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Have you been unknowingly “signing” agreements and other documents by sending texts?

By Jayson Thomas

According to a recent appellate decision from the Ontario Divisional Court in *1475182 Ontario Inc. o/a Edges Contracting v. Ghotbi*, the act of sending a text message may satisfy the legal requirement of a signature.ⁱ Not typing one’s name at the end of the message. Not even typing one’s initials. Instead, simply sending the text message itself may be enough.ⁱⁱ Despite the unique circumstances giving rise to the Court’s decision in *Ghotbi*, its implications are wide-reaching.

When Are Signatures Required?

Before visiting *Ghotbi*, it is important to recall a few basic legal principles concerning signatures generally.

It is common knowledge that, with limited exceptions, a contract need not be signed to be enforceable. Indeed, trial courts across Canada and the rest of the common law world routinely hold parties to agreements they never reduced to writing at all. But that does not mean that the signature – a written word or symbol used to denote identity for the past five thousand yearsⁱⁱⁱ – is redundant. To be sure, countless statutes in Ontario and elsewhere have long required that certain matters be set forth in writing and signed in order to have legal effect.

The Ghotbi Decision

One example of this is found in Ontario’s *Limitations Act, 2002*.^{iv} The *Limitations Act* requires a civil proceeding to be commenced within a specified period (two years for most types of actions) before it becomes time barred. However, the *Limitations Act* provides that the applicable limitations period is reset when a person acknowledges liability in respect of the claim.^v The only *catch* being that the acknowledgment must be “in writing **and signed**”.^{vi} This latter requirement was squarely at issue in the *Ghotbi* case.

Dr. Ghotbi was a dentist who retained the Plaintiff to construct leasehold improvements at his new practice in January 2015.^{vii} The Plaintiff delivered a final invoice on January 19, 2016, which Dr. Ghotbi did not pay. On June 2, 2016, the

Plaintiff sent Dr. Ghotbi a text message asking whether he would be at his office with the Plaintiff's payment, which the Plaintiff claimed was months past due. Dr. Ghotbi responded to this text message as follows:

The balance will be paid once everything is completed as per your agreement. No payment will be made until everything is clear. I'm going to hire a third-party inspector and their fees will be deducted from your payments too.

This was the entirety of Dr. Ghotbi's text message. The Divisional Court's decision in *Ghotbi* does not indicate that Dr. Ghotbi typed his name or initials in this message or in any subsequent message he sent to the Plaintiff.

Dr. Ghotbi did not pay the Plaintiff's final invoice, so the Plaintiff commenced an action for what he claimed was owed. However, he failed to do so until May 30, 2018, more than four months after the applicable two-year limitations period passed following the delivery of his January 19, 2016 invoice. Accordingly, his claim for payment would be time-barred by the two-year limitations period – and ultimately dismissed – unless he could establish that Dr. Ghotbi's June 2016 text message, delivered just within the two-year limitations period, constituted a “written and signed” acknowledgment of liability under the *Limitations Act*.

The Court concluded that Dr. Ghotbi's text message satisfied these requirements.^{viii} The Court reasoned that: (1) the *Limitation Act's* “signature requirement” was ultimately concerned with the authenticity of the acknowledgment; and (2) since no issue was raised that Dr. Ghotbi was the author of the June 2, 2016 text messages, “the underlying purpose” of that provision of the *Limitations Act* was satisfied.^{ix} Adding to its assessment of the authenticity of the text message, the Court noted that like all cellular telephone users, Dr. Ghotbi had a unique telephone number linked with his phone and that there were undoubtedly other unique identifiers associated with his phone, including an International Mobile Equipment Identifier (“IMEI”) number. In the most critical passage of its decision, the Court held that:

These unique identifiers provide, in effect, a digital signature on every message sent by the user of that particular device...In my view, that digital signature is sufficient to meet the requirements of s. 13(10) [i.e. the signature requirement] of the Act.

The Implications of the Court's Ruling in Ghotbi

To our knowledge, *Ghotbi* represents the first reported decision in Ontario in which a Court has found that a text message itself constitutes a *signed* document under the *Limitations Act* or any other statute.^x This decision will undoubtedly have an impact that extends beyond the signature requirements of the *Limitations Act*.

As noted above, like the *Limitations Act*, many statutes require certain documents to be in writing and signed to have any legal effect. These include:

- the *Statute of Frauds* (an offspring of the English statute of the same name passed in 1677), which requires contracts for the purchase and sale of land and leases exceeding three years (among other contracts) to be in writing and signed;^{xi}
- the *Family Law Act*, which requires domestic contracts to be in writing and signed;^{xii}
- the *Repair and Storage Liens Act*, which provides that a mechanic's non-possessory lien is only enforceable if the mechanic or storer of goods obtains a signed acknowledge of her or his customer's indebtedness;^{xiii} and

- the *Personal Property Security Act*, which provides, among other things, that a security interest in personal property (i.e. collateral) must be signed before it can attach to that collateral and that a financing statement which perfects a security interest in consumer goods must be signed before it is registered.^{xiv}

Under the Court's decision in *Ghotbi*, to the extent that any one of these types of agreements or acknowledgments is communicated through the exchange of text messages, the signature requirement would be satisfied.

In addition to statutory signature requirements, most standard form commercial agreements contain a clause prohibiting the parties from amending or modifying their agreement in any way unless the amendment or modification is "in writing, and signed by the parties." Again, the Court's decision in *Ghotbi* could be relied on by a court to find that a contract has been modified through an exchange of text messages.

Ghotbi does not reflect a seismic shift in the law merely because it confirms that a party can "sign" a document by electronic means. Ontario's *Electronic Commerce Act* – which will soon celebrate its twenty-first birthday – expressly provides that an electronic signature which meets certain reliability criteria satisfies most legal requirements that a document be signed (the enumerated exceptions to this include wills, trusts created by wills, powers of attorney concerning financial affairs or personal care, and negotiable instruments).^{xv} The *Electronic Commerce Act* does not prescribe any specific method of signing.^{xvi} So a text containing the author's typewritten name, or at minimum, her typewritten initials, would likely satisfy the requirements of the *Electronic Commerce Act*.^{xvii}

Rather, the shift reflected by the Court's decision in *Ghotbi* is that the mere act of sending a text message itself may constitute attaching one's signature to the content of that message. Individuals may thus be unwittingly "signing" documents and other agreements, and/or amending agreements previously reduced to writing, by engaging in a text message exchange concerning the purchase and sale of land, long term leases, security agreements over personal property and/or consumer goods, and entering into domestic contracts.^{xviii}

Ghotbi was decided by a single judge of the Ontario Superior Court of Justice sitting as a justice of the Divisional Court. As such, the ruling in that case is not binding on other judges of the Superior Court, where the majority of civil and commercial disputes in Ontario are litigated. In this author's view, the ruling in *Ghotbi* is vulnerable to being overturned by the Court of Appeal for Ontario for reasons that warrant an entirely independent discussion. However, until that happens, the Court's decision in *Ghotbi* will undoubtedly be cited any time a party has agreed to or acknowledged anything in a text message that the law requires to be confirmed in writing and signed. Given the ubiquity of the use of text messaging and other instant messaging platforms in modern commercial communications, such disputes will undoubtedly soon come before the courts.

Adapting Business Practices in Response to Ghotbi

Until the holding in *Ghotbi* is revisited by the Court of Appeal, corporate counsel and business managers are well-advised to revisit their technology policies concerning the use of text messages and instant messaging platforms in their employees' communications and dealings with third parties. This may include implementing policies that prohibit or limit the subject of text message communications to operational and logistical matters that do not strictly affect the parties' legal rights. Otherwise, business owners may find themselves facing claims that their communications have unwittingly, and adversely, affected their legal relations.

For more information about the article, please contact LN partner [Jayson Thomas](#).

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ⁱ 1475182 Ontario Inc. o/a Edges Contracting v. Ghotbi, [2021 ONSC 3477](#) (Div. Ct.) [“*Ghotbi*”], at [paras. 42-50](#).

ⁱⁱ *Ghotbi*, at [paras. 49-50](#).

ⁱⁱⁱ <https://www.historyofinformation.com/detail.php?entryid=2614>.

^{iv} *Limitations Act, 2002*, [S.O. 2002, c. 24, Sch. B](#), [the “*Limitations Act*”]

^v *Limitations Act*, s. 13(1).

^{vi} *Limitations Act*, [s. 13\(10\)](#) (emphasis added).

^{vii} *Ghotbi*, at [para. 6](#).

^{viii} *Ghotbi*, at [paras. 42-50](#).

^{ix} *Ghotbi*, at [paras. 46 and 49](#).

^x The issue was raised in a motion for summary judgment in *Talsky v. Waxman*, [2016 ONSC 1953](#), but the motion judge ultimately declined to decide that issue, among others, as inappropriate for adjudication by way of summary judgment. Additionally, one Small Claims Court Judge previously found that, among other things, because a text message acknowledging liability was not signed, it did not comply with the requirements of the *Limitations Act*. See *Bain v. Morton*, [2014 CanLII 74053](#) (ON SCSM).

^{xi} *Statute of Frauds*, [R.S.O. 1990, c. S.19](#).

^{xii} *Family Law Act*, [R.S.O. 1990, c. F.3, s. 55\(1\)](#).

^{xiii} *Repair and Storage Liens Act*, [R.S.O. 1990, c. R.25, s. 7\(5\)](#).

^{xiv} *Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 11(2) and

^{xv} *Electronic Commerce Act*, [S.O. 2000, c. 17, s. 11\(1\)](#) and [31\(1\)](#).

^{xvi} To be clear, [section 32\(c\)](#) of the *Electronic Commerce Act* permits the Lieutenant Governor to prescribe such methods. However, as of the date hereof, no such methods have actually been prescribed.

^{xvii} By analogy, see *Lev v. Serebrennikov*, [2016 ONSC 2093](#) (Div. Ct.) [“*Serebrennikov*”], at [paras. 24-25](#), in which the Court found that a defendant’s name contained on an email, among other things, satisfied the signature requirement of the *Limitations Act*. The Court in *Serebrennikov* noted that there are cases that have rejected that an email can satisfy that same signature requirement.

^{xviii} Provided of course that those contracts are witnessed pursuant to [subsection 55\(1\)](#) of the *Family Law Act*; a requirement which under *Ghotbi* would presumably be met where the “witness” was made a party to the text message exchange.