

Kelty Druet (appellant) v. Marc Girouard (respondent)
(115-11-CA; 2012 NBCA 40)

Indexed As: Girouard v. Druet

New Brunswick Court of Appeal
Turnbull, Robertson and Richard, JJ.A.
April 26, 2012.

Summary:

The plaintiff expressed an interest in purchasing the defendant's (vendor's) condo. The parties agreed to carry on their discussions through e-mail. Following an exchange of e-mails, the plaintiff claimed that the defendant was contractually bound to sell the condo unit to him. The plaintiff commenced an action against the defendant/vendor seeking specific performance or damages for breach of contract. Following examination for discovery, the plaintiff brought a motion under rule 23.01(a) of the Rules of Court for an interpretation as to whether the e-mails constituted a binding agreement for sale of the condo.

The New Brunswick Court of Queen's Bench, Trial Division, in a decision reported 379 N.B.R.(2d) 1; 978 A.P.R. 1, determined that there was a binding agreement of purchase and sale respecting the condo. The e-mails constituted, in this case, a written document, as required under the Statute of Frauds and the "signatures", as indicated on the e-mails constituted a signature for the purposes of the Statute of Frauds. The defendant/vendor appealed.

The New Brunswick Court of Appeal allowed the appeal and set aside the decision below. The record before the motions judge disclosed no binding agreement of purchase and sale. The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met. However, the parties lacked the requisite intention to enter into a binding contract for the purchase and sale of the condominium unit.

Contracts - Topic 1151

Formation of contract - Signing - Electronic signature - The New Brunswick Court of Appeal identified a number of issues raised by the electronic signature provisions of the Electronic Transactions Act, but declined to offer an opinion on the issues - See paragraphs 24 to 30.

Contracts - Topic 1151

Formation of contract - Signing - Electronic signature - [See third **Contracts - Topic 1465**].

Contracts - Topic 1465

Formation of contract - Intention - Intention to create a legal relationship - The New Brunswick Court of Appeal discussed the approach to be taken to the question of intention to create legal relations - See paragraphs 38 to 49.

Contracts - Topic 1465

Formation of contract - Intention - Intention to create a legal relationship - The New Brunswick Court of Appeal held that, in a case where there was an exchange of rapid-fire e-mails between two consumers acting on their own, the law should recognize a rebuttable presumption against an intention to establish a binding relationship - The court stated that "Such a presumption accords with what we perceive to be the populist view that, generally, an exchange of e-mails qualifies as preliminary negotiations that may lead to the signing of a formal and binding contract" - See paragraph 41.

Contracts - Topic 1465

Formation of contract - Intention - Intention to create a legal relationship - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Contracts - Topic 8032

Statute of Frauds - Memorandum - Electronic documents (incl. e-mails) - The New Brunswick Court of Appeal held that e-mails could satisfy the writing requirement under the Statute of Frauds and the Electronic Transactions Act - See paragraphs 32 and 33.

Contracts - Topic 8032

Statute of Frauds - Memorandum - Electronic documents (incl. e-mails) - [See third **Contracts - Topic 1465**].

Contracts - Topic 8025

Statute of Frauds - Memorandum - Generally - Sufficiency of (incl. joinder principle) - The New Brunswick Court of Appeal discussed the joinder principle (i.e., when two or more documents (incl. e-mails) could be read together to constitute a sufficient memorandum to satisfy the Statute of Frauds) - See paragraphs 33 and 34.

Contracts - Topic 8025

Statute of Frauds - Memorandum - Generally - Sufficiency of (incl. joinder principle) - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered

\$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails could be properly joined such as to constitute a sufficient memorandum within the meaning of s. 1(d) of the Statute of Frauds - While the e-mails did not make specific reference to one another, the reference arose as a "matter of fair and reasonable inference - When read collectively, the e-mails outlined the essential terms of the agreement - See paragraphs 31 to 37.

Sale of Land - Topic 805

The contract - General - Agreement for sale - What constitutes - [See third **Contracts - Topic 1465**].

Sale of Land - Topic 808

The contract - General - Validity - [See third **Contracts - Topic 1465**].

Sale of Land - Topic 809

The contract - General - Purchase and sale agreement by e-mail or other electronic transactions - [See third **Contracts - Topic 1465**].

Sale of Land - Topic 1325

The contract - Necessity for writing - General - Statute of Frauds - Circumstances within statute - [See third **Contracts - Topic 1465** and second **Contracts - Topic 8025**].

Sale of Land - Topic 1330

The contract - Necessity for writing - General - Statute of Frauds - Electronic documents (incl. e-mail) - [See third **Contracts - Topic 1465** and second **Contracts - Topic 8025**].

Sale of Land - Topic 1532

The contract - Form and contents of agreement or memorandum - The signature - Signature sufficient to satisfy Statute of Frauds (incl. electronic signature) - [See third **Contracts - Topic 1465**].

Contrats - Cote 1151

Formation du contrat - Signature - Signature électronique - [Voir **Contracts - Topic 1151**].

Contrats - Cote 1465

Formation du contrat - Intention - Intention de créer un rapport juridique - [Voir **Contracts - Cote 1465**].

Contrats - Cote 8032

Loi relative aux preuves littérales - Écrit - Opérations électroniques (y compris courrier électronique) - [See **Contracts - Topic 8032**].

Contrats - Cote 8025

Loi relative aux preuves littérales - Écrit - Suffisance (y du principe de la liaison) - [Voir **Contracts - Topic 8025**].

Vente de biens-fonds - Cote 805

Le contrat - Généralités - Convention de vente - En quoi consiste - [Voir **Sale of Land - Topic 805**].

Vente de biens-fonds - Cote 808

Le contrat - Généralités - Validité - [Voir **Sale of Land - Topic 808**].

Vente de biens-fonds - Cote 809

Le contrat - Généralités - Convention d'achat-vente par courrier électronique ou autres opérations électroniques - [Voir **Sale of Land - Topic 809**].

Vente de biens-fonds - Cote 1325

Le contrat - Exigence d'une preuve littérale - Généralités - Loi relative aux preuves littérales - Circonstances auxquelles la loi s'applique - [Voir **Sale of Land - Topic 1325**].

Vente de biens-fonds - Cote 1330

Le contrat - Exigence d'une preuve littérale - Généralités - Loi relative aux preuves littérales - Opérations électroniques (y compris courrier électronique) - [Voir **Sale of Land - Topic 1330**].

Vente de biens-fonds - Cote 1532

Le contrat - Forme et contenu de la convention ou du mémoire - Signature - Signature suffisante pour les fins de la Loi relative aux preuves littérales (y compris signature électronique) - [Voir **Sale of Land - Topic 1532**].

Cases Noticed:

Wood et al. v. Advanced Systems Technology Inc. et al. (2007), 325 N.B.R.(2d) 123; 836 A.P.R. 123; 2008 NBQB 155 (T.D.), refd to. [para. 17].

Dominion Stores Ltd. v. United Trust Co. et al., [1973] O.J. No. 2259 (H.C.), refd to. [para. 17].

Norris v. Lloyd's of London (1998), 205 N.B.R.(2d) 29; 523 A.P.R. 29 (C.A.), refd to. [para. 22].

Durrell v. Evans (1862), 158 E.R. 848 (C.A.), refd to. [para. 28].

Goodman v. J. Eban Ltd., [1954] 1 Q.B. 550, refd to. [para. 28].

Mehta v. J. Pereira Fernandes S.A., [2006] EWHC 813 (Ch.), refd to. [para. 29].

JSO Associates Inc. v. Price, 2008 N.Y. Slip Op 30862 (U), refd to. [para. 29].

Martins v. 601360 N.B. Inc. (2010), 356 N.B.R.(2d) 68; 919 A.P.R. 68; 2010 NBCA 16, refd to. [para. 31].

Grant v. McKnight (2009), 340 N.B.R.(2d) 386; 871 A.P.R. 386; 2009 NBCA 4, refd to. [para. 31].

Safeway Shouldering Ltd. v. Nackawic (Town) (2001), 234 N.B.R.(2d) 356; 604 A.P.R.

356; 2001 CarswellNB 57; 2001 NBCA 14, refd to. [para. 31].
O'Donohoe v. Stammers (1884), 11 S.C.R. 358, refd to. [para. 33].
Boydell v. Drummond (1809), 103 E.R. 958 (K.B.), refd to. [para. 33].
Timmins v. Moreland Street Property Co. [1958] 1 Ch. 110 (C.A.), refd to. [para. 33].
Doran v. McKinnon (1916), 53 S.C.R. 609, refd to. [para. 34].
Harvie et al. v. Gibbons, [1980] A.J. No. 951 (C.A.), refd to. [para. 34].
Canadian Imperial Bank of Commerce v. Titus et al., [1980] O.J. No. 3546 (H.C.J.), refd to. [para. 34].
Dugas v. Dugas Estate (1978), 23 N.B.R.(2d) 199; 44 A.P.R. 199 (C.A.), refd to. [para. 39].
Massey Ferguson Limited v. Minister of National Revenue, [1977] 1 F.C. 760; 14 N.R. 316, refd to. [para. 40].
Calvan Consolidated Oil & Gas Co. v. Manning, [1959] S.C.R. 253, refd to. [para. 44].
Von Hatzfeldt-Wildenburg v. Alexander, [1912] 1 Ch. 284, refd to. [para. 44].
Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd. et al., [2000] 7 W.W.R. 46; 140 B.C.A.C. 182; 229 W.A.C. 182; 2000 BCCA 365, refd to. [para. 47].

Statutes Noticed:

Electronic Transactions Act, S.N.B. 2001, c. E-5.5, sect. 1(1), sect. 4(2) [para. 26]; sect. 7 [para. 25]; sect. 10(1), sect. 10(2) [para. 26].
Electronic Transactions Act, R.S.N.B. 2011, c. 145, sect. 8, sect. 11 [para. 25].
Interpretation Act, R.S.N.B. 1973, c. I-13, sect. 38 [para. 16].
Statute of Frauds, R.S.N.B. 1973, c. S-14, sect. 1(d) [para. 31].

Authors and Works Noticed:

Cheshire and Fifoot, *The Law of Contract* (9th Ed.), p. 103 [para. 39];
Cheshire, Fifoot and Furmston, *The Law of Contract* (11th Ed. 1986), p. 204 [para. 33].
Di Castri, J. Victor, *The Law of Vendor and Purchaser* (3rd Ed. 1988) (Looseleaf), p. 4-29 [para. 17].
Lewis, Mark, *Digital Signatures: Meeting the Traditional Requirements Electronically - A Canadian Perspective* (2002), 2 *Asper Rev. of International Business & Trade Law* 63, generally [para. 26].
McCamus, John D., *The Law of Contracts* (2005), generally [para. 40].
Newfoundland Law Reform Commission, *Discussion Paper on the Statute of Frauds, 1677*, generally [para. 31].
New Brunswick, Department of Justice - Legislative Services Branch, *Discussion Paper Regarding Electronic Transactions Act (December 2000)*, generally [para. 25].
Ontario Law Reform Commission, *Report on Amendment of The Law of Contract (1987)*, generally [para. 28].
Robertson, Joseph T., *Discussion Paper on the Statute of Frauds, 1677* (St. John's, NL: Newfoundland Law Reform Commission, March 1991), generally [para. 28].
Sopinka, John, Lederman, Sidney N., and Bryant, Alan W., *The Law of Evidence in Canada* (2nd Ed. 1999), p. generally [para. 16].
Swan, Angela, *Canadian Contract Law* (2nd Ed. 2009), pp. 139 [para. 45]; 328 [para. 31]; 335, 336 [paras. 28, 37]; 340 [para. 25].
Waddams, Stephen M., *The Law of Contracts* (6th Ed. 2010), pp. 110 [para. 40]; 168

[para. 34].

Counsel:

Kelty Druet, appeared in person;
Christian Girouard, for the respondent.

This appeal was heard on November 15, 2011, before Turnbull, Robertson and Richard, JJ.A., of the New Brunswick Court of Appeal. The following reasons of judgment were delivered Robertson and Richard, JJ.A. (Turnbull, J.A., concurring), on April 26, 2012.

Appeal allowed.

Editor: Elizabeth M.A. Turgeon

Contracts - Topic 1151

Formation of contract - Signing - Electronic signature - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Contracts - Topic 8032

Statute of Frauds - Memorandum - Electronic documents (incl. e-mails) - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical

or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Sale of Land - Topic 805

The contract - General - Agreement for sale - What constitutes - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Sale of Land - Topic 808

The contract - General - Validity - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Sale of Land - Topic 809

The contract - General - Purchase and sale agreement by e-mail or other electronic transactions - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7)

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Sale of Land - Topic 1325

The contract - Necessity for writing - General - Statute of Frauds - Circumstances within statute - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Sale of Land - Topic 1325

The contract - Necessity for writing - General - Statute of Frauds - Circumstances within statute - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails could be properly joined such as to constitute a sufficient memorandum within the meaning of s. 1(d) of the Statute of Frauds - While the e-mails did not make specific reference to one another, the reference arose as a "matter of fair and reasonable inference - When read collectively, the e-mails outlined the essential terms of the agreement - See paragraphs 31 to 37.

Sale of Land - Topic 1330

The contract - Necessity for writing - General - Statute of Frauds - Electronic documents (incl. e-mail) - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser

counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.

Sale of Land - Topic 1330

The contract - Necessity for writing - General - Statute of Frauds - Electronic documents (incl. e-mail) - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails could be properly joined such as to constitute a sufficient memorandum within the meaning of s. 1(d) of the Statute of Frauds - While the e-mails did not make specific reference to one another, the reference arose as a "matter of fair and reasonable inference - When read collectively, the e-mails outlined the essential terms of the agreement - See paragraphs 31 to 37.

Sale of Land - Topic 1532

The contract - Form and contents of agreement or memorandum - The signature - Signature sufficient to satisfy Statute of Frauds (incl. electronic signature) - A purchaser expressed interest in the vendor's condo - Seven e-mails were exchanged over two days: (1) the vendor offered to sell her condo for \$160,000 with purchaser taking over the existing mortgage and paying legal fees; (2) the purchaser counter offered \$155,000 and agreed re mortgage and legal fees; (3) the purchaser asked if his wife could visit the condo; (4) the vendor accepted the counter offer; (5) another e-mail respecting visit; (6) an hour later the purchaser expressed his satisfaction with the transaction, while stating that he was prepared to have a sales agreement drafted; (7) three hours later the vendor indicated that she was no longer prepared to sell - The New Brunswick Court of Appeal held that the e-mails did not constitute a binding purchase and sale agreement - The court assumed, without deciding that the signing requirements of the Statute of Frauds/Electronic Transactions Act were met, and accepted that the writing requirement (Statute of Frauds) was also met - However, based on the objective standard of the typical or reasonable bystander, the court concluded that the parties lacked the requisite intention to enter into a binding agreement - See paragraphs 1 to 55.