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The Modernization of the Bills of Exchange Act: A Proposal

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Abstract:

The Canadian Bill of Exchange Act (the Act),¹ covering bills of exchange (bills), cheques, and promissory notes (notes), is modeled on its counterpart in England (the English Act).² It was first adopted in Canada in 1890 and, while it has been amended several times, has never been substantially overhauled during the intervening 120 years.³ One judge described the English Act as "the best drafted Act of Parliament ever passed."⁴ Nevertheless, over the years, some contentious issues have arisen in connection with its interpretation while other provisions have become obsolete. Even so, considering the overall operation of the Act, one can conclude that, as a codification of the law of negotiable instruments, it has served its purpose well.⁵ I do not propose repealing the Act or replacing it with a new statute. Rather, the purpose of this paper is to identify points to be addressed in specific amendments to the existing Act and designed to clarify and improve the law of negotiable instruments. This approach will retain the Act's connection with English law, including the extensive jurisprudence that has evolved over the years throughout the Commonwealth and in other countries with similar legislation.⁶ It should be pointed out that the Act has not functioned as a codification of the law of payment systems or funds transfers. Thus, while it provides for cheques as instruments, it is not a comprehensive code covering cheque collection; nor does it cover other methods for the transfer of funds from one bank account to another. The proposed amendments are not intended to be a substitute for the badly needed and long overdue codification of a more general funds transfer law.

Keywords:

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50 CBLJ 26 - THE MODERNIZATION OF THE BILLS OF EXCHANGE ACT: A PROPOSAL

Benjamin Geva *

I. INTRODUCTION

The Canadian Bill of Exchange Act (the Act), [1](#) covering bills of exchange (bills), cheques, and promissory notes (notes), is modeled on its counterpart in England (the English Act). [2](#) It was first adopted in Canada in 1890 and, while it has been amended several times, has never been substantially overhauled during the intervening 120 years. [3](#)

One judge described the English Act as "the best drafted Act of Parliament ever passed." [4](#) Nevertheless, over the years, some contentious issues have arisen in connection with its interpretation while other provisions have become obsolete. Even so, considering the overall operation of the Act, one can conclude that, as a codification of the law of negotiable instruments, it has served its purpose well. [5](#) I do not propose repealing the Act or replacing it with a new statute. Rather, the purpose of this paper is to identify points

Page 27

to be addressed in specific amendments to the existing Act and designed to clarify and improve the law of negotiable instruments. This approach will retain the Act's connection with English law, including the extensive jurisprudence that has evolved over the years throughout the Commonwealth and in other countries with similar legislation. [6](#)

It should be pointed out that the Act has not functioned as a codification of the law of payment systems or funds transfers. Thus, while it provides for cheques as instruments, it is not a comprehensive code covering cheque collection; nor does it cover other methods for the transfer of funds from one bank account to another. The proposed amendments are not intended to be a substitute for the badly needed and long overdue codification of a more general funds transfer law.

The discussion that follows sets out modest proposals, consistent with the present structure and language of the Act, for the improvement of the law of negotiable instruments. Proposals take into account the approach of the South African Bills of Exchange Amendment Act, 2000. [7](#) They are also influenced by the substantive law in the United States. [8](#) However, they primarily draw on my own reflections that have evolved in more than 30 years of research, teaching, and consulting in Canada and elsewhere. Limited space precludes me from engaging in an exhaustive discussion of possible amendments to the Act. Topics excluded altogether are the conflict of laws provisions, (addressed in ss. 159 to 163), the drawee bank's right to recover a mistaken cheque payment, and the consequential changes required to complement the substantive changes outlined

Page 28

below. [9](#) I have not attempted to provide precise language for the proposed amendments. The proposed new sections appear in the area closest to their subject-matter.

II. SPECIFIC PROPOSALS

1. Outright Deletions With No Replacements

Several provisions are to be deleted outright as they involve practices that are obsolete or no longer in use:

1 Sections 13 to 15 dealing with the marking of bills or notes, the consideration for which consists of the purchase price of a patent right so as to make their transferee subject to equities. Nowadays, there is no reason to distinguish such transactions from ordinary business transactions so as to deny the transferees the benefits that would accrue to holders in due course; [10](#)

2 Section 32 dealing with the referee in case of need. The practice is "archaic" and out of use if not altogether "extinct"; [11](#)

3 Section 41 dealing with days of grace for bills not payable on demand; [12](#)

4 Sections 146 to 154 dealing with acceptance and payment for honour. These provisions too are obsolete; [13](#) and

5 Sections 168 to 175 dealing with crossed cheques because crossed cheques are not used in Canada. [14](#)

Page 29

2. Amendment to Section 2: Expanding the Definition of "Issue"

With respect to an instrument issued to order, the definition of "issue" should be expanded to include the first delivery, not only to the "holder," namely the payee or endorsee in possession of the instrument (as defined in s. 2), but to any person entitled to possession of the instrument. This amendment is designed to recognize the possibility of a bank draft payable to a payee and issued to a remitter, who is then expected to deliver it to the payee for value as, for example, for the payment of goods sold by the payee to the remitter. While in possession, the remitter is a non-holder in lawful possession whose rights will be governed by proposed new s. 73.1 (item 20, below). Under proposed new s. 73.1(f), the remitter's delivery for value to the payee will constitute "negotiation" of the instrument. This will then accord the payee holder in due course status and enable the payee to hold the instrument free from defences available to the issuing banker against the remitter/customer. At present, both aspects of such instruments --- the rights of the remitter as well as the defence-free position of the payee who takes the instrument in good faith and for value --- are confused and the law is in an unsatisfactory state.

3. Amendments to Sections 16 and 176: Unconditional Order or Promise

It is a basic tenet of negotiable instruments governed by the Act that the order or promise to pay must be unconditional. Amendments to the definitions of a "bill of exchange" and "promissory note" should

clarify that the precluded condition is external to the instrument. Thus, an instrument payable by a certain date or subject to a countersignature is nevertheless a bill (if it is an order) or a note (if it is a promise), since compliance with the condition can be ascertained by reference to the mere appearance of the instrument. This will remove any doubt as to the application of the Act to the traveller's cheque.

4. Amendment to Section 25: Bill Drawn on the Drawer

Section 25 currently provides that "where in a bill drawer and drawee are the same person . . . the holder may treat the instrument, at his option, either as a bill or as a note." The recommended

Page 30

amendment is intended to clarify that such an instrument is to be governed by the BEA in any event, regardless of the holder's choice. [15](#)

5. Amendment to Section 20(3): Bill Payable to Bearer

This amendment is intended to clarify that a bill which is payable to "cash," "cash or order" or any other impersonal payee is to be payable to bearer.

6. Amendment to Section 20(5): Fictitious Payee

A new paragraph should be added to state that a bill is deemed payable to a fictitious or non-existing person when the person identified as payee is not intended to have any interest in the bill by:

- (a) a person who fraudulently signs the bill;
- (b) an employee or agent, entrusted with responsibility with respect to bills issued by the employer or principal of the employee or agent, who fraudulently supplies the name or identification of the payee to an authorized signer on behalf of the employer or principal, who signs it on the basis of the name or identification so supplied (the so-called "payroll padding" practice); or
- (c) a person who fraudulently supplies the name or identification of the payee to be signed by automated means, and the bill is so signed.

Also to be considered for inclusion is the case of an impostor impersonating the payee or a person authorized to act for the payee. This will cover situations where, by use of the mails or otherwise, the impostor induces the drawer to issue the bill to the impostor or to a person acting in concert with him. [16](#)

Current jurisprudence on s. 20(5) is confusing and unsatisfactory. For instance, it has been held that while the existence of a payee is objectively determined, "fictitiousness" results from the intention of the creator of the instrument. It was accordingly held that the section applies where a fraudulent employee supplies the signer of a payroll cheque with the name of a dead person, with the intent of himself collecting on the cheque. When the fraudulent employee cashes the cheque, the loss falls on the employer. However, where the fraudulent employee provided the payroll signing officer with the name of a former employee, *i.e.*, a real person in existence, the latter was not "fictitious" from the point of view of the signing officer.

Page 31

Therefore, the section did not apply and the employer was able to avoid the loss. [17](#) It was subsequently held that it is only the intention of a director with signing authority that can determine whether the payee was fictitious. [18](#) An amendment is necessary to reverse this case law and to allocate the loss incurred by internal fraud where it belongs, namely, the company within which the fraud was perpetrated. The amendment is particularly intended to cover cases of payroll padding, *i.e.*, where the drawer's agent or employee furnishes the signing officer with the payee's name and with the intention of the agent or employee to collect on the cheque.

7. Amendment to Section 27(1)(c): Bill Payable in Instalments

This amendment is intended to clarify that an instalment bill is to be payable in a sum certain not only when acceleration is upon default in one instalment. Rather, an instalment bill should also be payable in a sum certain when acceleration is pursuant to a valid acceleration clause on the bill or in the agreement for which it was taken and which is identified on the bill. An agreement providing for the pledge of collateral security for the engagement on the bill is such an agreement. The current provision gives effect to an acceleration clause only on the basis of default in payment and only on the instrument. [19](#) This is too narrow.

8. Addition to Section 27(1): Floating Rate Instruments

An amendment is required to accommodate instruments on which the interest payable is stated to be floating as determined by some index. The sum payable on such an instrument cannot be ascertained from the face of the instrument. Case law supports this practice; [20](#) however, s. 27(1)(d) is limited to an instrument payable "

Page 32

according to an indicated rate of exchange or a rate of exchange to be ascertained as directed by the bill" and does not cover a rate of interest to be ascertained as directed by the bill.

9. Amendment to Sections 31(1) and 39: Protection Against Unauthorized Completion or Issue

At present, the protection of one who takes an instrument after it has been completed without authority is limited in three ways. First, he [21](#) must be a holder in due course and cannot be a *bona fide* payee. Second, the signer of the blank form must have delivered the instrument; even a holder in due course will not be protected in cases where the signer has been dispossessed. Third, initial delivery of the incomplete instrument must have been made by the signer "in order that [the signed blank paper] may be converted into a bill"; delivery for safekeeping will not protect the innocent holder even where he is a holder in due course. [22](#)

An amendment ought to eliminate all these limitations and allocate the loss of signing an incomplete instrument form to the signer. Indeed, by itself, signing a blank form instrument exposes the signer to a

risk, which the signer ought to bear.

It has also been held in Canada that an action by a holder in due course can successfully be met by a defence of lack of issue of a complete instrument. [23](#) This result is contrary to principle [24](#) and ought to be rectified by a proper statutory amendment.

10. Amendment to Section 48: Ratification of Forged Signature

Section 48(2) precludes "the ratification of an unauthorized signature . . . amounting to forgery." As a matter of private law,

Page 33

there is no compelling reason for this result and it is proposed that the provision be repealed.

11. New Section 49.1: Allocation of Forgery Losses

Allocation of forgery losses on the basis of fault contributing to the loss is likely to reduce forgery losses. However, Canada has followed English law [25](#) in giving fault no explicit role in the allocation of forgery losses. Thus, Canadian case law has declined to impose a duty of care on a customer towards the drawee bank to prevent and detect forgery. [26](#) In practice, banks have overcome this by providing for such duties in their standard form customer contracts. This, however, has resulted in unnecessarily long account agreements that may contain controversial terms. [27](#) Moreover, lack of privity of contract usually precludes a collecting bank (typically the taker from a forged endorsement) from being protected against a negligent drawer. [28](#)

Thus, in Anglo-American legal systems, the general rule is that a forged endorsement is wholly inoperative and may not pass title even to a *bona fide* purchaser. This is expressed in Canada in s. 48 of the Act. This rule, which allocates forged endorsement losses to the transferee from the forger, goes back to *Mead v. Young*. [29](#) There,

Page 34

Buller J. rationalized the rule on a loss-reduction ground, stating that the taker from the forger is in a better position to take necessary precautions than the drawer who "might have no means of discovering the person who committed the forgery." [30](#)

The rule in s. 48 concerning the ineffectiveness of forgery is not stated in absolute terms; rather, under s. 48(1), a forged or unauthorized signature "is wholly inoperative . . . unless the party against whom [the instrument] is sought to retain or enforce payment is precluded from setting up the forgery or want of authority." As indicated, *Mead v. Young* attributed the ineffectiveness of a forged endorsement to the loss-reduction policy. Hence, as a matter of statutory interpretation, the loss-reduction policy also ought to determine the scope of the estoppel exception, so as to apply it to the case of a negligent drawer who purports to rely on the forgery as against the collecting bank.

There has been no need for this interpretation in England because the English Act contains specific statutory provisions protecting both drawee and collecting banks dealing in good faith and without

negligence in circumstances where a cheque bears a forged endorsement. ³¹Other than for crossed cheques ³²(which are not used in Canada), ³³such provisions are not included in the Canadian Act. In this respect, the Canadian statutory scheme is similar to the American approach. ³⁴However, in the United States, general duties of care to prevent and detect forgery are addressed in §§ 3-406 and 4-406 of the Uniform Commercial Code (UCC).

For their part, Canadian courts have relied on the plain language of s. 48 and the interpretation of the "estoppel" clause in its English counterparts, neither of which has allowed for the recognition and evolution of duties of care in the allocation of forgery losses. It is proposed that this restriction be eliminated by statute.

Page 35

12. Replacement of Section 50: Signature by Procuration

The provision dealing with signature by procuration should be repealed. The text is outdated and confusing; it is not even entirely clear what constitutes "a signature by procuration." I propose instead that the Act adopt the general principles of agency law as an introduction to s. 51(1). The replacing provision should state that a person may sign a bill on behalf of a principal or a represented person, in which case, where the signer was authorized to sign on behalf of the principal or represented person, and subject to s. 51, the signer is exempted from personal liability. Rather, it is the principal or represented person who should be bound by the signature and who should be liable on the bill.

13. Amendment to Section 51(1)

Section 51(1), dealing with signing in a representative capacity, is incomplete and has given rise to confusing case law. ³⁵I propose to add the following amendments: a signer who signs on a bill on which another name appears is personally liable to a holder without knowledge of the signer's representative character. Stated otherwise, a signature on a bill without an indication of a representative capacity, coupled with the identification of the principal, is to result in the personal liability by the signer. An exception could be made to cover the case of a signer who signs his name without indicating his representative status on a standard form-bill indicating the name of another person and an account of that other person from which the drawee is to obtain reimbursement. As well, I propose to add that a signer, who has no authority to sign for or on behalf of the person indicated as principal, or in a representative character, shall be personally liable on the bill.

In the case of reasonable ambiguity as to whether a signature is in a representative capacity, it ought to be provided that the signer is personally liable to a holder in due course who took the bill without notice that the signer was not intended to be personally liable on the bill. As against any other holder, the signer should also be personally liable, unless the signer, who had authority to sign for or on behalf of the person indicated as principal, or in a representative character, proves that the original parties did not intend him to be liable on the bill.

Page 36

14. Amendment to Section 52(1): Taking for Value

"Value" is partially defined in ss. 2 and 52(1) to cover both a mere promise and an executory consideration. This works well so far as the creation of an obligation, or *liability*, on a bill (or note) is concerned. However, it does not work well in connection with the *transfer*, or the taking for value requirement, for the purpose of becoming holder in due course under s. 55(1)(b). Under that section, the better view is that taking for value requires the value or consideration to be executed. [36](#) Thus, a holder, to whom an instrument was transferred for value consisting of a promise of performance or payment by him, ought to be excused from the performance of the promise if he becomes aware of a defect in the title of his transferor prior to performance; if that holder goes ahead and performs with full knowledge of the defect, he ought to lose his holder-in-due-course status. An amendment is thus required to clarify that taking for value is taking to the extent of the performance of the promise.

15. Replacement of Section 53(1): Holder for Value

Section 53(1) is notoriously enigmatic. It provides that where value has been given for a bill the holder is deemed to be a holder for value, but neither the definition nor the rights of "holder for value" are clearly set out. Nor is it clear why and for what purposes the provision is needed. It is proposed that the provision be replaced by a statement of the existing implicit principle under the Act that "value," as defined in s. 2 in conjunction with s. 52(1), is required to support an obligation on a bill (or note), except that absence of consideration is not a defence against a holder in due course. [37](#)

16. Amendment to Section 54(2): To Whom is the Accommodation Party Liable?

As explained, "holder for value" has an unclear and confusing status and should thus be eliminated. Accordingly, it should be enough to provide that the accommodation party is liable on the bill on his accommodation party's signature, and not only "to a holder for value" as currently stated.

Page 37

17. New Subsection 55(1.1) and Amendment to Section 57: Protection of Remote Party-Payee

So far as the acceptor is concerned, the payee is a remote party. Nevertheless, under the orthodox position, the payee cannot be a holder in due course because he does not take the bill by negotiation. [38](#) There is no satisfactory explanation for the payee's defence-free position towards the acceptor. [39](#) It is thus proposed that the Act provide that, as towards the acceptor, a payee to whom the drawer issued the bill should have rights of a holder in due course where the payee has taken the bill complete and regular on its face, the payee became the holder before the instrument was overdue, the payee took the instrument in good faith and for value, and the payee had no notice of any defence of the acceptor against the drawer.

As well, a payee should benefit from a presumption of having the rights of a holder in due course under s. 57(2), [40](#) even when he does not take the bill by "negotiation." [41](#) This will oblige him to repel the attack on the presumption on the same footing as an endorsee. [42](#) For example, if a third-party's fraud

in the issue of the bill is proven, in order to recover, the payee ought to be required (contrary to *Talbot v. Van Boris*) [43](#) to prove that, subsequent to the issue of the bill, value has been given for it in good faith.

18. Amendment to Section 55(2): Defective Title

"Defective title" should include (i) the failure to provide in full or in part the value for the bill or its issue, and (ii) the availability to any

Page 38

person of an adverse claim to the bill. The current definition of "defective title" in s. 55(2) is stated to be non-exhaustive. The term itself originated as "equities affecting the bill" so as to be distinguished from "equities affecting the parties." [44](#) "Defect of title" or "equities affecting the bill" ought to encompass both (i) a prior party's "equities of liability" or contract defences and (ii) a third party's "equities of ownership" or adverse claims to the instrument. [45](#)

An adverse claim of ownership need not be that of a prior party liable on the bill. For example, such is the claim of a dispossessed holder of an instrument payable to bearer, who will successfully assert his claim except against a holder in due course.

The proposed amendment will necessitate the addition of a new definition to s. 2 stating that "adverse claim" means a claim of a property or possessory right in the bill or note or its proceeds, including a claim to rescind a negotiation and to recover the bill or note or its proceeds.

19. Amendment to Add a New Paragraph to Section 73: Rights of Holder Not in Due Course

A new provision should be added to state that a holder not in due course acquires such title as his transferor has in the bill, so that, except when he has rights of a holder in due course under s. 73(b), he holds the bill subject to any defect of title affecting the bill or attaching thereto, as well as to mere personal defences available to him against his own immediate prior party.

The Act provides in s. 73(b) for the holder in due course's freedom from "any defect of title . . . as well as from mere personal defences." It is generally accepted that a holder not in due course holds the bill subject to any defect of title but only to the mere personal defences available to his immediate party. [46](#) For "defect of title", see s. 55(2) as proposed to be revised above. A new definition should be added to define "mere personal defence" to mean the set-off by way of defence to an action on a bill or note of a debt or any other liquidated sum of money owed to the defendant, other than

Page 39

on the basis of any defect to the plaintiff's title in the bill or note. [47](#) A defence based on the failure to provide in full or in part the value for the bill or its issue is not a mere personal defence.

This new definition for "mere personal defence" is declaratory. Equally declaratory is the proposed statement under which a holder not in due course is subject to any defect of title, as well as to mere personal defences available to his immediate party. At the same time, the proposed revision to s. 55(2) expanded the definition of "defect of title" to include the "failure to provide in full or in part the value

for the bill or its issue." Under the new paragraph to s. 73 here proposed, "failure to provide in full or in part the value for the bill or its issue," being a defect of title under the proposed revision to s. 55(2), will thus be available against any holder not in due course. This will be a desirable modification; at present, the prevailing view is that the failure of consideration in an unascertained amount (e.g. , breach of contract resulting in unliquidated damages) is not available against a holder not in due course, even when he is an immediate party. A leading case is *James Lamont & Co. Ltd. v. Hyland Ltd.* , [48](#) where the Court of Appeal did not allow an immediate party (a buyer of services who was the acceptor of a bill) to set up a defence or bring a counterclaim or apply for a stay of execution, based on alleged unliquidated damages due from the plaintiff (payee-seller of the services), arising from the latter's breach of the contract for which the bill was given. [49](#) This position is specifically rejected in the United States by UCC art. 3, [50](#) which I recommend should be followed in Canada. [51](#)

20. New Section 73.1: Rights of Non-Holder in Lawful Possession

A new provision should be added to cover the rights of a non-holder in lawful possession in his own right of a bill payable to order [52](#) as follows:

Page 40

- (a) Where he is a transferee he acquires such title and rights as the transferor had in the bill;
- (b) Where he is a transferee for value he also has the right to have the endorsement of the transferor;
- (c) He may sue parties liable on the bill in his own name, in which case:
 - (i) he must prove lawful possession in his own right;
 - (ii) he must comply with all duties and obligations under the Act as if he is a holder; and
 - (iii) the party liable is entitled raise to all defences available to him as if the action was brought by a holder other than a holder in due course.
- (d) He may give discharge on the bill, and payment to him is deemed to be payment in due course;
- (e) He may transfer lawful possession and dispose of all other rights and title to a transferee;
- (f) Notwithstanding section 59(3), he may negotiate the bill by delivering it to the payee or endorsee;
- (g) He may endorse and incur endorser's liability to any subsequent holder, but as against a party who became liable on the bill prior to the endorsement of the non-holder in lawful possession in his own right, any subsequent person in possession, whether or not he is an endorsee, may be a non-holder in lawful possession in his own right, but not a holder;
- (h) He may exercise the option of a holder under section 25 (regarding a bill drawn on the drawer).

Some examples of a non-holder in lawful possession in his own right are the remitter of a bill payable to his creditor, a transferee of an unendorsed instrument payable to order (who took it either for value or by way of gift), a drawer who pays a bill payable to a third party, or a trustee in bankruptcy or executor in possession of a bill payable to the bankrupt or deceased. The Act deals only with two of these cases.

First, s. 60(1) covers a transferee for value of an unendorsed instrument. Second, s. 139 applies to a drawer who pays a bill payable to a third party. It is proposed to deal with the issue in a more comprehensive and exhaustive way, so as to codify and apply a principle which goes back to pre-English Act cases. [53](#)

In the proposed new provision, a non-holder in lawful possession in his own right is treated like a holder not in due course, though this is subject to a few exceptions that make his position less desirable. First, he does not benefit from the presumptions that inure to the benefit of a holder; [54](#) he is thus required to prove his lawful

Page 41

possession in order to benefit from his status. Second, under proposed paragraph (g), while he may endorse and incur endorser's liability, subsequent transferees remain non-holder owners and not holders towards parties prior to him. [55](#)

Proposed paragraph (g) is intended to clarify the existing law. This clarification can be read into the existing provisions, though not without difficulties. Thus, under s. 130, the signature of the non-holder in lawful possession is that of an "endorser." He therefore has the power to transfer the bill by negotiation to someone who will be a "holder" towards himself but not towards prior parties with respect to whom there is no uninterrupted chain of negotiations.

Per the proposed new s. 73.1(f), a remitter may confer on the payee a holder in due course status, since the taking of the instrument from the remitter amounts to "negotiation." This rectifies the current anomalous situation under which the payee's freedom from the defences of the issuer of a bank cheque against the remitter was held to exist on the basis of (to say the least) dubious theories. [56](#)

The proposed s. 73.1(h) would give the non-holder in lawful possession the holder's options in relation to the nature of an instrument drawn on the drawer as well as in relation to the nature of an unexplained signature.

21. Deletion from Section 130: Endorser's Liability Presumption

Section 130 provides in part that "when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers." Reference to an endorser's liability "to a holder in due course" is redundant and thus should be omitted.

Page 42

22. New Section 130.1: Giver of an Aval

Liability of a person who gives an aval to secure or guarantee the liability of a party on a bill is not provided by the Act. This omission led to a complex practice in England; [57](#) however the omission was cured in Canada by a "creative" interpretation of s. 130, which contains additional language that does not appear in its English counterpart [58](#), covering the stranger's liability. [59](#) However, it is suggested here that a comprehensive legislative solution, possibly modeled on the South African amendment, [60](#) will

dispel any possible remaining doubts and put the matter on firmer grounds.

23. Replacement of Section 144(1): Material Alteration

Under s. 144(1), "where a bill or an acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized or assented to the alteration and subsequent endorsers." [61](#)

The provision is deficient in two principal respects; both should be rectified by amendment. First, it is better to speak of the materially altered bill being discharged rather than being voided. Second, it is not justified to release those who became liable prior to the material alteration from their original liability where the material alteration was not fraudulently made, authorized or assented to by the holder. Case law may have confirmed this result by excluding accidental

Page 43

alteration from the coverage of the provision. [62](#) In fact, a materially altered bill is "split" into two bills, with prior parties remaining liable according to the original tenor of the bill.

24. New Section 144.1: Bill Taken for Obligation

A new provision is to be added to deal with the relationship between the bill and the obligation for which it was given (*e.g.* , in payment for goods or repayment of a loan). It is to state as follows:

- (a) The obligation is suspended *pro tanto* until the bill is either discharged or dishonoured;
- (b) Other than in the case provided in paragraph (c), the obligation is discharged when the bill is discharged;
- (c) When the bill is dishonoured, the holder or person entitled to lawful possession in his own right may sue either on the bill, in an action governed by this Act, or on the obligation, under the law governing the obligation; and
- (d) Notwithstanding paragraph (b), when a party liable on the bill is discharged due to the failure by the holder or the person in lawful possession in his own right to comply with respect to the bill with any duty relating to the presentment, sending notice of dishonour or protest, and subject to deduction for any loss or damages caused by the failure to comply with any such duty, the holder or the person in lawful possession in his own right may sue that party on the obligation, under the law that governs that obligation.

Paragraphs (a) to (c) of subsection (1) codify and clarify the existing law. [63](#) Paragraph 1(d) is designed to clarify the law, correct an anomaly and eliminate injustice. A contrary "draconian rule" is indefensible. [64](#)

An exception should be made where otherwise agreed, and where a bank [65](#) is or becomes liable, other than as an accommodation party or a giver of an aval, on a bill taken for an obligation of a person other than the obligated bank. In such a case any other liability on the bill, and the obligation, is *pro tanto* discharged. This exception is designed to cover the case of payment by means of a

Page 44

bank draft or certified cheque, in which case, typically, the remitter already paid the issuing bank and it is unjust to hold him responsible for the subsequent default of the banker, on whom the payee was prepared to rely. This follows the UCC's approach [66](#) and reflects the better view under existing law.

25. Amendment to Section 155(1): Lost Bill

Section 155(1) provides that "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost is found again."

An amendment is required to enhance the ex-holder's right and allow him to obtain (against security) signatures other than that of the drawer. In fact, what is proposed is consistent with present s. 156, which does not discharge those other parties from their liability. As well, following a similar amendment in South Africa, [67](#) the provision ought to be amended to cover "destroyed" bills and not only lost bills.

For the purpose of s. 155(1), and in fact, whenever the drawer is treated as the issuer of the bill, the maker of a note shall be deemed to correspond to the drawer of a bill. This is an exception to the general rule, provided in s. 186(2), under which the maker of a note is usually analogized to the acceptor of a bill.

26. New Section 156.1: Conversion and Money Had and Received

A provision should be added stating that, where applicable, and subject to the provisions of the Act, the actions of conversion and money had and received under the common law [68](#) are available to a dispossessed holder of a bill or any other person entitled to lawful possession of it.

In English law, as against anyone who took an instrument after the theft or loss of an instrument payable to order, the actions of conversion and money had and received are fundamental to the enforcement of the rights of the true owner of a bill who has been

Page 45

dispossessed. [69](#) There is no comparable remedy in civil law which may lead to inconsistency in the allocation of forged endorsement losses between Québec and the rest of Canada. Briefly stated, under Québec law, the liability of former wrongful possessors is based on fault [70](#) and is not absolute as it is in the common law tort of conversion.

27. Revision of Sections 163.1 to 163.4: Alternative Modes of Presentment

In 2007, the Act was amended to accommodate electronic presentment of bills [71](#) as will be authorized under the Canadian Payments Act. [72](#) In my view, this does not go far enough; rather, a broader authorization for alternative modes of presentment, other than by the exhibition of the instrument at the drawee branch, [73](#) is needed. For example, an alternative mode of presentment should be permitted *per* interbank agreements in data centres as well as in clearing facilities. Also, procedures ought to be made

to accommodate both the technical failure of the electronic presentment and the dishonour of the cheque electronically presented, such as for the return of an image return document.

28. First New Paragraph to Section 165: Post-Dated Cheques

A provision should be added stating that a cheque is payable on demand as of the date written on it as the date of issue. This is designed to give full effect to the practice of cheque post-dating. A cheque is required under s. 165(1) to be payable on demand; hence, questions arise as to whether a post-dated cheque is a cheque at all and whether it is payable prior to the date it bears as the date of its ostensible issue. [74](#) The proposed new provision gives effect to the

Page 46

view that appears to prevail [75](#) in Canada [76](#) and is designed to settle these controversies by legitimizing the instrument as a cheque payable as of the date it bears.

29. Second New Paragraph to Section 165: Cheque Certification

"Certification" is not addressed by the Act. It is the marking of a cheque by the drawee bank to show that (1) the cheque is drawn by the person purporting to draw it, (2) it is drawn on an existing account with the drawee and (3) there are sufficient funds to meet it. By reference to an article of mine, [77](#) case law in Canada conceptualized the drawee bank's liability on certification as that of an acceptor. [78](#) Crawford challenges this conceptualization but does not question the certifying bank's liability; [79](#) nor does he claim that the imposition of absolute liability on the certifying bank [80](#) is a necessary derivation from the acceptance rationale, [81](#) a point on which I elaborated elsewhere. [82](#) Regardless, liability on certification ought better to be set out specifically by statute.

30. Third New Paragraph to Section 165: Non-Transferable Cheque

A drawer of a cheque may insist on the use of the instrument strictly for a non-cash payment to the payee so as to preclude its negotiation or even transfer. It is thus proposed that a provision be added stating that a cheque manifesting an intention that it will not be transferred shall not be transferable, but shall only be valid as between the parties thereto. [83](#) Such a cheque may, however, be

Page 47

delivered to an agent, including a bank, for collection. This is broader than s. 20(1) covering the non-transferable bill [84](#) as well as that of s. 174 dealing with "Not Negotiable" cross. [85](#)

31. Amendment to Section 165(3): Cheque for Deposit

Section 165(3) currently provides that "Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and

powers of a holder in due course of the cheque." The provision has been criticized as going too far [86](#) in allowing a collecting bank to become a holder in due course under a relaxed taking for value requirement [87](#) and possibly even without fulfilling other requirements such as the taking in good faith and without notice requirements. [88](#) I propose to replace the provision with a new provision stating that a bank which takes for value, or has a lien on, a cheque payable to order which the holder delivers to it for collection, has such (if any) rights, as it would have had if, upon delivery, the holder had indorsed it in blank. [89](#) *Per* proposed amendments to s. 52(1), discussed in item 14 above, "taking for value" will not be satisfied by merely crediting the account; actual withdrawal of credited funds will usually be required.

Page 48

32. Amendment to Section 167: Authority to Pay

Present s. 167 deals with the revocation of banker's authority upon countermand of payment and notice of customer's death. An amendment should add similar events, such as notice of adjudication of incapacity, or declaration of bankruptcy, winding up or otherwise placement under judicial management, as having the same effect.

33. New Section 167.1: Payment of Cheque

The Act does not provide when a cheque is paid. Elsewhere I have argued that the time of payment could be derived from clearing rules and bank practices, particularly by reference to the failure of a drawee bank to timely return a dishonoured cheque. [90](#) Crawford "respectfully disagree[s]" with my analysis. [91](#) For greater legal certainty, the point ought to be specifically provided for by statute, following in the footsteps of UCC, art. 4. [92](#)

34. New Section 184.1: "Visa"

The Act provides for a note payable after sight but does not provide for a mechanism for ascertaining the point from which time of maturity becomes visible on such an instrument. For a bill, presentment for "acceptance," to be responded to by a signature on the bill, provides for such a mechanism. Unlike the drawee of a bill, the maker of a note is liable on it anyway so no presentment for acceptance is available (or indeed needed). Borrowing the solution in art. 78 of the Geneva Uniform Laws, the proposed new provision should state, in the language of the aforesaid art. 78, that, where a note is payable after sight, presentment for "the visa of the maker" is necessary in order to fix the maturity of the instrument. Maturity will run as of that presentment, as acknowledged by the maker's signature on the note. The provisions applicable to the presentment of a bill for acceptance will apply with the necessary modifications to the presentment of a note for visa. The refusal of the maker to give his visa with the date thereon is a dishonour of the note.

Page 49

35. Amendments to Part V

Part V (ss. 188 to 192) was added in 1970 and deals with consumer bills and notes. [93](#) It permits a consumer to resist an action brought by a sales financier by raising defences available against the seller. It covers negotiable instruments issued to (i) vendors of goods or services and negotiated to a financier as well as to (ii) some lenders, who lent money used to buy the goods or services. To trigger the availability of defences, such instruments are required by s. 190(1) to "be prominently and legibly marked." However, the provisions are not tightly drafted and embarrassing errors and loopholes have surfaced. [94](#) It is proposed to revise Part V with a view to correcting errors and filling in gaps as follows:

- 1 Its provisions could be extended to small businesses and farmers and not necessarily be restricted to consumers;
- 2 The term "consumer purchase" is defined in s. 188 to exclude "cash purchase." This appears to exclude sales where the outstanding balance of the purchase price is fully paid for from the proceeds of a loan at the time of the sale so that no credit has been extended by the seller so that the transaction is a "cash purchase"; [95](#)
- 3 Under s. 189(3)(b), an instrument issued to a lender is issued in respect of a consumer purchase where:
 - (a) the consideration for its issue was the lending or advancing of money or other valuable security by a person other than the seller, in order to enable the purchaser to make the consumer purchase; and
 - (b) the seller and the person who lent or advanced the money or other valuable security were, at the time the bill or note was issued, *not dealing with each other at arm's length within the meaning of the Income Tax Act* . [Emphasis added.]

The emphasized language has proved to be too narrow to capture a lender closely related to the vendor as intended by Parliament. [96](#)

- 4 Section 190(2) provides that, in principle, an unmarked consumer bill or note is void. This raises questions as to whether the holder can sue the consumer on the underlying transaction. There is no reason to deprive the holder from

Page 50

this action, which could be met by defences available to the consumer on the underlying transaction. To that end, it is better to say that an unmarked instrument is unenforceable (rather than void), and to clarify that the action on the underlying transaction is available to the holder;

- 5 To prevent easy avoidance, it ought to be provided in s. 190(2) that a consumer may assert his defences arising from the sale against a lender whose note is governed or would have been governed by Part V and who is suing on the loan; and

- 6 At present, s. 191 subjects the holder of a marked consumer bill or consumer note to "any defence or right of set-off, other than counter-claim, that the purchaser would have had in an action by the seller *on the consumer bill or consumer note* " [emphasis added]. The emphasized language is a source of confusion and should be eliminated. There is no seller's action on the bill or note when the instrument is issued to the lender. Also, unless a new paragraph is added to s. 73 as proposed in item 19 above, the present language protects the holder from the defence of a

failure of consideration in an unascertained amount. Finally, the phrase "set-off, other than counter-claim" requires clarification; [97](#) arguably, it refers to statutory and not equitable set-off and precludes an affirmative liability. [98](#)

III. CONCLUDING REMARK

As electronic funds transfers have come to supersede cheques, it is only natural that a discussion on meaningful reforms in the law governing payment systems and electronic funds transfers will eclipse a discussion of basic law reform in the area of paper-based systems. However, for the foreseeable future, paper credit and payment instruments will continue to play a significant role in facilitating economic activity. Legal certainty requires the improvement of the law that governs these instruments. I hope that the detailed proposals set out above will lead to a constructive and useful discussion.

ENDNOTES

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[1](#) Bills of Exchange Act, R.S.C. 1985, c. B-4 (unless indicated otherwise, all statutory references below are to the Act).

[2](#) Bills of Exchange Act, 1882 (U.K.), 45 & 46 Vict., c. 61.

[3](#) For its legislative history, see B. Crawford, *The Law of Banking and Payment in Canada*, vol. 3 (Aurora, Ontario, Canada Law Book) (looseleaf), at § 20:30.10.

[4](#) *Bank Polski v. Mulder and Co.*, [1942] 1 K.B. 497, [1942] 1 All E.R. 396 (C.A.), at p. 500, MacKinnon L.J.

[5](#) To the same effect, see my earlier article, B. Geva, "Reflections on the Need to Revise the Bills of Exchange Act --- Some Doctrinal Aspects" (1982), 6 C.B.L.J. 269. To a large extent, this paper is a follow-up to that article.

[6](#) An overview of the level of adherence by these jurisdictions is provided in P. Ellinger, "Negotiable Instruments," chap. 4 in J.S. Ziegel, chief ed., *Commercial Transactions and Institutions*, vol. IX of U. Drobnig and K. Zweigert, responsible eds., *International Encyclopedia of Comparative Law* (Tübingen, J.C.B. Mohr, 2000), at pp. 46-51. Countries are divided into those with minor and major variations. Canada is classified as a jurisdiction with major deviations. Greater deviations appear in statutes such as that of South Africa and India (discussed *ibid.*, at pp. 51-54). This is even more true for the United States (discussed *ibid.*, at pp. 54-56) which is, in my view, *sui generis* because its legislation, the Uniform Commercial Code (UCC), art. 3 (1990, as amended 2002) has departed altogether from the English model, not only in matters of substance, but also in structure, style and language.

[7](#) Act No. 56 of 2000, to amend the Bills of Exchange Act, Act 34 of 1964, as am. (S.A. Amendment Act). For an extensive review of the South African amendments see L. Gering and D. Tobias, *Commentary on the Bills of Exchange Amendment Act 2000* (Lansdowne, South Africa, Juta Law, 2001).

[8](#) As pointed in footnote 6, *supra*, UCC art. 3 derived its basic concepts, albeit indirectly, from the English Act. It is only natural then that UCC art. 3 will be a source of inspiration for proposals to reform the Act in Canada.

9 On the former point (the drawee bank's right to recover on cheques paid by mistake of fact), see Geva, *supra*, footnote 5, at pp. 302-313.

10 See Crawford, *supra*, footnote 3, vol. 3 at § 21:40.110.

11 N. Elliott, J. Odgers and J.M. Phillips, *Byles on Bills of Exchange and Cheques*, 28th ed. (London, Sweet & Maxwell, 2007) (*Byles*), at p. 111 (regarding s. 15 of the English Act corresponding to s. 32 of the Act). See also Crawford, *supra*, footnote 3, vol. 3 at § 30:10 (by reference to p. 30:20.10). Reference in case of need is a practice under which the drawer and any endorser may insert on the bill the name of a person to whom the holder may resort in case of dishonour.

12 "No days of grace are provided for in the UCC in the United States or in the U.K. *Bills of Exchange Act* or in the Geneva Convention . . ." See Crawford, *supra*, footnote 3, vol. 3, at § 22:50.40.

13 *Ibid.*, at § 30:10 (by reference to p. 30:20.20 and .30). The provisions refer to the power to honour the bill by a person who is not a party to it.

14 *Ibid.*, at § 34:80.10.

15 See, e.g., *Law Society of Alberta v. Canadian Imperial Bank of Commerce* (1989), 71 Alta. L.R. (2d) 102, 101 A.R. 374 (Q.B.), at pp. 127-128 (Alta L.R.).

16 This follows in the footsteps of UCC § 3-404(a).

17 See *Royal Bank of Canada v. Concrete Colum Clamps (1961) Ltd.* (1976), 74 D.L.R. (3d) 26, [1977] 2 S.C.R. 456.

18 See *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce* (1996), 140 D.L.R. (4th) 463, [1996] 3 S.C.R. 727, 66 A.C.W.S. (3d) 1127, which I discussed at length in B. Geva, "Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee --- *Boma v. CIBC*" (1997), 28 C.B.L.J. 177.

19 See, e.g., *Canadian Imperial Bank of Commerce v. Morgan*, [1993] 7 W.W.R. 171, 11 Alta. L.R. (3d) 90 (Q.B.).

20 See, e.g., *New Fort Financial Services Ltd. v. 85190 Holdings Ltd.* (1984), 55 A.R. 157 (Q.B.); *Royal Bank of Canada v. Stonehocker* (1985), 61 B.C.L.R. 265 (C.A.), leave to appeal to S.C.C. refused [1985] 1 S.C.R. xiii; *National Bank of Canada v. Intracom Investments Ltd.* (1985), 165 A.P.R. 351, 64 N.B.R. (2d) 351 (Q.B.), varied with respect to calculation of compound interest only [1986] N.B.J. No. 79, 72 N.B.R. (2d) 34 (C.A.); and *Alberta (Treasury Branches) v. Smith* (1989), 45 B.L.R. 122, 67 Alta. L.R. (2d) 357 (Q.B.).

21 Following the language of the Act, I use "he" to denote he, she or it, and "his/him" by reference to her, it or its. Certainly, I will not object to a statutory amendment adopting a gender neutral language throughout the Act.

22 The leading case is *Smith v. Prosser*, [1907] 2 K.B. 735, 23 T.L.R. 597 (C.A.).

23 *National Bank of Canada v. Tardivel Associates* (1993), 15 O.R. (3d) 188, 44 A.C.W.S. (3d) 1191 (Gen. Div.), affd 109 D.L.R. (4th) 126, 17 O.R. (3d) 61, 45 A.C.W.S. (3d) 1153 (Gen. Div. (Div. Ct.)). This is so notwithstanding the "valid delivery" conclusive presumption in s. 39(2). Briefly stated, the court reasoned that an undelivered bill is not a "bill" and hence, the provision does not apply.

24 See B. Crawford, "Is This A Cheque I See Before Me?: *National Bank v. Tardivel* and The Scope Of The Defence Of Non-Delivery" (1994), 24 C.B.L.J. 1, and B. Geva, "Negotiable Instruments and Banking: Review of Some Recent Canadian Case Law" (1994), 9 B.F.L.R. 197, at pp. 203-205.

25 See, e.g., *London Joint Stock Bank v. Macmillan*, [1918] 1 A.C. 777, 34 T.L.R. 509 (H.L.), at p. 795 (A.C.), Lord Finlay L.C., holding that for the customer to become liable to the drawee bank his "negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn."

26 The leading case is *Canadian Pacific Hotels Ltd. v. Bank of Montreal* (1987), 40 D.L.R. (4th) 385,

[1987] 1 S.C.R. 711, 4 A.C.W.S. (3d) 299 , which followed *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* , [1985] 3 W.L.R. 317, [1984] 1 Lloyd's Rep. 555 (C.A.), revg [1986] 1 A.C. 80, [1985] 2 All E.R. 947 (P.C.) .

27 See generally K.W. Perrett, "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999), 14 B.F.L.R. 245. A most recent case in which the contract language was found to be inadequate to protect the bank is *S.N.S. Industrial Products Ltd. v. Bank of Montreal* (2010), 321 D.L.R. (4th) 531, 2010 ONCA 500, 191 A.C.W.S. (3d) 229 .

28 For an attempt to overcome this hurdle, see *Royal Bank of Canada v. Société Générale (Canada)* (2007), 31 B.L.R. (4th) 63, 154 A.C.W.S. (3d) 72 (Ont. C.A.), supp. reasons 31 B.L.R. (4th) 83, 2007 ONCA 302, leave to appeal to S.C.C. refused [2007] 3 S.C.R. xv, 376 N.R. 400 *n* , declining to summarily dismiss the collecting bank's action against drawers for negligence, unjust enrichment, and money had and received.

29 (1790), 4 T.R. 28, 100 E.R. 876 (K.B.). *Mead v. Young* involved misdirection by the mail, to a person other than the designated payee, of a bill payable to order; both the drawer and the designated payee were innocent. Buller J. found the drawer *not* to be negligent. Cheques paid by and to large business entities and organizations were not contemplated when the rule was pronounced, so that policy considerations involving loss caused by the misuse of such cheques were not taken into account at that time. In the present cheque collection environment, the typical taker from the forger is the collecting bank that may not be in a position to detect fraud against the drawer or drawee.

30 *Ibid.* , at p. 32 (T.R.), at p. 878 (E.R.).

31 These provisions are s. 60, included in the English Act from its inception (dealing with the drawee bank), and s. 4 of the Cheques Act, 1957 (U.K.), c. 36 (dealing with the collecting bank. Until 1957, protection for a collecting bank was limited in England under s. 82 of the English Act to crossed cheques). Thus, in England, there has been no pressing need to deal with the existence of such a duty of care.

32 See the Act, *supra* , footnote 1, at ss. 171 and 172.

33 See, *supra* , recommendation 5 in the part of this paper entitled "1. Outright Deletions with No Replacements."

34 However, the United States has not included any provision as to crossed cheques.

35 See, e.g. , *Allprint Co. v. Erwin* (1982), 136 D.L.R. (3d) 587, 38 O.R. (2d) 13, 14 A.C.W.S. (2d) 506 (C.A.) .

36 This point is noted by J.S. Ziegel in "Royal Bank of Canada v. Dawson Motors (Guelph) Ltd.: A Postscript" (1981-82), 6 C.B.L.J. 507, at pp. 508-509.

37 See discussion in B. Geva, "Absence of Consideration in the Law of Bills and Notes" (1980), 39 Cambridge L.J. 360.

38 See *Jones (R. E.) Ltd. v. Waring and Gillow Ltd.* , [1926] 1 A.C. 670, 41 T.L.R. 332 (H.L.) .

39 See *Byles* , *supra* , footnote 11, at pp. 235-238.

40 For the wording of the suggested amendment to s. 58, cf. B. Geva, "Defences on Cheque Certification: *Esses v. Friedberg* " (2009), 24 B.F.L.R. 359, where I argue that court could so interpret s. 57(2) as it is worded now.

41 When a payee takes a bill by "negotiation," as when he takes it from a remitter, he could become a holder in due course anyway under the proposed new s. 73.1(f).

42 Presently, s. 57(2) reads (2) Every holder of a bill is, in the absence of evidence to the contrary, deemed to be a holder in due course, but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is the holder in due course is on him, unless and until he proves that,

subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

43 *Talbot v. Von Boris*, [1911] 1 K.B. 854 (C.A.). The case held that the provision cannot benefit the payee to whom the bill was originally issued. For a critical analysis, see Geva, *supra*, footnote 40, at pp. 362-364, and 368-371.

44 See *Alcock v. Smith*, [1892] 1 Ch. 238 at p. 263, 8 T.L.R. 222 (C.A.).

45 See generally Z. Chafee, "Rights in Overdue Paper" (1917-18), 31 Harv. L. Rev. 1104, at p. 1109.

46 See ss. 69(1) and 71 and discussion in B. Geva, *Financing Consumer Sales and Product Defences in Canada and the United States* (Toronto, Carswell, 1984), pp. 125-131.

47 *Ibid.*, at pp. 131-137.

48 [1950] 1 K.B. 585, [1950] 1 All E.R. 929.

49 *Cf. Iraco v. Staiman Steel* (1987), 62 O.R. (2d) 129, 45 D.L.R. (4th) 158, 8 A.C.W.S. (3d) 136 (C.A.), where the court allowed defendant to pay the amount of the instrument into court pending his counterclaim against an out-of-country plaintiff-holder allegedly in breach of the contract that gave rise to the instrument.

50 See UCC, § 3-305(a)(2) and (3).

51 For an extensive analysis see B. Geva, "Equities as to Liability on Bills and Notes: Rights of a Holder Not in Due Course" (1980-81), 5 C.B.L.J. 53, arguing for this result as a matter of common law.

52 With respect to a bill payable to bearer, the one in possession is, by definition, a "holder." See the definition of "bearer" in s. 2.

53 See, e.g., *Mason v. Morgan* (1834), 2 Ad. & E. 30, 111 E.R. 12 (K.B.); and *Stone v. Rawlinson* (1745), Willes 559, 125 E.R. 1320.

54 *Per s.* 57, these presumptions concern becoming a party for value and holding in due course.

55 Thus, where A issues a bill payable to B who negotiates it to C who transfer it by delivery to D who endorses it to E, E (and any subsequent endorsee) may sue D as a holder but may sue A and B only on the basis of lawful possession of a non-holder.

56 See, e.g., *Yan v. Post Office Bank*, [1994] 1 N.Z.L.R. 154 (C.A.), discussed by B. Geva, "The Issuer's Defences Against the Payee of a Bank Draft --- Addendum to 'The Autonomy of the Banker's Obligation on Bank Drafts and Certified Cheques'" (1994), 73 Can. Bar Rev. 280.

57 See, e.g., *MacDonald (Gerald) & Co. v. Nash*, [1924] 1 A.C. 625, 40 T.L.R. 530 (H.L.). See also *G. & H. Montage GmbH v. Irvani*, [1990] 1 W.L.R. 667, [1990] 2 All E.R. 225 (C.A.), at pp. 671-674 (W.L.R.), leave to appeal to H.L. refused [1990] 1 W.L.R. 692c, for a review of jurisprudence as well as of the Geneva Uniform Laws that provide a much more elegant solution for the giver of an aval.

58 Section 56 of the English Act.

59 *Gallagher v. Murphy*, [1929] S.C.R. 288, [1929] 2 D.L.R. 124, specifically relying on the proviso to s. 130. The section reads in full as follows: "No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such, but when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course *and is subject to all the provisions of this Act respecting endorsers*" [emphasis added]. The emphasized language does not appear in English s. 56, which otherwise is substantially similar.

60 Section 54A to the South African Bills of Exchange Act, as added by the S.A. Amendment Act, *supra*, footnote 7, at s. 17.

- [61](#) However, under s. 144(2), "Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, the holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenor." No change is proposed for this subsection.
- [62](#) *Byles*, *supra*, footnote 11, at p. 274.
- [63](#) See, e.g., *In re Charge Card Services Ltd.*, [1988] 3 All E.R. 702, [1988] 2 F.T.L.R. 609 (C.A.), at p. 707.
- [64](#) See R.M. Goode, *Commercial Law*, 2nd ed. (London, Penguin Books, 1995), p. 558.
- [65](#) As defined in s. 164, to include "every member of the Canadian Payments Association established under the *Canadian Payments Act* and every local cooperative credit society, as defined in that Act, that is a member of a central, as defined in that Act, that is a member of the Canadian Payments Association."
- [66](#) UCC, § 3-310(a).
- [67](#) Section 67 to the South African Bills of Exchange Act, as added by the S.A. Amendment Act, *supra*, footnote 7, at s. 24.
- [68](#) Section 9 says these actions will apply, "save in so far as they are inconsistent with the express provisions of this Act."
- [69](#) See, e.g., Geva, *Bank Collections and Payment Transactions* (Oxford, Oxford University Press, 2001), pp. 440-444.
- [70](#) See *Norwich Union Fire Insurance Society v. Banque Canadienne Nationale*, [1934] 4 D.L.R. 223, [1934] S.C.R. 596, and discussion in Geva, *supra*, footnote 69, at pp. 456-459.
- [71](#) An Act to amend the law governing financial institutions and to provide for related and consequential matters, S.C. 2007, c. 6.
- [72](#) Canadian Payments Act, R.S.C. 1985, c. C-21. For now, the electronic presentment provisions of the Act (ss. 163.1 to 163.4) are inoperative. In October 2008, the CPA board decided not to proceed any further with the image-based clearing initiative. See <http://www.cdnpay.ca/news/board_decision_re_tecp.asp>.
- [73](#) As required for presentment for payment under ss. 84(3) and 87(b).
- [74](#) See, e.g., M.L.J. Rajanayagam, "The Post-Dated Cheque and Holding in Due Course" (1969), J. Bus. L. 33.
- [75](#) Crawford is, however, more equivocal: *supra*, footnote 3, vol. 3 at § 34:50.20(5).
- [76](#) *Keyes v. Royal Bank of Canada*, [1947] S.C.R. 377, [1947] 3 D.L.R. 161; and *Shapiro v. Greenstein* (1969), 10 D.L.R. (3d) 746 (Que. C.A.).
- [77](#) B. Geva, "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986), 65 Can. Bar Rev. 107, at p. 129.
- [78](#) See *Maubach v. Bank of Nova Scotia* (1987), 40 D.L.R. (4th) 134, 60 O.R. (2d) 189, 4 A.C.W.S. (3d) 119 (H.C.J.), affd 44 D.L.R. (4th) 575, 62 O.R. (2d) 220 (C.A.).
- [79](#) Crawford, *supra*, footnote 3, vol. 3, at § 34:70.60.
- [80](#) As appears to be the law under *A.E. LePage Real Estate Services Ltd. v. Rattray Publications* (1994), 120 D.L.R. (4th) 499, 21 O.R. (3d) 164, 52 A.C.W.S. (3d) 433 (C.A.).
- [81](#) Crawford, *supra*, footnote 3, vol. 3, at § 34:70.60(3)(b)(v).
- [82](#) B. Geva, "The Autonomy of the Banker's Obligation on Bank Drafts and Certified Cheques" (1994), 73

Can. Bar Rev. 21. The view rejecting the absolute liability is confirmed by *Esses v. Friedberg & Co.*, 2008 ONCA 646, 241 O.A.C. 134, leave to appeal to S.C.C. refused [2009] 1 S.C.R. viii, 395 N.R. 393 n. See Geva, *supra*, footnote 40.

83 Such language may use the terms such as "non-negotiable" or "non-transferable" or be drafted to be payable to payee only, with or without the printed "order" next to it.

84 The provision states that "[w]hen a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable." It is not settled what language is sufficient. See, e.g., *Hibernian Bank v. Gysin*, [1939] 1 K.B. 483, [1939] 1 All E.R. 166 (C.A.). It has been held that the provision does not preclude transferability under general law. See *ibid.* and *Chandler v. Edmonton Portland Cement Co. Ltd.*, [1917] 1 W.W.R. 1408, 33 D.L.R. 302 (Alta. S.C., A.D.).

85 The provision states that "[w]here a person takes a crossed cheque that bears on it the words 'not negotiable', he does not have and is not capable of giving a better title to the cheque than the person from whom he took it had." The provision does not preclude transfer even by negotiation. It ought to be repealed anyway. See, *supra*, recommendation 5 in the section of this paper entitled "1. Outright Deletions with No Replacements."

86 See S. Scott, "The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and Its Curious Parliamentary History" (1973), 19 McGill L.J. 78.

87 For the taking for value requirement under this proposal, see, *supra*, item 14, "Amendment to Section 52(1): Taking for Value."

88 So far, case law has not dispensed with the taking in good faith and without notice requirements. See, e.g., *Royal Bank of Canada v. Ryan* (1993), 107 Nfld. & P.E.I.R. 1, 39 A.C.W.S. (3d) 1094 (Nfld. S.C.), at paras. 89-91.

89 The proposed new provision follows s. 2 to the English Cheques Act, 1957.

90 B. Geva, "Presentment and Payment in Cheque Electronic Clearing: *Advance Bank v. TD Bank*" (2005), 20 B.F.L.R. 361.

91 Crawford, *supra*, footnote 3, vol. 1 at § 1:20.50.

92 See UCC, § 4-215(a) and related provisions, discussed in B. Geva, "Payment Finality and Discharge in Funds Transfers" (2008), 83 Chicago-Kent L. Rev. 633, at pp. 639-643.

93 An Act to amend the Bills of Exchange Act, R.S.C. 1970, c. 4 (1st Supp).

94 For a detailed discussion, see Geva, *supra*, footnote 46, at pp. 197-230.

95 See e.g., *Royal Bank of Canada v. Siemens* (1978), 82 D.L.R. (3d) 527 (B.C. Co. Ct.).

96 See, e.g., *Canadian Imperial Bank of Commerce v. Lively* (1974), 46 D.L.R. (3d) 432, 19 N.S.R. (2d) 400 (S.C.).

97 With respect to instruments given for patent rights, s. 14 (sought to be repealed; see point 1 in item 1 above) is clearer; it states that "[t]he endorsee or other transferee of any instrument . . . having the words 'Given for a patent right' printed or written thereon takes the instrument subject to any *defence or set-off* in respect of the whole or any part thereof that would have existed between the original parties." [Emphasis added].

98 See Geva, *supra*, footnote 46, at pp. 225-227.

