed emphasis on an admission given by Mr. Mickleborough in cross-examination that a farmer who is expected to deliver grain yet to be grown "would want to know if there is an act of God clause" that would protect them from crop failure. Such a clause appears in SWT's standard form production contract. It applies if "the producer does not or cannot deliver the contracted commodity due to a force majeure event" such that "the producer no longer has or cannot deliver the quantity of tonnes contracted, or a quality that [SWT] is willing to accept".

[79] In *First City Investments Ltd. v Fraser Arms Hotel Ltd.*, [1979] 6 WWR 125 (BC CA), Hickson J.A. (as he then was) described the type of term that might be considered essential:

> [28] … It is only the lack of a term that is *so essential to the contract that without it the court cannot collect the real intentions of the parties* from the language within the four

> corners of the instrument and so cannot give effect to such intentions by supplying anything necessarily to be inferred that will render the contract unenforceable.
>
> (Emphasis added)

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[80] In *101060873 Saskatchewan Ltd. v Saskatoon Open Door Society Inc.*, 2016 SKCA 98 at para 31, [2016] 12 WWR 65, this Court identified the essential terms of a contract for the sale of land to be the parties, the property and the price. The Court also stated that, if these are agreed upon, the other terms would be implied by law. Although that case dealt with the sale of land, the same three terms have been identified as being essential to a contract for the sale of goods. See G.H.L. Fridman, *Sale of Goods in Canada*, 6th ed (Toronto: Carswell, 2013) at 42 [Fridman]. As a general proposition, I see no reason in principle why the law should impose greater requirements in the sale of goods, particularly where the Legislature has directed through *The Sale of Goods Act* that in certain cases some terms are to be implied into contracts for the sale of goods. In saying this, I accept that, depending on the nature of the transaction, additional terms may be found to be essential. For example, the decision in *McDougall v MacKay* (1922), [1923] 64 SCR 1 at 9, would appear to recognize that in some cases the date of possession may be essential. Fridman gives as a further example the possibility that the place of delivery may be an essential term of a contract for the sale of goods (at 42). In this case, the period within which delivery was to be made would likely be considered to be an essential term because of its connection to the price of the commodity. However, for the reasons that I have already given, the judge did not err in finding that there was an agreement on this term.

[81] Furthermore, the notion that a farmer might wish to avoid the obligation to make delivery in the event of a crop failure is well removed from the conclusion that such a clause is an essential term of a contract for the sale of grain. This Court has been referred to no case that would hold that it is essential that a contract for the sale of grain (or other goods) qualify the producer's delivery obligation in a way that addresses the allocation of particular *force majeure* risks that may bear on the ability of a party to fulfil their contractual obligations. In the latter regard, it is important to observe that ALC is not maintaining that the contract does not speak to the question of risk. To the contrary, the premise of its appeal on this point is that the contract in this case *does* address the allocation of risk associated with a crop failure by leaving it with the producer. Understood in this way, ALC's submission is not so much that the contract is missing an essential term but that a term it contains is *incorrect*, based on the argument that it is mandatory, when grain has not yet been

grown, that a delivery contract contain a provision with very specific terms that allocate *force majeure* risks to the buyer of the goods. Respectfully, that is not what the law intends when it requires that a contract address all essential terms. In sum, if it is essential that the agreement address the allocation of the risk of a crop failure (and I do *not* find that this is an essential term) the contract in this case would not fail for want of an essential term.

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[82] In conclusion, I see no error in the judge's finding that there had been a communication of, and therefore agreement on, the essential terms of the contract.

3. Conclusion on contract formation

[83] The judge did not err in concluding that a contract was formed between ALC and SWT. The agreement required ALC to deliver 87 metric tonnes of flax to SWT in November of 2021 for a price of $669.26 per tonne. The breach of the contract entitles SWT to judgment for damages unless the contract is unenforceable by reason of s. 6(1) of *The Sale of Goods Act*.

B. There is a note or memorandum in writing of the contract

[84] As I have observed, under s. 6(1) of *The Sale of Goods Act* a contract for the sale of goods of a value of $50 or more is not enforceable unless there is part performance of it or "unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf". ALC argues that even if there is a contract, the judge erred in finding that the requirement for a "note or memorandum in writing of the contract" was met in the circumstances of this case. As I will explain, in my view he did not so err.

[85] The judge found the writing requirement to be met through the final two text messages exchanged between Mr. Mickleborough and Mr. Achter on March 26, 2021. Apart from its submission that the failure to include a copy of the terms and conditions found on the reverse of the front page of the contract affected its validity, which I have already addressed, ALC does not otherwise suggest that the exchanged text messages did not meet the requirement of a "note or memorandum" of the contract. Instead, all of its arguments made in relation to s. 6(1) concern whether the requirement that the contract was *signed* had been met. Nonetheless, because of the relationship between the requirement that there be a note or memorandum in writing and the requirement for a signature, I will offer a few additional comments on the point that the exchange

of text messages was sufficient to constitute a note or memorandum in writing to provide context for my later discussion as to why this contract was signed.

[86] In this case, the judge observed that the "common law has developed in these modern times to hold that emails are sufficient to constitute in writing and signed requirements". The judge also added that "there is case authority for the use of email and the use of electronic non-wet ink signatures to identify the person signing and to establish the person's approval of the document's contents" (at para 59). The judge's reasons must be taken to embody the conclusion that these principles apply to text messages as equally as they do to emails. My focus, at this point, is in relation to the conclusion that text messages can satisfy the requirement for a note or memorandum in writing as required by s. 6(1) of *The Sale of Goods Act*.

[87] The judge supported these determinations with reference to *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79, [2017] 9 WWR 172, aff'd 2017 SKCA 79, [2017] 11 WWR 680 [*Embee*]; *Buckmeyer Estate, Re*, 2008 SKQB 141, [2008] 9 WWR 682; *Love v Love*, 2011 SKQB 176, [2011] 11 WWR 614; *Love v Love*, 2013 SKCA 31, [2013] 5 WWR 662; and *Quilichini v Wilson's Greenhouse*, 2017 SKQB 10, [2017] 8 WWR 375. Because of the significance of *Embee* to these reasons, it merits introduction now.

[88] In *Embee*, the issue was whether a creditor, I.D.H., could recover money owed to it by its debtor, Embee. Because I.D.H. was presumptively out of time to sue, the key question in the case was whether Embee had acknowledged its debt prior to the expiration of the applicable limitation period so as to extend the time to sue under s. 11(1) of *The Limitations Act*, SS 2004, c L-16.1. In first instance, Layh J. held that email communications could constitute a statement that was "in writing" so as to satisfy the requirement found in s. 11(1) that the acknowledgment "must be in writing and must be signed by the person making it or the person's agent" (s. 11(2)(a)). In very brief reasons, this Court endorsed the reasons given by Layh J. on this issue. Based on the approval that this Court gave to Layh J.'s judgment, all references to *Embee* after this point are to his reasons.

[89] Regarding the requirement in s. 11(1) of *The Limitations Act* that the debt acknowledgment be "in writing", Layh J. stated as follows:

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> [38] I find that emails sent by Embee to I.D.H. are in “electronic” form. I also find that the emails, as required by s. 8(b) [of *EIDA*], are “accessible so as to be usable for subsequent reference.” The exchange of emails between the parties (and the fact that they were able to provide copies of these emails to the court) satisfies me that email correspondence meets the “in writing” requirement of s. 11(2) of *The Limitations Act.*

[90] Section 8 of *EIDA* describes the circumstances in which a requirement under law that any information or document be in writing can be met by a form of electronic communication. It states as follows:

> **Requirement for information to be in writing**
>
> **8** A requirement pursuant to any law that any information or document be in writing is satisfied if the information or document:
>
> (a) is in an electronic form; and
>
> (b) is accessible so as to be usable for subsequent reference.

[91] In this case, the judge correctly observed that the issue in *Embee*, turning as it did on a provision in *The Limitations Act*, was different than the facts of this case. However, he found the reasoning in that case “to equally apply” to *The Sale of Goods Act* (*Chambers Decision* at para 58). I see no error in this conclusion, or in the judge’s more specific finding that the text messages exchanged between Mr. Achter and Mr. Mickleborough satisfied the writing requirement found in s. 6(1) of *The Sale of Goods Act*. In this regard, the text messages are a type of writing in electronic form. They also remained accessible for subsequent reference as demonstrated by their reproduction for the purposes of this litigation, as was the paper contract, the front of which was photographed by Mr. Mickleborough.

[92] I therefore see nothing controversial about the judge’s finding that the writing requirement had been met by the texts exchanged between Mr. Achter and Mr. Mickleborough. The requirement under s. 6(1) of *The Sale of Goods Act* for a note or memorandum in writing of the contract can be satisfied 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 at para 33, 349 DLR (4th) 116 [*Druet*]). In *Druet*, the New Brunswick Court of Appeal found that seven emails pertaining to the sale of land could be joined together to meet the writing requirement under s. 1(d) of the *Statute of Frauds*, RSNB 1973, c S-14, although the Court ultimately concluded that there was no intention to contract in that case: see paras 31–37.

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[93] In short, here, the judge did not err in concluding that there existed a note or memorandum in writing of the deferred delivery contract within the meaning of s. 6(1) of *The Sale of Goods Act*.

C. Mr. Achter signed the contract

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[94] The issue in relation to s. 6(1) of *The Sale of Goods Act* reduces to the question as to whether Mr. Achter can be taken to have *signed* the deferred delivery contract when he replied to Mr. Mickleborough's text message by a text message containing a thumbs up emoji. ALC's final argument, which formed the bulk of its submissions in this Court, is that the judge erred in concluding that Mr. Achter had signed the contract. As I will explain, in my view, the judge did not err in law or fact in coming to this conclusion.

1. The judge's reasons

[95] The judge began his analysis by reproducing s. 6 of *The Sale of Goods Act*. He then set out the legal principles that he stated were "not at issue", including that of fulfilling the signature requirement, noting that "the signature does not need to be a signature in the strict sense of the word – so long as it shows that it is the defendant who is agreeing to the terms" (at para 54, quoting from SWT's brief of law). Following this, the judge reproduced ss. 3(b) and 14 of *EIDA*. He then referred to *Embee*, highlighting the following passage from that case (at para 57):

> [43] I find this discussion significant because it shows that even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law. I agree. The common law has always applied a wide range of analysis to determine the sufficiency of a signature. For example, an ordinary signature at the foot of a document probably provides more comfort as to the authenticity of its contents than a signature at the head of a document even though both are "signed." Common law courts have considered several deviations from "wet ink" signatures, including simple modifications such as crosses, initials, pseudonyms, printed names and rubber stamps.

[96] It was after this that the judge affirmed that the reasoning in *Embee* applies as equally to an exchange of text messages as to email messages. The judge then noted that there was no dispute that Mr. Mickleborough had signed the contract on behalf of SWT; the issue he identified that required resolution was whether Mr. Achter had provided his signature on behalf of ALC. On this, the judge's reasoning was brief, as follows:

> [62] In my opinion the signature requirement was met by the 👍 emoji originating from [Mr. Achter] and his unique cell phone (agreed upon statement of facts para. 2; cross-examination of [Mr. Achter] T6.7-T6.10; T28.6-T28.20) which was used to receive

> the flax contract sent by [Mr. Mickleborough]. 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 Sale of Goods Act*]. 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 [ALC] 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 ([Mr. Achter] using his unique cell phone number) and as I have found above – to convey [ALC]'s acceptance of the flax contract.

[97] 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. As already noted, this metadata included Mr. Achter's unique cellphone number and other information that meant that, when Mr. Achter's text message containing the thumbs up emoji was received by Mr. Mickleborough, it was identified as having been sent by Mr. Achter. These are findings of fact that may not be disturbed in the absence of a palpable and overriding error.

2. ALC's submissions

[98] ALC says that the contract was not signed by Mr. Achter, as required by s. 6(1) of *The Sale of Goods Act*. Its overarching submission is that Mr. Achter's text message does not meet the requirements of a signature under *EIDA*. In this regard, s. 14(1) of *EIDA* provides that a "requirement pursuant to any law for the signature of a person is satisfied by an electronic signature". Section 3(b) of *EIDA* defines *electronic signature* as meaning "information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document".

[99] In *Embee*, Layh J. correctly identified the four elements of *EIDA*'s definition of an electronic signature as follows (at para 57):

> (1) The presence of some type of "information" on the emails;
>
> (2) Such information may be in electronic form;
>
> (3) The information must have been "created or adopted [by the person] in order to sign a document"; and
>
> (4) The information must be "attached to or associated with the document."

[100] As previously canvassed, the references to "emails" in the test can be substituted *mutatis mutandis* with the words *text messages*.

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[101] I will address ALC's arguments by first placing its submissions regarding *EIDA* in the context of the signature issue under s. 6(1) of *The Sale of Goods Act*. I will then consider the relevance of *EIDA*. Finally, I will discuss how Mr. Achter's text message satisfies each part of the *EIDA* definition of *electronic signature*.

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3. Signature requirement under s. 6(1) of *The Sale of Goods Act*

[102] Although ALC approaches the matter through the lens provided by *EIDA*, the statute by which it attempts to render its contract with SWT unenforceable is *The Sale of Goods Act*. Therefore, to achieve success in its appeal, ALC must show error in the judge's conclusion that, as a result of the exchange of the text messages between Mr. Mickleborough and Mr. Achter, the deferred delivery contract was "signed by the party to be charged or his agent". This, at root, involves a question of the interpretation of the words *signed by* in s. 6(1) of *The Sale of Goods Act*.

[103] The resolution of any issue of statutory interpretation requires the court to focus on the "text, context, and purpose" of the provision at issue, to use the shortened paraphrase of the modern approach to statutory interpretation referenced in *R v McColman*, 2023 SCC 8 at para 31, 423 CCC (3d) 423, and as codified in s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2. Consistent with the modern approach, I begin by considering the relevant text of *The Sale of Goods Act*.

[104] Say "signature" to most English language speakers and their mind is apt to conclude that you are referring to a handwritten name or a so-called "wet-ink signature". It has been said that the "epitome of a signature is the act of an individual writing their name in their own hand on a document, usually in the form of a manuscript signature" (Stephen Mason, *The Signature in Law: From the Thirteenth Century to the Facsimile* (London, UK: University of London Institute of Advanced Legal Studies, 2022) https://uolpress.co.uk/wp-content/uploads/wpallimport/files/pdfs/9781911507321.pdf at 4 [Mason]). In a digital world, I expect no serious dispute that it could include an image of the same.

[105] However, even in ordinary parlance the verb *to sign* – i.e., the verb used in s. 6(1) – is commonly understood to encompass more than just the handwriting of a name. For example, the *Oxford English Dictionary Online* includes within the definition of the word *sign*, when used as a verb, to "use or affix a *mark* or signature" (Oxford University Press, entry last updated June 2024, emphasis added). In *R v Kapoor* (1989), 52 CCC (3d) 41 (Ont SC (H Ct J)) at 66, Watt J. (as he

then was) referred to one dictionary that stressed the breadth of the types of marks, beyond a handwritten name, that might qualify as a signature:

> In *Jowitt's Dictionary of English Law*, 2nd ed. (1977), "signature" is defined in vol. 2, p. 1660, as follows:
>
> > Signature, a sign or mark impressed upon anything; a stamp, a mark; the name of a person written by himself either in full or by initials as regards his Christian name or names, and in full as regards his surname, or by initials only (*In the Goods of Blewitt* (1880) 5 P.D. 116); or by mark only, though he can write (*Baker v. Dening* (1838) 8 Ad. & E. 94); or by rubber stamp (*Goodman v. Eban* [1954] 1 Q.B. 550); or by proxy (*Tennant v. London County Council* (1957) 121 J.P. 428).
> >
> > A person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person, signature is commonly performed by his subscribing his name to the document, and hence "signature" is frequently used as equivalent to 'subscription'; but any mark is sufficient if it shows an intention to be bound by the document: illiterate people commonly sign by making a cross.

An identical definition appears in the current edition of that dictionary: *Jowitt's Dictionary of English Law*, 6th ed, vol 2: J–Z (London, UK: Sweet & Maxwell, 2023) at 2402.

[106] The inclusion in these definitions of a *mark* as constituting a signature also reflects the history of the case law interpreting s. 6(1) of *The Sale of Goods Act* and its equivalents. The origin of that section is traceable to the *Statute of Frauds*, 1677, 29 Cha II, c 3. Well before the Legislature of the Northwest Territories first enacted the equivalent of s. 6 in 1896 (*The Sale of Goods Ordinance 1896*, No 10, s. 4 of the Ordinances of the NWT, 1896) and before the Legislature of this province adopted it in the consolidation of its statutes in 1909 (*The Sale of Goods Act*, RSS 1909, c 147, s 6), courts took an expansive approach to what qualifies as a signature under various statute of frauds legislation.

[107] Certainly, Layh J. did not misapprehend the authorities when he wrote in *Embee* that "[c]ommon law courts have considered several deviations from 'wet ink' signatures, including simple modifications such as crosses, initials, pseudonyms, printed names and rubber stamps" (at para 43). For the moment, I will mention only one further example of a mark constituting a signature. In the case of *In the Estate of Finn*, [1935] All ER Rep 419, Langton J. admitted into probate a will that had been "signed" by a thumbprint. In doing so, he held that the "thumbmark in the present case is no worse than a cross". As noted in *Bassano v Toft*, [2014] EWHC 377 at

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para 45 (QB), a "signature need not consist of a name, but may be of a letter by way of mark, *even where the party executing the mark can write*" (emphasis added).

[108] Accordingly, little is to be gained by fixating upon the idea that a signature is synonymous with a handwritten name. Reflecting a purposive approach to the interpretation of legislated signature requirements, courts have focused on whether a mark fulfils the purposes for which such requirements have been imposed rather than whether what is offered as a signature is a handwritten name. In *Druet*, Robertson and Richard JJ.A. (as the latter then was) commented on the "legislative objectives underscoring the signature requirement under the *Statute of Frauds*" (at para 28), as follows:

> [28] … It is generally accepted that signatures serve two purposes. One is to identify the person who is signing; that is to say, to identify the source and authenticity of the document. The other purpose is to establish the signatory's approval of the document's contents. …

[109] In this province, Popescul C.J.K.B. recently emphasized that, regardless of whether it is paper-based or electronic, the fundamental purpose of a signature is the same. In this regard, he stated that the "signature links the person to the document and is evidence of the person's *intention to be bound* by the document" (*R v Mackenzie Wright*, 2023 SKKB 236 at para 172, 543 CRR (2d) 261 [*Mackenzie Wright*], emphasis added). Others have observed, as well, that there is an element of solemnity to the affixation of a signature to a document that reminds parties of the legal implications of contracting (Mason at 6).

[110] I would not be so naive as to suggest that myriads of decisions interpreting the *Statute of Frauds* and the legislation its provisions have spawned can all be reconciled. However, taken together, the case law demonstrates an acute interest by the courts in attempting to ensure that the statutes that were enacted to prevent fraud not become an instrument for parties to avoid their legitimate obligations. The body of case law as a whole can be understood to take a purposive approach to interpreting the signing requirement found in s. 6(1) of *The Sale of Goods Act* and its many analogues. Collectively, the cases identify a signature to be a mark or other proxy that fulfills the purposes described in *Druet*, and the many like authorities. Signatures convey agreement and identify the person expressing that agreement. In short, at least for the purposes of s. 6(1) of *The Sale of Goods Act*, someone may "sign" a note or memorandum of a contract with a *signature* that is a name or other mark of agreement made for that purpose and in a way that it identifies its maker

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and signifies an intention to contract for the sale of goods. Any solemnity requirement that may exist in the statutory "signed by" precondition in s. 6(1) is satisfied by the act of a person affixing a signature or mark upon or in association with a document with the expectation that the act of doing so will authenticate the document as being binding upon them. I will return later in these reasons to further discuss the issue of intention.

[111] Having laid this background, I turn to the specifics of ALC's arguments.

4. Relevance of *EIDA*

[112] ALC argues that, because Mr. Achter never physically signed the contract, for his text message to be recognized as a signature, it must qualify as such under *EIDA*. For its part, SWT invites this Court to conclude that *EIDA* is "helpful" but ultimately does not preclude the recognition of a "common law" signature. It bases this submission on the statement made by Layh J. in *Embee* that "even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law" (at para 43) and his later comment that if an "acknowledgment fails to establish an 'electronic signature' under *EIDA*, … a broader analysis under longstanding principles of common law could, nonetheless, still establish the presence of a signature" (at para 57).

[113] Justice Layh found in *Embee* that all four requirements for an electronic signature under *EIDA* were satisfied in the circumstances of that case (see para 57). His comments relating to the "principles of common law" can be, and my own references to the common law relating to signatures are to be, understood as having been with reference to the case law that has interpreted the signature requirement under statute of frauds legislation. Those authorities recognize that the verb *to sign* and the noun *signature* are not restricted to the physical handwriting of a name or indeed to the writing of a name at all.

[114] *EIDA* is based on John D. Gregory, *The Uniform Electronic Commerce Act, 2000*, 6-1 Lex Electronica, 2000 CanLIIDocs 357 [Gregory], which was adopted by the Uniform Law Conference of Canada. Helpfully, the author explained the overarching purpose of *EIDA* in his commentary as follows:

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> 16. In all its functional equivalence rules, *the Uniform Act does not intend to change the substance of the existing law. It intends only to make the law media neutral, equally applicable to paper and to electronic documents*. The definition of "electronic signature" therefore does not create a new legal "thing" with this name. Rather it says what the essential functions of any signature are. The essence of a signature is the intention with which it was made. The definition says that the electronic information must be made or adopted "in order to sign a document". The existing law about the appropriate intention, and how one proves it, continues in effect.
>
> (Emphasis added)

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[115] At least so far as s. 14 of *EIDA* is concerned, this description is well-grounded in the language of the statute. In this regard, as I have noted, s. 14(1) provides that a "requirement pursuant to any law for the *signature* of a person is satisfied by an *electronic signature*" and s. 3(b) defines *electronic signature* as meaning "information in electronic form that a person has created or adopted in order *to sign* a document and that is in, attached to or associated with the document" (emphasis added). Neither of these provisions define or describe the attributes of a signature. Instead, the indicia of a signature are a function of the proper interpretation of the statute that imposes the signature requirement in any given situation. Of course, in the present case, the requirement is found in s. 6(1) of *The Sale of Goods Act*.

[116] This interpretation of s. 3(b) and s. 14 is consistent with the idea that *EIDA* "does not intend to change the substance of the existing law", but instead it "intends only to make the law media neutral, equally applicable to paper and electronic documents" (Gregory at para 16). It is also consistent with the requirement at common law that, before any mark can be treated as a signature, it must have been made with the intent to convey agreement and the further intent to identify the person expressing their agreement with the document in question and with the effect that it achieve those two things. Therefore, while *EIDA* defines the term *electronic signature* in a way that equates it to writing or text on a paper document, it does so on terms that allow for the continued application of the common law principles including those that have built up surrounding the interpretation of s. 6(1) of *The Sale of Goods Act* and its many analogues in other jurisdictions.

[117] Ultimately, here, as in *Embee*, the four requirements of the *EIDA* test for the recognition of Mr. Achter's text message as an electronic signature have been met. I will now explain this conclusion and, when doing so, I will make clear that the emoji and metadata in this case constituted a signature under the common law.

5. First, second and fourth requirements for an electronic signature

[118] To repeat, the four requirements for an electronic communication to qualify as an electronic signature under *EIDA* are: (1) the presence of some type of "information" on the communication; (2) that such information may be in electronic form; (3) the information must have been "created or adopted [by the person] in order to sign a document"; and (4) the information must be "attached to or associated with the document" (*Embee* at para 57 and s. 3(b) of *EIDA*).

[119] Contrary to ALC's suggestion otherwise, I see no room for controversy in connection with the first, second and fourth elements of the *EIDA* definition. In this regard, the emoji and metadata that accompanied Mr. Achter's text message clearly contained "information", that information was in electronic form, and it was "attached to or associated with" a chain of text messages, including Mr. Mickleborough's text message containing the photograph of the first page of the written contract that set forth the essential terms of the bargain. The judge referred to all three of these elements when he expressed his conclusion that "the signature requirement was met by the [thumbs up] emoji originating from [Mr. Achter] and his unique cell phone" (at para 62). These are findings that are well-grounded in the evidence, and I see no plausible basis upon they can be challenged.

[120] The intervenor, Syngrafii Inc., suggests that Mr. Achter's text message cannot qualify as an electronic signature because s. 3(b) of *EIDA* defines *electronic signature* as meaning "information in electronic form that a person has created or adopted in order to sign a document and that is *in, attached to or associated with the document*" (emphasis added). Its proposition is that the terms "in", "attached to" and "associated with" suggest a close connection between the mark or information and the document to be signed. More specifically, in its factum, it invites this Court to conclude that these words require that "the electronic information or a mark a person adopts to sign should only be considered an electronic signature when that information or mark is *on the electronic document or contract itself*" (emphasis added). Given that the appeal record demonstrates that, when Mr. Achter's text message appeared on Mr. Mickleborough's cellphone, it presented as the concluding message in a chain that included both the photograph of the front page of the paper contract that Mr. Mickleborough had sent to Mr. Achter and the thumbs up emoji with which Mr. Achter had replied, I take Syngrafii's submission to be that the combined effect of *EIDA* and s. 6(1) of *The Sale of Goods Act* is to demand that the electronic signature be placed or affixed as an amendment or addition to the electronic contract form itself.

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[121] I cannot agree with Syngrafii. I say this for two basic reasons.

[122] First, its argument ignores the other wording in *EIDA*. In this regard, s. 3(b) contemplates the recognition of an electronic signature if the information in electronic form that a person has created or adopted in order to sign a document is "in, attached to *or associated with* the document" (emphasis added). The definition expressly and disjunctively includes the words "associated with". As a verb, *to associate* is commonly understood to bear such meanings as "to join", or "to link together" (*Oxford English Dictionary Online* (Oxford University Press, entry last updated July 2023)). Because the phrase "associated with" is juxtaposed by the disjunctive article "or" with the words "in" and "attached to", it must mean something different and perhaps broader than the juxtaposed words themselves. Given the way that Mr. Achter's text message appeared on Mr. Mickleborough's cellphone – as part of a chain that included both the photograph of the contract that he had sent and the thumbs up emoji with which Mr. Achter had replied – in a very real and practical way, Mr. Achter's text message, which the judge found to constitute the signature, was palpably *associated with* the contract itself. Syngrafii's argument is, therefore, defeated by a plain reading of s. 3(b).

[123] Second, Syngrafii's argument also fails to engage with the case law recognizing that parties can rely on two or more documents to prove compliance with statutory requirements such as s. 6(1) of *The Sale of Goods Act*. For example, and as mentioned earlier, in *Druet*, the Court found that, through the application of the principle of joinder (see *Doran v McKinnon* (1916), 53 SCR 609), an exchange of a series of seven emails pertaining to the sale of land, "as a 'matter of fair and reasonable inference'", met the writing requirement under s. 1(d) of the *Statute of Frauds*, RSNB 1973, c S-14 (at para 36). Giving effect to Syngrafii's argument that the chained exchange of text messages in this case must be pulled apart would run contrary to the legislative intention to achieve functional equivalence between electronic information and paper documents.

[124] Thus, I am satisfied that the first, second and fourth parts of *EIDA*'s definition of an *electronic signature* are met in the circumstances of this case through the use of a thumbs up emoji and the accompanying metadata.

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6. Third requirement for an electronic signature: intention to sign

[125] This leaves the question of the meaning of the requirement in the third part of the *EIDA* definition – i.e., that the information said to comprise the electronic signature must have been "created or adopted [by the person] in order to sign a document". In both its factum and its oral argument, most of ALC's focus was on this third requirement.

[126] As I have previously observed, the requirement found in s. 3(b) of *EIDA*, that to qualify as an electronic signature the information must have been "created or adopted in order to sign a document", is not something that is unique to the electronic world. The law has long demanded that even the handwriting of a name must occur with this intent. This was one of the points made in *Caton v Caton*, [1867] LR 2 HL 127 at 139 [*Caton*], wherein Lord Chancellor Chelmsford stated as follows:

> The cases upon this point cited in the course of the argument establish that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of "authenticating the instrument," or "so as to govern the whole agreement," to use the words of Sir William Grant, in the case of *Ogilvie v. Foljambe*, or in the language of Mr. Justice Coleridge, in *Lobb v. Stanley*, "so as to govern what follows." …
>
> (Footnotes omitted)

[127] *Caton* continues to be widely followed in the common law world, including in this country, as imposing an intent requirement before a written name or a mark can be found to be a signature. In this regard, *Caton* was recently cited in *Hudson v Hathway*, [2022] EWCA Civ 1648, [2023] 2 WLR 1227 [*Hudson*], for the principle that "[t]he touchstone for determining what is a signature is an *intention to authenticate* the document" (at para 55, emphasis added). It was with reference to this criterion that Lord Justice Lewison further stated that, in applying "that principle, it has been held that a printed name may amount to a signature (*Schneider v Norris* (1814) 2 M & S 286); as may the name on a telegram form (*Godwin v Francis* (1869-70) 5 CP 295), or a rubber stamp (*Goodman v J Eban Ltd* [1954] 1 QB 550)" (at para 55). He went on to confirm that deliberately affixing a name to an email qualifies as a signature:

> [67] There is, therefore, a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature. Given that so much correspondence takes place nowadays by email rather than by letters with a "wet ink" signature, it is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature. …

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[128] Closer to home, in *Austie v Aksnowicz*, 1999 ABCA 56, [1999] 10 WWR 713 [*Austie*], Côté J.A. relied on *Caton* and other authorities for the proposition that the mere writing of a name is not enough to constitute a signature and instead the making of the mark must be done with an intention to agree or authenticate:

> [43] *Surely the defendant's merely having written his name is not enough to constitute signature*. Not even the mere fact that he wrote it in the usual appearance and form of his usual signature. What if he had been trying out a new pen on what was then a blank sheet, and practising his signature? What if a memorandum were later written above an existing signature in an autograph book or guest register? What if the defendant signed as witness to another's signature? See *Gosbell v. Archer* (1835) 2 Ad. & El. 500, 508-10, 111 E.R. 193, 197, 4 L.J.K.B. 78. That cannot suffice: *Kerns v. Manning* [1935] I.R. 869, 882-3 (C.A.). Counsel for the defendant admits that view of the law, and relies on the later supposed adoption of it as a signature.
>
> [44] *The cases show that the signature must have been affixed with some intent to agree to or authenticate the document*: *Kerns v. Manning*. That is the conclusion of the one monograph on this whole topic, Williams, *The Statute of Frauds Section IV* p. 82 (1932).
>
> [45] The signature must do two things. It must be so placed as to show that it was intended to relate and refer to, and in fact relate and refer to, every part of the instrument said to be a memorandum; it must govern every part of the instrument, and show that the signature was intended to show that every part of the instrument emanates from the defendant: *Caton v. Caton*, *supra*, at 886, 890, 891 (L.J. Ch.). There Lord Westbury also said that words of reference cannot convert a signature intended to have a limited purpose as to part only of a document, and turn it into a signature authenticating the whole document. Documents can be incorporated by reference, but signatures originally put on for a limited purpose cannot.
>
> (Emphasis added)

[129] As I have noted, in *Mackenzie Wright*, Popescul C.J.K.B. recently emphasized that, regardless of whether it is paper-based or electronic, the fundamental purpose of a signature is the same. In this regard, he stated that the "signature links the person to the document and is evidence of the person's *intention to be bound* by the document" (at para 172, emphasis added).

[130] All of this means that the answer to the question of whether Mr. Achter's text message constitutes a signature can, and should, be considered in the same way as print copy analogues. Considering the state of the law surrounding the making of non-electronic marks, and the overall intent of *EIDA* to achieve neutrality between electronic and non-electronic communications, I do not interpret s. 3(b) of *EIDA* to impose an intent requirement "to sign" that is different in substance from what would be demanded were the thumbs up emoji and accompanying metadata communicated in written form. Whether the mark is physical or electronic, it must be made for the

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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.

[131] As an example of the writing of a name without an intent to agree, to authenticate or to contract, and thus not amounting to a signature, in *Austie* Côté J.A. pointed to an affixing of a name "merely to admit receipt" (at para 51). In contrast, as I have already discussed here, the judge specifically rejected the factual proposition that Mr. Achter had used the thumbs up emoji simply to confirm receipt of the photograph of the front page of the contract. As I have also reviewed, the judge took pains to identify that it was the *combination* of the thumbs up emoji *and* the metadata that allowed Mr. Mickleborough to identify that the emoji originated from Mr. Achter's personal cellphone, that constituted Mr. Achter's signature in the context of this matter. The text message, consisting of the thumbs up emoji and the metadata that accompanied it, together fulfilled the purposes or functions that the judge identified as being associated with a signature. Even more specifically, the judge found on the facts of this case that the text message served as "a valid way to convey the two purposes of a 'signature' – *to identify the signator* ([Mr. Achter] using his unique cell phone number)" and "*to convey* [*ALC*]*'s acceptance of the flax contract*" (at para 63, emphasis added).

[132] I can agree with ALC that the existence of a signature depended on Mr. Achter not just communicating his agreement but doing so in a way that intentionally identified himself as the person expressing that agreement. However, I disagree with ALC's contention that the judge erred when he found that this had occurred. As the judge pointed out, Mr. Achter's text message was sent "from his unique cell phone … which was used to receive the flax contract" sent by Mr. Mickleborough (at para 62). The text message containing the thumbs up emoji was therefore not only identifiable as coming from Mr. Achter, but Mr. Achter would have known – *and intended* – that his text message would be received by Mr. Mickleborough as coming from himself.

[133] Therefore, when the text messages and surrounding circumstances are considered as a whole, it is easy to understand how the judge concluded that Mr. Achter had signed the deferred delivery contract. The thumbs up emoji expressed Mr. Achter's agreement to the contract and the act of sending the emoji with the metadata identified, or authenticated, Mr. Achter as the person expressing that agreement with that intention. In this regard, Mr. Achter's text message fulfilled

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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. I will mention only a few additional authorities to emphasize this point.

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[134] In *Goodman v J Eban Ltd*, [1954] 1 QB 550 (CA) [*Goodman*], referred to in several of the authorities I have previously discussed, Sir Evershed explained that a rubber stamp meets the signature requirement in circumstances where it was intended to personally authenticate the document (at 557):

> In my judgment, therefore, it must be taken as established, from the citations which I have made, that where an Act of Parliament requires that any particular document be "signed" by a person, then, prima facie, the requirement of the Act is satisfied if the person himself places upon the document an engraved representation of his signature by means of a rubber stamp. Indeed, if reference is made to the Shorter Oxford English Dictionary [2nd ed, vol 2, p 1892], it will be found that the primary meaning of the verb "to sign" is not confined to actual writing with a pen or pencil. The word in origin appears to have related to marking with the sign of the cross. But the later meanings include "(2) to place some distinguishing mark upon (a thing or person)" and "(4) to attest or confirm by adding one's signature; to affix one's name to (a document, etc.)." It follows, then, I think, that the essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing on the document, one's name or "signature" so as personally to authenticate the document.

[135] In more recent times, in *Embee*, there were two groups of emails. Some ended with an electronic representation of signatures, which were said to have been "specifically created and adopted … to sign documents" (at para 12). However, other emails ended with a salutation and the automatically inserted name and position of the sender. It was held that both groups of emails contained information "created or adopted [by the person] in order to sign a document" (at para 57(3)).

[136] Finally, courts have accepted printed names, even when the name has been printed before words are written on the paper expressing the agreement – as signatures. Thus, the requirement for a signature has been found to be where letterhead paper has been used to communicate agreement, even though no additional mark other than the printed letterhead, such as a handwritten or stamped name, has been affixed. (See Mason at 48, referring to *Tourret v Cripps* (1879), 48 L J Ch 567, 27 WR 706 [*Tourret*] and several other cases.)

[137] To be clear, 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. However, it and the emoji served precisely the same purpose – and, importantly, would have been known by Mr. Achter to serve that purpose – as did the rubber stamp in *Goodman,* the letterhead in *Tourret* and the automatically-inserted name in *Embee* – that is it authenticated him and his assent to the contract. It does not matter whether Mr. Achter knew precisely what metadata accompanied his text message reply to Mr. Mickleborough as it is not disputed that there was sufficient information for Mr. Achter to be identified to Mr. Mickleborough and that Mr. Achter knew and intended that his text message would be identified to Mr. Mickleborough as coming from himself.

[138] 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.

[139] The judge did not err in finding that Mr. Achter's text message "signed" the contract.

7. ALC's other authorities and remaining arguments

[140] As I see it, the outcome of this analysis is dictated by the application of well-settled legal principles to a modern set of facts. Yet, ALC marshals several cases that would argue for a different conclusion. The most compelling of these is *Mehta v J Pereira Fernandes SA*, [2006] EWHC 813 (Ch), [2006] 2 All ER 891 [*Mehta*].

[141] At issue in *Mehta* was whether an email satisfied the requirements of s. 4 of the *Statute of Frauds*, which provided that no action could be brought to charge the defendant to answer for the debt of another "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized" (at para 9). The name of the defendant, Mr. Mehta, did not appear in any place at the end or even in the text of the email; however, it appeared as part of the email address from which the email was sent that then appeared as a header on the printed email. Judge Pelling Q.C. noted that the header was inserted automatically and "the email was sent on the instructions of" Mr. Mehta (at para 19). He concluded from *Caton* that there

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must be an intention to authenticate the document and to affix a signature rather than to include the name "incidentally" (at para 25):

> [26] In the light of the dicta cited above, it seems to me that a party can sign a document for the purposes of section 4 by using his full name or his last name prefixed by some or all of his initials or using his initials, and possibly by using a pseudonym or a combination of letters and numbers (as can happen for example with a Lloyds slip scratch), providing always that whatever was used was inserted into the document in order to give, and with the intention of giving, authenticity to it. Its inclusion must have been intended as a signature for these purposes. I agree with Mr Aslett's analysis in paragraph 4 of his supplementary written submissions that in *Caton* the names were included in the document under consideration to describe intended performance. I also accept his submission in paragraph 6 of his supplementary written submissions that the meaning of "*incidental*" in this context means "… *where the signature or name just happens to appear somewhere*".
>
> (Emphasis in original)

[142] Judge Pelling accepted that a signed document should be treated equivalently whether it be signed electronically or as a hard copy (see para 28). Nonetheless, he held that the email header constituted an "incidental" inclusion of the name that was not intended to authenticate its contents or to serve as a signature (at para 29).

[143] Stephen Mason criticizes the reasoning in *Mehta* (Stephen Mason & Daniel Seng, eds, *Electronic Evidence and Electronic Signatures*, 5th ed (London, UK: University of London Institute of Advanced Legal Studies, 2021) https://read.uolpress.co.uk/projects/electronic-evidence-and-electronic-signatures). He suggests that Judge Pelling: (a) misunderstood the address as being automatically added (see para 7.162); (b) overlooked or misinterpreted relevant case law including the cases that have held that it is not necessary that the name be intended for a signature (see para 7.166); (c) failed to consider the email as a complete document, which was important because "the information contained in the 'From', 'To', 'Sent' and 'Subject' part of the email cannot be disconnected from the body" (at para 7.169); and (d) failed to consider the purpose of the email address itself. The commentor's discussion of the last point merits emphasis:

> **7.172** One further point might be usefully considered, and that is the purpose of the email address, which is of the utmost significance. The address acts to ensure the communication reaches the person it is addressed to; otherwise, an email address, even if different by one letter, number or dot, is unforgiving. It will not reach its destination, unlike a letter sent by way of post, where a human being can extract information from the envelope and use their knowledge to effect delivery of an envelope incorrectly addressed. It is also suggested that the 'From' address is also used with the intent to identify the sender (it being the function of the 'reply-to' address to indicate where, by default, a reply will be sent). If it follows that the 'From' line of an email acts to designate the sender, then the act of signature is the irrevocable dispatch of the email. … In this respect, it is difficult to see how the email

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> address can be considered to have merely appeared or is incidental: it is a crucial element of the document.
>
> (Footnotes omitted)

[144] This reasoning resonates in the context of the present case. There *may* be some validity to the proposition that, taken together, the thumbs up emoji with the metadata that accompanied Mr. Achter's text message could not result in a signature if his text message had not been sent in response to one from Mr. Mickleborough or if there had not been a history of authenticated communications between the parties. However, I do not need to decide if these hypothetical changes to the fact pattern would affect the result of this case. This is because, as I have stated, I am unable to see a palpable and overriding error in the judge's finding that Mr. Achter had communicated his agreement in a way that he knew and intended that the message of agreement (i.e., associating the thumbs up emoji with the contract) was his own with the expectation that he would thereafter be bound by the contract.

[145] ALC argues in its factum that there was nothing special about the thumbs up emoji and there was "no evidence that Mr. Achter created it himself to sign agreements". It further submits that the "metadata cannot satisfy the signature requirement as it is incidental information which was never intended [by Mr. Achter] to serve as a signature" and was "not adopted by him to sign agreements". These assertions merely contradict the facts as found by the judge; they do not explain why he might have been mistaken. Moreover, these submissions proceed based on a misunderstanding as to what constitutes an adopted mark and what signifies the intention that must accompany the making of the mark for it to qualify as a signature.

[146] I can agree with ALC that Mr. Achter did not *create* the thumbs up emoji for the purposes of signing contracts. However, the same can be said about the letters that together make up a person's name. In either case, what is controlling is the *use* to which the thumbs up emoji or those letters are put. Here, the judge found as fact that Mr. Achter would be understood by an objective observer to have attached the thumbs up emoji to the chain of text messages for the purposes of conveying his agreement to the contract and his intention to be bound by it and he communicated this intending that he be identified as the author of this expressed agreement. It is irrelevant that a thumbs up emoji may be used in other contexts to communicate other messages or ideas. What matters is the use to which it was put by Mr. Achter in the eyes of an objective observer. The

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judge's conclusions on these points also satisfies the solemnity aspect of the "signed by" requirement in s. 6(1) of *The Sale of Goods Act*, which requires objective evidence of the act of a person affixing a signature upon a document being done with the expectation that the act will authenticate the document as being binding upon them.

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[147] I also reject ALC's argument that a recognition of Mr. Achter's text message as a signature means that every text message constitutes a signature. This is not true any more than it means that every time a person writes their name they have created a signature. As SWT points out, context matters. In this case, the judge found that Mr. Achter had communicated ALC's agreement with the intention that he be identified as ALC's authorized agent.

[148] ALC further says that these conclusions will create commercial uncertainty as to the legal position of parties who choose to communicate by way of emojis or text messages. This ignores the previously-noted fact that s. 6(1) of *The Sale of Goods Act* does not invalidate contracts – it merely renders them *unenforceable by action*. A valid but unenforceable agreement may yet be relevant for various legal purposes (McCamus at 191). Moreover, many jurisdictions have abolished in-writing and signature requirements such as those found in s. 6 of *The Sale of Goods Act* without apparent concern that this abolition would wreak commercial chaos (see, for example, *Statute Law Amendment Act, 1958*, SBC c 52, s 17; *An Act to Repeal the Statute of Frauds*, SM 1982-83-84, c 34; *An Act to Amend the Sale of Goods Act*, SNB 1987, c 54; and *Statute Law Amendment Act (Government Management and Services)*, SO 1994, c 27, s 54). The Law Reform Commission of Saskatchewan has recently proposed that this province do the same: *Proposals for Amendments to The Sale of Goods Act: Final Report* (Saskatoon: July 2024).

[149] In any event, avoiding any speculative commercial uncertainty, as ALC urges this Court to do, would come at a cost. It would allow contracting parties to walk away from their bargains in circumstances where the court is able to conclude that a deal had been struck and there exists retrievable communications authenticating the entry of the parties into the contract and evidencing that agreement's essential terms.

[150] Finally, if commerce or policy considerations dictate some amendment to the law of signatures under *EIDA* and *The Sale of Goods Act*, it is for the Legislature to take such steps

through statutory amendment. Until then, this Court must follow the extant statute law and jurisprudence.

8. Conclusion on signature requirement

[151] The judge did not err when he held that Mr. Achter's text message met the requirement that there be a note or memorandum made and "signed by the party to be charged or his agent in that behalf" within the meaning of s. 6(1) of *The Sale of Goods Act*.

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V. CONCLUSION

[152] The judge found that a valid and enforceable contract exists between ALC and SWT. He reached this conclusion after examining the history of the parties' dealings, which included previous instances where contracts were entered into between them via exchanged text messages. The judge determined that a reasonable outside observer, who took account of the relevant circumstances, would conclude that the use by Mr. Achter of the thumbs up emoji was a communication of his agreement to be bound by the terms of the contract proposed by Mr. Mickleborough. The judge's conclusion on this point must be respected unless it is the product of a palpable and overriding error. As no such error was made by the judge, his finding that a contract for the sale of flax was entered into between ALC and SWT has not been impeached.

[153] The judge's determination that, taken together, the text messages exchanged between Mr. Achter and Mr. Mickleborough constituted a "note or memorandum in writing of the contract [that was] made and signed by the party to be charged or his agent in that behalf" within the meaning of s. 6(1) of *The Sale of Goods Act* must stand. The text messages between the two men easily satisfy the writing requirement embedded in s. 6(1). Additionally, Mr. Achter's text message signed that writing.

[154] For the purposes of s. 6(1) of *The Sale of Goods Act*, a person may sign a note or memorandum of a contract for the sale of goods by affixing or associating a name or other mark of agreement on or with a document for a purpose and in a way that identifies its maker and signifies an intention to contract, with the expectation that the act of so doing will authenticate the document as being binding upon them. Mr. Achter's use of the thumbs up emoji communicated

his agreement to the terms of the contract proposed by Mr. Mickleborough with the expectation that ALC would be held to it. Because Mr. Achter sent that emoji in a text message from his personal cellphone, there was electronic data that he knew would identify him as the maker of the mark and communicate his agreement to the contract. His text message therefore signed the contract as surely as if he had printed the photograph that Mr. Mickleborough had sent to him and then written his name on that print copy and returned it to Mr. Mickleborough.

[155] ALC's appeal must therefore be dismissed. SWT is entitled to its taxable costs against ALC.

"Leurer C.J.S."
Leurer C.J.S.

I concur.

"Caldwell J.A."
Caldwell J.A.

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Barrington-Foote J.A. (in dissent)

I. INTRODUCTION

[156] I agree with my colleagues that the parties entered into the flax contract, and that there was a note or memorandum of that contract within the meaning of s. 6(1) of *The Sale of Goods Act*, RSS 1978, c S-1. However, I have a different view as to the nature of some of the grounds of appeal that were advanced in relation to these issues and why they are without merit. These differences relate to my colleagues' analysis on these points, not their bottom-line conclusions.

[157] More importantly, I do not agree that Chris Achter signed the flax contract between Achter Land & Cattle Ltd. [ALC] and South West Terminal Ltd. [SWT] by sending the text containing the thumbs-up emoji (👍) to Kent Mickleborough [emoji text]. Specifically, I am of a different opinion than my colleagues as to the interpretation of s. 6(1) of *The Sale of Goods Act* and, as a result, as to whether the judge erred in concluding that the flax contract was signed by ALC as required by that subsection, which is as follows:

> **When contract enforceable by action**
> **6**(1) A contract for the sale of goods of the value of $50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

See also, *South West Terminal Ltd. v Achter Land & Cattle Ltd.*, 2023 SKKB 116, [2023] 10 WWR 717 [*Chambers Decision*].

[158] This provision does not say that the contract must be in writing. It requires that a note or memorandum of it be *signed* by the party to be charged or his agent in that behalf. In my opinion, this requires something more than that the party respond affirmatively to an offer in a text message where the other requirements of s. 6(1) have been met, even if the "yes" is communicated from an identifiable cell phone number. I agree that s. 6(1) should be interpreted in a manner that adapts to the widespread use of electronic communication, including text messages. However, it is not necessary or appropriate to do so in a manner that effectively renders the requirement for a signature meaningless in circumstances such as these. A change of that kind is for the Legislature.

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[159] I will deal first with the issues that relate to errors in the analysis that do not affect the correctness of the judge's conclusion that the parties entered into the flax contract, and then with the errors relating to the signature requirement that call for his bottom-line conclusion to be set aside.

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II. ANALYSIS

A. Contract formation: Intention to contract and s. 18 of *The Electronic Information and Documents Act, 2000*, SS 2000, c E-7.22 [*EIDA*]

[160] ALC submits that the judge committed errors of law and of mixed fact and law in concluding that the parties had entered into a binding legal contract. Unlike my colleagues, I agree that his analysis reflects error. However, I am satisfied that he nonetheless did not err in finding that the parties had entered into the flax contract. My reasons for these conclusions are as follows.

[161] As my colleagues have explained, "[a] contract is formed where there is 'an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration'" (quoting *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Catedral v Aga*, 2021 SCC 22 at para 35, [2021] 1 SCR 868). In the *Chambers Decision*, the judge correctly summarized the objective test that applies when determining whether these conditions are met, writing as follows:

> [18] … The test for agreement to a contract for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract (*Aga* at para 36). The question is not 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 (*Aga* at para 37). …

[162] The judge applied this test to the facts. He concluded, based on the evidence of other deferred delivery contracts that had been entered into and carried out by the parties, the events leading to the exchange of text messages between the parties in relation to the flax contract, and the content of those text messages, that the parties had reached a *consensus ad idem*. In so doing, the judge found as a fact that Mr. Achter had used the thumbs-up emoji to signal agreement to or affirmation of the flax contract, and not, as Mr. Achter claimed, to merely acknowledge its receipt.

[163] Having made this finding, the judge also held that sending the emoji text was an expression of acceptance within the meaning of s. 18 of the *EIDA*, reasoning as follows:

> [37] Additionally, I find under these circumstances a 👍 [thumbs-up] emoji is "an action in electronic form" that can be used to allow to express acceptance as contemplated under *The Electronic Information and Documents Act, 2000*, SS 2000, c E-7.22 [*EIDA*] as per s. 18:
>
> > 18(1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed:
> >
> > > (a) by means of information or a document in an electronic form; or
> > >
> > > (b) by an action in an electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.
> >
> > (2) A contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation[.]

[164] These conclusions as to Mr. Achter's intention in using the emoji and as to whether its use fell within s. 18(1)(b) are findings of fact or mixed fact and law. Allegations that the judge erred in fact or in mixed fact and law are subject to review on the palpable and overriding error standard. Palpable means "plainly seen", "plainly identified", or "obvious" (*R v Kruk*, 2024 SCC 7 at para 97, 489 DLR (4th) 385, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 5–6, [2002] 2 SCR 262). However, ALC also argued that this reasoning disclosed an extricable error of law. More specifically, it says that a thumbs-up emoji *cannot* convey an intention to be bound, as it is inherently ambiguous and, further, that such ambiguous actions were not within the contemplation of the Legislature when it passed the *EIDA*. This ground of appeal is reviewable on the correctness standard.

[165] With respect, I do not agree that s. 18(1)(b) of the *EIDA* should be interpreted as proposed by ALC. Unlike the judge, I would take judicial notice of the fact that a thumbs-up emoji can signify approval or agreement. Like my colleagues, it is my view that the question of whether it does will depend on the circumstances. Although a thumbs-up emoji is "ambiguous" in the sense that it can bear more than one meaning, depending on context, s. 18(1)(b) includes the use of a symbol of that kind, just as s. 18(1)(a) includes words that must be interpreted contextually. The same is true when determining whether, as the judge found, sending a text with a thumbs-up emoji constitutes acceptance of an offer in the manner described in s. 18(1)(b). The judge did not err in

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law by concluding that a thumbs-up emoji could signify approval or consent, as alleged by ALC. Nor did he commit a palpable error of fact or of mixed fact and law.

[166] I also note that the *Chambers Decision* may be read as having decided that an offer or acceptance of an offer must fall within s. 18(1) of the *EIDA* to be effective. If that was what the judge found, I would respectfully disagree. In *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79, [2017] 9 WWR 172, aff'd 2017 SKCA 79, [2017] 11 WWR 680, Layh J. held that an electronic signature need not fall within the *EIDA* definition of "electronic signature" to be valid. On appeal, this Court agreed with his analysis. As Layh J. observed, "even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law" (at para 43). In his view, "the real intent of the *EIDA* is to ensure that electronic forms of signatures may be sufficient to meet the measure of what might be a written and signed document" (at para 44).

[167] I interpret s. 18(1) of the *EIDA* in the same way in relation to contract formation. That provision affirms that a contract may be formed in the manner it describes but does not preclude contract formation by electronic means in a manner that is not caught by the subsection. To put the matter differently, s. 18(1) did not codify or replace the law on this point. It was recognized long before the *EIDA* was passed that a contract could be formed by electronic means. I do not read s. 18(1), interpreted in accordance with s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2, as limiting offer, acceptance or others matters material to the formation or operation of a contract to the means specified in that provision. Like s. 18(2), it is permissive or inclusive rather than exhaustive or exclusive.

B. Contract formation: Agreement on the terms of the contract

[168] In order to reach a *consensus ad idem*, there must not only be an intention to agree "at large", but an intention to accept the terms that have been offered. This point was summarized as follows in *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36, [2021] 9 WWR 1 [*Mosten*]:

> [67] … For an enforceable contract to come into existence, the parties must reach *consensus ad idem* as to what has been offered and accepted and as to the consideration

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> therefor. This can only occur where those promises have been communicated to, and understood by, all of the parties. *Consensus ad idem* is essential to contract formation and enforcement and it is, therefore, the object of contract interpretation.

[169] ALC submits that the judge erred in failing to find that, even if the emoji text was properly seen by the objective bystander as signifying consent, there was no *consensus ad idem* because SWT did not send the terms of the flax agreement to ALC. For the reasons explained by my colleagues, I agree that the judge did not err in finding that the objective observer would conclude that Mr. Achter did receive the terms, that he knew what they were, and that he agreed to them on ALC's behalf. That was a finding of mixed fact and law.

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[170] However, the judge, having made this finding, muddied the waters somewhat by offering the following additional observations, which I reproduce for ease of reference:

> [49] I agree with [SWT's] approach that even if the general terms and conditions are not part of the flax contract – the essential terms of the flax contract are contained in the first page of the contract that was texted to [Mr. Achter] and to which he confirmed. The question is whether the contract as presented disclosed the substance of the parties' agreement. The agreement did convey with sufficient clarity the essential terms in agreement being the parties (SWT and [ALC]), the property (flax) and the price ([*101034761 Saskatchewan Ltd. v Mossing*, 2022 SKQB 193, 49 RPR (6th) 51] at paras 112-113). It is understood that courts will not enforce an agreement where an essential term is too uncertain – but nevertheless every effort should be made to ascertain the substance of the agreement (*Mossing* at para 115). In my view there are no missing or unascertainable essential terms in the flax contract – the parties, property and price were crystal clear.

[171] It is arguable that paragraphs 48 and 49 of the *Chambers Decision*, read together, mean that the judge did not reach a conclusion as to whether the parties had agreed to all of the terms on the front and back of the form, or only on the essential terms. The difficulty with such reasoning is that SWT offered to enter into a contract which contained all of the terms on the front and reverse of the form. ALC could either accept that offer or, if it wished to enter an agreement containing different terms, could make a counter-offer. It could not form a contract that contained only the essential terms of a contract to deliver flax to SWT at an agreed price. That is so because, as *Mosten* affirmed, there must be a *consensus ad idem* as to what has been offered and accepted.

[172] However, I do not read paragraphs 48 and 49 to mean that the judge did not conclude that the parties had agreed on all of the usual terms. Rather, paragraph 49 was added by the judge "in the alternative"; that is, he found that the parties had agreed to the same terms as on previous occasions, but that even if they did not, ALC had accepted an offer to enter into a contract on the

essential terms specified on the first page. Although the latter conclusion reflects an error of law, this Court's determination that the judge did not err in finding that ALC had agreed to all of the usual terms of the deferred delivery of the contract means that the error in the "in the alternative" analysis has no effect.

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C. Contract formation: Uncertainty and failure to agree on essential terms

[173] ALC also submits that the flax contract failed for uncertainty, including as a result of the parties having failed to agree on an essential term. The law relating to these issues is summarized in John D. McCamus, *The Law of Contracts*, 3d ed (Toronto: Irwin Law, 2020) at 97 [McCamus], as follows:

> In order for an agreement to be enforceable, the parties must have reached agreement on all the essential terms of their agreement. As is often said, the parties must make the agreement, the courts will not make it for them. Further, the parties "must so express themselves that their meaning can be determined with a reasonable degree of certainty." Where the parties either fail to reach agreement on all the essential terms of the agreement or express themselves in such fashion that their intentions cannot be divined by the court, the agreement will fail for lack of certainty of terms. In such circumstances, the parties have not reached a sufficient *consensus ad idem* to enable the courts to enforce their agreement. …
>
> (Footnotes omitted)

See also *Harle v 101090442 Saskatchewan Ltd.*, 2014 SKCA 6 at para 41, 433 Sask R 62; *Neigum v Van Seggelen*, 2022 SKCA 108 at paras 54–57, 474 DLR (4th) 673; and *Bawitko Investments Ltd. v Kernels Popcorn Ltd.* (1991), 79 DLR (4th) 97 at 104 (Ont CA).

[174] Here, we are concerned with two aspects of the doctrine of certainty. As McCamus explains, "an agreement may suffer from incompleteness in the sense that an essential term is simply not present". Further, "an important term of an agreement may suffer from vagueness or, as is sometimes said, incurable uncertainty. In such circumstances, it must be determined whether, as a result of the vagueness of a particular term, the entire agreement fails for uncertainty" (at 98).

[175] ALC's allegation that a term was too vague relates to the use of the term "Nov" to describe the delivery date, without specifying the year. This raises an issue of contractual interpretation. Other than in the case of a standard form contract, "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (*Sattva*

Capital Corp. v Creston Moly Corp., 2014 SCC 53 at para 50, [2014] 2 SCR 633). For that reason, the standard of review relating to alleged errors of contractual interpretation – other than in relation to a standard form contract – is palpable and overriding error: *Sattva* at paras 49–51. For the reasons explained by my colleagues, there was no such error.

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[176] ALC's second argument under this heading is that an act of God clause is an essential term in a contract for the sale of grain that is yet to be produced. In the *Chambers Decision*, the judge held that the essential terms of the flax contract were the parties, the property and the price, which were specified on the first page of the proposed contract that was texted to Mr. Achter. The judge relied in this context on *101034761 Saskatchewan Ltd. v Mossing*, 2022 SKQB 193, 49 RPR (6th) 51, which related to a contract for the sale of land.

[177] However, the judge did not directly address the specific issue raised by ALC – that is, he did not ask if a *force majeure* or act of God clause was an essential term given that this was a contract for the sale of grain that had not yet been produced. In the final analysis, that omission was of no moment. ALC's assertion that this was an essential term was based on the proposition that *force majeure* clauses are essential terms of production contracts, and that this was such a contract. However, as noted above, the judge disagreed, finding that this was not a production contract, rather, a deferred delivery contract like the others the parties had entered. This finding of mixed fact and law was not the product of palpable error and effectively disposed of the argument that a *force majeure* clause was essential.

[178] However, the judge also held that a *force majeure* clause was not an essential term because the parties, property and price are the essential terms of a contract for the sale of goods. That is not the law. As my colleagues point out, while those are generally the essential terms, that is not always the case. They cite *First City Investments Ltd. v Fraser Arms Hotel Ltd.*, [1979] 6 WWR 125 (WL) (BCCA), for the proposition that the type of term that might be essential is limited to one that "is so essential to the contract that without it the court cannot collect the real intentions of the parties from the language within the four corners of the instrument" (*First City Investments* at para 28). In *United Gulf Developments Ltd. v Iskandar*, 2008 NSCA 71, 853 APR 318, Cromwell J.A. (as he then was) described the question in somewhat different, and in my view, preferable terms, writing as follows:

> [14] To have an enforceable contract, there must be agreement between the parties as to all essential terms. To use the language of a leading case, a contract "... settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties": *May and Butcher, Ltd. v. The King*, [1934] 2 K.B. 17 (H.L.) at p. 21. Determining what terms are "essential" in a particular case is, however, more difficult than stating the principle. The sort of terms that are considered essential varies with the nature of the transaction and the context in which the agreement is made: *Mitsui & Co. v. Jones Power Co.*, 2000 NSCA 95, 189 N.S.R. (2d) 1 (C.A.) at para. 64.

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[179] Respectfully, I do not agree with my colleagues that the fact that the delivery obligation was unqualified answers the question of whether a *force majeure* clause was an essential term. That reasoning begs the question as to whether risks such as crop failure due to drought had to be addressed by a provision in the contract and, as such, is an error of law. It would lead to the absurd result that a *force majeure* provision could not be found to be an essential provision to provide relief from having to perform what would otherwise be an unconditional contractual obligation in specified circumstances, which is, of course, often the very point of such a provision. However, I do agree with their bottom-line conclusion that a *force majeure* clause was not an essential term in the circumstances of this case. That follows from the fact that, for the reasons explained by the judge, the parties agreed to enter into the same form of deferred delivery contract as they had in the past, which did not contain a *force majeure* clause.

[180] Finally, it is my opinion that the parties, property and price were not the only essential terms of the flax contract. Given the nature of the transaction and the context in which it was made, it is not only likely, but clear that the November 2021 delivery date was also an essential term. Once again, however, nothing turns on this palpable error of mixed fact and law, as the date was specified on the front page of the proposed agreement that Mr. Mickleborough sent to Mr. Achter. Accordingly, while the judge erred in this respect, he did not err in finding that the parties had agreed on the essential terms.

D. Section 6(1) of *The Sale of Goods Act*: The requirement for a note or memorandum of the agreement

[181] ALC argues that even if there is a contract, the judge erred in finding that the requirement for a "note or memorandum in writing of the contract" imposed by s. 6(1) was met in the circumstances of this case. As my colleagues note, ALC's submissions relating to s. 6(1) were directed almost entirely to the question of whether the note or memorandum was *signed*. However,

it also says that the requirement for a note or memorandum was not met because only the front page of the flax contract was sent to Mr. Achter.

[182] The judge adopted the following summary of the law in relation to the requirement for a note or memorandum:

> [54] [SWT's] brief ably sets out some background that in my view is not at issue:
>
> 68. The requirement of a "note or memorandum" in s. 6 of [*The Sale of Goods Act*] originated as s. 17 of the *Statute of Frauds* of 1677. The *Statute of Frauds* does not require the entire agreement to be in writing, compliance may [be] found if the essential terms of the agreement are set out in an acceptable note or memorandum (*Faer v Krug*, 2020 SKQB 298 at para 55; see also S.M. Waddams, *The Law of Contracts*, 6th ed (Aurora, Ont: Canada Law Book, 20210) at 231 [*Waddams*]). Courts have interpreted s. 6 as requiring a document expressly or implicitly identifying the parties, the goods sold, and the price (the consideration) if a price was agreed upon (Gerald Fridman, *Sale of Goods in Canada*, 6th ed (Toronto: Carswell, 2013) at 42-43 [*Fridman*]). However, the note or memorandum does not need to be a singular document – it may be multiple documents, so long as there is reference between the documents (*Fridman* at 42-43; see also *Waddams* at 231-234).

[183] Despite having included this summary, the judge did not address this issue. He dealt only with the *signature* requirement imposed by s. 6(1) of *The Sale of Goods Act*. He did determine that the flax contract was *formed* through the exchange of the texts between Mr. Mickleborough and Mr. Achter, but that is, of course, a different question than whether those texts were a note or memorandum within the meaning of s. 6(1) or, for that matter, whether the note or memorandum included the terms on the reverse of the page that was texted to Mr. Achter. The failure to determine whether there was a note or memorandum within the meaning of s. 6(1) constituted an error of law.

[184] There are two questions that could be said to have arisen in relation to this issue. The first is whether the s. 6(1) "note or memorandum" can be made up of more than one text message. This is a different issue than whether the failure to include a copy of the terms on the reverse of the front page of the contract affected its validity. I agree with my colleagues that the joinder principle discussed in *Druet v Girouard*, 2012 NBCA 40 at para 33, 349 DLR (4th) 116, applies in this context, just as it does to a contract concluded through an exchange of emails. I did not understand ALC to suggest otherwise.

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[185] The second issue relates to the *content* of the note or memorandum. Does s. 6(1) of *The Sale of Goods Act* require that it contain all of the terms of the contract, or only the essential terms? Here, the terms were not in either of the two texts.

[186] Although the judge did not address this issue, he did adopt SWT's proposition that s. 6(1) "does not require the entire agreement to be in writing, compliance may [be] found if the essential terms of the agreement are set out in an acceptable note or memorandum" (*Chambers Decision* at para 54). In my view, that is a correct statement of the law. See also, to the same effect, *McKenzie v Walsh* (1920), 61 SCR 312; *McKenzie v Hiscock* (1965), 55 DLR (2d) 155 (Sask CA) at 161–162; and Victor Di Castri, *The Law of Vendor and Purchaser*, loose-leaf (Rel 8, 2024) 3d ed, vol 1 (Toronto: Thomson Reuters, 2000) (WL) at §4:1. Accordingly, the text messages from Mr. Mickleborough and Mr. Achter were – leaving aside for the moment the signature issue, which is dealt with below – properly found to be a s. 6(1) note or memorandum.

[187] For these reasons, while the judge erred by failing to address the issue of whether there was a note or memorandum that complied with s. 6(1), there is no basis for intervention by this Court grounded on that error.

E. Section 6(1) of *The Sale of Goods Act*: The requirement that the note or memorandum be signed

[188] As my colleagues observe, the judge's explanation for his finding that Mr. Achter's emoji text met the signature requirement in s. 6(1) of *The Sale of Goods Act* is brief. I will reproduce it here for ease of reference:

> [62] In my opinion the signature requirement was met by the 👍 [thumbs-up] emoji originating from [Mr. Achter] and his unique cell phone (agreed upon statement of facts para. 2; cross-examination of [Mr. Achter] T6.7-T6.10; T28.6-T28.20) which was used to receive the flax contract sent by [Mr. Mickleborough]. 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 Sale of Goods Act*]. 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 [ALC] to enter into grain contracts.
>
> [63] This court readily acknowledges that a 👍 [thumbs-up] 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 ([Mr. Achter] using his unique cell phone number) and as I have found above – to convey [ALC]'s acceptance of the flax contract.

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[189] This reasoning demonstrates that the judge found that Mr. Achter's signature was the text message comprised of both the emoji *and* the metadata accompanying it. The *Oxford English Dictionary Online* [OED] defines *metadata* as "data whose purpose is to describe and give information about other data" (Oxford University Press, updated September 2024). Here, the metadata at issue is the sender and receiver information. The judge's understanding of the legal test that resulted in that finding of mixed fact and law is reflected in his comment that "the authenticity of the text message … is the underlying purpose of the written and signed requirement of s. 6" (*Chambers Decision* at para 62), and his reference to "the two purposes of a 'signature' – to identify the signator ([Mr. Achter] using his unique cell phone number) and … to convey [ALC]'s acceptance of the flax contract" (at para 63).

[190] Like the judge, my colleagues interpret the meaning of *signed* and thus, *signature*, as turning on what they view as the purpose for which the signature requirement has been imposed. They conclude that a name or "mark of agreement" constitutes a signature if it is "made for that purpose and in a way that it identifies its maker and signifies an intention to contract for the sale of goods", provided that there is evidence that it was affixed on the document with the expectation that doing so would "authenticate the document as being binding" (majority reasons at para [110]). 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.

[191] There is no doubt that a text message that, whether alone or together with other text messages, constitutes a s. 6(1) note or memorandum, and that contains a mark or symbol that signifies assent, *could* meet the signature requirement. Further, I agree that in order to constitute a signature, it is *necessary* that the text message identify the party to be charged and signify an intention to be bound by the terms of the contract that is the subject of that note or memorandum. However, it is not *sufficient* to meet these two requirements. In my opinion, such an interpretation cannot be squared with the words of s. 6(1) of *The Sale of Goods Act*, interpreted in accordance with the modern principle of interpretation codified by s. 2-10 of *The Legislation Act*, which is as follows:

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Acts and regulations remedial

> **2-10**(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.
>
> (2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[192] In *Oladipo v The College of Physicians and Surgeons of Saskatchewan*, 2024 SKCA 94 [*Oladipo*], this Court affirmed the following principles relating to the meaning of s. 2-10(1) that are of particular interest in this case:

> [36] … [Section 2-10] codifies the modern principle of statutory interpretation and, thus, a contextual and purposive approach. However, as the Court explained in *Windels v Reddekopp,* 2023 SKCA 38, "a court is not entitled to ignore the language chosen by the Legislature to advance what the court considers to be the purpose of the legislation. The judicial function is to interpret and apply legislation; it is not to legislate. The process of interpretation always begins with the language of the legislation" (at para 102). Further, as the Court noted in *Hess v Thomas Estate*, 2019 SKCA 26, 433 DLR (4th) 60, the modern principle "does not mean the court can ignore the ordinary meaning of the words chosen by the legislature" (at para 50). …

[193] Justice LeBel made the same point in relation to the modern principle in *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376, noting that "[a]lthough statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament" (at para 33). Similarly, in Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at §7.03 [Sullivan], the learned author observes that, while a strained interpretation may be adopted to avoid defeating the purpose of the provision, "the meaning adopted must be one the words of the text can reasonably bear".

[194] Two other points bear emphasis here. Interpretation pursuant to s. 2-10 of *The Legislation Act* begins with the words at issue and must attend to their ordinary meaning – not the definition in a legal dictionary. Sullivan summarizes their understanding of "ordinary meaning" as follows (at §3.02[1]):

> The expression "ordinary meaning" is much used in statutory interpretation, but not in a consistent way. Sometimes it is identified with dictionary meaning, sometimes with "literal meaning" and sometimes with a meaning derived from reading words in their literary context. Most often, however, ordinary meaning refers to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context — in the words of Gonthier J., "the natural meaning which appears when the provision is simply read through". This last sense of "ordinary meaning" is the one adopted in this text.
>
> (Footnotes omitted)

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[195] In my view, this is the correct approach to interpreting the words at issue here – *sign* or *signature* – particularly as they have long been used and continue to be in common use in this sort of context. These are words for which a natural meaning spontaneously comes to mind.

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[196] A second principle of particular interest here is that courts may adopt what Sullivan describes as a dynamic interpretation (at §6.02[4]):

> If the original meaning of a text is understood as the sense its words had at the time of enactment, then sticking to the original meaning may not be very constraining. Even though the sense of a word generally remains constant over time, the things or events that come within the ambit of that sense may change dramatically. Understanding original meaning in this way allows for a dynamic approach to interpretation. New inventions, changes in institutions or the environment and the evolution of new ideas may all be taken into account, *provided they do not require changing or expanding the original sense of the word*.
>
> (Emphasis added)

[197] As Sullivan further explains (at §6.03[3]):

> Much modern legislation is drafted in general terms, which lends itself to a dynamic approach. Although the sense of a general term remains constant, the facts to which it applies may vary over time. If the new facts are functionally equivalent or analogous to facts that were within the ambit of the legislation when it first came into force, the courts have no difficulty in applying the legislation to the new facts. This is so whether the new facts have arisen because of changes in social attitudes or institutions or because of new technology.
>
> …
>
> When the legislative language is general and the new facts are within the "spirit'" or the "principle" of the legislation, the courts generally adopt a dynamic approach.
>
> (Footnotes omitted)

[198] By way of example, this concept is illustrated by the reasoning of Rothstein J. in *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283. As he wrote, speaking for a majority of the Court, "[i]n addition, this Court has long recognized in the context of the reproduction right [conferred by s. 3(1)(f) of the *Copyright Act*, RSC 1985, c C-42] that, where possible, the Act should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting" (at para 39, citing *Apple Computer Inc. v Mackintosh Computers Ltd.*, [1987] 1 FC 173 (Trial Div), aff'd [1988] 1 FC 673 (CA), aff'd [1990] 2 SCR 209. See also, for example, *British Columbia (Attorney General) v Brecknell*, 2018 BCCA 5 at para 57, 358 CCC (3d) 179; and *R v 974649 Ontario Inc.*, 2001 SCC 81 at para 38, [2001] 3 SCR 575).

[199] How, then, should s. 6(1) of *The Sale of Goods Act* be interpreted in light of these principles? To begin, it is my view that the first impression meaning is well described by these definitions of *signature* (n. & adj.) in the OED:

> 3.a. The action of signing one's name; authorization or authentication of a document, letter, etc., by signing it. Also: an instance of this.
>
> …
>
> 3.b. A person's name written (esp. in a distinctive way) so as to authenticate a document, authorize a transaction, or identify oneself as the writer or sender of a letter. Also: a distinctive mark or cross serving this purpose.

[200] The corresponding definition of *sign* (v.1) is as follows:

> I.3.a. *transitive*. To confirm the authenticity or validity of (a document, contract, cheque, etc.) by writing one's signature; to render official by affixing one's signature. …
>
> …
>
> I.3.d. *intransitive*. To write one's signature (or another distinguishing mark) on a letter or document, as a means of authentication or identification. …

[201] These definitions confirm that to sign in this context means to write your name – the words that identify you – or to affix a cross or other distinguishing mark to serve the same purpose, in order to authenticate or authorize the document at issue. The following definition of *mark* (n.1) in the OED is also of interest here:

> IV.13.b. A written character, usually a cross, made in place of a signature by a person unable to write. Frequently with possessive adjective.

[202] It is also apparent that the words *sign* and *signature* have been used for centuries in this sense in a legal context. William Blackstone, *Commentaries on the Laws of England*, Book the Second (William S. Hein & Co., 1992. Originally published: Oxford: Clarendon Press, 1766), for example, contains the following statement in a section of the chapter titled "Of Alienation by Deed" that speaks to the requirement to "*seal*, and in most cases … *sign*" (at 305, emphasis added; translated from Old English):

> … The method of the Saxons was *for such as could write to subscribe their names*, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up; *by signing a cross for their mark*, when unable to write their names. …
>
> (Emphasis added; translated from Old English)

[203] The same distinguishing features of these words is reflected in the definition of *signature* in William Jowitt, *Jowitt's Dictionary of English Law*, 2d ed, vol 2 (London: Sweet & Maxwell,

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1977) at 1660 [*Jowitt's*], referred to by my colleagues at paragraph [105] of their reasons, which I will repeat for ease of reference:

> Signature, a sign or mark impressed upon anything; a stamp, a mark; the name of a person written by himself either in full or by initials as regards his Christian name or names, and in full as regards his surname, or by initials only …; or by mark only, though he can write …; or by rubber stamp …; or by proxy ….
>
> A person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person, signature is commonly performed by his subscribing his name to the document, and hence "signature" is frequently used as equivalent to "subscription"; but any mark is sufficient if it shows an intention to be bound by the document: illiterate people commonly sign by making a cross. …

[204] Like the OED definition, this reflects the notion that to sign an agreement is to sign your name, by writing the word or words by which they are known or addressed, or by writing or otherwise inserting your mark to serve the same purpose. So too does the definition of "SIGNED; SIGNATURE" in Daniel Greenberg, *Stroud's Judicial Dictionary of Words and Phrases*, 7th ed, vol 3: P–Z (London: Sweet & Maxwell, 2006) at 2545, which begins with following paragraph:

> Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority (*R. v Kent Justices* L.R. 8 Q.B. 305), with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed. In *Morton v Copeland* (16 C.B. 535), Maule J., said, "Signature does not necessarily mean writing a person's Christian name and surname, but any mark which identifies it as the act of the party"…"provided it be proved or admitted to be genuine, *and be the accustomed mode of signature of the party*". Without more, "to sign" is not the same as "to subscribe".
>
> (Emphasis added)

[205] This definition, like that in *Jowitt's*, confirms that 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* <u>*signature*</u> *on the document, with the requisite intention, that means it has been signed*. I would reiterate that s. 6(1) of *The Sale of Goods Act* does not demand that the agreement be in writing. It demands that there be a note or memorandum of the agreement that is *signed*.

[206] To be clear, this does not mean that only a handwritten first and last name or an "X" will do. Typing rather than writing your name, writing only your first or last name, or placing another

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mark that you use to represent yourself on the note or memorandum can constitute signing it within the meaning of s. 6(1), provided they were written on or inserted in the document in order to sign it in the sense described above. Indeed, cursive signatures are often a stylized and unrecognizable scrawl that can better be called a mark than an attempt to write the words that constitute your name All of these means of signing a note or memorandum are consistent with the ordinary meaning of the words, interpreted in the contextual and purposive manner demanded by s. 2-10 of *The Legislation Act*. Further, the case law has never limited the word "signature" only to a handwritten first and last name or an "X". That is a matter of settled law.

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[207] This distinction between these two questions – was the person's name or mark written or otherwise placed on the document and, if so, was it affixed with the intention of authenticating the document as binding – is also nicely reflected in the opinion of Evershed L.J., writing for the majority in *Goodman v J. Eban Ld.*, [1954] 1 QB 550 (CA). Having explained that a rubber stamp technically met the signature requirement as it was a personal authentication of the document, he made these observations (at 557):

> In my judgment, therefore, it must be taken as established, from the citations which I have made, that where an Act of Parliament requires that any particular document be "signed" by a person, then, prima facie, the requirement of the Act is satisfied if the person himself places upon the document an engraved representation of his signature by means of a rubber stamp. Indeed, if reference is made to the Shorter Oxford English Dictionary [2d ed, vol 2, at 1892], it will be found that the primary meaning of the verb "to sign" is not confined to actual writing with a pen or pencil. The word in origin appears to have related to marking with the sign of the cross. But the later meanings include "(2) To place some distinguishing mark upon (a thing or person)" and "(4) To attest or confirm by adding one's signature; to affix one's name to (a document, etc.)." *It follows, then, I think, that 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*.
>
> (Emphasis added)

[208] Similarly, in *R v Kapoor* (1989), 52 CCC (3d) 41 (Ont SC (H Ct J)) at 65–66, Watt J. (as he then was) described a signature in a way that was very much in accord with the ordinary meaning of that word, writing as follows:

> In general terms, a signature is the name or special mark of a person written with his or her own hand as an authentication of some document or writing: see, *The Shorter Oxford English Dictionary*, 3rd ed., vol. 11, p. 1994 [Oxford: Clarendon Press, 1950]. It is not essential that a signature be in any particular form, as for example, that it include all the given names as well as the surname of the signatory, or that it be legible. Indeed, in some cases, it may amount to no more than a mark.

[209] As to the purpose of the signature requirement, this approach to the interpretation of *signed* and *signature* serves the three purposes referred to by my colleagues – that is, identifying the signatory, signifying the intention to contract, and providing evidence that the words or symbol were affixed on the document with the expectation that doing so would "authenticate the document as being binding" (majority reasons at para [154]). However, it does so in a way that pays heed to the fact that the signature requirement, as opposed to a requirement that the contract be in writing, was intended to introduce an element of solemnity or attentiveness to the act of contracting. This, too, is one of the purposes of requiring the note or memorandum to be signed. The Law Reform Commission of British Columbia in its *Report on the Statute of Frauds*, 1977 CanLIIDocs 8, for example, noted the significance of solemnity or attentiveness as follows:

> The requirement "that a party must sign written evidence of an agreement in order to be legally bound" does, in many cases, focus his attention on the legal implications of his acts. This advantage is not often perceived, and is never spoken of in litigation which involves a *signed* agreement. Yet there can be no doubt that in thousands of cases, the requirement of a signature does in fact raise an awareness of the importance of the transaction to countless numbers of individuals.
>
> (Italicized emphasis in original; underlined emphasis added)

[210] Similarly, as the Manitoba Law Reform Commission wrote in its *Report on the Statute of Frauds*, 1980 CanLIIDocs162 at 27–28:

> The advantages of the section are generally conceded to be both cautionary and evidentiary. The act of creating a memorandum and signing it *warns the parties of the seriousness and finality of their transaction*, while the memorandum itself acts as the best evidence of the terms to which the parties have agreed. …
>
> (Emphasis added)

[211] In the same vein, 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) describes the purpose of the signature requirement this way (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)

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[212] What, then, of the need to adopt a dynamic interpretation that responds to technological change? The law has evolved to adapt to electronic means of communication, including emails and text messages. It was entirely possible to do so while respecting the spirit of the legislation. However, it is not necessary or appropriate to interpret s. 6(1) of *The Sale of Goods Act* in a manner that would mean any text message expressing assent to a note or memorandum – whether in words or by the insertion of a symbol that means "yes" – constitutes a signature. In my opinion, that is the effect of the majority's reasons. The concept of a signature did not fall by the wayside when emails, text messages and similar forms of electronic communication or messaging came to dominate.

[213] Put differently, the signature requirement did not become obsolete due to the widespread use of emails and texts to make agreements. I take judicial notice of the fact that from a technical perspective, there are various ways to "sign" emails and text messages, and documents forming part of or are appended to such communications. The sender can, for example, type their name in the text in a location and in circumstances that support the conclusion that it is a signature. They may use an app that enables them to insert a version of their cursive signature or can sign a physical copy of the document and append it to the digital medium in the form of a PDF or digital image. It is arguable that a "signature block" that is automatically inserted in the email or text message could be found to meet the signature requirement. A party in the position of SWT can provide for the other party to sign a contract by typing their name or initials, or by clicking on a specified location in the document. Not surprisingly, Justin Isherwood, Grain Manager for SWT, confirmed in his cross-examination that SWT had standard operating procedures about entering into contracts, and that although he was not sure of the exact "verbiage" about executing contracts, he was aware that there were options of this kind relating to e-signatures.

[214] These aspects of the technology point the way to the correct interpretation of s. 6(1) of *The Sale of Goods Act*. Section 6(1) can – and, thus, *should* – be interpreted in a manner that is consistent with the ordinary meaning of the words, interpreted in the contextual and purposive manner mandated by the modern principle. That includes the requirement that the party charged write or otherwise insert a *signature* in the note or memorandum *for the purpose of authenticating the document*. This, in essence, is the lesson of *Mehta v J Pereira Fernandes SA*, [2006] EWHC 813 (Ch), [2006] 2 All ER 891, and the other authorities that take a similar approach.

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[215] 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*, provided that the text message or messages constitute a s. 6(1) note or memorandum, 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, interpreted in the manner specified in s. 2-10 of *The Legislation Act*.

[216] I am also unable to agree with the judge that the past course of dealings between ALC and SWT supports the conclusion that this was a signed note or memorandum of the flax contract. ALC and SWT had contracted in this way in the past. That is not at issue. It would, however, beg the question to point to the fact that they had entered into binding contracts in this way as proof that either those contracts or this contract were signed notes or memorandums within the meaning of s. 6(1) of *The Sale of Goods Act*. Let me explain.

[217] For the reasons detailed above, there is evidence that supports the conclusion that Mr. Achter intended to agree to the flax contract when he sent the emoji text to Mr. Mickleborough. That was a finding of fact. The evidence of repetition in the way the parties had reached contracts in the past was relevant and weighed in favour of that conclusion. There is, on the other hand, nothing in the evidence that supports the conclusion that Mr. Achter's use of his personal cell phone to send a text message means that he affixed his *signature* as the means of authenticating that agreement – which is, of course, the particular essence of the *signature* requirement. Indeed, he was responding to a text that had a space for him to sign – which he did not – and indicated on a previous occasion that he did not know how to sign on his cell phone. The fact that he used a thumbs-up emoji rather than the word "yes" is irrelevant – in effect, it is a red herring – and weighs neither for nor against a finding that the signature requirement was satisfied. The same is true of the evidence that the parties repeatedly entered into contracts in essentially the same way in the past.

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[218] I would finally emphasize that while the judge's finding that ALC had signed the flax contract was a finding of mixed fact and law, it does not follow that this Court cannot intervene absent palpable and overriding error. ALC contends that the judge erred in his interpretation of the signature requirement in s. 6(1) of *The Sale of Goods Act*. That alleged error is reviewable on the correctness standard of review. I have, based on the application of that standard, concluded that the judge did err in law in this way. This error, in turn, resulted in an error in his bottom-line conclusion. The appeal must accordingly be allowed.

[219] For these reasons, it is my respectful opinion that the judge erred in law in his interpretation of s. 6(1) of *The Sale of Goods Act*. Applying the correct test, I would find that the text messages from and to Mr. Mickleborough did not comply with the signature requirement imposed by that provision.

III. CONCLUSION

[220] In the result, I would allow the appeal, with costs to ALC on Column 2 of the Tariff.

"Barrington-Foote J.A."

Barrington-Foote J.A.

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