CIRCUlawR
A regular publication for legal news and reviews

Modern Means of Communication: You May Be Legally Bound By Your Casual Texts

In the current times, the concept of "wet ink" writing is no longer the norm. With the proliferation of technology, the law tries to keep up and allows a broader interpretation to statutory and contractual requirements that a document be in writing to accommodate the reality of the modern means of communication. This article focuses on the interpretation of the "in writing" and "signature" requirements under construction statutes and contracts, to provide guidance on what forms of documents and signatures are legally effective.

It is not only recently that the courts have acknowledged means of communication other than handwritten documents. In 1988, the British Columbia Supreme Court noted in *Beatty v First Exploration Fund 1987 and Co.*[1]:

> The conduct of business has for many years been enhanced by technological improvements in communication. Those improvements should not be rejected automatically when attempts are made to apply them to matters involving the law. They should be considered and, unless there are compelling reasons for rejection, they should be encouraged, applied and approved[2].

In the *Beatty* case, one of the matters considered was the validity of faxed proxies at a meeting of partners of a publicly-traded limited partnership. According to the underlying agreement, the proxies had to be signed by the appointor and be in writing. The court considered the definition of "writing" and "written" provided by both the BC and federal *Interpretation Acts* in force at the time (which applied only to "enactments") to find that the extended meaning of the words "writing" and "written" in those Acts had persuasive influence in the interpretation of the agreement. Further, relying on previous judgments that shared the same progressive approach to technological advances in the means of communication, the court concluded that the faxed proxies met the requirements imposed by the agreement with respect to the proxies being "signed" and "in writing". The court rejected the argument that validating faxed proxies would increase the risk of fraud and create uncertainty. Faxed copies, the court noted, are photocopies of an original proxy, which show what was depicted on the original proxy, including the exact replica of the signature of the person that signed the document. Finally, the court observed that the possibility of fraud and uncertainty is no greater in the use of originals than in the use of faxed copies.

More recently, following closely the *Model Law on Electronic Commerce* promulgated by the United Nations Commission on International Trade in 1996, Canadian federal and provincial governments adopted legislation facilitating the conduct of business by electronic means. In British Columbia, the statute is the *Electronic Transactions Act*[3] (the "*ETA*"). This legislation provides rules for making electronic documents as functional as their paper counterparts[4]. It specifically notes at section 3 that information or a record to which the *ETA* applies must not be denied legal effect or enforceability solely by reason that it is in electronic form.

(Continued on page 2)

Where there is a requirement under the law that a record be "in writing", section 5 of the *ETA* notes that such a requirement is satisfied if the record is (a) in electronic form, and (b) accessible in a manner usable for subsequent reference. Further, section 6 of the *ETA* stipulates that a requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides that information or record in electronic form and the information or record is (a) accessible by the other person in a manner usable for subsequent reference, and (b) capable of being retained by the other person in a manner usable for subsequent reference. Regarding signatures, section 11 of the *ETA* states that if there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature, which is defined by the *ETA* as information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record. Importantly, regarding electronic communication of information and records in the context of contracts, section 15(1) of the *ETA* provides that, unless the parties agree otherwise, an offer or 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 record in electronic form, or (b) by an activity in electronic form (including communicating electronically in a manner that is intended to express the matter).

I.D.H. Diamonds NV v Embee Diamonds Technologies Inc.[5], decided by a Saskatchewan court, is a leading case applying provincial e-commerce legislation to the question of whether emails can satisfy the requirements of "in writing" and "signed" by its author. The issue in the case was whether emails sent by the debtor to its creditor constituted acknowledgement of the debt for the purpose of extending the two-year limitation period under the *Limitation Act* (SK), which provided that an acknowledgement of the debt "must be in writing and must be signed by the person making it…". In the case, the emails contained at the end of the email the name of the sender, his position, and the debtor company's name, contact information and logo. The emails did not contain a digital signature, even though senior employees of the debtor had digital signatures. The court considered the application of the *Electronic Information and Documents Act* (SK) (the "*EIDA*"), which is the Saskatchewan equivalent of the British Columbia's *ETA*. The court found that the emails were "in writing" because they satisfied the requirements of section 8 of the *EIDA* (the equivalent of section 5 of the *ETA*), namely, the emails were in "electronic" form and "accessible so as to be usable for subsequent reference". The court also found that the emails met the requirements of an "electronic signature" as defined by the *EIDA* (the equivalent of section 11 of the *ETA*). Particularly, the court found that the following four requirements were satisfied:

(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"[6].

Notably, the court also stated that, in any case, it could establish the presence of a "signature" on the emails by application of the broad analysis under the longstanding principles of common law. The common law, the court noted, has always applied a broad analysis to determine the sufficiency of a signature, which was not replaced by the adoption of *EIDA*[7]. The court provided examples of deviations from the "wet ink" signatures that the common law courts have considered, such as, crosses, initials, pseudonyms, printed names and rubber stamps.

The analysis in *I.D.H. Diamonds* has been applied by the British Columbia courts in similar circumstances, including in *Johal v Nordio*[8]. The BC Supreme Court also clarified that on the plain language interpretation of the *ETA*, the legislation does not require a digital signature to meet the requirements of the *ETA*. Instead, the court noted, the *ETA*'s focus is on whether the email sender

(Continued on page 3)

intended to create a signature to identify himself/herself as the composer and sender[9].

In a couple of 2021 cases, communications by text have been found to satisfy the "in writing" and "signature" requirements. In the Ontario case of *Edge Contracting v Ghotbi*[10], the issue was whether the purported acknowledgement of a debt under the *Limitation Act* (ON) was signed where the communications from the debtor to its creditor were by means of text messages. There was no dispute between the parties as to whether the acknowledgement was in writing. The issue in dispute was whether the text met the signature requirement. Both the trial judge and the appellate judge agreed that the text satisfied the signature requirement. The appeal judge noted that the issue in every case is one of fact that concerns the authenticity of the document[11]. There was no dispute that the text messages were sent by the debtor, so from that perspective, the court considered that the underlying purpose of the *Limitation Act* (ON) was satisfied. More importantly, the court noted that the text messages also satisfied the express requirements of a "signature" under that Act. The court observed that the debtor used his phone to send and receive text messages from the creditor. The court considered that the unique phone number that was linked to the debtor's cellular telephone and other unique identifiers that were associated with the debtor's phone (e.g. an International Mobile Equipment Identifier number (IMEI)) provided, in effect, a digital signature on every message sent by the user of that particular device.

Similarly, in the British Columbia case of *Ross v Parihar*[12], the court found that text messages sent by the debtor to the creditor constituted acknowledgment for the purpose of the *Limitation Act* (BC). The court recognized the importance of being receptive to pervasive modern means of communication, stating that "next to the traditional telephone, text messages and emailing have now become common place in our daily lives."[13]. Further, while text messages may include an "electronic signature", the court noted, that the senders may choose to identify themselves by other means, such as their initials, first name, photo, or phone number. In the case at hand, it was not clear whether the debtor identified himself in his text messages, but since he was not disputing the content, accuracy, reliability, or that he sent the text messages, the text messages were found to satisfy the "electronic signature" requirement under the *Limitation Act* (BC). As the appeal judge had noted in *Edge Contracting*, the BC court stated that the issue in every case is one of fact concerning authenticity.

> *"…the overarching question is a question of fact concerning authenticity…*

Key Takeaways

A review of the case law shows that the courts are receptive and willing to accommodate new means of communication that have become the norm in our society. The clear takeaway from the case law is that when "in writing" and "signature" requirements are imposed under a statute, unless the statute at hand provides otherwise, an email or text massage can satisfy these requirements. While the courts have not had any trouble finding that an email or text message is a document in writing, as regards signatures, in the case of emails, it appears that the presence of identifying information of the sender, such as the sender's name or initials, amounts to signature. In the case of text messages, even though the presence of such identifying information would ensure more certainty, there are other identifiers, such as the sender's unique phone number and the IMEI, that are sufficient to satisfy the signature requirements. However, in any case, the overarching question is a question of fact concerning authenticity, so, it is likely that the court's analysis will be influenced should there be a dispute by the sender regarding the content, accuracy, reliability or whether he/she sent the email or text message.

(Continued on page 4)

Further, the analysis provided by the above case law (which is focused on the interpretation of statutes), is also likely relevant to the interpretation of "in writing" and "signature" requirements under contracts. Contractual notice provisions are pervasive in construction contracts, many of which require that the notice from one party to the other be provided "in writing". Unless the contract specifies the forms of the notice, the simple requirement that the party give "written notice" to the other, will likely be satisfied by the use of email or text messages, provided all the other requirements, including the content of the notice, have also been satisfied.

September, 2021

Marcela Ouatu

1 Beatty v First Exploration Fund 1987 and Co., [1988] BCJ No. 666 (BCSC) [*Beatty*]

2 Ibid at para 29

3 Electronic Transactions Act, SBC 2001 c 10

4 Please note that the *ETA* does not apply to certain types of documents (e.g. documents that create or transfer interests in land and that require registration to be effective against third parties).

5 I.D.H. Diamonds NV v Embee Diamonds Technologies Inc., 2017 SKQB 79 [*I.D.H. Diamonds*]

6 Ibid at para 57

7 Ibid at para 43 and 44

8 Johal v Nordio, 2017 BCSC 1129

9 Ibid at para 33

10 Edge Contracting v Ghotbi, 2021 ONSC 3477 [*Edge Contracting*]

11 Ibid at para 45

12 Ross v Parihar, 2021 BCPC 96

13 Ibid at para 50

MARCELA OUATU
604.358.7590

MARCELA@CIVICLEGAL.CA

Marcela is an associate lawyer of the firm. Her practice is focused primarily in the areas of tendering, procurement, construction matters and local government law. Marcela's experience includes assisting with construction contracts, procurement, and liability issues for public organizations as well as insurance disputes and construction litigation. She writes on legal topics of interest to members of the local government and construction communities, including builders' liens and construction contracts. Prior to joining Civic Legal LLP, Marcela completed a Juris Doctor and a Master of Laws at the Peter A. Allard School of Law at the University of British Columbia. Marcela articled at a civil litigation law firm, where she gained extensive legal experience in advocacy by frequently representing clients in the Supreme Court of British Columbia.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.