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CASE NOTES AND COMMENTS

The Fictitious Payee After *Teva v. BMO*: Has the Pendulum Swung Back Far Enough?

Benjamin Geva*

Under Section 20(5) of the *Bills of Exchange Act*¹ (“*BEA* s. 20(5)”) where on a bill of exchange “the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.” A bill of exchange includes a cheque.² Where *BEA* s. 20(5) applies to a cheque, its effect is to reallocate forged endorsement losses from banks involved in the collection and payment of the cheque to the drawer.³ Quite recently, in commenting on *Raza Kayani LLP v. Toronto-Dominion Bank*,⁴ I highlighted the ongoing confusion in the judicial interpretation of *BEA* s. 20(5)⁵ (“*Kayani Comment*”). That comment does not appear to have been available to the judges of the Ontario Court of Appeal in subsequently rendering their judgement in *Teva Canada Ltd. v. Bank of Montreal*⁶ (“*Teva*”). At the same time, in invoking a policy rationale, in addition to relying on a precedent,⁷ the Court in *Teva* acknowledged my position as had been already expressed in a previous writing on the subject.⁸ It thus recognized that as regards to cheque fraud committed by an insider in and on a corporate⁹ drawer *BEA* s. 20(5) is to be

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¹ R.S.C. 1985, c. B-4.

² Under *BEA, ibid.*, s. 165 (1), “A cheque is a bill drawn on a bank, payable on demand.” Under *BEA ibid.* s. 2, “bill means bill of exchange”.

³ Briefly stated this is so since the bearer is the holder of a bill payable to bearer (*BEA, ibid.*, s. 2, ‘holder’ defined) and payment to the holder “made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective” discharges the bill. *BEA, ibid.*, s. 138. Conversely when a cheque payable to order is paid over a forged endorsement, the taker from the forger is not the holder so that loss falls on the taker from the forger, typically the collecting bank. See *BEA, ibid.*, ss. 48-49, in conjunction with s. 59(3).

⁴ 2014 ONCA 862, 2014 CarswellOnt 16810, 14 C.C.L.T. (4th) 175, 378 D.L.R. (4th) 729, 328 O.A.C. 229 (Ont. C.A.).

⁵ Benjamin Geva, “The Fictitious Payee Strikes Again: The Continuing Misadventures of *BEA* s. 20(5)”, (2015) 30 BFLR 573 [*Kayani Comment*].

⁶ 2016 ONCA 94, 2016 CarswellOnt 1483, 129 O.R. (3d) 1, 394 D.L.R. (4th) 298, 344 O.A.C. 344 (Ont. C.A.).

⁷ *Rouge Valley Health System v. TD Canada Trust*, 2012 ONCA 17, 2012 CarswellOnt 255, 108 O.R. (3d) 561, 287 O.A.C. 241 (Ont. C.A.) at para. 11.

⁸ Benjamin Geva, “Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee — *Boma v. CIBC*”, 28 CBLJ 177 at 195.

interpreted as allocating losses to “the drawer, who typically is better positioned to discover the fraud or insure against it.”¹⁰ Accordingly, the Court in *Teva* distinguished *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*¹¹ (“*Boma*”) and thus restored a measure of consistency between law and good policies.

In *Teva*,

Between 2003 and 2006, McConachie [an employee in Teva’s finance department] requisitioned numerous cheques payable to six entities he designated. Two of the entities had names he invented; the other four were current or former customers of Teva. None of the entities was owed any money by Teva. The cheques were issued by Teva’s accounts payable department and given to McConachie, even though he had no authority either to requisition cheques or approve payments to customers and Teva’s own internal approval policies had been ignored.¹²

All cheques were collected by the fraudster and his accomplices in accounts opened in the name of sole proprietorships registered under Ontario’s *Business Names Act*.¹³ Teva sued the collecting banks in conversion. Regrettably, assertion by the banks of the drawer’s negligence did not go anywhere,¹⁴ notwithstanding the availability of a helpful precedent,¹⁵ so that the case had to be decided as a matter of interpretation of *BEA* s. 20(5).

In the *Kayani Comment*¹⁶ I argued that the misadventures of *BEA* s. 20(5) have been caused by the judicial focus on the meaning of ‘fictitious or non-existing’ instead of on the policy rationale for allocating certain fraud losses onto a defrauded drawer. Interestingly, in *Teva*, ploughing his way through a web of

⁹ ‘Corporate’ is used here broadly and loosely to denote any organization.

¹⁰ *Teva*, *supra* note 6, at para. 34.

¹¹ 1996 CarswellBC 2314, 1996 CarswellBC 2315, EYB 1996-67134, [1996] 3 S.C.R. 727, 27 B.C.L.R. (3d) 203, 140 D.L.R. (4th) 463, [1997] 2 W.W.R. 153, 82 B.C.A.C. 161, 203 N.R. 321, 133 W.A.C. 161, [1996] S.C.J. No. 111 (S.C.C.).

¹² *Teva*, *supra* note 6 at para. 2.

¹³ R.S.O. 1990, c. B17.

¹⁴ *Teva*, *supra* note 6 at para. 28, citing an earlier proceeding in the same case: *Teva Canada Ltd. v. Bank of Nova Scotia*, 2012 ONCA 486, 2012 CarswellOnt 8505, 353 D.L.R. (4th) 326, (*sub nom.* *Teva Canada Ltd. v. Bank of Montreal*) 294 O.A.C. 323 (Ont. C.A.) at paras. 19 and 20; leave to appeal refused 2013 CarswellOnt 490, 2013 CarswellOnt 491, (*sub nom.* *Teva Canada Ltd. v. Bank of Montreal*) 446 N.R. 399 (note), (*sub nom.* *Teva Canada Ltd. v. Bank of Montreal*) 309 O.A.C. 400 (note) (S.C.C.).

¹⁵ *Royal Bank v. Société Générale (Canada)*, 2006 CarswellOnt 8091, 31 B.L.R. (4th) 63, 219 O.A.C. 83, [2006] O.J. No. 5081 (Ont. C.A.); additional reasons 2007 ONCA 302, 2007 CarswellOnt 2370, 31 B.L.R. (4th) 83 (Ont. C.A.); leave to appeal refused 2007 CarswellOnt 5676, 2007 CarswellOnt 5677, 376 N.R. 400 (note), 245 O.A.C. 400 (note), [2007] S.C.C.A. No. 87 (S.C.C.); leave to appeal refused 2007 CarswellOnt 5678, 2007 CarswellOnt 5679, 377 N.R. 400 (note), 246 O.A.C. 400 (note) (S.C.C.).

¹⁶ *Supra* note 5 at 589-592.

often conflicting precedents and bound by policy-devoid judgements of a higher instance, Laskin JA nevertheless reached a result defensible on policy grounds.

I will resist the temptation to rewrite the *Kayani Comment*,¹⁷ but will consider this case note as a sequel or addendum to it. I will thus endeavour to examine *Teva* and its impact in the context of the evolution of Canadian law in the judgements of the Supreme Court of Canada in *Royal Bank v. Concrete Column Clamps (1961) Ltd.*¹⁸ (“*Concrete Column Clamps*”) and *Boma*.¹⁹ For my broader analysis, which is not affected by this case note, I direct the reader to the *Kayani Comment*.²⁰

In *Teva*,²¹ as in the earlier cases, the starting point was:

... four propositions taken from the late Dean John D. Falconbridge’s influential book, *Banking and Bills of Exchange*, 6th Ed. (Toronto: Canada Law Book, 1956) at 468-9:

(1) If the payee is not the name of any real person known to the drawer, but is merely that of a creature of the imagination, the payee is non-existing, and is probably also fictitious.

(2) If the drawer for some purpose of his own inserts as payee the name of a real person who was known to him but whom he knows to be dead, the payee is non-existing, but is not fictitious.

(3) If the payee is the name of a real person known to the drawer, but the drawer names him as payee by way of pretence, not intending that he should receive payment, the payee is fictitious, but is not non-existing.

(4) If the payee is the name of a real person, intended by the drawer to receive payment, the payee is neither fictitious nor nonexisting, notwithstanding that the drawer has been induced to draw the bill by the fraud of some other person who has falsely represented to the drawer that there is a transaction in respect of which the payee is entitled to the sum mentioned in the bill.

In *Teva*,²² the collecting banks argued that the case was covered by the first proposition, while *Teva* argued that the fourth proposition applied.²³

¹⁷ *Ibid.*

¹⁸ 1976 CarswellQue 45, 1976 CarswellQue 45F, [1977] 2 S.C.R. 456, 74 D.L.R. (3d) 26, 8 N.R. 451 (S.C.C.), where the issue was characterized, at para. 1, as “a new one for [the SCC] but an old one in the law of negotiable instruments.”

¹⁹ *Supra* note 11.

²⁰ *Supra* note 5.

²¹ *Teva*, *supra* note 6 at para. 35.

²² *Ibid.*

²³ *Ibid.* at paras. 38 and 39.

In *Rouge Valley Health System v. TD Canada Trust*,²⁴ (“*Rouge Valley*”) Laskin JA summarized Falconbridge’s distinction between ‘fictitious’ and ‘non-existing’ in *BEA* s. 20(5)²⁵ as follows:

* Whether the payee is non-existing is a simple question of fact not depending on anyone’s intention.

*Whether the payee is fictitious depends upon the intention of the drawer of the ... cheque.

This interpretation was adhered to in *Concrete Column Clamps*.²⁶ However, in *Boma*, the Supreme Court of Canada,

appeared to treat non-existing and fictitious payees interchangeably. And, instead of adhering to Falconbridge’s explanation of “non-existing” as a question of objective fact, Iacobucci J. imported the notion of “plausibility” into the question whether a payee is non-existing. The effect of his modification is that even if a payee is, in fact, a creature of the fraudster’s imagination, the payee may still not be non-existing if the drawer had a plausible and honest, though mistaken, belief that the payee was a real creditor of the drawer’s business.²⁷

As well,

In *Boma* at para. 40, Iacobucci J. said that the relevant intent for determining whether a payee is fictitious, is the intent of the drawer itself, not the intent of the actual “creator of the instrument.”²⁸

Prior to *Boma*, in implementing Falconbridge’s distinction, there appeared to be a consensus that a cheque payable to a non-existing person falls under *BEA* s. 20(5), no matter under whose fraudulent design the cheque was made out. In *Boma*, Iacobucci J. undermined this consensus by excluding the cheque from *BEA* s. 20(5), where on the basis of the similarity between the (imaginary) payee’s name and a real creditor of the drawer, the drawer’s guiding mind²⁹ had a plausible and honest, though mistaken, belief that the payee was a real creditor of the drawer’s business. For ‘plausibility’ to exclude a cheque from the coverage of *BEA* s. 20(5), a guiding mind must have seen the cheque (or approved its

²⁴ *Supra* note 7 at para. 23.

²⁵ The distinction in the original language, Falconbridge text that follows *supra* note 21 at 468 is as follows: Whether a named payee is non-existing is a simple question of fact, not depending on anyone’s intention. The question whether the payee is fictitious depends upon the intention of the creator of the instrument, that is, the drawer of a bill or cheque or the maker of a note.

²⁶ *Supra* note 18.

²⁷ *Teva, supra* note 6 at para. 41.

²⁸ *Ibid.* at para. 59.

²⁹ A broad term loosely denoting an organ or someone with managerial as opposed to mere signatory authority.

issuance), so that due to the similarity between the imaginary name and the name of a real creditor (past or present), it is plausible that the guiding mind thought the cheque was payable to a real creditor. There is no need to prove that a guiding mind truly thought so; what is, however, required is proof of cheque examination and approval.

As for fictitiousness, where according to Falconbridge's principles³⁰ it is the drawer's intention that matters, it is agreed that the relevant time for the intent to exist is that of the writing of the cheque.³¹ What has been disputed, however, is whose intent determines the drawer's intention in case of a corporate drawer. The majority in *Concrete Column Clamps*³² (Pigoen J.) identified the actual signer as the 'creator' of the cheque whose intention mattered as to whether the cheque was payable to a fictitious payee. This was followed by LaForest J. in his dissenting judgment in *Boma*.³³ For his part, in his dissent in *Concrete Column Clamps*,³⁴ Laskin CJC³⁵ thought that the creator of a cheque whose intention mattered was the moving force behind its writing, that is, the fraudster who either signed or supplied to the signer the payee's name with the intent to appropriate its proceeds. For Laskin CJC, the intention of an innocent signer who was effectively misled by the fraudster did not matter. Accordingly, in the case of an internal fraud at a corporate drawer's organization, carried by one who is neither the signer nor a guiding mind, under Laskin CJC's dissent in *Concrete Column Clamps*,³⁶ cheques payable to an existing person who is not intended by the fraudster to be paid will be payable to a fictitious payee, and loss with respect to them will fall on the corporate drawer. At the same time, according to Iacobucci J. in *Boma*,³⁷ even where the fraudster is the signer, the cheques will not be payable to a fictitious person, as long as the signer is not a guiding mind of the corporate drawer.

Giving the judgement of the Court of Appeal in *Teva*, Laskin JA appeared to be sympathetic to the criticism against *Boma*.³⁸ However, sitting at a Court of Appeal of a Province, he was not in a position to reverse a judgement of the Supreme Court of Canada. Instead, he distinguished *Boma*. For *Boma* to apply, Laskin JA required actual 'corporate intent' in the cheque writing, something he did not find to exist in *Teva*, where "[c]lerks processed the cheques and mechanically applied signing officers' signatures" and did not "turn their minds to the names on the requisitions or the cheques."³⁹ Contrary to *Teva*'s express

³⁰ See text that follows *supra* note 25.

³¹ *Teva*, *supra* note 6 at para. 60 (referring to the drawing of the cheque).

³² *Supra* note 18.

³³ *Supra* note 11.

³⁴ *Supra* note 18.

³⁵ Who is of course other than Laskin JA who gave the judgement in *Teva*, *supra* note 6.

³⁶ *Supra* note 18.

³⁷ *Supra* note 11.

³⁸ The extensive literature is cited e.g. in the *Kayani Comment*, *supra* note 5 at 593 at fn 94.

policy, cheques were not approved prior to release,⁴⁰ so that no corporate intent to issue them could have been facilitated.⁴¹ In the process, Laskin JA expanded the result of *Concrete Column Clamps* so as effectively to follow the dissenting view of Laskin CJC, albeit without explicitly adopting his reasoning that was not adopted by the *Concrete Column Clamps* majority.

Effectively Laskin JA held in *Teva* that to override the application of Falconbridge's first proposition, so as to exclude a case from the coverage of *BEA* s. 20(5), there must be, at least on the basis of 'plausibility,' a specific corporate intent to pay the payee whose name is "merely that of a creature of the imagination."⁴² Similarly, for the fourth proposition to apply, so as to exclude a case from the coverage of *BEA* s. 20(5), corporate intent is needed to pay the 'real person'. In the facts of the case, he concluded, the first proposition was not overridden and the fourth proposition did not apply so that all cheques requisitioned by the fraudster were covered by *BEA* s. 20(5) and the entire loss fell on *Teva*.⁴³

By reference to Falconbridge's view that non-existence is objective while fictitiousness is subjectively determined,⁴⁴ there is a question as to whether these two categories are mutually exclusive. In the *Kayani Comment* I answered in the affirmative,⁴⁵ not only on the basis of the language of *BEA* s. 20(5), speaking of a payee who is "a fictitious *or* non-existing person" [emphasis added]. Rather, once a payee is a 'non-existing person' nothing is to be gained by describing him or her to be also 'fictitious'. Whether a person is 'fictitious' matters only once s/he is 'existing'.⁴⁶ However, in his first proposition Falconbridge does not mind treating a non-existing person, creature of the drawer's imagination, as "probably also fictitious."⁴⁷ Arguably inasmuch as this is confusing, nevertheless it is not harmful. Since the Court in *Teva* did not mind the

³⁹ *Teva*, *supra* note 6 at para. 53. See also at para. 75.

⁴⁰ *Ibid.* at paras. 12-13. See also at para. 53.

⁴¹ This allowed Laskin JA to distinguish (at paras. 80-82) *Metroland Printing, Publishing & Distribution Ltd. v. Canadian Imperial Bank of Commerce*, 2001 CarswellOnt 1518, 14 B.L.R. (3d) 212, [2001] O.T.C. 330, [2001] O.J. No. 1695 (Ont. S.C.J. [Commercial List]); affirmed 2002 CarswellOnt 956, 158 O.A.C. 111 (Ont. C.A.); leave to appeal refused 2003 CarswellOnt 436, 2003 CarswellOnt 437, 307 N.R. 400 (note), 180 O.A.C. 400 (note) (S.C.C.).

⁴² For the first proposition (and all others) see *Teva*, *supra* note 6 at para. 35 (as well as text that follows *supra* note 21).

⁴³ First point (as to Falconbridge's first proposition) is addressed primarily in *Teva*, *supra* note 6 at para. 48-57, while the second (as to Falconbridge's fourth proposition) is addressed primarily at paras. 58-75.

⁴⁴ See text that follows *supra* note 25.

⁴⁵ *Supra* note 5 at 578-79.

⁴⁶ As in fact acknowledged by Laskin JA at *Teva*, *supra* note 6 at para. 58.

⁴⁷ See text that follows *supra* note 21.

possibility that a ‘non-existing’ person will also be ‘fictitious’,⁴⁸ in this case note I will go along with this position.

The following is then the evolution of the interpretation of *BEA* s. 20(5), point by point, in a nutshell:

Concrete Column Clamps⁴⁹

1. *BEA* s. 20(5) applies to a corporate drawer only in the case of a cheque signed by an authorized signer;

Comment

There is neither disagreement nor variation on this point.

Concrete Column Clamps⁵⁰

2. *BEA* s. 20(5) applies where the fraudster is the authorized signer of the cheque, in which case the payee is always fictitious, whether his name is of a real or imaginary person;

Qualified by Boma⁵¹

*This is true only where a guiding mind of the corporate drawer is the fraudster. Such was the case in Fok Cheong Shing Investments Ltd. v. Bank of Nova Scotia*⁵² where the fraudulent guiding mind signed the cheque. At the same time, no matter who (among authorized signers) signed the cheque, where the fraudster is not a guiding mind the payee is not ‘fictitious,’ since there is no corporate intent to defraud by making the cheque not payable to a genuine creditor. Whether the payee is nevertheless ‘non-existing’ depends on the ensuing rule 3(a).

Boma qualification is narrowed in Teva⁵³

*For Boma*⁵⁴ *qualification to apply, a corporate drawer’s guiding mind must actually turn his or her mind to the payee’s name at the time the cheque was drawn. Where no “responsible officers scrutinized or even looked at any of the fraudulent cheques,” “no inference of a corporate intent to pay legitimate creditors should be drawn.”*⁵⁵

⁴⁸ See e.g. *Teva*, *supra* note 6 at para. 36.

⁴⁹ *Supra* note 18.

⁵⁰ *Ibid.*

⁵¹ *Supra* note 11.

⁵² 1982 CarswellOnt 735, 1982 CarswellOnt 735F, [1982] 2 S.C.R. 488, 146 D.L.R. (3d) 617, 46 N.R. 181 (S.C.C.).

⁵³ *Supra* note 6.

⁵⁴ *Supra* note 11.

⁵⁵ *Teva*, *supra* note 6 at para. 75.

Concrete Column Clamps⁵⁶

3. In a 'payroll padding' scenario, that is where the fraudster is the one who prepares cheques, or provides the list of payees, and is relied upon by the ultimate signer, no cheque is payable to a fictitious payee. This is so because the authorized signer intended all cheques to be payable to the named payees. However, since 'existence' is an objective fact, cheques may be payable to non-existing persons, so as to fall under *BEA* s. 20(5). Stated otherwise,
- (a) Whether the payee is a non-existing person is determined objectively. Hence, *BEA* s. 20(5) applies and the loss falls on the corporate drawer. A cheque payable to a payee who is either [known to be?]⁵⁷ dead or imaginary falls into this category. A cheque is payable to an imaginary payee when it is payable to the name of a person with no connection to the drawer, particularly, not to a creditor of the drawer as for example, an employee. The name of a non-existing person may be that of a literary, historical or public figure. As well, the name could randomly be picked from the telephone directory or any other source. It could thus be the name of a real person, even of someone known to the fraudster, who is nevertheless 'non-existing' because he or she has no connection with the drawer. While a real person who is alive certainly exists, as far as the corporate drawer is concerned,⁵⁸ he or she is just a name, and hence 'non-existing.' In the payroll padding scenario, the intent of the honest authorized signer to benefit the payee is irrelevant, since the test for being 'non-existing' is determined objectively;

Qualified in Boma⁵⁹

This is not so where the payee's name is sufficiently similar to a name of a legitimate creditor of the drawer so that the imaginary name might plausibly be identified by the corporate drawer's guiding mind as being a real creditor of his/her business.

⁵⁶ *Supra* note 18.

⁵⁷ Of course, the bracketed language undermines the objective nature of the test. Also, known to whom?

⁵⁸ This qualification is another drawback to the alleged objective nature of the test.

⁵⁹ In the language of Laskin JA in *Teva*, *supra* note 6 at fn 2 (para. 41): "This modification has been criticized. See the persuasive dissenting reasons of LaForest J. in *Boma*; Geva, *supra* [footnote 8] and Crawford and Falconbridge, *Banking and Bills of Exchange* (Toronto: Canada Law Book, 1986) s. 4902.3(i) at p. 1254."

*Boma*⁶⁰ qualification is narrowed in *Teva*⁶¹

*For Boma*⁶² *qualification to apply, the drawer must have actually considered the payee's name on the cheque, and "because of the similarity in name, [it is at least plausible that the drawer] had an honest, though mistaken, belief that the named payee was a real [creditor]."*⁶³ *Where there is no evidence of anyone other than the fraudster, not being a guiding mind, "turning a mind to the names of the payees on the cheques at the time they were drawn,"*⁶⁴ *Boma qualification does not apply so that the cheque is governed by BEA s. 21(5) as payable to a non-existing person and loss falls on the corporate drawer.*

*Concrete Column Clamps*⁶⁵

- (b) Conversely, whether the payee is a fictitious person is determined subjectively, from the viewpoint of the signer (creator of the instrument). Stated otherwise, a 'fictitious' person may be 'existing'. Employees and other creditors of the drawer, whether past or present, are 'existing', and from the point of view of the fraudster, are fictitious. Where they are not owed any legitimate debt,⁶⁶ the fraudster may implement his or her fraudulent design by either requisitioning or signing cheques payable to them. However, to bring the situation into the ambit of *BEA* s. 20(5), and on this point, notwithstanding Laskin CJC's position to the contrary,⁶⁷ the fraudster must be an authorized signer who actually signed them; where the fraudster is not the signer, his or her intention does not matter. Rather, since in the payroll padding scenario, cheques payable to the names of former employees/creditors are intended by the honest authorized signing officer to be paid to them, they cannot be said to be payable to 'fictitious' persons. Nor, as discussed, are they payable to non-existing persons. Accordingly, *BEA* s. 20(5) does not apply and the corporate drawer does not bear the loss.

⁶⁰ *Supra* note 11.

⁶¹ *Supra* note 6.

⁶² *Supra* note 11.

⁶³ *Teva*, *supra* note 6 at para. 50. See also *Teva* at para. 44 citing Bradley Crawford, *The Law of Banking and Payment in Canada* (Aurora: Canada Law Book, 2008) at 22-34.

⁶⁴ *Teva*, *ibid.* at para. 57.

⁶⁵ *Supra* note 18.

⁶⁶ Otherwise, a creditor who is owed money is likely to complain for not receiving payment and thereby expose the fraudulent scheme. Hence, it will be a foolish mistake for the fraudster, in implementing his or her fraudulent design, to use the name of such a creditor.

⁶⁷ See text around *supra* notes 34-36.

Modified in Boma⁶⁸

The determining intent for fictitiousness is that of the drawer's guiding mind and not that of the signing officer — where the latter is not a guiding mind.

Teva's⁶⁹ application of Boma⁷⁰

To fit into Falconbridge's fourth proposition⁷¹ covering the case in which "the payee is the name of a real person, intended by the drawer to receive payment" so that "the payee is neither fictitious nor nonexisting" — the named payee must be intended by a guiding mind of the drawer to receive payment. In such a case BEA s. 20(5) does not apply and the loss falls on the drawer. Otherwise, where no guiding mind intends to make the payment to the real person the fourth proposition does not apply.

Teva's⁷² treatment of Falconbridge's fourth proposition⁷³ is, however, problematic. This is so inasmuch as this treatment suggests that a case not covered by Falconbridge's fourth proposition automatically falls into the ambit of BEA s. 20(5). This, however, does not seem to be what was envisioned by Falconbridge. In terms of his four propositions,⁷⁴ to be covered by BEA s. 20(5), in circumstances where the payee cannot be said to be non-existing, so as not fall into one of the first two Falconbridge's propositions, the case must still be within the scope of Falconbridge's third proposition. Such is the case where the drawer, that is according to Boma,⁷⁵ the drawer's guiding mind, names the payee who is known to him or her, merely "by way of pretence, not intending that [the named payee] should receive payment."⁷⁶ Certainly, such was not the case in Teva,⁷⁷ Laskin JA must then be understood to say that for BEA s. 20(5) to apply to a fictitious payee, suffice it for the corporate drawer's guiding mind not to intend to pay the designate payee. This appears to be quite a stretched application of Boma.⁷⁸

Thus, distinguishing Boma,⁷⁹ the Court effectively expanded the application of BEA s. 20(5) and found it to apply in Teva⁸⁰ to all cheques generated by the

⁶⁸ *Supra* note 11.

⁶⁹ *Supra* note 6.

⁷⁰ *Supra* note 11.

⁷¹ See text that follows *supra* note 21.

⁷² *Supra* note 6.

⁷³ See text that follows *supra* note 21.

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 11.

⁷⁶ See text that follows *supra* note 21.

⁷⁷ *Supra* note 6.

⁷⁸ *Supra* note 11.

fraudster. Consequently, the entire loss fell on Teva and not on the collecting banks. The outcome was the same as that reached by Laskin CJC in his dissent in *Concrete Column Clamps*.⁸¹ However, Laskin CJC reasoned that the drawer's intent is determined by the intent of the fraudster rather than that of the signer. In light of the majority decision in *Concrete Column Clamps*,⁸² this option was not available to Laskin JA in *Teva*,⁸³ who thus based his decision on the lack of intent by a guiding mind to pay to the real creditor.

Interestingly, in *Teva*, Laskin JA stated his conclusion not to depend on an allocation of fault:

It is not Teva's negligence for which it is found liable, but rather its lack of corporate knowledge and therefore the absence of any evidence from which one could reasonably infer it intended to pay real creditors of its business for legitimate debts.⁸⁴

Nevertheless, 'lack of corporate knowledge' was found on the basis the lack of implementation of cheque approval policies; "had Teva followed its own approval policies and mistakenly approved the fraudulent cheques", Laskin JA "would have inferred a corporate intent to pay real creditors for legitimate obligations."⁸⁵ Indeed, cheque approval may not suffice to discharge a duty of care requiring even tighter office procedures;⁸⁶ at the same time, fastening on the drawer loss caused by the absence of cheque approval acknowledges that fault and loss minimization policies underlie *Teva*.⁸⁷

*Teva*⁸⁸ is a clear judicial acknowledgement as to the fact that *Boma*⁸⁹ did not follow existing law. In nevertheless following *Boma*,⁹⁰ Laskin JA convincingly limited its application to the non-existing payee, and stretched to the limits (if not beyond) the fictitious payee scenario, either way, expanding the application of *BEA* s. 20(5) to allocate fraud losses within the drawer's organization on the drawer.

Laskin JA's decision in *Teva*⁹¹ is thus a masterpiece of judge-made law. Constrained by unfavourable judgments, both as the lack of a duty of care by the

⁷⁹ *Ibid.*

⁸⁰ *Supra* note 6.

⁸¹ *Supra* note 18.

⁸² *Ibid.*

⁸³ *Supra* note 6.

⁸⁴ *Ibid.* at para. 86.

⁸⁵ *Ibid.* at para. 85.

⁸⁶ Which needs to include reconciliation between debts due cheques issued and perhaps other matters.

⁸⁷ *Supra* note 6.

⁸⁸ *Ibid.*

⁸⁹ *Supra* note 11.

⁹⁰ *Ibid.*

drawer⁹² and the interpretation of *BEA* s. 20(5),⁹³ the Court nevertheless managed to set its course towards the implementation of sound policies of which it became persuaded. It did so and allocated the loss onto the corporate drawer by creatively working within the parameters of existing law, albeit by somewhat stretching its interpretation.

This is, however, not to say that the law under *BEA* s. 20(5) has been successfully established in *Teva*.⁹⁴ Inasmuch as Laskin JA moved forward, his hands were tied by precedent. As well, he did not cover all grounds. To begin with, he did not address issues concerning the conversion liability of a collecting bank,⁹⁵ as well as the effect of an account opened under the business name of a sole proprietorship.⁹⁶ These two issues are in fact connected: as I explained in the *Kayani Comment*, a cheque payable to a business name of a sole proprietorship is payable to an existing payee.⁹⁷ This is true even where the business name was registered exclusively with a fraudulent intent. Accordingly, no cheque in *Teva* was payable to a non-existing payee. In principle this does not preclude treating all cheques requisitioned and collected by the fraudster as payable to a fictitious payee — as long as per Laskin JA there was no intent by a drawer's guiding mind to pay a legitimate debt to a real creditor. At the same time, it is not all that clear whether and how *BEA* s. 20(5) applies to the case where the fraudster is the true owner of the cheque, albeit with a voidable title, who as such is entitled to collect the cheque payable to the fraudster's business name! Had the fraudster made out cheques payable to himself and collected them, would *BEA* s. 20(5) be applicable? I do not think this is different from the situation in *Teva*⁹⁸ where the fraudster made out the cheques payable to his registered business name. True, a forged endorsement could be made by a named payee who knows the cheque is meant to be payable to another person with the same name.⁹⁹ This, however, seems to be distinguishable from the situation in *Teva*¹⁰⁰ where a payee fraudulently generates a cheque payable to himself albeit under a business name.

Of course, objections to the availability to the drawer of conversion against the collecting bank stand also on their own, regardless of the fact that it was payable to the fraudster's business name. Thus, a cheque payable to a fictitious or non-existing payee does not exist as a valuable asset in the drawer's hands, not to mention the strict liability in conversion which precludes any consideration of

⁹¹ *Supra* note 6.

⁹² See *supra* notes 14-15 and text.

⁹³ Particularly *Boma*, *supra* note 11.

⁹⁴ *Supra* note 6.

⁹⁵ Addressed by me in the *Kayani Comment*, *supra* note 5 at 574-77.

⁹⁶ Addressed by me in the *Kayani Comment*, *ibid.* at 587-88.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 6.

⁹⁹ This rule goes back to *Mead v. Young* (1790), 4 T.R. 28, 100 E.R. 876.

¹⁰⁰ *Supra* note 6.

negligence.¹⁰¹ Finally, in *Teva*,¹⁰² the Court did not critically examine Falconbridge's four propositions.¹⁰³

This is of course not to obscure the fact that in *Teva*,¹⁰⁴ the Ontario Court of Appeal reached a good result, both in the facts of the case and more in general, in establishing limits to *Boma*.¹⁰⁵ However, what may prove to be mostly unwelcome, is that in the process, the meaning of *BEA* s. 20(5) has been buried under an avalanche of rules, sub-rules, and distinctions, which may not be always easily appreciated. My own understanding is that after *Teva*,¹⁰⁶

1. For *BEA* s. 20(5) to apply, the payee's name must fraudulently be inserted with no intention to confer rights on the named payee; however, it is also required that the payee meets the definition of either 'non-existing' or 'fictitious' as has been judicially determined.

2. Whether a payee is 'non-existing' is objectively determined. Accordingly, a name of a dead person or of an imaginary character, including a name of any person unrelated to the corporate drawer, is 'non-existing' and *BEA* s. 20(5) applies so that loss falls on the corporate drawer. However, according to *Boma*,¹⁰⁷ as understood in *Teva*, this is subject to an exception. For this exception to apply, so as to bring the case outside the ambit of *BEA* s. 20(5), two cumulative conditions must be satisfied. First, the payee's name must be similar to that of a real person connected to the corporate drawer; typically, and perhaps only, such a real person with a similar name must be a past or present creditor. Second, prior to the loss of control of the cheque by the drawer, a guiding mind in the corporate drawer either viewed or approved, either the cheque itself, or a list of payees. Where these two conditions exist, it is 'plausible' that the guiding mind was misled to think that the non-existing payee's name is of the real creditor with the similar name. Where this exception applies, loss does not fall on the corporate drawer.

3. Whether a payee is 'fictitious' (so as to have *BEA* s. 20(5) apply, in which case the loss falls on the drawer) is determined subjectively, according to *Boma*,¹⁰⁸ from the point of view of a guiding mind. This appears to suggest that *BEA* s. 20(5) applies only where the fraudster is a guiding mind. However, according to *Teva*,¹⁰⁹ *BEA* s. 20(5) applies as

¹⁰¹ See the *Kayani Comment*, *supra* note 5 at 574-77.

¹⁰² *Supra* note 6.

¹⁰³ Discussed by me in the *Kayani Comment*, *supra* note 5 at 577-80.

¹⁰⁴ *Supra* note 6.

¹⁰⁵ *Supra* note 11.

¹⁰⁶ *Supra* note 6.

¹⁰⁷ *Supra* note 11.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Supra* note 6.

well even where the fraudster is not a guiding mind, provided that prior to the loss of control of the cheque by the drawer no guiding mind can be said to intend payment to the real creditor. *Quare* whether 'intention' must be actually proved or suffice it to be plausible, and whether it is plausible where a guiding mind in the corporate drawer either viewed or approved, either the cheque itself, or the list of payees. Also *quare* whether *BEA* s. 20(5) applies where one guiding mind is the fraudster and another guiding mind intends to pay the real creditor having the same name.

This summary appears to inflict a fatal blow on Falconbridge's four propositions.¹¹⁰ Neither mere non-existence nor intended fictitiousness gives a definite answer as to whether *BEA* s. 20(5) applies. Regardless, one ought to be overoptimistic to be confident that a subsequent court will find its way in the maze of rules, exceptions and qualifications. Thus, even if *Teva*¹¹¹ demonstrates the ability of a court to adapt the interpretation of a section to conform to the right policies, Laskin JA's judgement also shows the limits to this ability.

In the *Kayani Comment* I concluded that under the better interpretation,¹¹²

for *BEA* s. 20(5) to apply, what counts is the insertion of a name by way of pretence merely, "without any intention that payment shall only be made in conformity"¹¹³ with the cheque. It does not matter whether the name is of an existing or non-existing person, or to use the statutory language, "fictitious or non-existing".

In a broader perspective, I highlighted the importance of fault in allocating fraud, including forgery losses.¹¹⁴ I do not think it is too late for the Supreme Court of Canada to take that route. However, if only with the view of expediting matters, I have become persuaded that a legislative intervention may become necessary.

¹¹⁰ See text that follows *supra* note 21.

¹¹¹ *Supra* note 6.

¹¹² See the *Kayani Comment*, *supra* note 5 at 590.

¹¹³ The quoted language is from *Governor & Co. of the Bank of England v. Vagliano Brothers*, [1891] A.C. 107 (U.K. H.L.) at 153, the first case interpreting the English parallel to *BEA* s. 20(5).

¹¹⁴ See the *Kayani Comment*, *supra* note 5 at 575-77.

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