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Presentment and Payment in Cheque Electronic Clearing: Advance Bank v. TD Bank

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CARSWELL

Presentment and Payment in Cheque Electronic Clearing: *Advance Bank v. TD Bank*

*Benjamin Geva**

In the context of Advance Bank v. TD Bank, a case involving the return of a cross border dishonoured cheque by a Canadian drawee bank, the article addresses issues relating to the presentment and payment of cheques in Canada. It deals with compliance with the statutory requirements for presentment in the context of CPA clearing rules, and further discusses the legal implications of the treatment of a cheque processed in the clearing. The article argues that a delayed return of a cheque by the drawee bank constitutes “payment” of the cheque that benefits the depositor vis-à-vis the collecting bank, though not the drawee bank.

Cet article traite de la présentation et du paiement des chèques au Canada, dans le contexte de l'affaire Advance Bank v. TD Bank, une cause impliquant le refus de paiement d'un chèque tiré sur une banque canadienne et son retour outre frontière. Il analyse les différentes exigences législatives en matière de présentation dans le contexte des règles de compensation de l'association canadienne des paiements, de même que les aspects juridiques du traitement d'un chèque soumis à la compensation. Suivant l'auteur, un retour de chèque effectué tardivement par la banque tirée équivaudrait pour le dépositaire au paiement du chèque et ce, vis-à-vis de la Banque chargée de l'encaissement, mais non vis-à-vis de la banque tirée.

1. INTRODUCTION

In *Advance Bank v. Toronto Dominion Bank*¹ (“*Advance*”) a cheque cleared in the interbank electronic clearing system operated by the Canadian Payments Association (CPA) was returned dishonoured. Parties to the litigation were the bank on which the cheque was purportedly drawn and the collecting bank, into which the cheque was originally deposited. The former was a CPA member. The latter was a

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¹ (2003), 2003 CarswellOnt 1927, 227 D.L.R. (4th) 755, 35 B.L.R. (3d) 266, 65 O.R. (3d) 46 (Ont. S.C.J.) (Speigel J.).

cross border institution and not a member of the CPA. It accessed the CPA interbank cheque clearing system by having its own correspondent bank, another cross border non-CPA member, using another correspondent bank, a CPA member, acting as the presenting bank.²

The Court found that the cheque was neither accepted nor paid so that it was validly returned dishonoured. It also held that a non-CPA member, to which the cheque was originally deposited, could not sue the drawee bank on the basis of any alleged breach of CPA Rules governing cheque clearing in the CPA interbank clearing system.

In holding against the bank of deposit, the judgment given did not break new ground. Rather, it applied a derivation from a principle pronounced by earlier case law, which was well presented and rationalized by Bradley Crawford, in an article³ specifically relied on by the Court.⁴ As will be explained further below, although there was some irony in the final result, neither the derivation itself nor the principle from which it was made was a novelty. Moreover, I would endorse its ultimate conclusion in favour of the drawee bank. Yet, together with some observations made by the Court, it is precisely the derivation cited by the Court in support of its holding, with which I take issue and that I wish to revisit.

² CPA was established in 1980 under the *Canadian Payments Association Act*, R.S.C. 1985, c. C-21, subsequently renamed the *Canadian Payments Act* (S.C. 2001, c. 9, s. 217). It operates the Canadian interbank cheque clearing system under a mandate to operate a national clearing and authority to issue by-laws and rules concerning clearing arrangements, referred to below as "clearing rules." Non-bank financial institutions may be eligible to become CPA members; yet, only deposit-taking institutions take part in the interbank cheque clearing, all of which are referred to throughout this article as "banks". Participants in the interbank cheque clearing system may be "direct clearers," who constitute a small group (around 12 out of total membership of close to 120), consisting of the large institutions that take part in the actual exchange of cheques in Regional Exchange Points throughout Canada and have settlement accounts with the Bank of Canada. The rest of the participants are "indirect clearers", for which correspondent direct clearers act as clearing agents in the exchange and who settle in correspondent accounts maintained with respective direct clearer-clearing agent. See B. Crawford, *Payment, Clearing and Settlement in Canada*, vol. 1 (Toronto: Canada Law Book, 2002) at 128-153. The CPA website is: <<http://www.cdnpay.ca>>.

³ B. Crawford, "Late Return of a Dishonoured Cheque" (2001) 36 C.B.L.J. 1.

⁴ *Supra*, n. 1 at 53. For earlier case law see also J. Goodman, "Cheque Clearing Cases Create Confusion" (2002) 17 B.F.L.R. 99.

Standing on its own the derivation may seem logical, but in a broader context it is not all that sensible. It does not reflect good law and does not fit well in the overall scheme of the law of cheques. Having undesirable side effects that ought to be avoided, the derivation is not inevitable; in fact there is case law to the contrary so that legislative intervention may not be necessary.

Following the exposition of the facts and the judgment, the ensuing analysis will address three fundamental issues raised in the case in connection with the present electronic cheque clearing regime in Canada. An argument will be presented and substantiated on each of the three issues. First, in the course of the clearing process the drawee bank does not “accept” a cheque. Second, in the clearing process valid “presentment” is required and its occurrence is to be identified. Third, in delaying the return of a cheque, a drawee bank becomes liable to the presenting bank for its payment. In the context of the Canadian interbank cheque clearing system, between direct clearers, “payment” occurs by the loss of the right to revoke the provisional settlement, made earlier, at the time the cheque was delivered by the presenting bank to the drawee. Fourth, where the drawee bank paid to the presenting bank, the customer who deposited the cheque for collection is entitled to receive payment, though not from the drawee bank. Rather, the depositor’s entitlement is from the depositary bank, at least as of the time the latter had received payment.

In the final analysis, the principle under which a depositor may not sue for breach of interbank clearing rules to which the depositor is not privy is sound. Nonetheless, in my view, it does not follow that the depositor may not benefit from “payment” that occurred under them; it is this alleged derivation with which I agree. _____ *dis*

In conclusion, I am in agreement with the Court on the first point (acceptance), but find the discussion on the second point (presentment) to be problematic, and do not concur with the analysis on the third point (payment). While the Court did not discuss the fourth point (consequences of payment), I agree with the dismissal of the action against the drawee bank.

2. THE FACTS

All facts were undisputed. On April 4, 2001 a cheque for CDN\$285,000 (“the cheque”) purportedly drawn on the Collingwood branch of the defendant, Toronto Dominion Bank (“TD”), was deposited in Illinois in an account with the plaintiff, Advance Bank (“Advance”). The cheque was forwarded for collection to TD in Toronto, through American National Bank of Chicago (“ANBC”) and the Bank of Nova Scotia (“BNS”), both acting as intermediary banks; ANBC being a correspondent or clearing agent for Advance and BNS being the same for the ANBC. In the course of the collection process, both Advance’s account with ANBC and ANBC’s account with BNS were credited.⁵

On April 9, 2001 the cheque reached the Toronto Data Centre of BNS. That day, BNS delivered the cheque for payment to TD Toronto Data Centre. Delivery was made through the Canadian cheque clearing system operated by the Canadian Payments Association under clearing rules issued by it (“the Rules”).⁶ The TD Data Centre was operated by an independent service provider, Symcor Services Inc. (“Symcor”). It carried out automated processing of cheques drawn from TD branches, in a process culminating in an automatic date stamp being imprinted on the back of each cheque, upon which the customer’s account was debited automatically. In the facts of the case, the purported drawer, a TD customer, was promptly advised by means of a daily electronic statement on April 9, 2001. Having noticed the pertinent debit item in the statement, the customer immediately contacted the Collingwood branch, which in turn requested a copy of the cheque. That branch received the cheque a week later, on April 16, 2001, and forwarded it to the customer.

⁵ Also in the course of the collection process, on April 5, 2001, ANBC called the TD Collingwood branch and received oral confirmation as to the availability of funds and lack of an outstanding stop payment order with respect to the cheque. It then advised Advance as to the USD equivalent of the cheque, being \$179,407.50.

⁶ Throughout this article, “clearing rules” denote rules governing the interbank clearing, issued under any type of multilateral interbank agreement. As indicated *supra*, n. 2, in Canada “clearing rules” are now issued by the CPA, which, although established by statute, is an industry-based organization and hence its rules can be seen as issued on the basis of the agreement of participants. Outside Canada such rules may be called “clearing-house rules;” the emphasis in the latter term is on the interbank “clearing-house association” which issues them as well as on a physical facility, the clearing house, where interbank clearing takes place. Particularly the latter feature is not part of the interbank cheque system in Canada.

The latter promptly advised the branch that same April 16, by means of a declaration, that the cheque was forged. Around April 20, 2001, TD credited its customer account with the amount of the cheque.⁷

Around 10 days later, on or about April 26, 2001, TD returned the original cheque⁸ directly to Advance. The cheque arrived by overnight courier at the Advance Illinois branch of deposit, presumably on that same date. After around three weeks, on May 15, 2001, TD returned a certified true copy of the cheque to Advance through the Federal Reserve Bank of Chicago ("FRC") that debited Advance's account with it accordingly.

It is not clear why FRC debited Advance's account with it, when it was Advance's account with ANBC that was credited with the amount of the cheque. Also, the report is silent on the settlement between the two Canadian banks, TD and BNS respectively, acting as the drawee and presenting banks in this case. Evidently, settlement between them took place on the books of the Bank of Canada with the amount of the cheque included in the respective interbank balances settled for April 9, 2001.⁹ TD's balance must have included a credit for the cheque and BNS's balance must have included a corresponding debit for it. There is also no information as to whether and when the reverse occurred in the process of the return of the cheque, not only between TD and BNS (on the books of the Bank of Canada), but also between BNS and ANBC (on the books of BNS), and obviously, it is unclear as to the reimbursement of ANBC from Advance.¹⁰ It can safely be assumed that all those

⁷ See s. 48(1) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, providing that a forged signature is "wholly inoperative and no right to retain the bill or to give discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature". A cheque is *specie* of a bill. See s. 165.

⁸ In the language of the Court, *supra*, n. 1 at 50, "TD obtained the original Cheque and returned it to Advance. . ."; presumably, it obtained it from Symcor, *ibid*.

⁹ The normal settlement procedure for the end of the day exchange in CPA, the interbank cheque clearing system, takes place on a multilateral basis on the books of the Bank of Canada on the next banking day; yet, it is backdated to the day of the exchange. In the facts of the case this would have meant April 10 settlement for April 9 exchange, backdated to April 9.

¹⁰ Perhaps when the cheque was forwarded for collection, Advance's account was credited and ANBC's account was debited on the books of FRC, in which case, upon the return of the case, FRC debited the account of Advance (as the report actually tells us) and credited ANBC's account (which would have given ANBC its reim-

reverse entries actually occurred; nothing however turns on their exact timing.

Upon originally receiving the cheque for deposit on April 5, 2001, Advance advised its customer, the depositor, that the funds would be held for seven days.¹¹ On this basis, Advance released funds to its customer on April 11, 2001, before the forgery was discovered and the process of return commenced. TD advised Advance of the forgery and the return of the cheque either on April 17 or April 25, 2001, either way, after the funds had been released to the depositor. In the facts of the case, Advance was thus left to initially bear the loss as it released the funds for a cheque for which credit to its own account was reversed.

In cheque clearing terminology,¹² Advance, ANBC, and BNS were collecting banks. Among them, Advance was a depository or negotiating bank, ANBC and BNS were intermediary banks, and BNS was the presenting bank. TD was the drawee or payor bank.

3. THE JUDGMENT

Both banks agreed on the facts in the dispute but disagreed as to the conclusions of law to be drawn. Advance sued TD for recovery on the basis of unjust enrichment.¹³ The Court formulated the question presented to it to be whether TD accepted or paid the cheque so as to be liable on it. It then proceeded to dismiss the claim on three grounds. First, the Court held that not being a CPA member, Advance could not rely on the Rules to its benefit; presumably, this included any inference as to the occurrence of payment derived from the Rules. Second, the Court held that in the absence of a signature placed on the cheque there was no acceptance; specifically no acceptance took place by the affix-

bursement but of which the report does not provide any information). We can only speculate on this point since the judgment does not mention FRC in connection with the collection (as opposed to the return) of the cheque, and further, is telling us that in the course of the collection process it was Advance's account with ANBC and not FRC that was credited.

¹¹ Evidently, Advance purported to comply with Regulation CC Availability of Funds and Collection of Checks, 12 CFR Part 229.

¹² In the absence of statutory definitions in Canada, the ensuing terminology draws on common banking parlance and clearing rules as well as inspired by Article 4 of the American Uniform Code—Bank Deposits and Collections.

¹³ *Supra*, n. 1 at 51.

ation of the date stamp at the Data Centre. Nor did the “automatic debit and credit, which are meant to be provisional under the Rules, . . . create acceptance.” Rather, “[t]here must be something more; the drawee must puts its mind to final payment.”¹⁴ Third and finally, the Court held that the delivery of the cheque by BNS to the TD Data Centre was not a presentment for payment and did not trigger the actual payment of the cheque.

In conclusion the Court held, “[t]here was no acceptance of the Cheque, nor was there payment on the Cheque either through the Clearing or upon presentment. Absent acceptance or payment, TD is not liable on the Cheque. Since TD was only spared an expense that it was not required to incur, it cannot have been unjustly enriched.”¹⁵ In the result, TD’s motion for summary judgment to dismiss was granted and Advance’s motion for summary judgment to allow recovery was denied. Judgment was thus given in favour of TD.

4. DISCUSSION

The Court’s own analysis was divided into three parts. First, the Court discussed the relevance of the clearing rules for the resolution of the dispute. Second, it dealt with the existence or absence of acceptance in the facts of the case. Third, the Court analyzed the occurrence of presentment of payment, following which payment may have occurred. It seems to me that separation among the various issues under the analysis of the Court in each of its headings is far from being clear. It is thus preferable to discuss the judgment and its underlying issues under different headings, being acceptance, presentment for payment, payment, and Advance’s rights and remedies. An overall framework will be presented following the discussion.

(a) Was the Cheque Accepted?

It is not usual for a cheque to be accepted; it may nevertheless be certified; it was held that “the certification of a cheque by a bank is

¹⁴ *Supra*, n. 1 at 55. The Court further held that in the facts of the case Symcor, the independent service provider that operated the TD Data Centre (above, paragraph containing notes 6-7), lacked the authority to accept cheques on behalf of TD.

¹⁵ *Supra*, n. 1 at 57.

equivalent to acceptance.”¹⁶ Under the *Bills of Exchange Act* (BEA)¹⁷ acceptance requires the drawee’s signature.

In discussing the existence of signature in *Advance*, the Court did not deny the possibility that a stamp on the back of a cheque could be an adequate signature,¹⁸ but concluded that the automatic affixation of a date stamp, “can hardly be said to be acceptance.”¹⁹ On this point the Court was correct.

Regrettably however, the Court’s discussion on acceptance²⁰ was interwoven with its discussion on payment. Relying on *National Slag v. Canadian Imperial Bank of Commerce*,²¹ the Court concluded that “[t]he automatic debit and credit, which are meant to be provisional under the Rules, also do not create acceptance. There must be something more; the drawee must put its mind to final payment.”²² Along these lines, the Court concluded, “the requirements for acceptance under the BEA were not met in this case. The automatic date stamp place by Symcor on the cheque did not constitute acceptance, nor did the automatic debits and credits to [the purported drawer-TD customer]’s and BNS’ accounts.”²³

¹⁶ *Maubach v. Bank of Nova Scotia* (1988), 1987 CarswellOnt 1072, 62 O.R. (2d) 220, 44 D.L.R. (4th) 575, 25 O.A.C. 211 (Ont. C.A.), aff’d (1987), 1987 CarswellOnt 866, 60 O.R. (2d) 189, 40 D.L.R. (4th) 134 (Ont. H.C.). In *Advance*, *supra*, n. 1 at 53, the Court recognized the functional equivalence between the certification of a cheque and the acceptance of a bill of exchange, though it reversed the logical sequence; rather than stating that the certification, being the uncodified practice, is the equivalent to acceptance, which is codified, it stated that “[a]cceptance is similar to certification, by which a bank irrevocably lends its own credit to the instrument”. “Certification” would have required the withdrawal of the amount of the cheque from the purported drawer’s account into a special suspense account, which did not happen in *Advance*.

¹⁷ *Supra*, n. 7. Relevant provisions are ss. 35 and 130. To be “complete and irrevocable” acceptance must also satisfy notice requirements under BEA, s. 38, an aspect that was overlooked by the Court.

¹⁸ For the application of this proposition to certification, see *Bank of Nova Scotia v. Canada Trust Co.* (1998), 1998 CarswellOnt 1284, 39 O.R. (3d) 84, 41 B.L.R. (2d) 109 (Ont. Gen. Div.), specifically relied upon by the Court.

¹⁹ *Ibid.*, at 54.

²⁰ *Ibid.*, at 53-56.

²¹ (1982), 1982 CarswellOnt 1333, 140 D.L.R. (3d) 473 (Ont. H.C.), aff’d (1985), 1985 CarswellOnt 1734, [1985] O.J. No. 149, 19 D.L.R. (4th) 383 (Ont. C.A.).

²² *Supra*, n. 1 at 55. “Rules” are CPA Rules. See text at n. 6, *supra*.

²³ *Ibid.*, at 56.

Nevertheless, to determine acceptance it would have been adequate for the Court to address the signature aspect. Simply stated, on the basis of lack of intent to be bound, or any representation that may suggest the automatic date stamp was a signature, there was no acceptance.

(b) Was the Cheque Presented for Payment?

Under the BEA, a cheque must be presented within a reasonable time after its issue.²⁴ Presentment is to be made by the physical exhibition of the cheque,²⁵ by the holder or on the holder's behalf, to the drawee bank,²⁶ usually at its branch as indicated on the cheque, being "the address of the drawee . . . given in the [cheque]."²⁷

Under BEA, s. 84, and unless excused,²⁸ the presentment of a cheque is required in order to charge its drawer, as well as any endorser, with liability thereon. Its objectives are twofold. First, the presentment is aimed at achieving certainty as to the moment of demand of payment addressed to the drawee, so as to force the drawee to respond unequivocally, either by paying the cheque or dishonouring it. Second, the presentment purports to ensure that demand for payment be made by the holder or on the holder's behalf, that is, by the one to whom the cheque is payable and who is in possession of the cheque.²⁹ Payment in due course that discharges the cheque must be made on or on behalf of the drawee and to the holder.³⁰ This twofold objective eliminates ambiguity as to rights and duties arising in the collection and payment process. Presentment thus serves the interests of both the drawer and holder, as well as their banks.

Per BEA, s. 129(a), adequate presentment is a term of the statutory engagement of the drawer vis-à-vis the holder. That is, it is only upon the dishonour of the cheque by the drawee, being the drawee's refusal

²⁴ BEA, s. 85(1)(b). Delay is excused where caused by circumstances beyond the control of the holder. See BEA, s. 90.

²⁵ BEA, s. 84(3).

²⁶ BEA, s. 86(1).

²⁷ Under BEA, s. 87(b) this is the proper place of presentment "where no place of payment is specified [in the cheque]."

²⁸ Presentment is dispensed with *inter alia* when there are no funds in the account, nor is there an overdraft facility available, and when it was waived. See BEA, s. 91.

²⁹ "Holder" is defined in BEA, s. 2.

³⁰ BEA, s. 138.

to pay upon presentment, made by the holder to the drawee, and the ensuing dishonour proceedings, that the drawer becomes liable to compensate the holder. Furthermore, adequate presentment is a term in contract other than those arising from the cheque itself. Thus, it is a term in the contract between the holder and the bank of deposit. Absent presentment neither payment, nor dishonour that will give rise to the liability of the drawer, will occur. The bank of deposit is therefore under contractual liability to its customer, the deposit-holder, to make the required presentment so as to lead either to the payment of the cheque, or to liability upon its dishonour. As well, adequate presentment is a term in the contract between the drawer and the drawee bank. The drawee bank's authority and duty owed to the drawer, its customer, to honour (*i.e.*, to pay) a cheque,³¹ is upon the presentment of the cheque. Finally, adequate presentment is a term in the interbank agreement between the bank of deposit and the drawee bank, whether bilateral or multilateral, and whether or not embodied in clearing rules. Each bank requires presentment to discharge its own obligations towards its own customer, the drawer in the case of the drawee bank, and the depositor-holder in the case of the bank of deposit.

In the case at bar, Advance argued that presentment took place in the Clearing. According to Advance, "the cheque was presented when it was delivered through the Clearing to the TD and was paid when TD debited the funds from [its customer-purported drawer]'s account."³² The Court rejected altogether this argument. Rather, it accepted TD's position "that when members of the CPA exchange cheques through the Clearing, the BEA prerequisites for presentment for payment are, in effect, mutually waived by members of the CPA for their benefit and detriment in the operation of the Clearing."³³

This statement cannot be taken to mean that banks participating in the clearing process are free to effectively waive BEA statutory presentment requirements. As indicated, adequate presentment is required

³¹ Obviously, the drawee bank's contractual duty to pay is not absolute, rather it is subject to the availability of funds either in the drawer-customer's account, or of an overdraft facility to him or her. See *Barclays Bank v. W.J. Simms*, 1 Lloyd's Rep. 225, [1980] Q.B. 677 (Goff J.) at 238 [Lloyd's].

³² *Supra*, n. 1 at 56.

³³ *Ibid.*, at 57.

under each banking contract, that is, the one between the bank of deposit and the depositor-holder, and the other between the drawee bank and the drawer-customer. The issue is not simply that of the prevalence of the BEA over internal CPA Rules, or for that matter, any interbank agreement, as the Court appears to assume.³⁴ Rather, the point is that by itself, an interbank agreement cannot adversely affect customers' rights, namely that of the drawer and the depositor-holder. Indeed, it is only up to the drawer, the party liable on the cheque, in his or her agreement with the payee, the original holder, to waive the presentment requirement.³⁵ To confer such power on collecting and paying banks is contrary to principle, and indeed as explained below, contrary to authority.

Elsewhere I argued that the better policies support the banks' ability to nevertheless agree on an alternative procedure for presentment, as long as such procedure facilitates the two fold objectives of the statutory presentment mentioned above.³⁶ However, to be effective and bind the customers, the procedure, originally set out in the interbank agreement, must be incorporated into their respective banking agreement so as to be implicit in their own, inter-customer or drawer-payee/holder contract. It is in this context that remote presentment, or cheque truncation, may be introduced even without a legislative amendment.³⁷

The Court's statement as to the ability of banks to waive presentment requirements might have been a mere unguarded observation, and in any event, was *obiter*. In the final analysis, the Court concluded that in the facts of the case "[t]he [TD] Data Centre was not the proper place for Advance to effect presentment, nor was Symcor authorized to pay or refuse payment on TD's behalf. TD did not waive the BEA require-

³⁴ *Ibid.* In support to this proposition the Court cited *Bank of Nova Scotia v. Toronto Dominion Bank*, (2001), 2001 CarswellOnt 1525, [2001] O.J. No. 1717, 145 O.A.C. 106, 200 D.L.R. (4th) 549 (Ont. C.A.).

³⁵ Waiver of presentment may be express or implied. See BEA, s. 91(1)(e). Presentment (by the holder to the drawee) is a condition to the liability of the drawer. See BEA, s. 129(a); it is therefore only for the drawer to waive it, and thereby to assume liability even in its absence.

³⁶ See paragraph containing n. 28-30, *supra*.

³⁷ B. Geva, "Off-Premises Presentment and Cheque Truncation under the Bills of Exchange Act" (1986-7) 1 B.F.L.R. 295. Point is summarized in B. Geva, *Bank Collections and Payment Transactions* (Oxford: Oxford University Press, 2001) at 146-148. This is not to say that a legislative amendment introducing remote presentment is not welcome.

ments with respect to dealing with Advance and the prerequisites of presentment was not fulfilled.”³⁸ Regrettably, there is no finding in the judgment as to whether the cheque was presented, either at the Collingwood branch of TD on which it was drawn, or elsewhere, under an effective alternative procedure. On its part, the Court appears to suggest that had Advance made presentment “at the TD location that was authorized to make decision . . . it could have avoided the dispute,”³⁹ thereby implying that in the facts of the case the presentment requirements were not fulfilled. In the view of the Court, a decision by Advance to effectively bypass a statutory presentment was “a necessary part of the risk assessment that banks . . . must make on an ongoing basis.”⁴⁰

This is however quite a startling position that must be taken with a grain of salt. In *Barclays Bank plc v. Bank of England*,⁴¹ Bingham J. dealt with “the duty of a banker entrusted with a cheque for collection . . . to obtain reasonable steps to obtain payment of the cheque . . .” He specifically held such duty to be “subject to the overriding statutory rule that the appropriate way to obtain payment under a cheque is . . . to present it for payment . . .”⁴² He did not rule out the possibility of banks contracting out of the statutory requirement of presentment at the drawee branch,⁴³ and agreeing on another place, as for example, the clearing house.⁴⁴ Nonetheless, being the demand for payment, presentment must be made at the place where the banking decision as to whether to pay the cheque is to be made.⁴⁵ Furthermore, an alternative arrangement under which presentment is to be made, other than as required by statute,

³⁸ *Supra*, n. 1 at 57.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ [1985] 1 All E.R. 385 (Bingham J.).

⁴² *Ibid.*, at 390.

⁴³ The statutory scheme in England is the source of the Canadian scheme and hence Bingham J.’s discussion is fully applicable in Canada. Relevant provisions in the English *Bills of Exchange Act*, 1882 (c. 61), to which Canadian ss. 85(1)(b), 84(3), 86(1), 87(b), 84 and 91, discussed *supra*, in text at n. 24-28 respectively correspond, are ss. 45(2), 52(4), 45(3), 45(4)(b), 45 (first paragraph) and 46(2).

⁴⁴ As indicated *supra*, n. 6, clearing in Canada does not involve a centralized facility such as the “clearing house.” Yet, in applying Bingham J.’s analysis, the point of receipt of the cheques by the drawee bank, at one of the Regional Exchange Points across the country, could be viewed as the relevant point in Canada. For the CPA interbank cheque clearing system, see n. 2 *supra*.

⁴⁵ *Supra*, n. 41 at 393-94 and authorities there cited.

is effective only where the drawer “knows and expressly or impliedly assents to the arrangement.”⁴⁶ Likewise, inasmuch as the drawer is discharged upon the holder’s failure to duly make presentment, the holder cannot be regarded as losing this right solely “as a result of a private agreement made between . . . banks for their own convenience,” unless “the very strongest proof of his knowledge and assent” is demonstrated.⁴⁷ To that end, while the ordinary usage and practice of banks is relevant and decisive as to the sufficiency of any given presentment, such usage and practice, “even if proved, could not without more derogate from the presenting bank’s duty owed to its customer.”⁴⁸ That is, as indicated above, both interbank agreement as to a reasonable alternative and the agreement of the drawer and payee-holder are required.

In the facts of *Barclays Bank*, in connection with the English interbank cheque clearing system, Bingham J. rejected the existence of an agreement, or even of an “established usage and practice of bankers participating in the clearing . . . to treat the delivery of cheques at the clearing house as the effective presentment to the paying bank.”⁴⁹ Rather, he found that presentment by the depositary/presenting bank occurs at the drawee branch, namely the branch of the drawee bank where the account on which each cheque was drawn is kept. Accordingly, he held, in transporting each cheque, “the paying bank [is to be regarded] as being, from the time of receiving the cheque until the time of presenting it [at the branch], a sub-agent of the presenting bank, which is itself the agent of the payee.”⁵⁰

Following *Barclays Bank*, the English BEA was amended in 1996 to specifically accommodate the presentment of cheques by a bank, either at a data centre or by electronic means.⁵¹ As well, the physical exhibition requirement has been dispensed with in connection with the electronic presentment.⁵² No corresponding amendment was made in

⁴⁶ *Ibid.*, at 391.

⁴⁷ *Ibid.*, at 394.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at 391.

⁵⁰ *Ibid.*, at 392.

⁵¹ Sections 74A and 74B of the English *Bills of Exchange Act supra*, n. 43. These provisions were added by SI 1996 No 2993 and are in force as of November 28, 1996.

⁵² Section 74C *ibid.*

Canada, although apparently the electronic presentment of cheques is under discussion.⁵³ On their part, as will be further discussed below, CPA Clearing Rules appear to accommodate the existence of presentment at “the first organizational unit of the Drawee that is able to make or act upon a decision to dishonour the [cheque],”⁵⁴ which is not necessarily the branch of the account and may well be the data centre serving it. Yet, as indicated, in the absence of any statutory amendment, as in England, to bind customers, customers’ agreements must be assumed to have occurred.

In the case at bar, had Advance failed to present the cheque, it must have been regarded to be in breach of contract with its customer. Nothing to that effect is noted in the judgment, nor does the judgment indicate any deviation from normal banking procedures. While it is conceivable that banks bypass statutory presentment, it is much less conceivable, in light of the analysis above, that banks would agree to abandon a presentment procedure altogether, thereby exposing themselves to actions by their respective customers. To that end, it is regrettable that the Court did not address its attention to the existence of an alternative presentment procedure and its binding effect on customers. Certainly, the Court was right in holding that the mere delivery to TD through the clearing on April 9, 2001, was not an effective presentment; this is so, per *Barclays Bank*, due to such delivery being in bulk, without facilitating an informed banking decision. Nevertheless, from the report, one may speculate that the alternative presentment procedure took place later on during April 9, 2001, at some point as the cheque was processed in the TD Data Centre. The Collingwood branch on which the cheque was purportedly drawn did not seem to be involved at all in the decision process. It received a copy of the cheque only in response to the protest of its customer and only with the view of passing on the cheque to the customer.⁵⁵ Indeed, it is quite plausible to assume that the TD Toronto Data Centre was TD’s “first organizational unit . . . that [was] able to make or act upon a decision to dishonour the [cheque],” so as to be the

⁵³ See CPA, “Cheque Imaging in Canada: A Change Whose Time has Come”, January 6, 2004, online: CPA <http://www.cdnpay.ca/publications/pdfs_publications/imaging.pdf>.

⁵⁴ See *e.g.*, s. 5 to CPA Rule A4 Returned and Redirected Items, governing time limitation for return and discussed further under section 4(c) *infra*.

⁵⁵ For the facts and judgment, see respectively, sections 2 and 3 of this article *supra*.

designated place of presentment.⁵⁶ It was of course for TD, at its own discretion, to devise a strict or lenient decision making process, or even to bypass it at its own risk; yet, having received the cheque, it may not then rely on the absence of either a prompt banking decision to pay or dishonour the cheque, or even on the lack of an opportunity to make such a decision.

(c) Was the Cheque Paid?

According to BEA, s. 138(1), a cheque, as a *specie* of a bill of exchange, is discharged “by payment in due course.”⁵⁷ Certainly, “payment” is the most common way for the discharge of a cheque;⁵⁸ nonetheless, “payment” is not defined in the BEA. Obviously, payment in cash over the counter is “payment.”⁵⁹ Payment over the counter is effectively precluded under the BEA where the cheque is crossed.⁶⁰ In Canada, crossing is not practiced;⁶¹ it is nevertheless quite unusual to have in Canada a cheque paid by the drawee bank over the counter in cash.

Similar to the position under the Canadian BEA, in the U.S., the Uniform Commercial Code (UCC) speaks of the discharge of an instrument by payment as well as by other means.⁶² Yet, unlike the BEA, the UCC expressly envisages a whole range of payment methods, broadly referred to as “settlement”. “Settle” is defined in UCC §4-104(11) as “to pay in cash, by clearing-house settlement, in charge or credit or by remittance, or otherwise as agreed.” The latter provision further states that “settlement may be either provisional or final.” “Final payment” is then defined in §4-215(a) in terms of payment in cash, settlement made

⁵⁶ Per s. 5 to CPA Rule A4 Returned and Redirected Items *supra*, n. 54.

⁵⁷ Defined in BEA, s. 138(2) as “payment . . . at or after maturity” made in good faith “to the holder . . . without notice that his title is defective”.

⁵⁸ For “discharge” by merger, renunciation, and cancellation see BEA, ss. 140-144.

⁵⁹ See *Chambers v. Miller* (1862), 13 C.B. (N.S.) 125, 43 E.R. 50, as well as *Hall v. Hatch* (1901), 3 O.L.R. 147 (Ont. H.C.).

⁶⁰ Cheque crossing is governed by BEA, ss. 168-175. For a comparative context, see Geva, *Bank Collections supra*, n. 37 at 136, 155, 174, 185, 430-433, and 485.

⁶¹ Briefly stated, in Canada, in the absence of statutory protections available to paying and collecting banks in connection with forged endorsements, “crossing” will result in according protections to banks, against the interest of their customers. Geva *ibid.*, particularly at 430-435.

⁶² Discharge and payment are governed by UCC §§3-601 to 3-604. Discharge by payment is dealt with in §3-602.

without a right to revoke it, and the failure to revoke a provisional settlement "in the time and manner permitted by statute, clearing-house rule, or agreement."

The silence of the BEA as to methods of payment is not to be interpreted as excluding payment other than in cash; such interpretation is illogical and in fact has no statutory base whatsoever.⁶³ Particularly since the practice of collecting and paying cheques through the interbank clearing system is anchored in a well-established usage⁶⁴ and has been statutory based,⁶⁵ the non-cash payment produced thereby is to be taken as accorded full recognition as a means of "payment" discharging a cheque under BEA, s. 138.

Indeed, other than in cash, proceeds of a cheque may be paid into the holder's bank account, this is the case for any cheque deposited for collection by the holder. Yet, the cheque collection process is not a credit transfer, in which payment takes place in the payee's bank account,⁶⁶ rather it is a debit transfer, in which payment is made in the drawer's account and collected into the payee/holder's account.⁶⁷ Payment of the cheque by the drawee bank is thus to be distinguished from the collection of the proceeds of its payment by a collecting bank and their deposit to the credit of the depositor (payee/holder) of the cheque. It is then in connection with the debit posted to the drawer's account by the drawee bank that the non-cash payment of a cheque must be taken to occur.

In the Canadian interbank cheque clearing context, and for the sake of simplicity, assuming a Canadian dollar cheque drawn on one direct

⁶³ After all, even payment in cash itself is not specifically mentioned; even as a matter of strict interpretation of the BEA there is no ground to read it as contemplating payment in cash to the exclusion of all other methods of payment.

⁶⁴ See e.g., *Lajambe v. Saint Hilaire* (1924), 30 Rev. Leg. (N.S) 447 (Circ. Ct.).

⁶⁵ See n. 2 *supra*.

⁶⁶ As for example in *The Brimnes Tenax Steamship Co. Ltd. v. The Brimnes (Owners)*, [1973] 1 All E.R. 769 (QBD (Adm. Ct.)), aff'd [1974] 3 All E.R. 66 (C.A.).

⁶⁷ For the fundamental distinction between credit-"push" into the payee's account, and debit-"pull" out of the payor's account, see Geva, *Bank Collections supra*, n. 37 at 127-128. In both banking operations, funds are transferred from the payor's account to that of the payee; the difference between the two categories is in the direction of the communication flow. In each case, payment occurs in the last bank in the communication chain, which is the payor/drawer's bank in a debit transfer (which then pulls the funds out of the drawer's account) and the payee/beneficiary's bank (which then pushes the funds into the beneficiary's account) in a credit transfer.

clearer and deposited in another,⁶⁸ debit is at all likelihood posted to the drawer's account upon the delivery of the cheque to the drawee bank, as part of a bulk delivery of all cheques drawn on the drawee bank, by the depositary bank in the region of deposit. This debit takes place on the basis of information electronically communicated over the internal system of the drawee bank, ahead of the arrival of the cheque to "the first organizational unit of the Drawee that is able to make or act upon a decision to dishonour the [cheque],"⁶⁹ and hence ahead of any examination of the cheque and the determination of the availability of cover in the drawer's account by the drawee bank. Such a debit is to be treated as no less provisional than the credit given by the depositary bank to the depositor upon the deposit of the cheque; it is also no less provisional than the mutual entries posted to the respective accounts of the drawee and depositary banks with the Bank of Canada reflecting the daily exchange in which the cheque has been included.⁷⁰ Accordingly, by no means can such a debit to the drawer's account to be considered as the payment of the cheque. In the above mentioned terminology of the UCC, this is a mere "provisional settlement" that has not crystallized yet to "final payment", which is the "payment" with which we are concerned.

"Payment" out of the drawer's account must then be treated as having occurred at some point in the banking process. The task is to identify a point of irrevocability in the position of the drawee bank, in terms of either its right against the drawer, or its liability towards the presenting bank. Two options are available. The first endeavours to identify a point in the internal process of the drawee bank in handling the cheque, that is, in what has been often referred to as the process of

⁶⁸ In the Canadian interbank cheque clearing system operated by the CPA, direct clearers are banks directly participating in the exchange, for themselves and as clearing agents for other participating institutions, and settle for resulting balances on the books of the Bank of Canada. See n. 2 *supra*.

⁶⁹ Per s. 5 to CPA Rule A4 Returned and Redirected Items *supra*, n. 54.

⁷⁰ On that point, *cf.* statement by Labrosse J. who "[could not] accept the argument that the cheque was 'paid' by the debits and credits made through the clearing procedure . . . any more than when [the bank of deposit] credited the plaintiff on deposit of the cheque." See *National Slag supra*, n. 21 (Ont. H.C.) at 475. On the basis of this statement, Spiegel J. treated in *Advance* the interbank "automatic debit and credit" as provisional and not determinative, though as indicated, in the context of denying the occurrence of "acceptance" (and not "payment"). See text at n. 22 *supra*. *National Slag* is further discussed in paragraph containing n. 89-91 *infra*.

posting of the cheque to the drawer's account. The second aims at identifying a point in the interbank clearing process in which the drawee bank has become liable on or accountable for the cheque to the presenting bank.⁷¹

At first blush the first option, that focusing on the internal process at the drawee bank, looks more attractive. This is so since it also covers cheques paid outside the interbank clearing. Such cheques include those drawn on the bank of deposit ("on us" cheques), as well as cheques drawn on, or deposited with, a correspondent, whether domestic (as for example between a direct clearer and an indirect clearer for which the direct clearer acts), or cross border. In the context of the first option, the examination of the internal process will endeavour to identify a point in which the drawee bank either decides to make payment or at least demonstrates that an irrevocable decision of payment has been reached. Indeed, there is some old case law⁷² and a legislative precedent in the U.S.⁷³ to support it; yet, in the final analysis, this approach is to be disfavoured, due to the mechanical or automated nature of the internal process. Neither point of decision nor of irrevocability can be identified in the normal internal process of posting.⁷⁴

⁷¹ "Accountability" for the amount of the cheque as part of the process of payment is used in this context perhaps to distinguish it from "liability" on the cheque, which may be taken to denote responsibility prior to the commencement of the process of payment. Yet, as discussed below, "accountability" is still a form of liability to be discharged by "final payment"; hence the distinction between "accountability" and "liability" is not iron-clad.

⁷² See *e.g.*, *White v. Royal Bank of Canada* (1923), 53 O.L.R. 543, [1923] 4 D.L.R. 1206 (Ont. C.A.) where it was successfully argued that when the branch of the drawee bank on which a cheque was drawn stamped the cheque "paid", and made out a credit slip, also stamped "paid", in favour of the branch of deposit (of the same bank), payment of the cheque had been made, even in the absence of a debit to the drawer's account, and could not have been revoked on notice of the insolvency of the drawer.

⁷³ Under §4-109 of the pre-1990 Official Text of the American Uniform Commercial Code, the "process of posting", whose completion, under §4-303(d), marked payment, was defined to mean "the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank: (a) verification of any signature; (b) ascertaining that sufficient funds are available; (c) affixing 'paid' or other stamp; (d) entering a charge or entry to a customer's account; (e) correcting or reversing an entry or erroneous action with respect to the item."

⁷⁴ Hence, in the present (1990) Official Text of Article 4 of the American Uniform

The second option attempts to identify the latest point in which the drawee bank is allowed to return a cheque dishonoured.⁷⁵ Having not properly exercised the right to return the cheque, the drawee bank must then be taken as agreeing to honour it so as to become irrevocably liable. In the absence of any specific statutory provision on the point, identification could be made by reference to procedures and rules governing the interbank clearing process. Indeed, interbank clearing rules are universal in setting a time limit for the return of a dishonoured cheque. Accordingly, a convenient point of reference is that of the loss of the right to return a dishonoured cheque, effectively resulting in the revocation of the provisional settlement for it on the day of its delivery to the drawee bank.

In line with the second option, UCC §4-302(a)(1) provides for the accountability of the drawee bank upon the failure to timely return or send a notice of dishonour for a cheque presented to it.⁷⁶ The deadline for the return or the dispatch of the notice is usually⁷⁷ the “midnight deadline”, defined in §4-104(10) as the midnight of the “next banking day following the banking day” of the receipt of the cheque. This is a general rule, independent of any governing interbank clearing rule or agreement. Payment in discharge of this accountability obligation may either precede or follow the point of accountability, and is in the form of final payment under §4-215, where it is not made in cash, it is carried out by either the failure, or lack of legal right, to revoke provisional settlement as provided by “statute, clearing-house rule, or agreement.”⁷⁸

Commercial Code, “the process of posting has been abandoned as inappropriate for automated check collection.” See Official Comment 4 to present §4-303. See also Official Comment 5 to §4-215 highlighting the existence of “[d]ifficulties in determining when the events described in the former Section 4-109 take place” so as to “make the process of posting unsuitable for a system of automated check collection or electronic presentment.”

⁷⁵ Return of the cheque is broadly used here to cover circumstances, if any, under which the drawee bank lawfully demonstrates its rejection of payment, *e.g.*, by sending an advice, without physically returning the cheque.

⁷⁶ For speculating on the use of “accountability” in this context, see n. 71 *supra*.

⁷⁷ The one exception under s. 4-302(a)(1) is the accountability of a drawee bank for an interbank cheque retained by it “beyond midnight of the banking day of receipt without settling for it”.

⁷⁸ For “final payment” under s. 4-215 see paragraph containing n. 62 *supra*. Note that under UCC Article 4, events triggering “accountability” under §4-302(1) or constituting “final payment” under §4-215 are not the only events which under §4-303(a)

In the context of interbank clearing, “final payment” will typically occur by inaction, that is, by means of the failure to revoke the provisional settlement given at the time the cheque was originally given to the drawee bank.

No similar statutory provisions exist in Canada. At the same time, under CPA Clearing Rules, whenever payment is refused or cannot be obtained, a dishonoured cheque shall be returned by the drawee to the bank of deposit “no later than the Business Day following receipt by the first organizational unit of the Drawee that is able to make or act upon a decision to dishonour the [cheque].”⁷⁹ With regard to both the obligation to return and its timing, this is similar to the scheme under the UCC, except that the aforesaid Canadian Clearing Rules provision is not accompanied by a statement as to any result, provided by statute or even Clearing Rule, as to the failure to comply with it. The question is then if even in the absence of a statutory framework, as under the UCC, payment for a cheque that has not been timely returned can be said to occur at the expiration of period set out for its return.

Support for the accountability of the drawee bank and the occurrence of payment by it to the presenting bank, in connection with the late return of a cheque, can be drawn from two recent Canadian cases dealing with disputes between CPA member banks.

*National Bank of Greece (Canada) v. Bank of Montreal*⁸⁰ (NBG) was an appeal by the National Bank of Greece (NBG) from a decision by the CPA requiring it to pay the Bank of Montreal (BMO) the face value of a cheque returned dishonoured beyond the next-day deadline. The cheque was drawn on NBG and deposited by its payee-holder to

defeat competing notice, stop-payment order, legal process or setoff with respect to the cheque; other enumerated events are acceptance or certification of the cheque, and a cutoff hour, set at the close of the banking day that immediately follows the banking day the bank received the cheque, but which may be fixed to occur earlier, though not “earlier than one hour after the opening of [that immediately following] . . . banking day.”

⁷⁹ Section 5 to CPA Rule A4 Returned and Redirected Items, governing time limitation for return, quoted in part in text at n. 54, 56, and 69 *supra*. Exceptions to both the right to return and the time limit are set out in ss. 4 and 6 *ibid*.

⁸⁰ (1999), 1999 CarswellNat 1860, [1999] F.C.J. No. 1694, 175 F.T.R. 232 (Fed. T.D.) (Pelletier J.), *aff'd* (2000), 2000 CarswellNat 3127, [2000] F.C.J. No. 2105, 2000 CarswellNat 3495, 266 N.R. 361, [2001] 2 F.C. 288, 30 Admin. L.R. (3d) 147, 196 F.T.R. 320 (note) (Fed. C.A.) (Evans J.A.).

the credit of its account with BMO, which used the CPA interbank cheque clearing system for delivering the cheque to the Royal Bank of Canada (RBC), acting as NBG's clearing agent. RBC duly presented the cheque to NBG. In the facts of the case, NBG returned the cheque dishonoured to RBC "more than one day after the cheque came to the attention of a bank officer having authority to deal with the cheque," thereby breaching the aforesaid Rule A4(5). In turn, "for reasons which were not made clear, the cheque remained with RBC" for close to a month, before RBC returned it to BMO.⁸¹

Effectively then, the sum of the cheque was included in the daily Bank of Canada settlement between BMO and RBC, as part of the balance of the daily exchange in which the cheque was included. It was posted as a credit to BMO and debit to RBC. RBC then charged NBG's correspondent account with it. Upon the return of the cheque, its sum was included in the daily Bank of Canada settlement between BMO and RBC as part of the balance of the daily exchange in which the returned cheque was included. It was posted as a debit to BMO and credit to RBC; the latter then credited the sum of the returned cheque to the account of its correspondent NBG. In turn, BMO then debited the account of its customer, the payee/holder of the cheque. It then sought to recover from NBG the amount so debited to its settlement account with the Bank of Canada.

In its judgment, the Federal Court endorsed the decision of the CPA Compliance Panel and upheld the restitution order. While recognizing that "the clearing and settlement system is not a proper forum for adjudicating disputes which are fundamentally disputes between banks' customers," the Court condemned the NBG's "self-serving behavior" and stated that "It does [not] [sic] lie in the mouth of a bank to misuse the system to avoid a loss, and then to argue that the rules are not intended to deprive it of the profit of its non-complying behavior." In the view of the Court, a CPA bank member that "gains an unfair advantage by its breach of the rules should be required to disgorge that advantage without requiring another bank to elect whether it should stand on its strict legal rights with its customer or absorb the loss itself."⁸²

⁸¹ *Ibid.* (TD), paras. 9 and 7.

⁸² *Ibid.* (TD), para. 19. For the Compliance Panel and its order, see reference in Goodman *supra*, n. 4 at 103 n. 14.

Indeed, the case did not go as far as explicitly stating that by failing to return the cheque by the next-day deadline the drawee bank became accountable and thereby, by its failure to revoke its provisional settlement, it must have been taken as having made final payment on the cheque. Nevertheless, in allowing BMO to hold on to the proceeds of the late returned cheque the Court effectively recognized that the cheque had been paid through the interbank settlement upon the failure to make a timely return.

The second case is much more direct on this point. *Banque Nationale du Canada v. Caisse centrale Desjardin du Québec*⁸³ (*BNC*) was an action by Banque Nationale du Canada (BNC), the bank of deposit, against Caisse, the purported drawee bank, for the amount of a cheque that the latter delayed its return beyond the next-day deadline set by the above mentioned s. 5 of Clearing Rule A4. In holding for the bank of deposit on the basis of the interpretation of the CPA Clearing Rules, the Quebec Court of Appeal specifically treated the original settlement, upon the delivery of the cheque by the bank of deposit to the drawee bank, as provisional and subject to revocation within the procedures established by CPA Rules. In the view of the Court, it follows from the language of Rule A4, "that a cheque which is not returned within the time limit is deemed paid and that the provisional payment made upon the clearing of the cheque becomes definitive upon the expiration of the time limit."⁸⁴

In *Advance*, had it been found that TD, the drawee bank, held on to the cheque beyond next-day deadline under s. 5 of the abovementioned Clearing Rule A4, the unavoidable conclusion, under both *NBG* and *BNC*, would have been that payment was made. Yet in both cases, litigation took place between two CPA member banks. In contrast, *Advance* was not a CPA member.⁸⁵ The impact of this fact is discussed immediately below.

⁸³ 2001 CarswellQue 597, [2001] R.J.Q. 846, [2001] R.R.A. 332 (Que. C.A.).

⁸⁴ *Ibid.*, at para. 33: "Il s'infere de la Règle 4-A qu'un chèque non retourné dans le délai est censé payé et que le paiement provisoire lors du passage du chèque au système de compensation devient définitive à la expiration du délai."

⁸⁵ For the facts of *Advance*, including its status as a bank not member of the CPA, see sections 1 and 2 of this article *supra*.

(d) Was TD Liable? — Advance's Rights and Remedies

In the United States, under UCC §4-103(b), "clearing-house rules . . . have the effect of agreements . . . whether or not specifically assented to by all parties interested in [cheques] handled." They are thus binding and inure to the benefit of bank customers using the services of banks that agreed to such clearing-house rules. However, in the absence of such a statutory provision, the Canadian position is quite the opposite: "the dealings sanctioned as between the banks by the voluntary association in the clearing-house system . . . is a matter not binding per se on the public. . . ."⁸⁶ This position was re-stated in connection to the clearing rules promulgated by the CPA. Viewed as an interbank binding contract setting standards and conferring rights and obligations on member banks,⁸⁷ they are to be treated as neither binding nor benefiting non-members. As was stated in *NBG*, "It is clear that [CPA] clearing and settlement rules and bylaws do not create rights and obligations on the part of banks to their customers. . . Any rights and remedies created by the rules are between banks and the CPA."⁸⁸

It was against this background that *National Slag v. CIBC*⁸⁹ can be rationalized. This was an action by a depositor against both the depository and drawee banks on the basis of the late return of a dishonoured cheque by the drawee. Speaking for the Ontario Court of Appeal, MacKinnon A.C.J.O. recognized that the drawee bank contravened the clearing-house rules, yet he added, "it was not in breach of any duty it owed the appellant."⁹⁰ In Crawford's view, "[t]hat is certainly an easy position to defend. . . Clearing Rules are internal documents, binding on the members of the CPA. . . but conferring no benefit and imposing no burdens on members of the public."⁹¹

⁸⁶ *Sterling Bank v. Laughlin* (1912), 3 O.W.N. 643, 1 D.L.R. 383 (Ont. C.A.). Yet, the statement was qualified. See *infra*, text at n. 105.

⁸⁷ See e.g., *National Bank of Greece (Canada) v. Canada Permanent Trust Co.*, [1987] R.J.Q. 607 (Que. S.C.).

⁸⁸ *Supra*, n. 80 (TD) at para. 14.

⁸⁹ *Supra*, n. 21 (C.A.), cited with approval in *Bank of Nova Scotia v. Regent Enterprises* (1997), 1997 CarswellNfld 284, 157 Nfld. & P.E.I.R. 102, 486 A.P.R. 102 (Nfld. C.A.) at para. 37.

⁹⁰ *Ibid.*, at para. 37.

⁹¹ *Supra*, n. 3 at 16.

This position was fully endorsed in *Advance*;⁹² while being a bank and not an ordinary non-bank customer, *Advance* was not a CPA member. There may be an irony in seeing a bank denied recovery on the basis of case law that focused on denial of rights to bank customers. Nevertheless, it is beyond any doubt in relation to the Clearing Rules, as a non-member *Advance* was not entitled to a treatment other than that given to all non-members, whether they are banks or non-bank customers.

Case law on the point is not uniform in insulating member banks from liability other than to fellow members.⁹³ Holding in favour of a depositor suing the depositary bank on the basis of the delayed return of a cheque, *Riedell v. Commercial Bank of Australia Ltd.*,⁹⁴ a leading Australian case, concluded that “payment” occurred by the expiration of the time prescribed for “returns” under the clearing rules. In thus holding that at that point of time, credit given to the depositor upon the deposit of the cheque at the depositary bank became final and irrevocable, the Court reasoned as follows:

The [depository] bank dealt with the cheque . . . in the capacity of agent for the [depositor] In discharge of its duty to make a prompt presentation of the cheque . . . the bank was entitled to use the ordinary machinery of the clearing The [depositor] could not complain of any delay involved in the clearing house practice. . . . On the other hand he was entitled as between himself and his agent to have the benefit of any advantage arising from the use of the machinery of the clearing.⁹⁵

One appellate authority in Canada, *Stanley Works of Canada Ltd. v. Banque Canadienne Nationale*,⁹⁶ reached a similar result, rationalizing it on the depositary bank’s duty to exercise reasonable diligence for the

⁹² *Supra*, n. 1 at 52-53.

⁹³ Canada and other BEA jurisdictions are not the only ones to struggle with the issue. For a brief review covering France, Germany, Japan and Italy see Geva, *Bank Collections supra*, n. 37 at 178.

⁹⁴ [1931] V.L.R. 382 (S.C.).

⁹⁵ *Ibid.*, at 384.

⁹⁶ (1981), 1981 CarswellQue 31, [1982] R.L. 433, 20 B.L.R. 282 (Que. C.A.). See also *Royal Bank of Canada v. Blinn*, 1999 CarswellAlta 1252, 1999 ABPC 121 (Alta. Prov. Ct.), where *Stanley Works* was regarded (in para. 7) as a legal authority for the argument that the depositary bank “had a duty to enforce a due observance of the clearing rules on behalf of its customers”.

protection of the depositor's interests.⁹⁷ While the Court did not specifically hold that the cheque had been paid by virtue of the delay in its return, it held the bank of deposit accountable to its customer for any advantage or benefit derived from the clearing rule, including the benefit incurred by the non-timely return of the cheque by the drawee bank.⁹⁸

An alternative approach supporting recovery by the depositor emerges from *Midland Doherty c. Royal Bank of Canada*, another case that dealt with the late return of dishonored cheques.⁹⁹ The Quebec Court of Appeal declined to confer on the payee/holder the benefit accorded by the clearing rules; it neither held that payment occurred nor held the depository bank liable to the depositor for accepting the returned cheque outside the time limit. The Court nevertheless held the drawee bank liable to the payee/holder for actual loss suffered on the basis of reasonably supposing that cheques had been paid. In the facts of that case, the depositor's actual loss was in the amount of counter payments made to the drawer on the assumption that cheques previously issued by the drawer to the depositor had been paid. In holding the drawee bank directly liable to the depositor, the Court went beyond *Riedell* and *Stanley Works*. Yet, damages were limited to actual reliance based loss, which were less than the face value of the late returned cheques.

Among all these conflicting views it is *Riedell* that strikes as the more persuasive and in line with the Canadian position outlined above in section 4(c) of this article. While relativity may often be unavoidable, I do not feel compelled to conclude that a cheque is to be deemed paid between member banks but not between customers. True, customers have no standing to sue for the breach of clearing rules to which they

⁹⁷ But see *National Slag supra*, n. 21 at 384 (C.A.) where in similar circumstances the Ontario Court of Appeal effectively regarded the duty to be contracted out.

⁹⁸ *Stanley Works supra*, n. 96 provoked an exchange of opinions in the Bar Review. The judgment was supported by J. Choquette (1982), 60 Can. Bar Rev. 746 and criticized by B. Crawford (1983), 61 Can. Bar Rev. 921, who *inter alia* challenged the accuracy of the text of the specific clearing rule relied on by the Court (which in the pre CPA era was not a public document and had to be produced as a piece of evidence).

⁹⁹ [1984] C.S. 909 (Que. S.C.), partly rev'd [1990] AQ No. 10 (CAQ). In the facts of the case returned USD denominated cheques were mistakenly directed within the drawee bank from the branch to the data centre rather than to the international department; this resulted in a significant delay in their actual return to the depository bank (and hence to the depositor).

are not parties, yet, it does not follow that they cannot benefit from "payment" that occurred under them; this is simply an unwarranted derivation. Indeed, taken at face value, *National Slag* is to be read as conferring on the drawee bank, acting with the consent of the presenting bank, an open-ended right to return a cheque at any time so that the depositor can never know whether it has been paid.¹⁰⁰ This conclusion is untenable; it would have eliminated any certainty as to the discharge of obligations paid by cheque. Not surprisingly, on occasion, courts have sought to avoid it. Thus in *Toronto Dominion Bank v. Reeser*, the drawee bank sought to return through the clearing a series of cheques, presented to the drawee bank between 7 and 20 months earlier. The Court declined to follow *National Slag*, rather, it held that pertinent cheques "were honoured on presentment" and thus cannot be returned.¹⁰¹

Indeed, certainty of payment is a fundamental objective of any non-cash payment system.¹⁰² True, no compelling regulatory concerns may require the achievement of such certainty in the cheque collection system;¹⁰³ yet, certainty of payment is extremely important to the parties to the cheque transaction. Typically, it is only when the cheque is paid that the debt for which it was given is discharged.¹⁰⁴ And while it is inherent in the cheque collection machinery that no advance guarantee may be given as to the exact time of payment, in retrospect there must be a point of time in which a cheque ought to be treated as "paid", and hence the debt paid by it is absolutely discharged. In short, having presented a

¹⁰⁰ *Quarre* whether a cheque is to be taken as "paid" on its return to the drawer, or the inclusion of its amount in a bank statement. Nevertheless, not all cheques are returned to the drawer and periodic statements may be submitted under qualifications and reservations so as not to be regarded as account stated. Also, all these are facts that may not be known to the depositor and may take place long after the clearing of the cheque and its "final payment" between the banks; it is thus both unfair and impractical to have the occurrence of "payment" dependent on them.

¹⁰¹ No 238131/85, Ont. Dist. Ct. Civ. Div. (November 4, 1987).

¹⁰² Where payment is made in cash, the physical delivery of the money marks the conclusion of payment and the discharge of the debt so paid. It is thus necessary in a non-cash payment to find a functional equivalent. *Cf.* discussion, though in connection with a credit transfer to a bank account, by Brandon J. in *The Brimne supra*, n. 66 (QBD, Adm. Ct.).

¹⁰³ See CPSS, *Core Principles of Systematically Important Payment Systems* (Basle: BIS, January 2001) at 70-75.

¹⁰⁴ This is so since payment by cheque is presumed to be conditional. See *Charge Card Services Ltd., Re* (1988), [1989] Ch. 497, [1988] 3 All E.R. 702 (Eng. C.A.).

cheque for payment through the interbank clearing system, a holder is likely to be cognizant of the fact that no confirmation as to payment will ever be given so that in effect, “no news is good news”. Yet there ought to be a point of time in which the holder is entitled to suppose the occurrence of payment, or at least be able to verify it. The position under which the holder’s bank is protected from a late return of the cheque but not the holder is untenable.

Two principal reasons will be mentioned as to why, as a matter of strict legal analysis, lack of entitlement by customers to the benefit of “payment” is an unwarranted derivation from their lack of privity under clearing rules. First, even *Sterling Bank v. Laughlin* itself, the *locus classicus* for the lack of standing of customers to sue and be sued on the basis of clearing rules, did not rule out the incorporation of such rules into banking contracts on the basis of usage. It effectively held that “the dealings sanctioned as between the banks by the voluntary association in the clearing-house system . . . is a matter not binding per se on the public *unless it can be assumed or proved that the party sought to be charged has been dealing with the bank subject to the usage of the clearing house.*”¹⁰⁵ Arguably, *Riedell*¹⁰⁶ made the required assumption whose effect is to provide the link allowing the bank customer to benefit from the rules inuring to the benefit of his or her agent.¹⁰⁷

Second, I agree that deeming interbank payment to occur does not justify a direct cause of action of the depositor against the drawee bank. Crawford is absolutely right in pointing out that BEA, s. 126 precludes an action by the holder against a drawee of an unaccepted bill of exchange, including a cheque.¹⁰⁸ True, to distinguish liability to make payment — barred under the aforesaid s. 126, from accountability or liability incurred in the process of payment that has allegedly been made, is not entirely impossible.¹⁰⁹ Yet this is too fine a distinction, and quite a tenuous basis for allowing direct recovery by the depositor from the drawee bank. Indeed, other than *Midland Doherty*, leading cases did not

¹⁰⁵ *Supra*, n. 86 (emphasis added).

¹⁰⁶ *Supra*, n. 94.

¹⁰⁷ See quotation in text at n. 95 *supra*.

¹⁰⁸ *Supra*, n. 3 at 5-7. In its relevant part, the provision flatly states that “the drawee of a bill who does not accept as required by this Act is not liable on the instrument.” In *Advance* no acceptance took place. See *supra*, section 4(a) of this article.

¹⁰⁹ *Cf.* n. 71 *supra*.

allow the depositor to recover from the drawee bank.¹¹⁰ Thus, in the final analysis, in dismissing *Advance's* action against TD, the drawee bank, *Advance* was correctly decided.

At the same time, the foregoing analysis does not preclude recovery by the depositor from the depositary bank. In the interbank cheque collection system, the drawee bank pays the presenting bank, where the latter is the depositary bank it acts as the agent for the depositor, otherwise it acts as a subagent. Either way, the depositor may recover only from the depositary bank, the depositor's own agent, who is also responsible to the depositor for acts or omissions of any other collecting bank, including the presenting bank, acting in the collection as a subagent.¹¹¹ In any event, recovery by the depositor from the depositary bank is simply on the basis of receipt of payment, whether directly, or through a subagent, rather than on the breach of contract or tort duty.¹¹²

5. CONCLUDING OBSERVATIONS: THE OVERALL FRAMEWORK

By itself, deeming payment to occur on the basis of the failure to meet the time limits for the return of a dishonoured cheque as set out by clearing rules is not an all-inclusive principle of law, covering all situations. It does not cover "on-us" cheques,¹¹³ interbank cheques dealt

¹¹⁰ This applies to *Riedell supra*, n. 94, *Stanley Works supra*, n. 96, and *Reeser supra*, n. 101, all of which allowed recovery from the depositary but not the drawee bank.

¹¹¹ For the chain of liability in agency under the common law see *e.g.*, R. Powell, *The Law of Agency*, 2nd ed. (London: Pitman, 1961) at 309. For the classic common law position with regard to the legal nature of the payment order and the resulting chain of liability see *Royal Products v. Midland Bank* [1981] 2 Lloyd's L.R. 194, 198 (Q.B.) (Webster J.). The case was concerned with a payment order initiating a credit transfer; yet the pertaining analysis equally applies to instructions initiating cheque collection such as those given by the depositor.

¹¹² In the case of more than one collecting bank, that is, where the presenting bank is other than the depositary bank, whether recovery by the depositor from the depositary bank is as early as of receipt of payment by the presenting bank, or only as of receipt of payment by the depositary bank, will not be dealt with in this article. In the United States, under UCC §4-215(d), "If a collecting bank receives a settlement for [a cheque] which is or becomes final, the bank is accountable to its customer for the amount of the [cheque] and any provisional credit given for the [cheque] in an account with its customer becomes final." This seems to point out at the entitlement of the depositor to recover from the depositary bank only as arising on receipt of payment by the depositary bank itself.

¹¹³ As was the case in *Process Piping Specialties c. Banque Canadienne Imperiale de*

with outside the regular interbank clearing system,¹¹⁴ and possibly, depending on the actual language of applicable clearing rules, even the return of a dishonoured cheque outside the system.¹¹⁵ There is however a broader framework into which all such cases fall.

At the crux of the matter is the centrality of the presentment requirement and the definitiveness of the response required from the drawee bank, by either honouring or dishonouring the cheque; there is no midway between these two options, that of payment and refusal to pay. Indeed, payment in cash is not mandated. In deference to commercial usage and practice, recognition is to be given to non-cash payment occurring in the course of the interbank cheque clearing and settlement. It is however in this context that an obligation to pay and actual payment are to be identified.

Notwithstanding MacKinnon A.C.J.O.'s statement in *National Slag*, the point is not that "one day's delay" in the return of the cheque cannot "turn a worthless cheque, by some legal legerdemain, into a good one."¹¹⁶ Rather, by not returning the "worthless cheque," in a timely manner, the drawee bank has manifested its intention to pay it, thereby turning it into "a good one." The situation becomes a usual case in which "a customer [drew] a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it"; on presentation, the cheque "constitutes a request to the bank to provide overdraft facilities . . .", with respect to which "[t]he bank has an option whether or not to comply. . ." In paying the cheque, the bank accepts the request and acts within its mandate; it become entitled to debit its customer's account, but may not recover from the recipient even when the payment was mistakenly made.¹¹⁷

Determining the point of time in which "payment" is made in the course of cheque clearing is not a matter of, strictly speaking, the interpretation of the clearing rules. Rather it is by reference to commercial

Commerce, 1986 CarswellQue 1161, [1986] R.J.Q. 2429 (Que. S.C.) that nonetheless purported to follow *Stanley Works supra*, n. 96.

¹¹⁴ As for example for a cross-border bank, presenting a cheque for collection outside the CPA operated cheque clearing system in Canada.

¹¹⁵ For this point, see Crawford *supra*, n. 3 at 14-15.

¹¹⁶ *Supra*, n. 21 (C.A.) at 383

¹¹⁷ *Barclays Bank v. W.J. Simms supra*, n. 31 at 238.

usage and practice, which may be evidenced by the clearing rule but need not be strictly governed by them. Even in the absence of a definite applicable clearing rule, either because it is not comprehensive or badly drafted, or whenever the clearing rule does not apply, as in the case of an "on us" cheque or a cross-border bank, a court is to determine the time the drawee bank assumed responsibility. In short, commercial usage and practice may be good enough to bypass cash payment but not to override the fundamental requirements of presentment and definite response to it. To that end, an applicable well written clearing rule is helpful and conducive to certainty, yet, in principle, it is not an absolute necessity. Where such a rule does not apply, a court will nevertheless have to decide as to the time of an "on us" cheque,¹¹⁸ as well as on the effect of a delay caused by either an intermediary bank,¹¹⁹ or a drawee bank that delayed the return of the cheque in holding on to it prior to its arrival to the organizational unit with the decision making power.¹²⁰

Indeed, "payment" will not easily be deduced from a clearing rule under all circumstances; to that end, a detailed statutory scheme, as under the UCC, providing for "accountability" and "final payment" by reference to specified statutory time limits,¹²¹ is helpful. Yet, even in the absence of such a scheme, so far as the Canadian interbank cheque clearing system is concerned, a similar result can be reached as a matter of statutory interpretation of the BEA in conjunction with general principles of law.

In the absence of "payment" generated by a delayed return, the depositary bank, as a collecting agent for the depositor, is responsible to the depositor for the negligence of every intermediary bank and that of the drawee bank, each of which acts in the collection process as the subagent of the depositary bank.¹²² Indeed, under the common law, direct

¹¹⁸ As in *Process Piping supra*, n. 113.

¹¹⁹ In fact, in *NBG supra*, n. 80, the major part of the delay in the return of the cheque was not attributed to the extra day it was retained with the drawee bank, but rather to the fact that "for reasons which were not made clear, the cheque remained with RBC" for close to a month, before it returned it to BMO. See *supra*, text at n. 81.

¹²⁰ Which would be the reverse of *Midland Doherty supra*, n. 99, where the delay occurred between the deciding organizational unit and the depositary bank.

¹²¹ See *supra*, discussion in paragraphs containing n. 76-78 and 62.

¹²² For the agency status of a collecting bank see *e.g.*, *Crawford supra*, n. 2 vol. 1 at 134 and 261. For the position of the drawee bank as an agent or sub-agent for the

liability of the drawee bank to the depositor, as was held under civil law in *Midland Doherty*, does not rest on firm ground.¹²³ However, to a depositor who suffered loss on the basis of the late return of a cheque, the depositary bank may be liable for damages; this however is a less promising alternative or avenue of recovery than on the basis of a debt owed on receipt of "payment", to be resorted only where no determination of "payment" has been made. As in *Midland Doherty*, in an action for damages rather than on a debt, actual loss to be recovered may not be to the full face value of the cheque.¹²⁴

In the final analysis, *Advance* was correct in disallowing the action against TD. Yet, TD "paid" the cheque. Under Canadian law,¹²⁵ *Advance* ought to have pursued its remedies from its collecting agent, American National Bank of Chicago.

depository bank see *Barclays Bank v. Bank of England supra*, n. 41, which specifically held that in passing on the cheque from the point of its delivery to it until actual presentment (at the branch), the drawee bank is acting as an agent for the presenting bank. Thus under the common law, the depositary bank in *Midland Doherty supra*, n. 99, would have held liable to the depositor for the negligence of the drawee bank; contrary to what was held under civil law, there would not be direct liability of the drawee to the depositor.

¹²³ On this point I am in agreement with Crawford *supra*, n. 3 at 16-19. Yet, it is to be noted that under the common law, the tort liability of a subagent to the principal is not all that impossible. See Powell *supra*, n. 111 at 309.

¹²⁴ See paragraph containing n. 99 *supra*. As well, for recovery of damages, both duty and its breach are to be established and proved.

¹²⁵ This appears to be the result also under the UCC. See text at n. 112 *supra*. Conflicts of laws issues are outside the scope of this article.