Court File No. SCC 36918

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TEVA CANADA LIMITED

APPELLANT

and

TD CANADA TRUST and BANK OF NOVA SCOTIA

RESPONDENTS

and

CANADIAN GENERIC PHARMACEUTICAL ASSOCIATION

INTERVENER

JOINT FACTUM OF THE RESPONDENTS, TD CANADA TRUST AND BANK OF NOVA SCOTIA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

McCARTHY TETRAULT LLP
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto, Ontario M5K 1E6
Paul Steep/ Frank J. McLaughlin
Shanique M. Lake
Tel: (416) 601-7998 / (416) 601-7531 / (416) 601-7613
Fax: (416) 868-0673
psteep@mccarthy.ca / fmclaugh@mccarthy.ca

Counsel for the Respondent, TD Canada Trust

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Suite 1300, 100 Queen Street
Ottawa, Ontario K1P 1J9
Nadia Effendi

Tel: (613) 237-0234
Fax: (613) 230-8842

neffendi@blg.com

Ottawa Agent for the Respondents, TD Canada Trust and Bank of Nova Scotia

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario M5H 4E3
Martin Sclisizzi / Heather Pessione / Caitlin Sainsbury
Tel: (416) 367-6027 / (416) 367-6589 / (416) 367-6438
Fax: (416) 367-6749
msclisizzi@blg.com / hpessione@blg.com / csainsbury@blg.com

Counsel for the Respondent, Bank of Nova Scotia

FRED TAYAR & ASSOCIATES
Professional Corporation
Barristers and Solicitors
65 Queen Street West, Suite 1200
Toronto, Ontario M5H 2M5

Colby Linthwaite / Fred Tayar
Tel: (416) 363-1800 / (416) 363-3356
Fax: (416) 363-3356
colby@fredtayar.com / fred@fredtayar.com

LANGLOIS LAWYERS LLP
1250, Rene-Levesque Blvd. West, 20th Floor
Montreal, Quebec H3B 4W8

Karen M. Rogers
Danielle Ferron
Daniel Baum
Tel: (514) 842-9512
Fax: (514) 845-6573
karen.rogers@langlois.ca
danielle.ferron@langlois.ca
daniel.baum@langlois.ca

Counsel for the Appellant

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant, Teva Canada Limited

Liebman Légal Inc.
1750 - 1 Westmount Square
Montréal, Quebec
H3Z 2P9

Irwin I. Liebman
Moe F. Liebman

Tel: (514) 846-0666
Fax: (514) 935-2314
E-mail: irwin@liebmanlegal.com

Counsel for the Intervener, Canadian Generic Pharmaceutical Association

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax : (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Canadian Generic Pharmaceutical Association

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PART I. OVERVIEW

1. This appeal raises the issue of the applicability of the non-existing and fictitious payee defence in s. 20(5) of the *Bills of Exchange Act*, R.S.C., 1985, c. B-4 (the **"*BEA*"**),[1] in the context of employee cheque fraud. The Appellant admits that it had in place specific policies and procedures to ensure the proper authorization of its cheques, but those policies were not followed. No signing officer or directing mind of the Appellant (the drawer) considered the identity of the payees or whether the obligation was owed when the cheques were drawn.

2. The Appellant formed no intention whatsoever in relation to the payees of the cheques. As a result, the Court of Appeal correctly held that the Appellant cannot avail itself of the plausibility

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[1] *Bills of Exchange Act*, R.S.C. 1985, c. B-4 [**"*BEA*"**].

doctrine established in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*[2] (**"*Boma*"**) to escape the application of s. 20(5).

3. The purpose of s. 20(5) is to protect banks in appropriate circumstances from certain types of cheque fraud perpetrated by employees of drawers. The application of the statutory defence places the loss with the party who is in the best position to prevent or minimize the risk of employee cheque fraud: the drawer. It is thus consistent with the sound policy objectives of deterrence of future harm and risk minimization.

4. Two of the six payees in this case were, as a matter of objective fact, non-existing. All of the payees were fictitious in the sense that there were no underlying transactions or obligations giving rise to a debt to those payees. In these circumstances, the onus was on the Appellant to establish that the plausibility exception to s. 20(5) applied. The evidence proved the opposite: not only did the Appellant not have a plausible belief and intention in regard to the cheques, it had no intention whatsoever.

5. The unanimous judgment of the Court of Appeal correctly found that in the absence of any demonstrated intention on the part of the drawer, the cheques should be treated as payable to bearer as the payees were non-existing and fictitious pursuant to s. 20(5), and therefore the Appellant's claim in conversion must fail.

6. The Appellant now argues for a radical narrowing of the interpretation of s. 20(5) such that it would apply only to cases in which the drawer itself acted fraudulently. This narrow construction of the section is unsupported by *Boma*, other judicial authority or academic opinion.

7. Recognizing it formed no intention in respect of any of the cheques, the Appellant now argues that it should be allowed to benefit from a presumption of an honest intention to pay existing payees for real obligations *merely by virtue of the fact that there was an automated system in place to issue cheques.* This Court ought to uphold the Court of Appeal's finding that no such presumption of corporate intent is justified.

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[2] *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce,* [1996] 2 S.C.R. 727 [**"*Boma*"**], Appellant's Book of Authorities [**"ABA"**], Tab 6.

8. Given that none of the cheques were properly scrutinized or authorized as required by the Appellant's internal controls, its intention is unknown, unknowable, and therefore effectively absent.

9. This Court in *Boma* required evidence of actual, honest, and contemporaneous intention on the part of the drawer in order to avoid the application of s. 20(5). Faced with uncontroverted evidence that it had no intention in respect of the cheques at issue, the Appellant now asks this Court to extend the ratio in *Boma* in a way that would "render the fictitious payee defence under s. 20(5) of the *BEA* meaningless" [3] and make collecting banks the insurers of drawers who do not follow their own procedures.

10. Acceptance of the Appellant's position would countenance willful blindness on the part of drawers in issuing cheques. It would enable, rather than deter, employee cheque fraud by removing any incentive from drawers to supervise and control their cheque issuance procedures.

11. The rationale underlying the *BEA* is that collecting banks should be enabled to accept for deposit cheques which appear valid. Placing a duty on banks to interrogate the source of all cheques is antithetical to the policy of negotiability of transactions which underlies the *BEA*.

12. The Appeal Decision is correct in law and reaches a just result. It follows but distinguishes *Boma* on the facts.

13. While not required to dispose of this appeal, the appeal provides this Court with the opportunity to review *Boma* and to reconsider the proper interpretation of s. 20(5). The interpretation of s. 20(5) by the majority in *Boma* imported into the non-existing payee defence, which prior to *Boma* was a pure question of objective fact, consideration of the subjective state of mind of the drawer to determine whether the drawer had an honest, plausible, mistaken belief that a non-existing payee was a real payee to whom a debt was owed.

14. In this respect the majority judgment in *Boma* led to commercial uncertainty. The cases subsequent to *Boma* confirm this. The interpretation of the meaning of "fictitious" and "non-

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[3] *Teva Canada Limited v. Bank of Montreal*, 2016 ONCA 94 [**"Appeal Decision"**], at para 75, Appellant's Record [**"AR"**], Vol I, Tab 1C.

existing" in s. 20(5) as requiring investigation into the subjective state of mind of the drawer occurred in part because Canadian courts have treated Falconbridge's four propositions as akin to statutory rules. In fact, they are mere interpretive guides and are not a complete code of principles. Falconbridge's fourth proposition in particular has been used by Canadian courts in a manner that has resulted in departure from the proper meaning of s. 20(5).

15. It is submitted that s. 20(5) should be interpreted to give effect to its plain meaning and in its proper context. Both the non-existing and fictitious payee defences should be determined as objective questions of fact, which are not reliant on the drawer's intention.

16. While reconsideration of the broader issue of subjective intent is *not* required to uphold the Appeal Decision in this case, addressing it would give this Court the opportunity to facilitate greater commercial certainty in the law and efficiency of dispute resolution.

A. Statement of Facts

17. Between August 2003 and July 2006, Neil McConachie (**"McConachie"**), an employee of the Appellant Teva Canada Inc. (formerly and at the time known as ratiopharm Inc.) (**"Teva"**), perpetrated a cheque fraud totalling in excess of $7 million. The fraud was ultimately detected by The Bank of Nova Scotia (**"Scotiabank"**) and McConachie's employment was terminated for cause.[4]

18. McConachie was a finance manager employed in Teva's finance department. He was not an officer or director of the company and did not have authority to authorize or sign cheques. He reported to Teva's controller, and later to its CFO, Michael Schmid, who is Teva's witness in this case.[5]

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[4] Appeal Decision, at para. 8, AR, Vol I, Tab 1C; Affidavit of Peter Dent sworn February 8, 2010 at para. 13, AR, Vol I, Tab 3A; Transcript of the Cross-Examination of Peter Dent, June 25, 2012 [**"Dent Transcript"**], qq. 25 – 29, Respondents' Record [**"RR"**], Vol I, Tab 2, pp.14 – 15.

[5] Appeal Decision, at para. 8, AR, Vol I, Tab 1C; Transcript of the Examination for Discovery of Neil McConachie held June 24, 2009 [**"McConachie Transcript"**], qq. 153, 155 – 156, RR, Vol I, Tab 1, p.7.

19. Teva maintained a rebate program that it euphemistically labelled the Continuing Education Program (**"CE Program"**).[6] It had nothing to do with education. It was a program whereby Teva paid millions of dollars to pharmacies and other entities as inducements to buy Teva's products.[7] This practice was subsequently banned by regulation.[8]

20. Teva made payments in the tens of millions of dollars through the CE Program. McConachie was responsible for administering the CE Program and exploited it to perpetrate his fraud.[9]

21. McConachie's responsibilities did not include initiating or requesting payments. He functioned as a sort of "middleman". Once payments were approved by his superiors, McConachie was responsible for final review and faxing of the completed cheque requisition to Teva's accounts payable department. Issued cheques were generally returned by the account payable department to McConachie for distribution to the requesting Teva account manager, who would provide them to the customer.[10]

22. Through his role as finance manager, McConachie was able to circumvent Teva's policy and procedure for issuing cheques. He created fraudulent cheque requisitions thereby duping Teva's accounts payable department into issuing cheques to fictitious and non-existing payees. He then misappropriated the cheques and deposited them at accounts he had opened at the Respondent banks (the **"Banks"**).[11] The fraudulent cheques issued by Teva and deposited at the Banks by McConachie or his associates are referred to herein as the **"Cheques"**.

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[6] Appeal Decision, at paras. 9 – 11, AR, Vol I, Tab 1C.

[7] Appeal Decision, at para. 9, AR, Vol I, Tab 1C; Affidavit of Michael Schmid sworn February 11, 2010 [**"Schmid Affidavit"**], at para. 4, AR, Vol. II, Tab 3B; Transcript of Cross-Examination of Michael Schmid, July 25, 2012 [**"Schmid Transcript"]**, qq. 158 – 160, 177 – 178, RR, Vol I, Tab 3, pp. 30, 32; Dent Transcript, qq. 239 – 240, RR, Vol I, Tab 2, pp. 21 – 22; McConachie Transcript, qq. 46 – 47, RR, Vol I, Tab 1, pp. 3 – 4.

[8] Appeal Decision, at para. 10, AR, Vol I, Tab 1C.

[9] Appeal Decision, at para. 11, AR, Vol I, Tab 1C.

[10] Schmid Affidavit, at paras. 4 – 6, AR, Vol. II, Tab 3B; McConachie Transcript, qq. 58 – 59, 107, RR, Vol I, Tab 1, p. 6; Schmid Transcript, qq. 222 – 224, RR, Vol I, Tab 3, p. 38.

[11] Appeal Decision, at paras. 14 – 16, AR, Vol I, Tab 1C.

23. Teva adopted a cheque approval policy in June, 2005, that required approvals by specific corporate officers depending on the amount of the cheque requested. If the amount requested was more than $50,000, approval by Teva's CFO was required. If the amount requested was more than $100,000, approval by both the CFO and the VP Sales and Marketing was required.[12] However, as Mr. Schmid admitted on cross-examination, this approval process was not followed when the Cheques were issued.[13] Although the vast majority of the Cheques were in amounts exceeding $50,000, and many exceeded $100,000, none of the Cheques were approved by the CFO or the VP Sales and Marketing. Contrary to Teva's internal approval requirements:

(a) the Cheques were requisitioned and approved solely by McConachie, who had no authority to do so;

(b) "all of the forms were not approved in accordance with the proper policy";

(c) special approvals required by officers of the corporation for cheques exceeding prescribed monetary thresholds were not obtained;

(d) the Cheques were issued by Teva's accounts payable department "notwithstanding that they knew that McConachie had no authority to [requisition or to] approve these payments"; and

(e) no signing officer or directing mind of Teva examined, or even turned his or her minds to, the Cheques.[14]

24. Despite defects that were evident on the face of the requisitions for the Cheques, clerks in Teva's accounts payable department mechanically processed the Cheques without question and

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[12] Appeal Decision, at para. 13, AR, Vol I, Tab 1C; Schmid Affidavit, at para. 6, AR, Vol. II, Tab 3B; Schmid Transcript, q. 218, RR, Vol I, p. 37.

[13] Appeal Decision, at paras. 14 – 15, AR, Vol I, Tab 1C; Schmid Affidavit at para. 7, AR, Vol. II, Tab 3B; Schmid Transcript, qq. 186 – 187, 211, 222 – 224, 241 – 244, 275 – 276, 324 – 336, RR, Vol I, Tab 3, pp. 34, 36, 38, 41 – 42, 44, 48 – 51; Dent Transcript, qq. 151 – 152, RR, Vol I, Tab 2, pp. 19 – 20.

[14] Appeal Decision, at paras. 14 – 15, AR, Vol I, Tab 1C, p. 19; Schmid Affidavit at para. 6, AR, Vol. II, Tab 3B; Schmid Transcript, qq. 211, 230, 281 – 282, RR, Vol I, Tab 3, pp. 36, 39, 45.

returned them to McConachie, who misappropriated them.[15] Mr. Schmid admitted that all of the Cheques were mechanically signed and that no officer of Teva saw the Cheques or was aware of them. None of Teva's cheque signing officers, whose facsimile signatures were mechanically affixed to the Cheques, had any involvement whatsoever in the authorization or preparation of the Cheques.[16]

25. McConachie or his associates deposited 43 fraudulent cheques, in the aggregate amount of $3,949,481, in bank accounts at Scotiabank. McConachie or his associates deposited 20 fraudulent cheques, in the aggregate amount of $1,533,768.43 in accounts at TD Canada Trust (**"TD"**).[17] It is common ground that the Respondents were innocent dupes in McConachie's fraudulent scheme.[18]

26. Each of the accounts McConachie used to deposit the Cheques was opened in the name of a sole proprietorship which McConachie or his associates registered pursuant to applicable provincial legislation.[19]

27. McConachie caused Teva to issue fraudulent cheques to six different payees: (1) PCE Pharmacare; (2) Pharma Team System; (3) Phamachoice; (4) London Drugs; (5) Pharma-Ed Advantage Inc.; and (6) Medical Pharmacies Group. Two of these payees, PCE Pharmacare and Pharma Team System, were imaginary names created by McConachie. They were not real entities, and never had legitimate business activities or dealings with Teva.[20] The other four payees,

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[15] Appeal Decision, at paras. 14 – 15, AR, Vol I, Tab 1C; McConachie Transcript, qq. 320 – 321, RR, Vol I, Tab 1, p. 12; Schmid Transcript, qq. 281 – 282, RR, Vol I, Tab 3, p.45.

[16] Appeal Decision, at para. 16, AR, Vol I, Tab 1C; Schmid Affidavit, at para. 10, AR, Vol. II, Tab 3B; Schmid Transcript, qq. 283, 285 – 287, 324 – 336, RR, Vol I, Tab 3, pp.45, 45 – 46, 48 – 51; Answers to Undertakings of Michael Schmid (**"Schmid Answers to Undertakings"**), AR, Vol. II, Tab 3E; Dent Transcript, qq. 139 – 140, RR, Vol I, Tab 2, pp.17 – 18; McConachie Transcript, q. 211, RR, Vol I, Tab 1, p. 10.

[17] Appeal Decision, at paras. 19, 22, AR, Vol I, Tab 1C. pp. 21, 22. The balance of the cheques were deposited at CIBC and are not part of this litigation.

[18] Appeal Decision, at para. 22, AR, Vol I, Tab 1C.

[19] *Business Names Act*, R.S.O. 1990, c. B-17; Appeal Decision, at paras. 18, 20, AR, Vol I, Tab 1C, p. 21.

[20] Appeal Decision, at para. 48, AR, Vol I, Tab 1C.

Phamachoice, London Drugs, Pharma-Ed Advantage Inc. and Medical Pharmacies Group, were current or former customers of Teva. No obligations were owed to any of the payees at the times the Cheques were issued.[21]

28. McConachie was able to continue his illegal activities for so long because Teva completely failed to follow its own cheque approval policy. The Cheques were requisitioned without compliance with Teva's corporate control policy and they were signed mechanically without authorization. Teva's authorized signing officers were entirely removed from the cheque requisition, approval, drawing, signing, and issuance process.[22] Teva did not form any actual belief or intention with respect to the Cheques. Had Teva's policy been followed, the company would have detected and stopped McConachie's fraud.[23]

29. The fraud perpetrated by McConachie was discovered by Scotiabank and reported to Teva in July 2006.[24] Teva sued the Respondents for conversion of the Cheques, and brought a motion for summary judgment. The Respondents brought cross-motions for summary judgement, relying on statutory defences in the *BEA*, including s. 20(5).

B. The Decisions Below

i. The Motion Judge's Decisions

30. The Motion Judge's 3-½ page endorsement granting summary judgment in favour of Teva and dismissing the Respondents' cross-motions for summary judgment was found by the Court of Appeal to be replete with legal errors. The Motion Judge's endorsement also contains no analysis of the fully developed evidentiary record; instead, he made conclusory statements regarding the Appellant's "belief" that were contrary to the evidence.

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[21] Appeal Decision, at para. 17, AR, Vol I, Tab 1C.

[22] Schmid Affidavit, at para. 10, AR, Vol. I, Tab 3B; Schmid Transcript, qq. 283, 285 – 287, RR, Vol. I, Tab 3, pp. 45 – 46; Schmid Answers to Undertakings, AR, Vol. II at Tab 3E; Dent Transcript, qq. 139 – 140, RR, Vol. I, Tab 2, p. 17 – 18; McConachie Transcript, q. 211, RR, Vol. I, Tab 1, p. 10.

[23] Appeal Decision, at paras. 16, 75, AR, Vol I, Tab 1C.

[24] Appeal Decision, at para. 22, AR, Vol I, Tab 1C.

31. The Motion Judge did not set out the appropriate legal tests, did not distinguish between non-existing and fictitious payees and did not refer at all to the evidence about the six different payees. The endorsement contains no proper legal analysis. The Motion Judge appeared to diminish the Respondent's position by referring to the defence in s. 20(5) as a "technical" one.[25]

ii. The Court of Appeal Decision

32. As noted by the Appellant at paragraph 23 of its factum, before the Court of Appeal:

> Teva argued that the payees whose names were similar to those of its customers and suppliers were not "non-existent", as defined in *Boma*, since Teva had a plausible belief that they were in fact legitimate payees. Teva further argued that the payees who were actual customers were not "fictitious", as Teva had intended that they be paid.[26]

33. Teva lost the appeal because the evidence did not support either of these contentions. Teva led no evidence of "plausible belief" with respect to the non-existing payees nor was there any evidence that it intended to pay any of the payees.

34. The Court of Appeal held that the Motion Judge made two legal errors in accepting Teva's non-existing payee argument: (i) he failed to ask whether there was any evidence of actual intention of Teva's directing mind to pay real creditors; and (ii) he failed to make a factual finding that Teva had an actual honest belief.[27] Moreover, the Court of Appeal found that Teva could not have had any actual honest belief, because the evidence could not support such a finding:

> On the evidence, those who were in positions of authority at Teva (and who arguably could represent the drawer's "belief"), could not have come to the honest but mistaken belief that the named payees [...] referred to Teva's real customers.
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> …
>
> No one in a position of authority ever looked at any of the requisitions or the cheques. Clerks processed the cheques and mechanically applied signing officers' signatures. The evidence does not even demonstrate that the clerks

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[25] Reasons of the Honorable Justice Whitaker, dated February 19, 2014 (**"Motion Reasons"**), at para. 35, AR, Vol I, Tab 1A. It is to be noted that His Honour made other clear legal errors that are not before this Court.

[26] Appellant's Factum, at para 23, p. 6.

[27] *Boma*, *supra*, at para. 62, ABA, Tab 6.

> themselves turned their minds to the names on the requisitions or cheques, or that they were misled by the similar names. Instead, the evidence reflects that no one gave the names on the requisitions or cheques any thought at all. No officer or other responsible person at Teva considered the identity of the payees on the fraudulent cheques and formed an honest, though mistaken belief, that the named payees were legitimate customers or service providers.[28]

35. With respect to the Cheques payable to invented payees (PCE Pharmacare and Pharma Team System), the Court of Appeal held that the Motion Judge erred in applying the test for determining whether payees are non-existing, and thereby wrongfully denied the Respondents the benefit of the application of s. 20(5) of the *BEA*. The Court of Appeal held that the payees with invented names were non-existing payees, and the cheques payable to them should be treated as payable to bearer.[29] While the Court of Appeal accepted Teva's argument that because these names were similar to existing customers, they might plausibly have been thought to be real payees, the Court of Appeal held that Teva in fact had no such plausible belief or intention, and there was no evidence on which to make such a finding in the record.[30]

36. The Court of Appeal held that the Motion Judge made two further legal errors with respect to Teva's fictitious payee argument: (i) rather than asking whether Teva adduced evidence of an actual intention of its directing mind to pay real creditors, the Motion Judge's analysis only went so far as to determine whether Teva ever had any such creditors; and (ii) he failed to make a factual finding that Teva had an actual intention to pay the payees. The Court of Appeal further held that a finding of corporate intention was not available to the Motion Judge on the evidence before him.[31]

37. With respect to the Cheques payable to real entities (Pharmachoice, London Drugs, Pharm-Ed Advantage Inc. and Medical Pharmacies Group) that had a history of legitimate business transactions with Teva, but no claim to be paid anything at the time McConachie procured the Cheques, the Court of Appeal found that they were fictitious within the meaning of s. 20(5) of the

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[28] Appeal Decision, at paras. 52 – 53, AR, Vol I, Tab 1C.
[29] Appeal Decision, at para. 88, AR, Vol I, Tab 1C.
[30] Appeal Decision, at paras. 48 – 52, AR, Vol I, Tab 1C.
[31] Appeal Decision, at para. 62, AR, Vol I, Tab 1C.

BEA, as interpreted by this Court in *Boma*.[32] This finding was based on lack of evidence that Teva had formed any corporate intention. Teva was not entitled to an inference that it intended to pay the named payees merely be virtue of having issued the Cheques when it did not follow its own corporate policies for issuing the Cheques:

> Here, by contrast, there is no evidence from which a corporate intent could be inferred. Neither Teva's directing mind nor any of its responsible officers scrutinized or even looked at any of the fraudulent cheques. Its sensible cheque approval policies were not followed. Instead, the only person within Teva's organization who considered the identity of the payees on the cheques and the legitimacy of the payments was an employee who had no signing authority, and no authority even to requisition cheques or approve CE payments. On these unchallenged facts, no inference of a corporate intent to pay legitimate creditors should be drawn. To hold otherwise would render the fictitious payee defence under s. 20(5) of the *BEA* meaningless.[33]

38. On this basis, the unanimous Court of Appeal reversed the Motion Judge and held that the Cheques were payable to non-existing and fictitious payees, such that s. 20(5) applied and Teva must absorb the loss caused by the fraud of its employee. In so finding, the Court of Appeal applied the relevant provisions of the *BEA* and followed and applied *Boma* to the evidence in the record.

39. In doing so, the Court of Appeal distinguished *Boma* on its facts, finding that there was no evidence that Teva, unlike the directing mind of the drawer in *Boma*, had an actual, honest but mistaken belief that the Cheques were intended to pay real entities for real obligations at the time the Cheques were issued.[34] Rather, the evidence established that the directing mind and management of Teva formed no belief or intent whatsoever in regard to the Cheques. Furthermore, no corporate belief or intent could be inferred given that Teva failed to follow its own cheque approval procedures.

40. The Appellant argues that "[c]rucially, the Court below found that *Boma* did not stand for the proposition that a corporate drawer's intention to make cheques payable to legitimate payees should be presumed."[35] First, *Boma* does not stand for such a proposition: the key finding in the

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[32] Appeal Decision, at paras. 58, 87, AR, Vol I, Tab 1C.
[33] Appeal Decision, at para. 75, AR, Vol I, Tab 1C.
[34] Appeal Decision, at paras. 82-87, AR, Vol I, Tab 1C.
[35] Appellant's Factum, at para. 27, p.7.

case turned on the actual, honest but mistaken belief of the drawer's directing mind, Boris Mange (**"Mange"**), at the time he signed the cheques. Second, the Court of Appeal did not say that corporate intention could never be presumed. On the contrary, it held that no such presumption could be found in this case:

> In saying that in this case no corporate intent should be found, I make two final points. First, I do not suggest that every cheque issued by a company must be scrutinized and approved by the signatory of the cheque. Of course now many companies, like Teva, use pre-printed cheques and have the signature of their authorized officers stamped on or applied mechanically. In large companies it might be impractical to expect every individual cheque, no matter how small the amount, to be scrutinized by the company's directing mind. But if these companies do not put in place and follow a policy for approving the issuance of their cheques, and if they are then defrauded by an employee within their organization, their action for conversion risks being met with a successful fictitious payee defence.
>
> Conversely, had Teva followed its own approval policies and mistakenly approved the fraudulent cheques obtained by McConachie, I would have inferred a corporate intent to pay real creditors for legitimate obligations. Had those in a responsible position reviewed and mistakenly approved even some of the cheques (as in the case of *Boma*), Teva would have had a basis to argue that its intent should be inferred. But that is not the evidence in this case.
>
> …
>
> I conclude that Teva has failed to show it intended the four payees who are or were its customers or the two non-existing payees to receive the proceeds of the cheques. All these payees were fictitious and the banks were entitled to treat all the cheques as payable to bearer. Teva's conversion action must therefore fail.[36]

[36] Appeal Decision, at paras. 84 – 87, AR, Vol I, Tab 1C.

PART II. POSITION WITH RESPECT TO THE APPELLANT'S QUESTION

41. With respect to the Appellant's question, namely, "*What is the proper scope of the defence provided by section 20(5)?*" the Respondents take the following position:

A. The scope of the defence provided by s. 20(5) is set out by this Honourable Court in *Boma*, and was correctly applied by the unanimous Court of Appeal in this case.

B. A purposive, contextual interpretation of s. 20(5) should assess whether the payees are non-exiting or fictitious as a matter of objective fact, not subjective intention.

PART III. STATEMENT OF ARGUMENT

A. The Scope of the Defence Provided by s. 20(5)

i. Section 20(5) Provides an Important Defence to Banks to Conversion Claims by Drawers

42. The Appellant's assertion that the Court of Appeal misstated the policy underlying s. 20(5) so as to offer broad protection for banks that deal with fraudulent cheques[37] is without foundation, ignores the purpose of s. 20(5), and thereby mischaracterizes the law of conversion as it applies to collecting banks.

43. The Appellant's assertion that banks bear the risk of fraudulent schemes is an oversimplification of the *BEA*. By providing that cheques payable to non-existing or fictitious payees may be treated as payable to bearer, s. 20(5) allocates to the drawer the risk of the type of cheque fraud at issue in this case as the banks cannot be liable in conversion for negotiating such cheques.

44. Section 20(5) was adopted into the Canadian *BEA* in the same language as its U.K. predecessor in s. 7(3) of the U.K. *BEA*.[38] Sir Mackenzie Chalmers,[39] who submitted a draft of the

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[37] Appellant's Factum, at para. 47, p.12.

[38] *Bills of Exchange Act, 1882* (U.K.), 45 & 46 Vict., c. 61, s. 7(3) (repealed).

[39] Sir Mackenzie Chalmers (**"Chalmers"**) was a British civil servant, judge and great supporter of the codification of commercial law. He drafted the 1882 U.K. *BEA* and the 1893 *Sale of Goods Act*.

provision to Parliament, confirmed that s. 7(3) was one of the sections of the U.K. *BEA* revised in committee, and thus was not intended to reflect the pre-existing case law.[40] In the first cases to interpret the provision, as discussed further below, the House of Lords directed that s. 7(3) should be interpreted primarily by giving effect to the plain meaning of the words used.

45. The interpretation of the section has subsequently proved challenging and, it is respectfully submitted, that in Canada the interpretation has strayed from its true purpose and intent. As discussed further below, these issues relate, in part, to courts' uncritical reliance on Dean John D. Falconbridge's (**"Falconbridge"**) four propositions concerning the interpretation of s. 20(5).[41] Among other things, these principles stray from the legislative text, and are not necessarily accurate summaries of the jurisprudence.[42]

46. Despite all of the associated controversy surrounding the troubled history of s. 20(5), when this case reached the Court of Appeal, that Court properly decided the case in accordance with the principles established by this Court in *Boma*. However, the Appellant seeks to reframe the s. 20(5) defence to a narrow exception that would apply in only the rarest of cases, namely, where the evidence establishes that the directing mind of the drawer itself perpetrates the fraud. No support can be found in the judgments of this Court for such an approach. It also flies in the face of the purpose and wording of the section and renders more or less meaningless three of four of Falconbridge's propositions.

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[40] A.G. Guest, *Chalmers and Guest on Bills of Exchange and Cheques*, 16th ed. (London, U.K.: Sweet & Maxwell, 2005) [**"*Chalmers and Guest*"**] at §1-006, pp. 3 – 4, Respondents' Joint Book of Authorities [**"RBA"**], Tab 4.

[41] See, e.g., the majority reasons in *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd*. (1976), [1977] 2 S.C.R. 456 [**"*Concrete Column*"**] where this Court categorized the case within one of Falconbridge's propositions without further analysis, in comparison to the careful analysis of Chief Justice Laskin in dissent, ABA at Tab 31.

[42] Bradley Crawford, *The Law of Banking and Payment in Canada* (Toronto: Canada Law Book, 2016) (loose-leaf ed., rev. 20) [**"*Crawford*"**] at §22:40:3(8.5), p. 22-42, RBA, Tab 5; Benjamin Geva, "The Fictitious Payee Strikes Again: the Continuing Misadventures of BEA s. 20(5)" (2015) 30 B.F.L.R. 573 at 578.

47. The purpose of the *BEA* is to ensure the currency of negotiable instruments. It requires certainty on the face of the instrument so that subsequent holders are aware of the liability they are assuming.[43]

48. In *Bank of England v. Vagliano Bros.*, the first case in which the House of Lords interpreted s. 7(3) of the U.K. *BEA* (as noted, the U.K. equivalent of s. 20(5)), Lord Herschell aptly held that the proper way to interpret the section was "in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law".[44] As discussed above, s. 7(3) was a new complete code, and not merely an enactment of the existing state of the case law.

49. The plain meaning of s. 20(5) is that a bill may be treated as payable to bearer in circumstances "where the payee is fictitious or non-existing". Non-existing should be given its natural meaning: not existing as a matter of objective fact. Since the House of Lords' decision in *Clutton & Co. v. Attenborough & Son*,[45] non-existing has been interpreted this way (in the U.K., Canada and elsewhere). In *Clutton*, a clerk of a firm of land agents induced the firm to draw cheques payable to the order of George Brett, whom the clerk represented to be entitled to payment for work supplied to the firm. There was no such person as George Brett who had a relationship with the firm and no such obligation was owed.

50. The drawer's claim against the bank failed on the basis that the payee was non-existing (and fictitious) within the meaning of s. 7(3) of the U.K. *BEA* and the cheques therefore could be treated as payable to bearer. The House of Lords held that s. 7(3) applied in circumstances where the payee was a person invented by the fraudster. This result was reached notwithstanding the fact that the drawer firm stated that it believed and intended that the cheques would be payable to a real person named George Brett.

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[43] *Alberta Treasury Branches v. Fletcher*, 1985 CanLII 1152 at para. 35 (Alta. Q.B.); see also, *Re*Collections Inc. v. Toronto-Dominion Bank*, 2010 ONSC 6560.

[44] *Bank of England v. Vagliano Bros.* (1891), [1891-94] All E.R. Rep. 93 [**"*Vagliano*"**] at p. 113 (H.L.).

[45] *Clutton & Co. v. Attenborough & Son*, [1897] A.C. 90 (H.L.), RBA, Tab 1.

51. This interpretation of "non-existing payee" has been adopted and followed ever since. It is stated by Falconbridge in the introductory principles to his four propositions as being a question of simple objective fact not depending on anyone's intention.[46]

52. As to the meaning of "fictitious", the majority in *Vagliano* held that the proper meaning of fictitious in s. 7(3) of the U.K. *BEA* was "feigned" or "counterfeit".[47] This too was a matter of objective fact and would be found where the named payee has no interest in the instrument and the name is inserted by way of pretence.

53. While there is controversy over whether fictitiousness should depend on the intention of the drawer (discussed below in Part B), the issue raised by the Appellant is a narrower one: that is, does the drawer need to demonstrate intention at all, or can the requisite intention be presumed in the absence of evidence that the drawer itself engaged in the fraud? The Appellant now says that the defence in s. 20(5) should be limited to such a situation. This is incorrect as a matter of statutory interpretation and is unsupported by the jurisprudence that has considered and applied the section.

54. The Appellant wrongly argues that the fictitious payee defence was a codification of pre-existing case law and was limited to one particular type of case that existed before the U.K. *BEA* was enacted: a case where a drawer knowingly and deliberately inserts the name of a payee without any intention that the payee receive payment.[48]

ii. The *BEA* Framework for Allocating Losses from Cheque Fraud

55. The *BEA* contains a framework that has the effect of allocating losses for cheque fraud to drawers or to banks in different circumstances. Section 48(1) of the *BEA* operates to allocate the loss to banks in respect of cheques bearing forged signatures (drawee bank) or forged endorsements (collecting bank). The drawer does not bear the risk incurred. This provision represents a sensible policy choice as the drawer is no better position to control this risk than banks

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[46] It is only with the majority in *Boma* that the belief and intention of the drawer has been considered relevant to the application on the non-existing payee defence.

[47] *Vagliano, supra,* at pp. 122, 153, 161.

[48] Appellant's Factum, at paras. 68 – 70, p. 19.

are, and banks historically were expected to be familiar with their customers' signatures and to recognize anomalies on the face of instruments presented to them.

56. Conversely, by designating cheques where the payee is fictitious or non-existing as payable to bearer, the purpose of s. 20(5) is to protect banks from cheque fraud losses committed at the stage when the cheques are drawn within the drawer's organization. The section allocates the loss to the drawer where the payee is not a known business entity and/or where there is no legitimate transaction or obligation due to the payee. The loss properly falls to the drawer who is clearly in a superior position to minimize, control and insure against the loss. It is within this statutory context and with this purpose in mind that s. 20(5) ought to be interpreted.[49]

57. The majority in *Boma* referred to the policy underlying the defence as follows:

> The policy underlying the fictitious person rule seems to be **that if a drawer has drawn a cheque payable to order, not intending that the payee receive payment, the drawer loses, by his or her conduct, the right to the protections afforded to a bill payable to order**.[50]

58. There is no basis in law to read this statement of the underlying policy as limited to cases where there is a deliberate intention on the part of the drawer not to make the payment to the payee.

59. Moreover, the majority's statement of the policy underlying s. 20(5) is not in any event comprehensive, since it does not refer to those cases where the payee is found to be non-existing, in which case the drawer's intention, or lack thereof, is irrelevant.

60. Writing for the unanimous Court of Appeal in this case, Laskin J.A.'s description of the purpose of s. 20(5) is consistent with the majority statement in *Boma*:

> The purpose of s. 20(5) is to protect the bank from fraud on the drawer, committed by a third party, including an insider in the drawer's organization. The section

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[49] Benjamin Geva, "Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee – *Boma v. CIBC*" (1997) 28 Can. Bus. L.J. 177 [**Geva, "Conversion"**] at p. 195.

[50] *Boma*, *supra*, at para. 46, ABA, Tab 6. [emphasis added]

> allocates risk to the drawer, who typically is better positioned to discover the fraud or insure against it.[51]

61. When s. 20(5) applies, it protects banks from conversion claims. That is the purpose of the section. It allocates the loss to drawers when the defence applies. Further, it cannot, as a matter of principle, be seriously argued that banks are typically better positioned to discover employee cheque frauds than the employer/drawer.

62. Here, by failing to ensure compliance with its internal policies, the drawer had no intention whatsoever in respect of who should receive payment. It follows that where the drawer did not intend for the payees to receive payment because it had no intention whatsoever, it must bear the loss.

iii. The Defence in s. 20(5) is Not Limited to Fraud by the Drawer Itself

63. The Appellant's position was the one accepted by the English Court of Appeal in *Vagliano*, but then rejected by the House of Lords.[52] In regard to the proper approach to statutory interpretation, Lord Herschell noted that the English Court of Appeal had reached its conclusion on the basis of the pre-existing state of the case law:

> The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further that his liability in that case depended upon an application of the law of estoppel.[53]

64. Lord Herschell then rejected that approach to statutory interpretation:

> With sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable

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[51] Appeal Decision, at para. 34, AR, Vol I, Tab 1C, p. 27; *Rouge Valley Health System v. TD Canada Trust*, 2012 ONCA 17 [**"*Rouge Valley* (C.A.)"**] at paras. 10 – 11, ABA, Tab 30, aff'g 2010 ONSC 4717 [**"*Rouge Valley* (Sup. Ct.)"**]; *Boma*, *supra*, at para 46, ABA, Tab 6.

[52] *Vagliano*, *supra*.

[53] *Vagliano*, *supra*, at pp. 112 – 113.

> instruments. I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. … What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.
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> …The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it, in certain respects. And I do not think it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.[54]

65. As to the substance of the Appellant's proposed narrow "underlying rationale", this too was rejected by the House of Lords. In *Vagliano* it was the clerk employed by the acceptor Vagliano (analogous to the drawer in this case) who created the fraudulent bills.[55] The acceptor had no knowledge of, and did not participate in, the fraud, yet the House of Lords held that the fictitious payee defence applied in favour of the bank. The bill could be treated as payable to bearer.

66. It is clear from the following passages that Lord Herschell and the other Lords disagreed with the Court of Appeal that knowledge by the drawer itself of the non-existing or fictitious character of the payee was required for the defence to apply:

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[54] *Vagliano, supra,* at pp. 113 – 114.

[55] The Appellant mistakenly asserts otherwise at para. 70 of its factum.

Per Lord Herschell:

> For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer, it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary, if it be sought to charge the acceptor, to prove in addition that he was cognisant of the fictitious character of the payee.[56]

Per Lord Halsbury:

> …I must say that I cannot acquiesce in the view which the majority of the Court of Appeal appear to have entertained that they were at liberty to import into sub-s (3) that it was a condition of its application that the acceptor should be aware that the payee was a fictitious or non-existing person. It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that where a statute is expressly said to codify the law you are at liberty to go outside the code so created because before the existence of that code another law prevailed.[57]

Per the Earl of Selborne:

> I cannot, however, agree with the opinion that in the cases which do fall within s 7(3) knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in my judgment, be implied from the earlier authorities, which treated knowledge as necessary. Those authorities were, no doubt, within the view of the legislature; and, all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by

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[56] *Vagliano*, *supra*, at p. 114.

[57] *Vagliano*, *supra*, at p. 101. In contrast, in the United States, the fictitious payee defence in s. 9(3) of the *Uniform Negotiable Instruments Law* §9(3) (1896) (which has since been replaced by Article 3 of the *Uniform Commercial Code*) provided that "the instrument is payable to bearer… (3) when it is payable to the order of a fictitious or non-existing persons… **and such fact was known** to the person making it so payable" [emphasis added]. The meaning of the provision is plain; it required that the "person [i.e., the drawer] making [the cheque] payable" have knowledge of the fictitious nature of the payee. Notably, these words are absent from s. 20(5) and they should not be read into the section (*Concrete Column*, *supra*, at p. 475, ABA, Tab 31).

> construction. I think it right to add that, in point of principle, it seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should, in such a case, depend upon the facts rather than upon an inquiry into the acceptor's state of mind.[58]

67. This was confirmed by Chalmers in his text on bills of exchange, as follows:

> It is immaterial for the purposes of the subsection whether or not the acceptor or other party liable on the bill knew that the payee was a fictitious or non-existing person.[59]

68. *Vagliano* therefore stands for precisely the opposite of what the Appellant argues for, namely, that the rule is limited to circumstances where the drawer itself engages in the fraud. In *Vagliano*, the fictitious payee defence was held to apply where the acceptor (drawer in the usual case) was duped by his clerk into thinking he was making a legitimate payment to a real payee.[60]

69. The following statement from Lord Herschell's judgment, quoted at paragraph 70 of the Appellant's factum, is relied on by the Appellant for the proposition that the drawer must have engaged in the fraud, but Lord Herschell's judgment says nothing of the sort:

> …whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence.[61]

70. That this passage does not mean that the drawer must be the one to have inserted the payee name by pretence is evident from Lord Herschell's opinion that there was no requirement of knowledge on the part of the drawer as to the fictitiousness of the payee. It was the mere insertion of the name as a pretence that was determinative.

71. That this is the meaning of Lord Herschell's passage quoted by the Appellant is clear from the following passage in Lord Herschell's reasons, where he clarified that the same result would follow if it was the drawer itself who inserted the name of the fictitious payee:

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[58] *Vagliano, supra*, at p. 106.

[59] *Chalmers and Guest, supra*, at §2-052, p. 48, RBA, Tab 4.

[60] *Vagliano, supra*.

[61] *Vagliano, ibid*, at p. 118.

> If, in the present case Vucina had himself drawn the bills and inserted the name of C. Petridi & Co. as payees, as a mere pretence without intending any such persons to receive payment, it follows from what I've said that in my opinion they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi & Co. was inserted.[62]

72. There is no question that, when the drawer itself engages in a pretence by naming a payee to whom no payment is intended, the defence will apply.[63] Contrary to the Appellant's argument, however, the application of the fictitious payee defence is not limited only to that rare circumstance.

73. The Appellant inappropriately asks this Court to limit s. 20(5) to this one type of case by reading into the section restrictive words that are not contained therein. The section has never been interpreted so narrowly.

iv. The Court of Appeal Interpreted s. 20(5) in Accordance with *Boma* and the Rule of *Stare Decisis*

74. In his careful reasons, Laskin J.A., provides a detailed and accurate discussion of *Boma*, and correctly interprets and applies the law on the s. 20(5) defence. In *Boma*, this Court considered the following four propositions taken from Falconbridge's Banking and Bills of Exchange, 6th ed.,[64] referenced above:

> 1) If the payee is not the name of any real person known to the drawer, but is merely that of a creature of the imagination, the payee is non-existing, and is probably also fictitious.
>
> 2) If the drawer for some purpose of his own inserts as payee the name of a real person who was known to him but whom he knows to be dead, the payee is non-existing but is not fictitious.
>
> 3) If the payee is the name of a real person known to the drawer, but the drawer names him as payee by way of pretence, not intending that he should receive payment, the payee is fictitious, but is not non-existing.

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[62] *Vagliano, ibid*, at p.154.

[63] See, e.g., *Fok Cheong Shing Investments Co. Ltd. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488.

[64] *Boma, supra*, at paras. 30ff, ABA, Tab 6; Appeal Decision, at para. 24 – 45, AR, Vol I, Tab 1C.

> 4) If the payee is the name of a real person, intended by the drawer to receive payment, the payee is neither fictitious nor non-existing, notwithstanding that the drawer has been induced to draw the bill by the fraud of some other person who has falsely represented to the drawer that there is a transaction in respect of which the payee is entitled to the sum mentioned in the bill.[65]

75. In reaching its conclusion in *Boma*, the majority endorsed Falconbridge's four propositions, but then significantly modified their application. In this decisive passage, the Court held as follows:

> Many of the cheques, however, were made payable not to actual persons associated with the companies, but to "J. Lam" and "J. R. Lam". The appellants had no dealings with any persons of such names. **According to the criteria set out in Falconbridge, supra, such a person would be categorized as "non-existing", and hence, fictitious.** But in my view, it seems that Boris Mange **was reasonably mistaken in thinking** that "J. Lam" or "J. R. Lam" was an individual associated with his companies. Mange knew that one of the subcontractors retained by the companies was a "Mr. Lam". He did not specifically recall Lam's first name, which, incidentally, was Van Sang. **However, when Mange approved the cheques to "J. Lam" and "J. R. Lam", he honestly believed that the cheques were being made out for an existing obligation to a real person known to the companies.** The trial judge's comments in this regard were tantamount to a finding of fact, and were not disturbed on appeal; as these are concurrent findings of fact, this Court should not intervene.[66]

76. Thus, the majority in *Boma* acknowledged that the payees who were not "actual persons associated with the companies" but rather names made up by the fraudster would, according to Falconbridge's first proposition and established precedent, be categorized as non-existing and fictitious.

77. However, the majority in *Boma* modified the non-existing payee rule on the basis that the directing mind of the company, Mange, had, at the time he approved the cheques, an honest but mistaken belief that they were being made out to real persons for existing obligations. The majority in *Boma*'s focus on the directing mind only, and not just on that of the signing officer, was itself a departure from previous decisions.

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[65] *Boma, ibid*, at para. 46, ABA, Tab 6; Appeal Decision, para. 35, AR, Vol I, Tab 1C.

[66] *Boma, ibid*, at para. 60, ABA, Tab 6. [emphasis added]

78. It is submitted, as the Court of Appeal correctly found, that this modification of the non-existing payee defence applies only in a case where the evidence establishes that, at the time the cheques were drawn,

(a) the drawer of the cheque turned his/her mind to the identity of the payees and had an actual, honest belief that the intended payees were real;

(b) that the drawer's honest but mistaken belief was plausible on the facts; and

(c) the drawer intended to make the payments to the named payees.

79. If the Appellant's position was correct, the majority in *Boma* would not have been troubled with Mange's honest but mistaken belief as to the identity of the payees at the time he signed the cheques. They would simply have needed to find that he did not participate in the fraud, and from that finding an inference of an intention to pay all of the named payees would have followed according to the Appellant. That clearly was not the test applied by the majority in *Boma*.

80. It is clear that for the ratio in *Boma* to apply, there must be evidence that the drawer had an actual, honest but mistaken belief at the time the cheques are drawn. Laskin J.A.'s analysis below was that for the *Boma* plausibility doctrine to apply there must be evidence that:

> At the time each cheque was drawn, [the corporate drawer] considered the name of the payee on the cheque and, because of the similarity in name, had an honest, although mistaken, belief that the named payee was a real customer or service provider.[67]

81. An actual intention is also required in order for a court to find that a payee is not fictitious; this too is affirmed in *Boma*.[68] Only if the payees were real persons intended by Teva's directing mind or responsible officers to receive payment would Teva escape the fictitious payee defence.

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[67] Appeal Decision, at para. 50, AR, Vol I, Tab 1C.

[68] *Boma*, *supra*, at para. 46, ABA, Tab 6.

82. The ratio in *Boma* has been interpreted repeatedly by the Ontario Court of Appeal, in a consistent fashion: (i) in *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia*;[69] (ii) in *Rouge Valley*;[70] (iii) in *Kayani v. The Toronto-Dominion Bank*;[71] and (iv) in this case.

83. In *Westboro Flooring* the Court of Appeal applied the ratio of *Boma* and found in that case that the s. 20(5) defence did not apply because the evidence established clear contemporaneous intent on the part of the drawer at the time the cheques were signed:

> Two excerpts from the trial judge's reasons are important to this issue. At para. 18 of his reasons the trial judge said:
>
> > **There can be no doubt that when the cheques were signed, the intention of the plaintiff/drawer of the cheques was to pay Terry Govas' business for legitimate debts they owed him.** . . . The name used was recognized by these parties as the name of the Govas' business, in shortened form, prior to and continues on to this day.
>
> …
>
> However, when applying the foregoing criteria to a payee in *Boma* with whom the drawer had no dealings and who therefore seemed to fall into the non-existing category, **Iacobucci J. considered it relevant that the drawer "honestly believed that the cheques were being made out for an existing obligation to a real person known to the companies"**. Iacobucci J. accordingly concluded that the cheques made payable to that payee fell within the fourth Falconbridge category set out above, namely, a cheque payable to a real person in circumstances where the drawer is fraudulently induced to believe that there is a real transaction.
>
> Assuming that Ottawa Hull Carpet would otherwise fall within the non-existing payee category, **the trial judge's finding that, in drawing the Duarte cheques, Westboro intended to pay Terry Govas' business for legitimate debts, brings this case squarely within the *Boma* reasoning.**[72]

84. In *Rouge Valley*, both the motion judge and the Court of Appeal distinguished *Boma* on the basis that the drawer, Rouge Valley, could not establish on the evidence that it had the required honest, mistaken intention to make legitimate payments to real payees. The evidence in *Rouge*

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[69] *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia*, 2004 CanLII 59980 (C.A.) [**"*Westboro Flooring*"**].

[70] *Rouge Valley* (C.A.), *supra*.

[71] *Kayani v. The Toronto-Dominion Bank*, 2014 ONCA 862 [**"*Kayani*"**], ABA, Tab 18.

[72] *Westboro Flooring, supra*, at paras. 18, 24 – 25. [emphasis added]

Valley, as in this case, was that in the course of the issuance of the cheques, no responsible officer of Rouge Valley ever examined any of the cheques or gave any consideration to the naming of their payees. The Court of Appeal in *Rouge Valley* held that the named payee, being a creature of the imagination of the fraudster, was non-existing. The Court held therefore that the defence in s. 20(5) applied so as to leave the losses with the drawer.[73]

85. Similarly, in *Kayani*, there was evidence that the drawer did not know of the payee until after the fraud was discovered. The Court of Appeal held that the *Boma* plausibility doctrine does not negate the requirement that the drawer must have knowledge of the payee and that the drawer must have intended to pay a real creditor:[74]

> Here, the respondents had no previous business relationship with Nithiyakalyaani Jewellers Ltd. Therefore, it cannot be said that when they prepared the instruments naming Nithiyakalyaani Jewellers as the payee, they plausibly believed they were paying Nithiyakalyaani Jewellers Ltd. How could they when they did not even know that company existed until after the fraud was discovered?
>
> This situation is factually distinct from that in *Boma*, where the drawer had an existing business relationship with a party with a name similar to the payee and had actually considered the name of the payee when the instruments were drawn.[75]

86. *Boma* has been consistently interpreted to require actual, contemporaneous intention on the part of the drawer to make the payments to the named payees.

87. The Appellant seeks to put another meaning on the ratio of *Boma* based on the fact that in that case Mange signed only 9 of the 155 cheques. However, the Appellant's position cannot be sustained on the majority's reasons in *Boma*. The finding in paragraph 60 that Mange had an honest, mistaken belief was applied to all of the cheques. Indeed the majority referred to the trial judge's finding of this as a "concurrent finding of fact" that could not be disturbed.[76]

88. In this case, Laskin J.A.'s reconciliation of these facts with the majority's reasons is the only sensible interpretation, namely, that the majority in *Boma* must have considered that the

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[73] *Rouge Valley* (Sup. Ct.), *supra*, at paras. 71 – 72; *Rouge Valley* (C.A.), *supra*, at para. 40 – 44.
[74] *Kayani*, *supra*, at paras. 43 – 44, ABA, Tab 18.
[75] *Kayani*, *ibid*, at paras. 44 – 45, ABA, Tab 18.
[76] *Boma*, *supra*, at para. 60, ABA, Tab 6.

formation of an honest, but mistaken belief in respect of the named payees by Mange when he signed the 9 cheques permitted an inference of intent applicable to the balance of the cheques to those same named payees.[77] The evidence of Mange provided an evidentiary foundation for such an inference to be drawn.

89. The Court of Appeal found that, in contrast to the evidence in *Boma*, there is no evidentiary foundation that could permit such an inference to be drawn in this case. No authorized person at Teva ever considered or turned their minds to any of the Cheques. No one at Teva except the fraudster gave any consideration whatsoever to the identity of the payees or the legitimacy of the payments at the time the Cheques were issued. The Cheques were not properly authorized before being produced. The Cheques were processed by a clerk in Teva's accounts payable department who applied the signing officers' signatures mechanically without any scrutiny by any officer of Teva whatsoever.[78]

90. As a result of the total lack of any intention in regard to the Cheques, Teva could not show that it intended the payees to receive payment. In the absence of any evidence of Teva's actual intention, the Court of Appeal held that intention could not be presumed.[79]

91. The Appellant's position before this Court is that a specific corporate intention should be presumed in all cases where there is no evidence that the drawer itself engaged in a fraud. As noted by the Court of Appeal, such an interpretation would eviscerate s. 20(5) of the *BEA*.[80] Such an interpretation would lead to the absurd result that a drawer could issue cheques contrary to its express policies, without any thought as to whether the payees are real or not, or whether there are real obligations owed to those payees, and then decide later which of those cheques it will honour or dishonour, with the expectation that the losses from the latter would be borne by collecting banks. This is inconsistent with the purpose of the *BEA* which is to facilitate efficient negotiability of bills of exchange. It requires certainty on the face of the bill so that subsequent holders are aware of the liability they are assuming. It is antithetical to the purpose of the *BEA* to impose a

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[77] Appeal Decision, at para. 54, AR, Vol I, Tab 1C, p. 36.
[78] Appeal Decision, at paras. 14 – 15, AR, Vol I, Tab 1C.
[79] Appeal Decision, at para. 69, AR, Vol I, Tab 1C.
[80] Appeal Decision, at para. 70, AR, Vol I, Tab 1C.

duty on collecting banks to look inside the mind of the drawer to determine which cheques will be honoured and which will not. Negotiability is premised on relying on the apparent validity of cheques.

92. The Appellant states that a failure to follow cheque issuing procedures was of no moment in *C.P. Hotels v. Bank of Montreal.*[81] But that case involved cheques with forged signatures. The banks were held responsible for the losses based on s. 48(1) of the *BEA* and not on s. 20(5).

93. The Court of Appeal correctly held in this case that even if an inference of corporate intent *could* be drawn where there was proper issuance of cheques by a corporation, such an inference is defeated in this case by virtue of the fact that none of the Cheques was properly authorized.[82] Thus, Teva could not bring itself within the ratio of *Boma*, the payees were correctly deemed to be non-existing or fictitious (or both), and s. 20(5) applies to allow the Cheques to be treated as payable to bearer.

94. Commentators have uniformly applauded the Appeal Decision as being a rational interpretation of *Boma* and as representing sound policy.[83]

95. Furthermore, Laskin J.A.'s observation that companies which "do not put in place and follow a policy for approving the issuance of their cheques" may be at risk of being met with a successful fictitious payee defence[84] was not a statement of a binding rule nor the creation of a duty, as the Appellant erroneously states. This statement followed Laskin J.A.'s statement that it may be possible to find corporate intent where there is evidence on the record of properly-authorized and approved cheques even when they are mechanically signed, but that such a possibility would be far less likely if there is no internal policy or the policy is not followed.[85]

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[81] *C.P. Hotels v. Bank of Montreal,* [1987] 1 S.C.R. 711, ABA, Tab 7.

[82] Appeal Decision, at para. 69, AR, Vol I, Tab 1C.

[83] Benjamin Geva, "The Fictitious Payee After *Teva v. BMO*: Has the Pendulum Swing Back Far Enough?" (2016) 31 B.F.L.R. 607 at p. 6; *Crawford, supra*, at §22:40:30(9)(b)(iii), p. 22-50.2b – 22-50.2c, RBA, Tab 5.

[84] Appeal Decision, at para. 84, AR, Vol I, Tab 1C.

[85] Appeal Decision, at para. 84, AR, Vol I, Tab 1C.

These are sensible commercial and legal observations to which no reasonable objection can be taken.

96. To find otherwise would be to incentivize drawers not to institute or follow prudent policies and control procedures for creation of cheques, and unfairly make the banks insurers against cheque fraud perpetrated by employees on their employers in each and every instance. Such a result would be entirely inconsistent with the articulation of policy considerations outlined in paragraph 47 by Iacobucci J. in *Boma*: "the policy underlying the fictitious person rule seems to be that if a drawer has drawn a cheque payable to order, not intending that the payee receive payment, the drawer loses, by his or her conduct, the right to the protections afforded to a bill payable to order".[86]

v. The Court of Appeal Did Not Introduce a Defence of Drawer's Negligence

97. The Appellant asserts that the Court of Appeal departed from existing principles by incorporating negligence of the drawer as a new defence for collecting banks to a cheque conversion claim.[87] This argument is unfounded. The Respondents did not make such an argument before the Court of Appeal, nor did the Court of Appeal make any such finding.

98. The discussion in the Court of Appeal the prudence of putting in place and following a policy to ensure proper authorization of corporate cheques arose only because the Appellant argued that its intention could be inferred from the mere issuance of the Cheques.

99. Teva made this argument because it found itself without any evidence of intention in relation to the Cheques and knowing that without such evidence, s. 20(5) would apply. It asked that the inference be made from the issuance of the Cheques, and the Court of Appeal held that the inference could not be made and was defeated on the evidence as Teva's control policies were not followed. This was not tantamount to a finding of any breach of a standard of care nor of a duty owed to the Banks. It was part of the evidentiary matrix that had to be considered in order to rule on Teva's argument as to why the fictitious payee defence should not apply.

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[86] *Boma*, *supra*, at para. 47, ABA, Tab 6.

[87] Appellant's Factum, at para. 59, p. 16.

100. In this context, the Court of Appeal expressly stated that Teva's responsibility for its own losses stemmed not from negligence but from its lack of corporate intention. Thus, s. 20(5) of the *BEA*, as interpreted in *Boma*, applied to protect the banks:

> It is not Teva's negligence for which it is being found liable, but rather its lack of corporate knowledge and therefore the absence of any evidence from which one could reasonably infer it intended to pay real creditors of its business for legitimate debts.[88]

101. The effect of this finding is therefore to suggest that a drawer cannot escape liability for fraudulent cheques, where it has no knowledge in respect of the cheques, especially where it had not conducted any due diligence to ensure compliance with its own procedures. Considering of Teva's conduct and intention is therefore, not a question of finding fault with Teva for breaching a duty owed to the bank, but rather it relates to corporate policy and conduct relevant to the issue of intention in relation to the Cheques.

102. In *Boma*, in rejecting the defence of drawer's negligence, Iacobucci J. recognized that a drawer's "conduct" does factor into the analysis underlying the fictitious payees defence and that the drawer may lose "by his or her conduct, the right to the protection afforded to a bill payable to order".[89]

103. This analysis suggests that focusing on the drawer's conduct does not import a negligence or contributory negligence standard, which are both fault-based, but rather indicates that consideration of conduct and intention can go to the evidentiary burden on drawers in circumstances where the payees are objectively non-existing or fictitious.

vi. The Appellant Seeks To Extend *Boma* in the Wrong Direction

104. The Appellant urges this Court to adopt a policy that would in effect exempt drawers from bearing the loss in cases such as this. The Appellant's position is striking: it argues that a corporation that put a dishonest individual in a position where he could circumvent its cheque approval process, resulting in many fraudulent cheques being issued over a period of years without detection, in circumstances where no officer or directing mind of the corporation turned their mind

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[88] Appeal Decision, at para. 86, AR, Vol I, Tab 1C.

[89] *Boma*, *supra*, at para. 46, ABA, Tab 6.

at any stage of the process to either the identity of the payees or to the existence of any obligations, and where proper authorization for the cheques was not obtained and mechanical signatures were applied, should be permitted to shift responsibility for the resulting losses to collecting banks. The Appellant says such loss should lie with the banks on the basis of its interpretation that *Boma* permits an inference to be drawn that the corporation intended to pay only real persons for real existing obligations merely because it had no fraudulent intent itself.

105. The effect of such a proposition would be to encourage willful blindness and poor organizational and supervision procedures. It would send a message to drawers that so long as they form no intention with respect to the cheques they issue, they will be protected. Our law should not countenance such a proposition which would only encourage, rather than deter, fraud.

B. In the Alternative, This Court Should Adopt a Purposive, Contextual Interpretation of s. 20(5)

106. While it is the Respondents' primary submission that the Court of Appeal correctly interpreted the current state of the law and reconsideration of this subsequent issue is not necessary to uphold the Appeal Decision, should this Court wish to clarify the state of the law, it is respectfully submitted that s. 20(5) should be interpreted in accordance with its purpose and within the framework of the *BEA*, which promotes the efficient negotiability of instruments and certainty in commercial transaction. Whether payees are "fictitious" or "non-existing" should be determined as a matter of objective fact. In this case, all of the payees were non-existing or fictitious as they had no interest in any of the Cheques.

i. The Evolution of the Interpretation of s. 20(5)

107. In the *Vagliano* and *Clutton* cases, the House of Lords interpreted s. 7(3) of the U.K. *BEA* in a manner so as to give effect to the words of the section and its purpose. The Lords held that both "non-existing" and "fictitious" should be determined as a matter of objective fact not dependent on the intention of the drawer. The same approach should be employed in the interpretation of s. 20(5) of the *BEA*. Words requiring knowledge or intention on the part of the drawer were left out of the provision and should not be read in.

108. A payee is "non-existing" when the payee did not actually exist, or was not a person known to the drawer to whom the drawer may owe an obligation. A "fictitious" payee is one to whom the drawer owes no obligation and with whom there was no underlying real transaction. These facts can be ascertained objectively. It should not matter whether the payee's name fraudulently inserted by an employee is one that is a creature of the fraudster's imagination or one taken from the phone book or from a list of previous customers. In all of these cases, there is no real payee who could have a claim to the cheque or to the money and no payee who could validly endorse the cheque, and therefore the bank commits no wrong against the drawer by paying the money to the bearer of the cheque.

109. This was the approach adopted in *London Life Insurance Company v. The Molsons Bank*,[90] where the Ontario Court of Appeal followed *Vagliano* and held that even though the payees were existing entities and the drawer intended to pay them, they must be considered fictitious within the meaning of the section because there were no real underlying transactions:

> The whole question of fictitious payees, under sec. 7, sub-sec. 3 of the English Bills of Exchange Act, which is copied verbatim in the corresponding section of our Act, was thoroughly discussed and authoritatively settled by the House of Lords in the celebrated case: The Governor and Company of the Bank of England v. Vagliano Brothers, [1891] A.C. 107…The majority do not agree in all respects, on the grounds upon which they base their decision. Petridi & Co. were, of course, a real and existing firm, and not in any sense fictitious or non-existing persons. But the whole transaction was held to be fictitious, and it was pointed out that Petridi & Co. could not indorse these bills, or take the position of payees without perpetrating a fraud.
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> …
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> If this is the correct result, I do not know that it is to be regretted, as it appears to be equitable in this case that the loss should be borne by the company which issued cheques in settlement of transactions which never really existed, and which gave Niblock the opportunity of committing these frauds, rather than by the bank.
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> It is not necessary in this case to consider the change made in the law by the Act, which does not require that the fact of the payee being a fictitious, or non-existing person, should be to the knowledge of any of the parties.[91]

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[90] *London Life Insurance Company v. The Molsons Bank*, [1904] O.J. No.75 (C.A.).

[91] *Ibid*, at paras. 24, 26 – 27.

110. Thereafter, *Vagliano* was improperly distinguished on the facts, resulting in an erroneous formulation of fictitiousness. *Vinden v. Hughes*[92] and *North and South Wales Bank Ltd. v. Macbeth*,[93] which introduced a test for "fictitious" that requires assessment of the drawer's subjective intention (but not for "non-existing" which remained a question of objective fact until *Boma*, as discussed below). Bradley Crawford (**"Crawford"**), a leading bills of exchange scholar, described the replacement of the absence of a legitimate underlying transaction between the drawer and payee with a subjective assessment of the drawer's intention as "highly questionable reasoning [that] would have a disastrous influence on the development of the Canadian case law".[94]

111. The development of the Canadian case law has also been adversely affected by the near automatic application of Falconbridge's four propositions; however, the propositions were stated without supporting citations and in some respects failed to properly summarize the underlying jurisprudence. For example, Falconbridge's fourth proposition is the direct opposite of the ratio of the decision in *Vagliano*.[95] The manner in which the Canadian law has developed was aptly captured by La Forest J. in *Boma* as follows:

> The problem with any black letter rule of law is that it offers no insight into the competing interests that underlie the conflict it allegedly resolves. Unfortunately, the cases that led to the formulation of Falconbridge's fourth rule, and those that have applied it, have by and large also failed to consider these competing interests as well as the policy considerations inherent in the conflict. This conflict becomes ripe when it is an employee of the drawer, or a third person, that perpetuates the fraud and the loss must be borne by one of the two innocent parties: the employer/ drawer or the accepting bank. [96]

112. The adoption of a subjective intention test for fictitiousness has been described by Crawford as "leading the Canadian courts into confusing exercises of interpretation that have

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[92] *Vinden v. Hughes*, [1905] 1 K.B. 795 (K.B.), RBA, Tab 3.

[93] *North and South Wales Bank Ltd. v. Macbeth*, [1908] A.C. 137 (H.L.), RBA, Tab 2.

[94] *Crawford*, *supra*, at §22:49.40(8.5), p. 22-41, RBA, Tab 4.

[95] *Crawford*, *ibid*, at §22:49.40(8.5), p. 22-42, RBA, Tab 5; see also, *Geva*,"Conversion", *supra*, at pp. 3 – 4.

[96] *Boma*, *supra*, at para. 94, ABA, Tab 6.

invoked complex and highly artificial reasoning, and produced arbitrary and unjust loss allocation rules against which our jurisprudence is only now reacting."[97]

113. In *Boma*, the majority further created uncertainty in the state of the law by collapsing the until-then objective test for non-existing payees into the test for fictitious payees, which as discussed above, had wrongly developed a subjective element beginning with *Vinden*.[98] By moving toward a single subjective test for both fictitiousness and non-existing payees, the majority in *Boma* departed from a purposive interpretation of s. 20(5), and further undermined the certainty of its application.

114. The incorporation of a subjective intention test into the non-existing payee defence in *Boma* represented a significant departure from longstanding interpretation and a significant narrowing of the defence. No reference was made by the majority in *Boma* to any basis in the principles of statutory interpretation for such an interpretation, nor to any support in judicial precedent or policy. The analysis may have been influenced by the facts of the case which dealt with a small family business.

115. A review of the jurisprudence demonstrates that the decisions attempting to follow and apply *Boma* have incrementally become more complex as courts consider which elements of the tests are objective and which are subjective and search for where that subjective intention ought to be found. The Appellant's position is that the words "non-existing" in the statute can now be interpreted to include a presumption of plausible existence. This offends common sense.

ii. A Return to a Contextual Interpretation of section 20(5)

116. This Court has stated that provisions in a statute must be interpreted as follows:

> Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical

[97] *Crawford*, *supra*, at §22:49.40(8.5), p. 22-33, RBA, Tab 5.

[98] *Boma*, *supra*, at para. 60, ABA, Tab 6.

> and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[99]

117. Resort to an investigation of the intention of the drawer is inconsistent with the scheme of the *BEA*. It is respectfully submitted that the contextual analysis of s. 20(5) by La Forest J. in *Boma* was consistent with modern principles of statutory interpretation:

> A second problem with allocating the loss to the accepting bank is that it does not fit in well with the general scheme of bills of exchange. The essence of a bill of exchange is its negotiability and the finality of payment inherent to such a negotiation. Imposing liability on the accepting bank rather than upon the party in the position to stop the fraud is inconsistent with these policies…….allocating the loss to the accepting bank would create a situation where the bank would be required to verify the validity of every single cheque it receives involving a corporate drawer.[100]

118. The scheme of the *BEA* allocates risk of cheque fraud either to banks or to drawers in different circumstances. Cases involving forged signatures or endorsements are allocated to the banks by section 48(1). The Respondents submit that the policy underlying s. 20(5) is to allocate to drawers losses in cases where, as a result of internal fraud by an employee, cheques are drawn in favour of payees that have no relationship with the drawer and/or are owed no obligation by the drawer. In such cases it accords with sound policy to allocate such losses to drawers who are far better positioned to recognize that the payee has no connection to the drawer's organization, is owed no obligation, and therefore to minimize this risk.

119. The expressions of policy by the majority in *Royal Bank of Canada v. Concrete Column Clamps*[101] and *Boma* quoted at paragraphs 35 and 36 of the Appellant's factum, were in consideration of cases of false or forged endorsements, where it can fairly be said that no party is in any better position to detect the fraud than any other. But that is not true of internal cheque fraud by an employee. It is indisputable that employers/drawers are in a far better position to

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[99] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paras. 21, 23; see also, *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 26 – 27; *R. v. Conception*, 2014 SCC 60 at para. 14.

[100] *Boma, supra,* at para. 97, ABA, Tab 6.

[101] *Concrete Column, supra,* ABA, Tab 31.

prevent, minimize and detect such fraudulent schemes.[102] The argument rejected by the majority in *Boma* was that banks should be exempt "from all exposure to the risk and consequence of fraud."[103] The Respondents make no such argument.

120. It is respectfully submitted that the dissenting reasons of La Forest J. in *Boma*, concurred in by McLachlin J. (as she then was), addressed more specifically the allocation of risk underlying s. 20(5) in cases of employee cheque fraud and acknowledged that the drawer is clearly in the best position to minimize that risk. It was also recognized by Laskin C.J. and Spence J. in dissent in *Concrete Column* that banks should not be required to undertake an investigation of every apparently valid corporate cheque that is presented to them, but on the other hand, the drawer should be expected to employ proper methods and procedures to control its issuance of cheques.[104]

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[102] See, e.g., Munaf Mohamed & Jordan McJannet, "The Employer, the Bank, and the Fraudster: Vicarious Liability and *Boma Manufacturing Ltd. v. CIBC*" (2005) 20 B.F.L.R. 465; Nicholas Rafferty & Jonnette Watson Hamilton, "The Collecting Bank's Liability for Conversion of Cheques" (2003) 19 B.F.L.R. 77; *Boma*, *supra*, at para. 95, ABA, Tab 6.

[103] *Boma*, *supra*, at para. 80, ABA, Tab 6.

[104] See *Concrete Column*, *supra*, at p. 488, ABA Tab 31, where this Court held: "…this Court being the court of final appeal should adopt the principle of putting the risk of loss from payroll padding upon the drawer of the cheque.... It is quite impossible for the bank to make any investigation of the bona fide existence of any named payee or of the fact that a debt was owed to that payee. On the other hand, the respondent company chose Gingras to act as its payroll clerk and then permitted Gingras an unchecked opportunity to carry out his nefarious machinations. There was no verification of those cheques by any accounting branch. There was no comparison of the cheques with any payroll list obtained from supervisors in the field. The cheques were simply put down in front of a signing officer who signed them without the slightest knowledge or investigation.

I am of the opinion that it would have been quite easy in proper office management to have designed sufficient methods of checking and verifying to have defeated Gingras' scheme. Again, Gingras was a trusted employee of the company. It is the ordinary course of business, in large corporations, to obtain surety bonds applicable to its trusted employees and the premium on such surety bonds is rightly regarded as an ordinary cost of doing business. Therefore, in these

121. Academic opinion is unanimous that the proper interpretation of s. 20(5) is to leave the losses that result from this type of internal employee cheque fraud at the point of origin – with the drawer.[105] On the other hand, there is no support for the notion that banks are in a better position than drawers to prevent, minimize, or control the risk of loss from this type of cheque fraud.

122. The policy underlying this interpretation of s. 20(5) is consistent with sound policy of minimization of risk in society and deterrence of future harm.[106] The true object of s. 20(5) ought to be recognized by this Court in giving a purposive interpretation of the section. The purpose of the section is to allocate to drawers, not banks, risk of cheque fraud that is within their control to prevent or minimize.

123. In a case where two of six named payees were non-existing, and where there were no legitimate transactions or obligations underlying any of the Cheques, where the drawer formed no intention whatsoever with respect to either the identity of the payees or the legitimacy of the payments, and where the drawer allowed cheques to be produced without any authorization, it cannot be doubted that it is in the interests of justice, sound policy, and proper statutory construction that the payees here were held by the Court of Appeal to be non-existing or fictitious within the meaning of s. 20(5).

PART IV. COSTS

124. The Respondents request their costs.

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circumstances, surely as a matter of proper administration of justice this Court should come to the conclusion that the loss should be payable by the employer and not by the bank acting in the ordinary course of its business in a manner which could not be criticized."

[105] See, e.g., *Crawford*, *supra*, at §22:49.40(8.5), p. 22-34, RBA, Tab 5; Geva, "Conversion", *supra*; Nicholas Rafferty & Jonnette Watson Hamilton, "Is the Collecting Bank Now the Insurer of a Cheque's Drawer Against Losses Caused by the Fraud of the Drawer's Own Employee?" (2005) 20 B.F.L.R. 427; Benjamin Geva, "The Modernization of the Bills of Exchange Act: A Proposal" (2011) 50 Can. Bus. L.J. 26.

[106] *Bazley v. Curry*, [1999] 2 S.C.R. 534 at paras. 31 – 32.

PART V. NATURE OF ORDER SOUGHT

125. The Respondents respectfully request that the appeal be dismissed with costs.

126. In the alternative, if the appeal is allowed on the application by the Court of Appeal of the s. 20(5), the Respondents request that their appeal on the limitation defence, which the Court of Appeal did not rule on, be remitted to the Court of Appeal for determination. The Respondents assert a defence under the *Limitations Act* with respect to 10 Cheques in the total amount of $1,144,979 negotiated at Scotiabank and 7 Cheques in the total amount of $563,096 negotiated at TD.[107] In addition, the question of whether the Respondents qualify for the holder in due course defence pursuant to s. 165(3) of the *BEA* would also need to be addressed by the Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February, 2017.

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Paul Steep / Frank J. McLaughlin /
Shanique M. Lake
McCarthy Tétrault LLP

Lawyers for the Respondent,
TD Canada Trust

_____

Martin Sclisizzi / Heather Pessione /
Caitlin Sainsbury
Borden Ladner Gervais LLP

Lawyers for the Respondent,
The Bank of Nova Scotia

[107] *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (**"*Limitations Act*"**), ss. 4 – 5.

PART VI. TABLE OF AUTHORITIES

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21.	Benjamin Geva "Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee – *Boma v. CIBC*" (1997) 28 Can. Bus. L.J. 177	56
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