BANK OF MONTREAL v. BARBEAU *

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Section 21(5) of the Bills of Exchange Act [1] declares that where the payee of a bill of exchange is "a fictitious or nonexisting person, the bill may be treated as payable to bearer". "Bearer" means the person in possession of a bill or note that is payable to bearer s. 2(d); such person is the "holder" — s. 2(h). The ostensible significance of this provision is that if applicable, the acceptor of the bill (or drawee if no acceptance is necessary) cannot impugn the title of the person demanding payment from him on the ground that, since the bill is on its face an order instrument and the payee is 'fictitious', there could be no valid endorsement to the holder. The provision has, however, another significance — if the acceptor has paid the holder out of monies in his hands belonging to the drawer, or if he has a right of recovery against the drawer, the latter can neither plead that the acceptor has paid the wrong person and hence claim reimbursement nor that his adversary has lost his right of recourse, as the case may be.

While the policy of the provision is intelligible, its application has resulted in considerable litigation. Perhaps it can now be said that its construction is a matter of settled law. If so its application should not give rise to any greater difficulty than that ordinarily created by the special facts of a particular case.

Nevertheless, the application of the doctrine to cheques, a species of bills of exchange but distinguished from the genus by the special relationship existing between the drawer and drawee, has presented certain difficulties flowing from its almost *sui generis* character. The recent decision of the Quebec Court of Appeal in *Bank of Montreal* v. *Barbeau* [2] illustrates those difficulties and the manner in which the judicial process influences the development of the positive law.

The facts of the Barbeau case although not in dispute, are extremely important. Mr. Barbeau who was interested in buying

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* [1963] B.R. 755.

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1 R.S.C. 1952, C. 15.

2 (1963) B.R. 755.

real estate in Montreal appointed Gérard Tousignant, a truck driver and old acquaintance, his agent. The latter reported an offer of sale of a property for $8,500, which he said belonged to Léo Maher but which in fact belonged to Dame Rathé. As a result of this information Mr. Barbeau signed an offer to purchase this property for $8,500 and gave Tousignant as deposit a cheque for $1,000 drawn on the Canadian National Bank and payable to Léo Maher. Tousignant had the cheque certified at the Canadian National Bank and then went to the Bank of Montreal with a friend named Léo Maheu. Upon entering the bank, Maheu remained in the background and was unable to see or hear the events which followed.

Subsequently Tousignant endorsed the cheque using Léo Maher's name. This cheque was presented to Tousignant's half-sister who worked in the bank. Upon recognizing her brother she asked who Léo Maher was; when Tousignant pointed to Maheu in the distance, the cheque was cashed. Maheu was not asked to identify his signature nor was Tousignant asked to endorse the cheque in his own name. Later the Bank of Montreal collected payment from the Canadian National Bank. A few days later when Barbeau discovered the fraud, he notified both banks and sued the Canadian National Bank for not fulfilling its mandate to pay Léo Maher, the Bank of Montreal being brought in as surety.

Whether the bank was to sustain the loss depended on whether Léo Maher was considered to be "fictitious or non-existing" within the meaning of the Bills of Exchange Act. If the bank could establish this relying on section 21(5).

> "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

it would successfully defend the action. On the other hand, if Barbeau was to win his case it was necessary to show that the Canadian National Bank had wrongfully paid the Bank of Montreal. The only way to arrive at this conclusion was to make the cheque an "order cheque" with an invalid endorsement.[3] To do this it would be necessary for the court to reject the defence that the payee was "fictitious or non-existing."

The learned trial judge, Ferland, J., upheld[4] plaintiff's action on two separate grounds. (1) Regarding the question of the existence of Léo Maher, he concludes that Maher was in fact Maheu. It is submitted with all due respect that this belief concerning Tousignant's intention has no basis in fact; on the contrary if Tousi-

[3] Bills of Exchange Act, S. 49 (3).

[4] C.S., Montreal, No. 405818, 7 January 1963.

gnant had intended Maheu to be Maher he would have used Maheu's name instead of Maher and this would have in no way affected his plans. Therefore by using Maher he had clearly in mind a person distinct from Maheu. (2) But the *ratio decidendi* of his decision was the bank's lax behaviour regarding the cheque; it neither verified the identity and signature of the presumed endorser nor required that the bearer endorse the cheque. The Bank of Montreal was guilty of negligence and was thus to be held responsible.

The judgment of the Appeal Court rendered by Mr. Justice Choquette (Taschereau and Tremblay, J.J. concurring) also maintained the plaintiff's action, but on different grounds. The learned judge states that the crucial question to be decided is the interpretation of s. 21 (5).

> "Je crois, en effet, que le débat se résume à la question de savoir si le preneur, Léo Maher, est une "personne fictive ou qui n'existe pas", au sens de la loi."[5]

Referring to Falconbridge and the accepted jurisprudence he concludes that the question of "fictitious" is determined by an examination of the drawer's intention.

> "Ici, le tireur, André Barbeau, a manifestement eu l'intention de faire son chèque à l'ordre d'une personne existante que Tousignant lui déclara s'appeler Léo Maher."[6]

The determination of "non-existance" he states is a question of fact not of intention. It is important to note that on the facts as found by the trial judge, the name Maher did not correspond to any existing person in so far as the proof of the case was concerned. In spite of that finding the learned appeal judge went on to link Maher with Maheu. First he points out:

> "Dans son excès de confiance, Barbeau aurait tout aussi bien signé un chèque fait à l'ordre de Léo Maheu ou de toute autre personne que Tousignant lui aurait désigné comme propriétaire des lieux."[7]

Therefore he held that the word Maher referred to Maheu, the man who accompanied Tousignant to the bank, there being merely a misdescription on the cheque. To justify this conclusion he invokes the provisions of s. 64 of the Act.

> "Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is misspelt, he may endorse the bill as therein described, adding his proper signature; or he may endorse by his own proper signature."

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[5] *Op. cit.*, fn. 2, p. 757.
[6] *Ibid.*, p. 757.
[7] *Ibid.*, p. 757.

However in this context section 64 is irrelevant since it is only an enabling provision referring to the case where a person lawfully entitled to a bill is wrongly designated on the face of it. In this express situation the bill or cheque can be negotiated in accordance with s. 64. However, this section will *not* cure a defective title. Therefore, it is respectfully submitted that Choquette, J., by invoking section 64 as a means of providing Maheu with a good title to the cheque, was begging the question.[8]

In addition to having no basis in law, the similarity of Maheu to Maher, also has no basis in fact. Nothing in the case shows that Maheu was entitled to the cheque; on the contrary, Tousignant always used the name Maher and indeed when in the bank, Tousignant pointed out Maheu as Maher. (Clearly his endorsing as Maher was not a spelling mistake). Nor is the assumption that Barbeau would have accepted any name that Tousignant gave him, including Maheu, relevant. Since he did insert the name Maher it is the consequences which flow from that name that are of concern, not hypothetical situations.

A further difficulty in determining the question of "non-existence" and whether the name Maher on the cheque can apply to Maheu is raised by the learned judge:

> "S'agit-il d'une personne inexistant ? Voilà une question de fait et non une question d'intention."[9]

Yet his finding that Maher is an existing person is based not on facts but on an examination of intention.

> "Il me paraît manifeste que Léo Maheu était la personne que Tousignant entendait désigner comme hénéficiaire sous le nom de Léo Maher."[10]

In an orthodox bill of exchange, the principal debtor is not the party who creates the instrument (the drawer) but the drawee. On the other hand, the significant feature of the cheque is that the drawer is the principal debtor; the bank, unless it certifies the cheque, is merely the paying agent. This difference can have important practical results as seen in the jurisprudence.

In *Vagliano* v. *The Bank of England*,[11] the British courts were faced with an unprecedented set of circumstances which required the formulation of certain definite rules in connection with the interpretation of the term "fictitious or non-existing" payee. The facts of this well known decision are unique. Vagliano was a London

[8] Furthermore, since s. 64 deals with an "order" bill, a fact still undertermined, he is only circumventing the problem.

[9] *Op. cit.*, fn. 2, p. 757.

[10] *Ibid.*, at p. 758.

[11] (1891) A.C. 107.

merchant who kept his account with the Bank of England and made his numerous bills payable there. Among his foreign associates was Vucina who for several years had drawn a large number of bills upon him, several of them being to the order of C. Petridi and Company. His clerk, Glyka, seized on these facts and forged bills drawn by Vucina payable to Petridi and then procured Vagliano's genuine acceptance. The Bank would be instructed to pay the bills in due course. Glyka would forge the endorsement of C. Petridi and Co., present the bills and obtain the money. The House of Lords held that the drawer, Vucina, had no intention to pay Petridi, his name having been forged. Thus the payee was held to be 'fictitious' and the bank was entitled to debit the acceptor's account with the sum so paid. The *ratio decidendi* of the case constitutes the criterion for determining the content of 'fictitious'. One looks at the drawer's intention; if the drawer has named the payee "by way of pretence only, without the intention that the named payee shall be the person to receive payment then the payee is fictitious".[12]

However it is important to note that this fact pattern involved a bill of exchange in which the debtor is invariably the acceptor and not the drawer. In the case of a cheque the drawer as in the Barbeau case is invariably the debtor in the transaction and he naturally intends to pay the person designated,[13] unless the drawer himself is perpetrating a fraud or intending to negotiate the cheque in the name of the 'fictitious payee'.[14] The practical results of applying the Vagliano decision can be seen in the subsequent leading cases involving cheques.

In *Clutton* v. *Attenborough*,[15] where the payee was a non-existent person the fact that the drawers of the cheque believed and intended the cheques payable to the order of a real person resulted in the payee being "non-fictitious" within the meaning of the Act.[16] Similarly in *North and South Wales Bank* v. *Mac Beth*[17] where the payee did in fact exist, it was held: "where a cheque is drawn by a real drawer who designates an existing person as the payee and intends that that person should be the payee it is impossible that the payee can be fictitious."[18]

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[12] *Ibid.*, at p. 152.

[13] A fraudlent purpose will not be a defence in determining this intention, *Ibid.*, at p. 143.

[14] Cf. *Bank of Toronto* v. *Smith* (1950) 3 D.L.R. 164.

[15] (1897) A.C. 90.

[16] Section 7(3) of the United Kingdom Act which is identical with ours S. 21(5).

[17] (1908) A.C. 137; Similarly, *Vinden* v. *Hughes* (1905) 1 K.B. 795.

[18] MacBeth case at p. 139.

Since the drawer of a cheque is invariably the debtor in the transaction and therefore intends to pay, in nearly all cases the bank has lost on its plea of fictitious payee. However in one Ontario decision, *London Life Insurance Company* v. *Molson's Bank,*[19] followed in *Metropolitan Life Insurance Company* v. *Quebec Bank,*[20] a different criterion for determining the question of fictitiousness was put forward. An agent of the insurance company had policies issued in the names of existing persons but without their knowledge. He paid the premiums for a time, then submitted a forged proof of their death and other necessary papers. The company sent him the cheques in settlement, payable to the order of the respective claimants drawn on the Molson's Bank. He forged the endorsements and obtained the money. The Court of Appeal held that the payees were fictitious and the cheques were payable to bearer. The court arrived at its decision not by considering the intention of the drawer but by deciding whether the payee was fictitious in relation to the transaction. "... were the payees really and for all business or practical purposes, fictitious ?"[21] i.e. whether the payee was in fact fictitious for purposes of the transaction.

If this reasoning were to be followed then every bill, the drawing of which was induced by fraud, would be considered 'fictitious' and thus always payable to bearer. This case does not reflect the principles followed today and in fact was overruled in both *Bank of Toronto* v. *Smith*[22] and *Harley* v. *Bank of Toronto*[23] which adopted the reasoning of the *Mac Beth* case,[24] now the leading authority. In this latter case Lord Loreburn discussing the question of 'fictitious' payee distinguished the Vagliano case.

> "Since the Vagliano case is not a case in which the drawer intended the payee to receive the proceeds of the bill"...[25]

Regarding the question of "non-existing", the Courts have consistenly held it to be a question of fact. In *Clutton* v. *Attenborough*[26] since the payee was a non-existent person the court held that no one either could or did intend him to be the recipient of the proceeds of the cheque which as a result was treated as payable to bearer.[27]

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[19] (1904) 8 O.L.R. 238.
[20] (1916) 50 Que. S.C. 214.
[21] London Life Insurance *Op. cit.* at p. 244.
[22] (1950) 3 D.L.R. 169.
[23] (1938) O.R. 100.
[24] (1908) A.C. 137.
[25] *Ibid.*, at p. 140.
[26] *Supra.*
[27] Cf. *Canadian Bank of Commerce* v. *Rogers* (1911) 23 O.L.R., p. 109 at 120.

Therefore jurisprudence has authoritatively settled the issue of the 'fictitious' or non-existent payee. The question that remains to be answered is how sound is the Barbeau decision in the light of the foregoing principles.

In view of Barbeau's intention to pay Maher, it is submitted that the finding of 'non-fictitious' was rightly decided in law. However with all due respect, exception must be taken to the decision of the learned appeal judge regarding the question of "non-existing", for clearly in law and in fact the payee Léo Maher was non-existent and on this basis Barbeau's action should have failed.

The difficulties which arise from the finding that Léo Maher did exist cannot be reconciled in law. The conclusions of the court [28] that Maher existed in Tousignant's mind would mean that Tousignant was entitled to endorse as Maher; and therefore there was no forgery and therefore Barbeau had no action.

However one may argue that the basis for the decision is not to be seen in law but rather in the special circumstances of the case; namely that the Bank of Montreal's bad banking practice was not to be encouraged.

The Bank by arranging to honour Barbeau's cheques undertook to pay the named payees or their order. It was bound to do so only upon being furnished with proper evidence of the identity of the payees or of the genuineness of their endorsements and of subsequent endorsements, if any. Consequently the Bank was penalized for being negligent in not taking the ordinary precautions any Exchange Bank should take.[29] But to do this it was necessary to find the cheque payable to order and thus Tousignant's endorsement should be a forged one and Barbeau could recover from the Canadian National Bank (section 49(3)). Subsequently in view of section 50(1), the Canadian National Bank would recover from the Bank of Montreal which was to be ultimatley responsible.

Although on the surface the court's decision may appear arbitrary, it is submitted that equitable considerations, derived from the special circumstances of the case, provided the motivation. But clearly the decision is not founded on the accepted principles found in our jurisprudence. It is thus impossible to extract any *ratio decidendi* which might be useful in interpreting section 21(5).

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[28] *Supra*, at p. 758.

[29] Clearly one might question this, since the fact that Maheu was pointed out in the background as Maher shows the Bank's caution and good faith.

With this in mind and in view of the doctrine of *stare decisis* it is submitted that sec. 21(5) be amended by the competent legislature.[30]

The unfavourable position of Banks under the present law suggests not only an amendment to section 21 but also to the sections on forgery. Perhaps they should be afforded the same protection as is given British Banks[31] that have acted in good faith and in the ordinary course of business.

[30] The rule applied in the case of an orthodox bill cannot equitably apply to cheques. For a discussion as to the differences between a bill of exchange and a cheque cf. *Mullick* v. *Radakissen*, (1854), IX Moore 76; 14 E.R. 223, FALCONBRIDGE, *Banking and Bills of Exchange*. 6th Ed. pp. 871-874.

[31] 45 and 46 Vict., c. 61; s. 60.