Defences on Cheque Certification Esses v. Friedberg

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CASE NOTES AND COMMENTS

Defences on Cheque Certification:

Esses v. Friedberg

Benjamin Geva*

1. INTRODUCTION

Esses v. Friedberg & Co.'1 was an appeal primarily on a summary judgment given in favour of plaintiff suing a certifying bank on three cheques. Plaintiff Esses was the payee who, as their holder, had them presented for payment to the Bank of Montreal (BMO), the drawee/certifying bank, which dishonoured them. In reversing the summary judgment against the certifying bank, the Court of Appeal recognized the liability of a bank certifying a cheque as that of an acceptor of a bill;2 nevertheless, the Court of Appeal declined to see this as conclusive to the result of the case. In the view of Watt J.A., where the issue of the cheques was affected with fraud, a plaintiff seeking to enforce liability thereon must not have participated in the fraudulent scheme, and must have acquired the cheques without knowledge of it. Furthermore, to succeed, it is up for the plaintiff to prove that these requirements have been met.3

In effect, in line with what I have advocated,4 the Court recognized the distinction between a binding obligation on a negotiable instrument and its autonomy. The Court thus did not adopt the strict "cash equival-
lency” explanation to certification, and rejected the existence of an absolute obligation by a certifying bank, not linked to the merits of the plaintiff’s position. Furthermore, again, in line with the position I already expressed, the judgment demonstrates that by no means the acceptance theory for certification necessarily requires the existence of an absolute liability of the certifying bank to any holder, regardless of whether such a holder is a holder in due course; rather the latter must have acquired the cheques in good faith and for value, and so as to be able to hold the instrument free from adverse claims and contract defences.

For all these reasons *Esses v. Friedberg* is welcome. Nevertheless, in reaching the correct result, the Court of Appeal glossed over a few fundamentals underlying the law of bills and notes. The purpose of this case comment is to examine carefully the decision under the law applicable to negotiable instruments.

2. FACTS

The pertinent facts of *Esses v. Friedberg* are as follows. Friedberg, a local currency exchange and brokerage, received from a money dealer a $450,000 CAD bank draft drawn by the Canadian Imperial Bank of Commerce (CIBC) and payable to Friedberg. In return, and as instructed by the money dealer, Friedberg drew on its USD account with BMO three cheques payable to the plaintiff and delivered them to the money dealer.

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5 As appeared to be the law under *LePage*, supra, n. 2.
7 A point acknowledged by B. Crawford, *Payment, Clearing and Settlement in Canada*, vol. 2 (Aurora: Canada Law Book, 2002) at 1227 (§31:07.5(e), notwithstanding his critique of the acceptance explanation for certification (*ibid.*, at 1217-1252 (§31:07), particularly at 1226-1233§31:07.05(e)).
8 Per BEA, s. 55(1):
   A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely, (a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.
9 Per BEA, s. 73(b), a holder in due course “holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.”
The money dealer had the three Friedberg cheques certified by BMO; he then allegedly delivered them to plaintiff in exchange for $450,000 CAD in cash (and a commission). More than four months later, plaintiff delivered the three Friedberg cheques to Bank Leumi branch in Toronto for deposit in his account with Bank Leumi Luxembourg. Bank Leumi Luxembourg provisionally credited plaintiff's account with the amount of the deposit. However, on the instructions of BMO alleging that the funds had been derived from fraud, Bank Leumi Luxembourg subsequently reversed the credit to plaintiff's account. Claiming the status of a holder in due course on the Friedberg cheques plaintiff sued BMO on its certification of the three Friedberg cheques.

The CIBC bank draft payable to Friedberg, against which the three Friedberg cheques were issued, had been purchased from CIBC by a fraudster. The fraudster, the remitter of the CIBC bank draft, bought it with proceeds received by him in a fraudulent real estate transaction, under which he had “sold” a residential property that did not belong to him to a sham buyer who paid with proceeds of a land-mortgage loan fraudulently procured from BMO. Those proceeds had been deposited in a bank account with CIBC from which the fraudster withdrew the funds with which he paid for the bank draft. The fraudster thus allegedly received the value of the CIBC bank draft in cash from the plaintiff in a transaction brokered by the money dealer.

3. JUDGMENT

BMO argued that the plaintiff was well aware of and complicit in the fraudulent scheme. BMO further questioned whether plaintiff even gave the cash for the three Friedberg certified cheques. On his part, plaintiff denied knowledge of and participation in the fraudulent scheme. Thus, in the view of the Court, “The central issues in this case have to do with [plaintiff’s] knowledge of the provenance of the scheme by which the certified cheques came into his possession and whether [he], in fact, gave value for the cheques.” Watt J.A. thus rejected the position

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10 Two cheques were for $115,000 USD, and the third was for $112,980 USD. See Esses v. Friedberg, supra, n. 1 at para. 18.
11 In fact no receipt was issued for the funds, receipt of which was contested by the defendant. See supra, n. 1 at paras. 21 and 73.
12 Ibid., at paras. 22 and 31.
13 Ibid., at para. 73.
of the motion judge who "grounded [plaintiff]'s entitlement on the basis that he was the payee of the cheques that BMO certified [and therefore] could not refuse to honour . . . ", regardless of whether the plaintiff was a holder in due course;\textsuperscript{14} in her view, to successfully raise a triable issue, BMO must have proved plaintiff's participation in the fraud.\textsuperscript{15}

In rejecting altogether her analysis, Watt J.A. stated as follows:

The payee of a cheque is a holder under s. 2 of the BEA. Under s. 57(2) of the Act, in the absence of evidence to the contrary, every holder of a bill of exchange, including the payees of certified cheques, is deemed to be a holder in due course. The presumption is rebuttable by evidence to the contrary. But if acceptance, issue or subsequent negotiation of the bill is affected with fraud or illegality, the burden of proof that a person is the holder in due course is on the party who claims the benefit of the status.\textsuperscript{16} Here it is clear that the bills, the certified cheques, were affected with fraud or other illegality. The presumption that their holder, [the plaintiff], was a holder in due course falls away. The onus of proving that he is a holder in due course shifts to Esses. BMO does not have to prove the opposite. . .\textsuperscript{17}

4. DISCUSSION: THE LAW

Underlying his judgment are thus the assumptions that (i) a payee may benefit from the holder in due course presumption under BEA s. 57(2), and that (ii) a payee may be a holder in due course. In fact, doctrine is hostile to both assumptions.

As the former, \textit{Talbot v. Von Boris},\textsuperscript{18} a leading English case, decided that the corresponding provision to BEA s. 57(2) requires value to be given after the issue of the bill. Hence, \textit{Talbot v. Von Boris} held that the provision cannot benefit the payee, to whom the bill was originally issued. On its basis, Guest concludes, that

Where . . . the claimant is the original payee of the instrument, the defendant must prove that the claimant received the instrument with notice of fraud, etc., with

\textsuperscript{14} \textit{Ibid.}, at para. 33.
\textsuperscript{15} \textit{Ibid.}, at para. 67.
\textsuperscript{16} The provision reads in full as follows:
(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.

The "unless and until" clause does not appear in the English corresponding provision.
\textsuperscript{17} \textit{Esses v. Friedberg}, supra, n. 1 at para. 69. See also \textit{ibid.}, at paras. 55-57.
\textsuperscript{18} [1911] 1 K.B. 854 (Eng. C.A.).
the curious result that in the matter of proof the original payee is in a more
favoured position that a person to whom the instrument has been negotiated, since
the burden does not shift to him to prove that subsequent the fraud, etc., value
has in good faith been given for the instrument. 19

Certainly, this is not only “curious” but rather, illogical; accord­
ingly, Crawford rejects Talbot, and concludes that it is “clearly wrong”; 20
as he explained earlier, “[t]here can be no doubt that the payee is a
holder; he is specifically made so by the definition in s. 2 of the BEA.
Therefore subsection [57(2)] applies in the payee’s favour.” 21

In my view, the fallacy of Talbot is the assumption that in the
absence of BEA s. 57(2), a payee is prima facie entitled to recover the
face-value of the instrument; and yet, under s. 73(a), as a holder he 22 is
accorded a mere right to “sue on the bill in his own name”; that is, he is
given only the standing to sue on the instrument, so as not to be “liable
to be defeated . . . on the ground that the action has been brought by the
wrong party”; 23 he is given neither the entitlement to recover the entire
amount of the instrument, nor even the benefit of any presumption as to
such an entitlement.

Similarly, my position is that a “holder for value” under BEA s.
53(2) is not helpful to plaintiff’s case. This provision states that “[w]here
value has, at any time, been given for a bill, the holder is deemed to be
a holder for value as regards the acceptor and all parties to the bill who
became parties prior to that time.” In my view, with this provision, the
holder overcomes only a challenge to his right made on the basis of
absence of consideration or value, namely, his taking the instrument by
way of gift; 24 “the . . . provision means only that absence [of] consider­
ation is not an equity of ownership; that is, the one who acquired an

19 A.G. Guest, Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes,
16th ed. (London: Sweet & Maxwell, 2005) at 299-300 (para. 4-085).
20 Crawford, supra, n. 7 at 925 (§21:03.5(d)).
(Toronto: Canada Law Book, 1986) at 1470 (§5102.5(c)).
22 This Comment follows the language of the BEA which is not gender-neutral. Certainly,
“he” is to be taken to include “she” or “it”, and “himself” is to include “herself” and “itself.”
on that ground in Addendum to article cited supra, n. 4. See (1994) 73 Can. Bar Rev. 21 at
280.
instrument by way of a gift, without giving value, may recover from prior parties liable on the instrument, though subject to their defences.\textsuperscript{25}

Indeed, it is only the holder in due course who, under s. 73(h), "holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and [who] may enforce payment against all parties liable on the bill" for its entire amount. Thus, I argue, as a matter of the better interpretation of the BEA, without the benefit of the presumption under s. 57(2), a payee is not to be accorded an entitlement to recover the face amount of the instrument without proving this entitlement in the first place.

As for, notwithstanding Talbot and like Crawford, whether s. 57(2) applies to the payee, the fundamental question is whether a payee can be a holder in due course in the first place. In fact, here lies the second doctrinal difficulty bypassed in Esses v. Friedberg.

Thus, a holder in due course must be "a person to whom after its completion by and as between the immediate parties, the bill or note has been negotiated."\textsuperscript{26} Accordingly, the orthodox English position, stated in \textit{R.E. Jones Ltd. v. Waring & Gillow Ltd.},\textsuperscript{27} has been that the expression "holder in due course" does not include the original payee. The judgment has not received a warm reception in Canada,\textsuperscript{28} and yet, possibly with a few lower courts' exceptions, no decided case endeavoured to challenge it doctrinally; the result is lack of actual determination of the issue, and hence, an inconclusive state of law on the point.\textsuperscript{29}

As a matter of the plain language of the BEA, that is straightforward statutory interpretation, \textit{Jones v. Waring} is easily justified. Thus, under


\textsuperscript{26} \textit{Lewis v. Clay} (1897), 77 L.T. 653 (Eng. Q.B.) at 656.


\textsuperscript{28} Most notably, Falconbridge was of the view that \textit{Jones v. Waring} "appears to be open to criticism, as being based on technical and not wholly convincing reasoning, and as reaching a conclusion which is not entirely satisfactory from the practical point of view, because there are situations in which the payee should logically be fully protected as a subsequent holder." A.W. Rogers, \textit{Falconbridge on Banking and Bills of Exchange}, 7th ed. (Toronto: Canada Law Book, 1969) at 625-26.

\textsuperscript{29} For cites and discussion see Crawford, \textit{supra}, n. 7 at 930-931 (21:03.7(a)).
BEA s. 55(1)(b), “at the time the bill was negotiated to [a holder in due course] he [must have] had no notice of any defect in the title of the person who negotiated it.” (Emphasis added). This is taken to mean that a holder in due course must take the instrument by negotiation; under BEA s. 59(3), “A bill payable to order is negotiated by the endorsement of the holder.” (Emphasis added). By definition, a payee of an instrument does not receive it by “the endorsement of the holder”; rather, typically, the instrument is “issued” to him; stated otherwise, per definition of “issue” in BEA s. 2, he receives the instrument under “the first delivery of [it], complete in form”, to himself as its first holder. 30

This interpretation, is not a mere technicality; rather, the taking by negotiation requirement for a holder in due course reflects the fact that as a purchaser of the instrument he has a derivative title thereto; as such he is a remote party to the original dealing that gave rise to the instrument, and thus can be immune from any defence or claim arising therefrom. In contrast, the payee is typically an immediate party to such dealings, and thus should not be insulated from defences or claims arising therefrom. Thus, when buyer issues to a seller an instrument in payment for goods, the seller, as a payee is an immediate party, will not qualify as a holder in due course. However, a financial institution, to which the seller negotiates the instrument, may nevertheless become a holder in due course, subject of course to compliance with all other statutory requirements. 31

However, elsewhere, I pointed out that a payee of a banker instrument on which a bank is obligated, that is, a bank draft, money order or certified cheque, is usually its purchaser from the remitter. The latter is the originator of the instrument, who paid value to the obligated banker for its issue or certification. 32 Accordingly, I argued that, 33

 notwithstanding what appears to be clear statutory language to the contrary, the payee of a banker instrument may be treated ... as one who has taken the

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30 Under BEA, s. 2, “issue” means “the first delivery of a bill or note, complete in form, to a person who takes it as a holder.”
31 Statutory requirements are set out in BEA, s. 55(1) reproduced, supra, n. 8.
32 This is obvious in the case of a bank draft, money order, or a cheque whose certification was procured by the drawer. However, to that end, certification procured by the holder “must be regarded as the issuance of a new . . . instrument with the drawer being regarded as the remitter, notwithstanding the genesis of the instrument as an ordinary cheque.” Geva, supra, n. 4 at 38.
33 Geva, supra, n. 4, at 30-31.
instrument by negotiation. Underlying this interpretation of the [BEA] is the proposition that unlike a usual payee, the payee of a banker's instrument is a remote party vis-à-vis the issuer. Such a payee has a derivative title to the instrument conferred upon him by the paying party. Indeed, the rights to and on the instrument of the remitter, namely, someone who procures or purchases from the issuer an instrument payable to another who has not transferred the instrument yet, go back to the law merchant and early English law. Not being a holder, the remitter is best viewed as the first owner of the instrument. The paying party procuring the banker's instrument payable to his creditor is such a remitter, having the power to recover on the instrument as well as to transfer it, particularly to the payee . . . . It is in this sense that the payee of a banker's instrument procured by a remitter is a remote party, vis-à-vis its issuer, with a derivative title to the instrument, conferred to him by the paying party/remitter.

As a matter of statutory interpretation, I relied on BEA s. 59(1), providing for the broad definition for "negotiation" as a transfer of a bill of exchange "from one person to another in such a manner as to constitute the transferee the holder of the bill." This definition does not require the transferor to be a holder; rather, he could be a remitter, as a non-holder owner, transferring the instrument to the payee. Indeed, the requirement that for "negotiation" to happen, the transferor of a bill must be a holder appears in BEA s. 59(3), under which "A bill payable to order is negotiated by the endorsement of the holder." And while it is natural to interpret BEA s. 59(3) and s. 59(2), providing that "A bill payable to bearer is negotiated by delivery," as exhausting the categories of "negotiation" as set out in s. 59(1), this is not the only plausible interpretation. Thus, it is possible to read s. 59(1) as providing for a broad principle, for which the most common examples are given in s. 59(2) and (3), without reading these subsections as necessarily exhaust all possibilities of "negotiation" under s. 59(1). Stated otherwise, a case falling under neither s. 59(2) nor s. 59(3), such as the transfer of a bill payable to order by its remitter, may nevertheless be "negotiation" under s. 59(1).

Accordingly, a payee who acquires a bill from the remitter by negotiation qualifies to become a holder in due course, provided of course all other requirements are met.\(^{34}\) Indeed, in such a case, there is no obstacle in applying BEA s. 57(2) holder-in-due-course presumption to that payee.

\(^{34}\) As set out in BEA, s. 55(1), reproduced in supra, n. 8.
5. DISCUSSION: APPLICATION TO THE FACTS OF THE CASE

In Esses v. Friedberg, plaintiff-payee Esses alleged that he had acquired the cheques, drawn by drawer-Friedberg and certified by defendant-BMO, from the money dealer, acting as a remitter, in return to payment in cash. According to the preceding analysis, this allowed Esses to argue receipt by negotiation, and thus rely on the holder in due presumption under BEA s. 57(2); except that at this point, per the same BEA s. 57(2), he became vulnerable to the rebuttal of that presumption. At the same time, BMO argued that the plaintiff was well aware of and complicit in the scheme, and further questioned whether plaintiff even gave value, in the form of cash or otherwise, for the three Friedberg certified cheques.

For the money dealer to become the remitter of the Friedberg cheques he must have acquired at some point the CIBC bank draft, with which he bought these cheques. Alternatively, having paid for them with the bank draft, it is the fraudster who bought the certified cheques through the money dealer; the latter must then be taken to act throughout the entire transaction as an agent for the fraudster. In this latter case, it is the fraudster, and not the money dealer, who is to be treated as the remitter of the certified cheques. The report does not contain any information shedding light on this aspect of the transaction. However, either way, the theory of plaintiff Esses must be taken to rely on his alleged good faith purchase of the Friedberg certified cheques; that is, his claim must be taken to be premised on the theory that he took the certified cheques in good faith, by negotiation and for value, from the remitter, whether the money dealer acting in his own name, or the fraudster acting through the money dealer. It is at this point that once it was determined that "the certified cheques, were affected with fraud or other illegality" the onus of proof shifted to Esses.

I should however state that the fraud or illegality affecting the certified cheques requires further analysis. Thus, Friedberg acquired the CIBC bank draft from its remitter, the fraudster, acting through the money dealer. The consideration CIBC received from the fraudster for the CIBC bank draft was in the form of proceeds derived from fraud; and yet, on the basis of the preceding analysis, Friedberg appears to

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35 Esses v. Friedberg, supra, n. 1 at para. 69, quoted at text at supra, n. 17.
obtain the bank draft by negotiation (from the fraudster through the money dealer), for value, and in good faith. As such Friedberg appears to have been a holder in due course of the draft. The fraud or illegality affecting the certified cheques must then be taken to be premised on the fraudulent and illegal source of the consideration for them, which nevertheless cannot be asserted against Friedberg. The defence raised by BMO is thus based on the adverse claim to the certified cheques of the fraud victim.

6. DISCUSSION: BEA S. 57 AND PAYEE NOT HOLDER IN DUE COURSE

Certainly, side by side with the endorsee in possession and the bearer, the payee in possession is a holder as defined in BEA s. 2. Hence, it is superficially appealing to interpret BEA s. 57(2), presuming a holder to be a holder in due course, to cover the payee and not only the endorsee or the bearer. At the same time, other than in the less usual case where he takes the instrument by negotiation, the payee, as an original party to the instrument, will not qualify as a holder in due course. For such a payee the benefit accorded by the presumption under s. 57(2) may easily become a blessing in disguise. This is so because the presumption is stated to be rebutted when "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"; in such a case the burden of proof reverts back to the holder. Under BEA s. 57(2), it is for the holder to prove then that he is either a holder in due course or that he derives title through a holder in due course situated in the chain of title between the disqualifying element and himself.

36 Indeed, in the facts of the case, "BMO has filed sufficient proof that the cheques Esses seeks to have honoured represent the bulk of the fraudulently obtained mortgage funds" Esses v. Friedberg, supra, n. 1 at para. 64.

37 The ultimate fraud victim could be either BMO or the owner of the residential property. If the latter, BMO effectively raised a third-party (jus tertii)’s adverse claim of ownership which is available to a party sued by one not holder in due course. See e.g., Lloyd v. Howard (1850), 15 Q.B. 995, 117 E.R. 735; and Geva, supra, n. 4 at 47-55.

38 As in fact held by the Court in Esses v. Friedberg, supra, n. 1 at para. 67, quoted in text that follows supra, n. 15.

39 Reproduced in full, supra, n. 16.

40 Indeed, according to BEA, s. 56, “A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.”
However, in the usual case, a payee to whom the instrument was issued rather than "negotiated," will not be able to prove holding in due course as required under BEA s. 57(2). From this perspective, it appears only fair to construe BEA s. 57(2) as inapplicable to the payee; there is no point to confer the benefit of the presumption on one who is unable to repel its rebuttal. However, with this interpretation we are left with no guidance as to the position of a maker or drawer vis-à-vis a payee in the case of proven or admitted third party's fraud, duress, or illegality, alleged but not proven to be known or participated by the payee.

It is against this background that Talbot v. Von Boris held that in the absence of proof as to his own involvement in or knowledge of the fraud or duress a payee may enforce full payment against the party alleging third-party's fraud or duress, so as effectively to be in a better position than that of a holder in due course. The latter would have to prove his good faith in relation to the alleged fraud or illegality.

In fact, a similar result, albeit in reliance on neither BEA s. 57(2) nor on Talbot v. Von Boris, may have been reached by the Supreme Court of Canada in Mollot v. Monette. In that case, a payee obtained judgment against a co-maker of a promissory note, possibly notwithstanding proof of the other co-maker's fraud and allegation of payee's complicity.41

This state of law is however an absurdity;42 hence courts cannot be blamed for trying to "force" the payee into BEA s. 57(2). However, the payee is usually an immediate party to the drawer or maker; it is only in exceptional circumstances that the payee is a remote party to the drawer or maker, who took the instrument by negotiation. Moreover, as I mentioned, there is no point in "forcing" the payee into BEA s. 57(2) only to find out that in the usual case, in the absence of negotiation, the payee is unable to repel the attack on the presumption stated in the provision.

It is thus unreasonable to accord to the payee the benefit of a holding in

41 1981 CarswellQue 30, 1981 CarswellQue 91, [1981] 2 S.C.R. 133, 16 B.L.R. 139, 39 N.R. 451, 128 D.L.R. (3d) 577 (S.C.C.). Rather, the Supreme Court cited BEA, s. 54(2) providing that "An accommodation party is liable on a bill to a holder for value, and it is immaterial whether, when that holder took the bill, he knew that party to be an accommodation party or not." In my view, this provision provides for the statutory contract of an accommodation party, on the same footing as for example BEA, s. 129(a) provides for the drawer's statutory contract, and thus ought not to be read as fastening defence-free absolute liability.

42 See text around supra, n. 19.
due course presumption that fits a remote party who takes the instrument by negotiation.

The solution to this dilemma is to identify the real issue not as whether a payee ought to enjoy the presumption under BEA s. 57(2); rather, the more pressing issue, is whether once "forced" into the provision, the payee ought not to be given the opportunity to repel the attack on the presumption, on the same footing as the endorsee. Stated otherwise, the payee is to be brought into BEA s. 57(2) only in order to allow him a reasonable exit from the attack on its presumption. Stated otherwise, even the payee who in the unusual case takes the instrument by negotiation ought not to be better off than the payee who in the usual case does not take the instrument by negotiation.

A scenario to that point involves an action by a payee who did not take the instrument by "negotiation," and against whom the defendant, drawer or maker, alleges but cannot prove, participation in or knowledge of, proven or admitted third-party-fraud or duress. Both Talbot v. Von Boris and Mollot v. Monette fall into this pattern. Certainly the defendant who in such a situation could have thrown the onus of proof on an endorsee, ought not to have been unable to throw the onus of proof on the payee, regardless of whether the payee took the instrument by negotiation. As well, the payee is to be afforded then a way to repel the attack which negates to him the benefit of the presumption under s. 57(2).

In my view, in the face of the "plain meaning" of BEA s. 57(2) which poses difficulties to achieve that result, the most elegant solution is to read the provision as not dealing with a holder in due course, but rather with the rights of a holder in due course. Indeed, under this interpretation, the key to the understanding of BEA s. 57(2) is not to focus on the holder in due status per se, but rather on the defence-free position associated with that status. Stated otherwise, I propose to read the subsection as providing that:

Every holder of a bill is, in the absence of evidence to the contrary, deemed to have the rights of 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

Instead of "be" in the existing provision.
that he has the rights of a 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 another person who has the rights of a holder in due course.

(Substituting language is in bold letters.)

This interpretation will do the least violence to the language of the provision; at the same time, it will overrule both Talbot v. Von Boris and Mollot v. Monette and protect the drawer and maker alleging against the payee third-party’s fraud, duress or illegality, in the same way as they would be protected in an action brought by an endorsee. It will also give the payee a way to meet the negation of the presumption by proving his own compliance with the good faith and value requirements so as to be entitled to recover the full amount of the instrument, and thereby have the rights of a holder in due course.

7. CONCLUSION

In any event, in the final analysis, as indicated, Esses v. Friedberg involved “negotiation” to the payee, at least under the better interpretation of BEA s. 59(1). Strictly speaking then, it was not necessary to go that far in the interpretation of BEA s. 57(2) as just suggested above. At the same time, it is unfortunate that the Court glossed over difficult issues associated with the application of s. 57(2) to the payee as well as with the payee’s position as a holder in due course. A thorough discussion of these issues would have given a stronger credence to the judgment as well as settle important fundamentals in the law of bills and notes. However, this drawback, lamentable as it is, does not diminish from the original observation made by the Court; thus, in declining to see liability under certification/acceptance as absolute and necessarily defence-free, the case is a positive development in Canadian law of negotiable instruments.

* * *

44 Instead of “is the” in the existing provision.