

CANADA / JUDGMENT

Canada Trustco Mortgage Co. v. Canada

2011 SCC 36

COURT

Supreme Court of Canada

DECIDED

15 July 2011

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Canada Trustco Mortgage Co. v. Canada

Collection

Supreme Court Judgments

Date

2011-07-15

Neutral citation

2011 SCC 36

Report

[2011] 2 SCR 635

Case number

33422

Judges

McLachlin, Beverley; Binnie, William Ian Corneil; Deschamps, Marie; Fish, Morris J.; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert

On appeal from

Federal Court of Appeal

Subjects

Taxation

Notes

SCC Case Information: 33422

Decision Content

SUPREME COURT OF CANADA

Citation: Canada Trustco Mortgage Co. v. Canada, 2011 SCC 36, [2011] 2 S.C.R. 635

Date: 20110715

Docket: 33422

Between:

Canada Trustco Mortgage Company

Appellant

and

Her Majesty The Queen

Respondent

Coram: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

Reasons for Judgment:

(paras. 1 to 55)

Dissenting Reasons:

(paras. 56 to 85)

Deschamps J. (Binnie, Rothstein and Cromwell JJ. concurring)

McLachlin C.J. (Fish and Abella JJ. concurring)

Canada Trustco Mortgage Co. v. Canada, 2011 SCC 36, [2011] 2 S.C.R. 635

Canada Trustco Mortgage Company Appellant

v.

Her Majesty The Queen Respondent

Indexed as: Canada Trustco Mortgage Co. v. Canada

2011 SCC 36

File No.: 33422.

2010: December 10; 2011: July 15.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

on appeal from the federal court of appeal

Taxation — Income tax — Collection — Bills of exchange — Tax debtor drawing cheques from trust account and depositing them in a joint account owned by him and a third party — Minister of National Revenue issuing three requirements to pay to Bank with respect to tax debtor's tax liability — Bank disputing liability — Whether Bank liable to make payments to tax debtor named as payee of cheques — Whether Bank liable to make payments to tax debtor when receiving cheques payable to tax debtor for deposit in account held jointly by tax debtor and third party — Whether Bank required to comply with requirements to pay — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 224 — Bills of Exchange Act, R.S.C. 1985, c. B-4 .

The tax debtor M owed tax to the federal government. The Minister of National Revenue became aware that cheques payable to M were being drawn on his trust account and deposited in a joint account owned by M and a third party. Each of the cheques drawn on the trust account was payable to M and delivered to the appellant, Canada Trustco Mortgage Company (the "Bank"), with an instruction to deposit the funds in the joint account. This instruction was given by writing "Dep to" and the account number on the back of the cheque.

The Minister issued three requirements to pay to the Bank as per s. 224 of the Income Tax Act ("ITA"). The Bank disputed its liability and the Minister assessed the Bank for the amounts of the cheques for failing to comply with the three requirements to pay. The Tax Court of Canada dismissed the Bank's appeal and the Federal Court of Appeal upheld the Tax Court decision.

Held (McLachlin C.J. and Fish and Abella JJ. dissenting): The appeal should be allowed, the lower courts' decisions set aside and the assessments vacated.

Per Binnie, Deschamps, Rothstein and Cromwell JJ.: The Bank was at no point liable to pay M the proceeds of the cheques. The fact that a person is designated as payee on the face of a cheque does not on its own mean that a bank is liable to make a payment to the person. A drawee is answerable to the drawer. The question is to whom the drawee may make the payment. What is on the back of the cheque — the instructions or the endorsement — is crucial to this question. In this case, the instructions were to deposit the cheques into the joint account. The Bank's liability to pay monies to M personally cannot be confused with its liability to pay monies to the holders of the joint account. There were no instructions that made the monies payable to M.

In this case, the cheques were neither expressed to be payable to bearer nor endorsed in blank. After the cheques had been delivered to the Bank for deposit into the joint account, M was no longer in possession of them, was not entitled to them and was therefore not their holder. Once the Bank received the cheques for deposit and credited them to the joint account, it acquired the rights of a holder in due course pursuant to s. 165(3) of the Bills of Exchange Act ("BEA") and was under a contractual obligation to the holders of the joint account to present the cheques for payment. In crediting the joint account, sending the cheques to a third party for clearing, and receiving the proceeds, the Bank was acting on the basis of its contractual relationship with the holders of the joint account and not on behalf of M personally. When the Bank debited the trust account the next day, it was not making a payment to M or to an agent acting for him alone. The Bank owed no money to M, as it was acting as the collecting bank for its customers, the holders

of the joint account. It did not collect the proceeds of the cheques as agent for the payee, M.

A banker's obligation arises out of the debtor-creditor relationship created when a bank account is opened. The payee of a cheque is not a party to this contractual relationship, and the mere fact of being a payee does not entail such a relationship with the drawee. A cheque operates neither as an assignment of funds in the hands of the payee nor as an assignment of funds in the hands of the drawee. In and of itself, a cheque imposes no obligation on a drawee bank to the payee. There is a distinction between delivery of a cheque for deposit and presentment for payment. It is clear from the rules applicable to presentment that the drawee bank's obligation — to make payment to the holder of the cheque — is to the drawer only and that this obligation is triggered only when the cheque is presented to it. It is also clear that, except as provided in the BEA, the drawee is obliged, as between itself and the drawer, to disburse the funds only upon presentment of the bill by the holder — the person who is entitled to receive them — or by the holder's agent. Viewed either from the angle of M being the payee or from that of the Bank being the drawee, the mere fact that cheques payable to M were delivered to the Bank for deposit did not make the latter liable to make a payment to the former within the meaning of s. 224(1) of the ITA.

Per McLachlin C.J. and Fish and Abella JJ. (dissenting): The Bank is liable to make a payment to M as a result of the cheques he wrote to himself. A bank that collects the funds from a deposited cheque receives the funds as agent for the customer (the payee). This involves two transactions. The funds are initially credited to its principal, the payee/customer. The bank then receives them back under the banking contract. The fact that these transactions follow one on the other does not change the conclusion that, legally, they are two distinct episodes. As such, a deposited cheque is payable to the customer when it is deposited; at no time is the cheque payable to the bank. Subsection 165(3) of the BEA does not establish that the bank becomes a holder of the cheque — its limited objective is achieved by granting the collecting bank all the rights and powers of a holder in due course, and does not require the bank to be actually designated a holder in due course. Once the Bank received M's cheques to himself, its liability to its customer was triggered. The Bank was therefore contractually bound to honour its customer's demand to pay him. As such, all of the requirements of s. 224(1) of the ITA were met, and the requirement to pay attached to the money in transit between M's accounts.

Regardless of the fact that the cheques were deposited into a joint account, the Bank was liable to M alone when it decided to honour the cheques. Once funds are irrevocably deposited in a joint account, they become the property of joint account holders jointly under the terms of their banking contract and cannot be garnished by the Minister because they are no longer the sole property of the tax debtor. However, it does not follow that the Minister could not intercept funds in transit before they arrived in the joint account. A requirement to pay in s. 224(1) intercepts funds while they are in transit. Before the funds arrive in the joint account and while the funds are being transferred, the drawee bank is only liable to make a payment to the payee of the cheque. The other joint account holder had no right to the funds before they arrived in the account. It is only M's status as payee that matters for the purpose of triggering s. 224(1), in the presence of a joint account.

Cases Cited

By Deschamps J.

Referred to: *National Trust Co. v. Canada* (1998), 162 D.L.R. (4th) 704; *Foley v. Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002; *Joachimson v. Swiss Bank Corp.*, [1921] 3 K.B. 110; *Bank of Montreal v. M.N.R.*, [1992] 1 C.T.C. 2292; *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727; *J.C. Creations Ltd. v. Vancouver City Savings Credit Union*, 2004 BCCA 107, 236 D.L.R. (4th) 602; *Westboro Flooring & Décor Inc. v. Bank of Nova Scotia* (2004), 241 D.L.R. (4th) 257; *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504; *Schroeder v. Central Bank of London* (1876), 34 L.T. 735; *Thomson v. Merchants Bank of Canada* (1919), 58 S.C.R. 287; *Schimnowski Estate, Re*, [1996] 6 W.W.R. 194; *Capital Associates Ltd. v. Royal Bank of Canada* (1976), 65 D.L.R. (3d) 384, *aff'd* (1973), 36 D.L.R. (3d) 579; *Boyd v. Emmerson* (1834), 2 Ad. & E. 184, 111 E.R. 71.

By McLachlin C.J. (dissenting)

B.M.P. Global Distribution Inc. v. Bank of Nova Scotia, 2009 SCC 15, [2009] 1 S.C.R. 504; *National Trust Co. v. Canada* (1998), 162 D.L.R. (4th) 704; *Foley v. Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002; *Schroeder v. Central Bank of London* (1876), 34 L.T. 735; *Thomson v. Merchants Bank of Canada* (1919), 58 S.C.R. 287; *Schimnowski Estate, Re*, [1996] 6 W.W.R. 194; *Westminster Bank Ltd. v. Hilton* (1926), 43 T.L.R. 124; *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727; *Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535; *Hirschorn v. Evans*, [1938] 2 K.B. 801; *Westcoast Commodities Inc. v. Chen* (1986), 55 O.R. (2d) 264.

Statutes and Regulations Cited

Bills of Exchange Act, R.S.C. 1985, c. B-4, ss. 2 “bearer”, 16(1), 20(3), 34, 67(2), 84(1), (3), 86(1), 126, 129, 138(2), 165(1), (3).

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 224.

Authors Cited

Crawford, Bradley. *The Law of Banking and Payment in Canada*, vol. 2. Aurora, Ont.: Canada Law Book, 2008 (loose-leaf updated October 2010, release 2).

Ellinger, E. P., Eva Lomnicka and Richard Hooley. *Modern Banking Law*, 3rd ed. Oxford: Oxford University Press, 2002.

Goode, R. M. “When is a cheque paid?”, [1983] J. Bus. L. 164.

Ogilvie, M. H. *Bank and Customer Law in Canada*. Toronto: Irwin Law, 2007.

Ogilvie, M. H. “Why Joint Accounts Should Not Be Garnished — *Westcoast Commodities Inc. v. Jose Chow Chen*” (1986-1987), 1 B.F.L.R. 267.

Ziegel, Jacob S., Benjamin Geva and R. C. C. Cuming. *Commercial and Consumer Transactions: Cases, Text and Materials*, 3rd ed., vol. II, *Negotiable Instruments and Banking*, by Benjamin Geva. Toronto: Emond Montgomery, 1995.

APPEAL from a judgment of the Federal Court of Appeal (Sexton, Blais and Layden-Stevenson JJ.A.), 2009 FCA 267, 2009 DTC 5171 (p. 6205), [2009] F.C.J. No. 1151 (QL), 2009 CarswellNat 2851, affirming a decision of Little J., 2008 TCC 482, [2009] 1 C.T.C. 2264, 2008 D.T.C. 4762, [2008] T.C.J. No. 372 (QL), 2008 CarswellNat 3092. Appeal allowed, decisions of the Federal Court of Appeal and the Tax Court of Canada set aside and the assessments vacated, McLachlin C.J. and Fish and Abella JJ. dissenting.

R. Paul Steep and Thomas N. T. Sutton, for the appellant.

Wendy Burnham and Michael Lema, for the respondent.

The judgment of Binnie, Deschamps, Rothstein and Cromwell JJ. was delivered by

- [1] Deschamps J. — Few jurists thrive on exploring the mechanisms rooted in the Bills of Exchange Act, R.S.C. 1985, c. B-4 (“BEA ”); most find them technical and tedious. Important as electronic transactions have become in an increasingly paperless world, cheques are still popular bills of exchange that are processed daily in a multitude of transactions across Canada based on recognized mechanisms. The arguments accepted by the courts below disregard those mechanisms. If accepted, their interpretation would require a bank to which a third party has made a demand for payment to determine not only whether its customer is liable to pay the third party, but also whether the payee is liable to do so. No reason was advanced for imposing such an obligation. For the following reasons, I am of the view that the bank in this case was at no point liable to pay the tax debtor the proceeds of the cheques. I would allow the appeal with costs throughout.
- [2] Section 224 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp .) (“ITA ”), provides that the Minister of National Revenue may require a person who is, or will be within one year, liable to make a payment to a tax debtor to instead pay the money the person owes the tax debtor to the Receiver General (“requirement to pay”). The Minister’s authority to issue a requirement to pay in appropriate circumstances is not in dispute. The issue in this appeal is whether a bank that receives a cheque payable to the tax debtor for deposit in an account held jointly by that debtor and a third party becomes liable to make a payment to the tax debtor.
- [3] The facts are uncontested. At the relevant time, the appellant, Canada Trustco Mortgage Company (“Trustco”), was authorized to offer financial services in Canada. The parties have described Trustco as a bank, as has the Tax Court of Canada, and for the sake of convenience, I will also refer to it as a bank.

- [4] Cameron Clyde McLeod was a practising member of the Law Society of British Columbia. For the purposes of his law practice, he maintained a trust account with Trustco at the latter's King George Highway branch in Surrey, B.C. In addition, he and another lawyer, Herbert Maier, held a joint account at the same branch. Each of the accounts was governed by an agreement.
- [5] Mr. McLeod owed tax to the federal government. The Minister became aware that cheques payable to Mr. McLeod were being drawn on the trust account and deposited in the joint account. The Minister issued three requirements to pay to Trustco. According to these requirements, Trustco was to pay to the Receiver General moneys otherwise payable to Mr. McLeod. In response to the requirements to pay, Trustco disputed its liability on the ground that it was "not indebted to the [taxpayer] alone".
- [6] Each of the cheques on which the claim is based was issued during the period of effectiveness of the requirements to pay, was drawn on the trust account, was payable to Mr. McLeod and was delivered to Trustco with an instruction to deposit the funds in the joint account. This instruction was given by writing "Dep to" and the account number on the back of the cheque. Although the evidence is silent as to the identity of the person or persons who delivered the cheques and gave the instructions to deposit them, neither the authority to do so of the person or persons in question nor the legitimacy of Trustco's receipt of the cheques for deposit is at issue. Trustco credited the joint account, sent the cheques to a third party for collection, processing and settlement — the third party's stamp appears on the back of the cheque filed as a sample — and, on the following day, debited the trust account.
- [7] The Minister assessed Trustco for the amounts of the cheques for failing to comply with the three requirements to pay. Trustco filed notices of objection. After they were rejected, it appealed to the Tax Court of Canada.
- [8] I will pause here to underscore the various capacities in which the parties in this appeal interacted, capacities that must not be conflated. A bank's relationship with a customer is based on a contract made up of both implied and express terms; I will elaborate on this below. Where a cheque is involved, the parties' rights and obligations are also governed by the BEA . In most transactions involving cheques, a bank acts in only one capacity, that is, as either the drawee, the negotiating bank or the collecting bank, and the bank's customer acts as either the drawer or the holder of a cheque. In this case, Trustco acted at times as the collecting bank and at other times as the drawee. Mr. McLeod acted variously as the drawer (he was the holder of the trust account), as the payee of the cheques (the cheques were made out to him) and as one of the two holders of the joint account.
- [9] It is also important to point out that the respondent, Her Majesty The Queen (hereinafter referred to as "Canada") made two significant concessions at trial (2008 TCC 482, [2009] 1 C.T.C. 2264, at para. 11):

- (a) the requirements to pay do not apply to funds on deposit in the trust account, and Trustco accordingly had no obligation to remit funds on deposit in the trust account; and
 - (b) the requirements to pay do not apply to funds in the joint account, and Trustco accordingly had no obligation to remit funds on deposit in the joint account.
- [10] Since Canada's position does not rest on funds being held in the trust account or in the joint account, the question becomes whether Trustco was liable to make payments to the tax debtor, Mr. McLeod, because of the fact that he was named as the payee of the cheques. To answer this question, Trustco's obligations must be examined in the two capacities in which it acted, as mentioned above: (1) as the collecting bank and (2) as the drawee of the cheque.
- [11] Little J. dismissed Trustco's appeal. He applied the test from *National Trust Co. v. Canada* (1998), 162 D.L.R. (4th) 704 (F.C.A.), to determine whether s. 224(1) of the ITA had been triggered. He asked whether Trustco was "liable" to make a payment and whether the amount would be "payable" to a tax debtor within a year. The need to "stop [the analysis] before considering that it was cheques that were presented to the bank" was pivotal to his reasoning (para. 20). He focussed on the "repayment" of the funds in the trust account (para. 12 (emphasis in original)).
- [12] Little J. considered that the proceeds of the cheques were "payable" to Mr. McLeod because the debtor-creditor relationship between Trustco and Mr. McLeod required the former to repay the funds deposited in the trust account to the account holder on demand (para. 22). In his view, Trustco's liability arose when Mr. McLeod "presented the bank with the cheques" (para. 28). This led Little J. to conclude that he did not need to examine the fact that the moneys had actually been transferred from the trust account to the joint account (para. 30).
- [13] In addition, although he acknowledged that the "writing [of] a cheque is not by itself a withdrawal", Little J. found that the situation was different once "the cheque is presented to the bank" (para. 31). He took into consideration the fact that Mr. McLeod was not only the payee but also the drawer and that as the drawer he was in a position to enforce the payment because of the debtor-creditor relationship that existed between Trustco and himself (*ibid.*). Little J. recognized — and he noted that Canada had conceded the point — that a bank is not liable to the payee of a cheque (para. 39). However, in his view, Trustco remained liable to pay the cheques to Mr. McLeod in his capacity as holder of the trust account. He accepted Canada's submission that Mr. McLeod was the bearer of the cheque (para. 41).
- [14] The Federal Court of Appeal found that no "palpable or overriding error" had been made and unanimously upheld Little J.'s decision (2009 FCA 267, 2009 DTC 5171 (p. 6205), at para. 1).

- [15] Trustco argues that the trial judge failed to differentiate between a demand for repayment of funds deposited in an account and the delivery of a cheque for deposit. In its view, it was liable only — as drawee — to pay funds out of the trust account upon proper presentment for payment by the holder of the cheque. At no point was it liable to make a payment to Mr. McLeod, the tax debtor.
- [16] Canada contends that there is no distinction between presentment of a cheque to the drawee for the payment of cash to Mr. McLeod and presentment of a cheque for deposit to the joint account. Its position is that when Mr. McLeod delivered the cheques to Trustco and instructed it to pay the amounts into the joint account, he acted as payee, creditor, drawer and depositor, but that his role as depositor is irrelevant.
- [17] Canada's contention implies that Trustco became liable to make a payment to Mr. McLeod when it accepted the cheque for deposit. To determine whether Trustco is liable to make a payment to the Receiver General, it will be necessary to review the relevant legal relationships.

I. Analysis

- [18] The analysis of a bank's relationship with its customers must begin with the seminal case of *Foley v. Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002:

The relation between a Banker and Customer, who pays money into the Bank, is the ordinary relation of debtor and creditor

. . .

. . . I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving money from other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. [pp. 1002 and 1008]

- [19] Implicit in the debtor-creditor relationship is the bank's obligation to repay the funds deposited in the account when its customer demands payment. In the case at bar, Trustco is a party in two separate contractual relationships: the first is in connection with the trust account and the second with the joint account. Having conceded that it cannot attach funds in either of these accounts, Canada cannot rely merely on the debtor-creditor relationships that arose from the fact that funds were at some point in time held in them. Canada accordingly focusses on the fact that cheques were made to the order of Mr. McLeod, the tax debtor, which narrows the issues and makes it necessary to review the obligations a bank must meet upon receipt of a cheque for deposit and upon presentment of a cheque drawn on it.

A. Obligation of the Collecting Bank

- [20] Counsel for Canada argues that the best way to view the receipt of the cheques for deposit is to break the transactions down into two steps: at the first, Mr. McLeod demanded to be paid as payee of the cheques and also demanded, as drawer, that the amounts be repaid out of funds owed to him in relation to the trust account; at the second, he instructed Trustco to deposit the funds into the joint account. In other words, notional payments were made to Mr. McLeod before the funds were deposited into the joint account.
- [21] This approach disregards the instructions to deposit the funds into the joint account. The evidence shows that the cheques were initially received at the branch with instructions to deposit the funds into the joint account, not that Mr. McLeod, as drawer, demanded that payments be made to him as payee. The evidence is also clear that the cheques were credited to the joint account before being sent for clearing and before the funds were debited from the trust account. At no point did Trustco actually make a payment to Mr. McLeod.
- [22] The argument of counsel for Canada also disregards the nature of the instrument used by the parties: a cheque. A cheque is an instrument that embodies both common law and statutory concepts. This means that both the statute governing the instrument — the BEA — and the common law must be taken into consideration.
- [23] The argument accepted by the Tax Court judge that Mr. McLeod was the bearer of the cheque (para. 41) is inconsistent with the definition of the term “bearer” in the BEA , according to which a bearer is a specific type of holder, namely “the person in possession of a bill or note that is payable to bearer” (s. 2 BEA). To be payable to bearer, a cheque must be expressed to be so payable, or the only or last endorsement on it must be an endorsement in blank (s. 20(3) BEA). In this case, the cheques were neither expressed to be payable to bearer nor endorsed in blank. After the cheques had been delivered for deposit into the joint account, Mr. McLeod was no longer in possession of them, was not entitled to them and was therefore not their holder.
- [24] More importantly, Canada’s approach and the Tax Court judge’s interpretation disregard the capacity in which Trustco acted. The receipt by a bank of a cheque for deposit carries with it obligations grounded both in the common law and in the banking agreement. Professor Ogilvie describes the bank’s legal position in such a situation as follows:

When a customer, the payee of a cheque, deposits a cheque or other instrument in an account with the customer’s bank, that bank takes on the role of collecting bank, which involves presenting the cheque for payment through the clearing system to the paying bank, that is, the bank of the drawer of the cheque from whose account at the paying bank it is expected that the cheque will be paid.

(M. H. Ogilvie, *Bank and Customer Law in Canada* (2007), at p. 288)

Whereas it was in *Foley v. Hill* that the House of Lords made clear that the bank is under an implied contractual duty to honour cheques drawn by its customers, it was in *Joachimson v. Swiss Bank Corp.*, [1921] 3 K.B. 110, that the duty to collect the proceeds of a cheque was characterized as one of the common law incidents of the banking contract: “The bank undertakes to receive money and to collect bills for its customer’s account” (p. 127). (See also *Ogilvie*, at p. 288.) Professor Goode adds that when the customer is silent about what is expected from the bank, the bank may be presumed to act as a collecting bank: R. M. Goode, “When is a cheque paid?”, [1983] J. Bus. L. 164, at p. 164.

- [25] For the collecting bank’s duty to its customer to be triggered, there must be a properly payable cheque and no suspicious circumstances. In undertaking to collect a deposited cheque, the collecting bank must select the collection method with reasonable care, promptly present the deposited cheque for collection, receive payment for it and credit the customer’s account or, if applicable, give notice of dishonour (B. Crawford, *The Law of Banking and Payment in Canada* (loose-leaf), vol. 2, at pp. 10-43, 10-46 and 10-51; E. P. Ellinger, E. Lomnicka and R. Hooley, *Modern Banking Law* (3rd ed. 2002), at p. 598).
- [26] The situation of a bank that credits its customer’s account before actually receiving the proceeds of collection raises, in Crawford’s words (p. 24-6), an “interesting conceptual problem”. However, as he correctly points out, this interesting question is of no practical importance in Canada. Section 165(3) of the BEA provides that a bank which receives a cheque for deposit acquires all the rights and powers of a holder in due course (Crawford, at p. 10-78; J. S. Ziegel, B. Geva and R. C. C. Cuming, *Commercial and Consumer Transactions: Cases, Text and Materials* (3rd ed. 1995), vol. II, at pp. 362-63).
- [27] In the case at bar, Trustco was put in possession of the cheques by the payee, Mr. McLeod, or by someone acting on his behalf, with instructions to deposit them. Not only was Mr. McLeod one of the holders of the joint account, but Trustco’s contract with the account’s holders authorized it to accept cheques from persons who provided the account number. It has not been suggested that the instructions to deposit the cheques were not actually given or that there was any doubt that the payee or his agent had the authority to give them. Since Trustco was in lawful possession of the cheques, it can safely be concluded that, once it had received the cheques for deposit and credited them to the joint account, it acquired the rights of a holder in due course pursuant to s. 165(3) of the BEA and was under a contractual obligation to the holders of the joint account to present the cheques for payment.
- [28] With some exceptions that do not apply in this case, presentment is a precondition for payment (s. 84(1) BEA). Presentment must be made by a holder (s. 84(3) BEA), and payment must be made to a holder (s. 138(2) BEA). This mechanism rests not on formalism, but on the internal logic of the BEA and on the contractual relationship of a bank with its account holders. The manner in which cheques deposited into bank accounts are processed is grounded in the premise that banks deal primarily with persons who hold accounts with them and in the implicit contractual undertaking of banks to collect the proceeds of cheques deposited in their customers’ accounts. In this case, Trustco collected the cheques on behalf

of Mr. McLeod and Mr. Maier jointly, not of Mr. McLeod alone. As the Chief Justice acknowledges, there are good reasons not to confound the holders of a joint account with a single one of its holders: M. H. Ogilvie, “Why Joint Accounts Should Not Be Garnished — *Westcoast Commodities Inc. v. Jose Chow Chen*” (1986-1987), 1 B.F.L.R. 267. This means that in the instant case, the payee, Mr. McLeod, cannot be confused with the holders of the joint account even though he is one of them.

- [29] In addition to the contract clause authorizing Trustco to accept deposits to the joint account from any person who could provide the account number, there was a clause to the effect that the amount of any instrument previously cashed, negotiated or credited by Trustco and returned unpaid or unsettled could be debited from the joint account. These clauses are relevant to a situation in which a bank receives a cheque, credits an account and then presents the cheque for payment. If the cheque is returned unpaid, the collecting bank may debit its customer's account. The clauses in question do not support an inference that the receipt of a cheque for deposit in the joint account would on its own suffice for Trustco to become liable to make a payment to Mr. McLeod.
- [30] In discharging its duties as the collecting bank, Trustco had to be alert to suspicious circumstances. However, the fact that cheques are drawn on a trust account is not material to the collecting bank's duties. As Garon T.C.C.J. pointed out in *Bank of Montreal v. M.N.R.*, [1992] 1 C.T.C. 2292, it is generally not incumbent on a bank to police a trust account (p. 2295). In crediting the joint account, sending the cheques to a third party for clearing, and receiving the proceeds, Trustco was acting on the basis of its contractual relationship with the holders of the joint account and not on behalf of Mr. McLeod personally. When Trustco debited the trust account the next day, it was not making a payment to Mr. McLeod or to an agent acting for him alone.
- [31] The Chief Justice expresses the opinion that Trustco never became the holder of the cheques. With respect, the fact that the cheques were not endorsed does not mean that Trustco did not acquire the rights of a holder in due course which results from having received valid cheques in good faith. Section 165(3) of the BEA was in fact adopted to avoid the argument that a bank that receives for deposit a cheque bearing a restrictive endorsement or no endorsement at all is not a holder — its purpose was not to protect against fraudulent endorsements (see s. 67(2) BEA ; *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at paras. 76-81; *J.C. Creations Ltd. v. Vancouver City Savings Credit Union*, 2004 BCCA 107, 236 D.L.R. (4th) 602; *Westboro Flooring & Décor Inc. v. Bank of Nova Scotia* (2004), 241 D.L.R. (4th) 257 (Ont. C.A.)). However, the fact that Trustco had acquired the rights and powers of a holder in due course of the cheques — as uncontroversial as it may be — is not the reason why Trustco was not liable to pay moneys to the tax debtor, Mr. McLeod. The reason Trustco owed no money to Mr. McLeod is that it was acting as the collecting bank for its customers, the holders of the joint account. It did not collect the proceeds of the cheques as agent for the payee, Mr. McLeod.

- [32] The Chief Justice relies on *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504, in support of the proposition that, in the case at bar, Trustco, as the collecting bank, acted as agent for the payee. B.M.P. concerned a payment made under a mistake of fact. In it I wrote, in discussing the equitable defence of change of position (para. 63) and the consequences on tracing of the passage of a cheque through the clearing system (paras. 76 and 83), that the Bank of Nova Scotia, as the collecting bank, had received the funds as agent for the payee, B.M.P. In that case, because the payee had instructed its bank to deposit the cheque into its own account, the distinction in the instant case between the payee and the account holder on whose behalf the cheque is collected did not arise. The payee and the account holder were the same person, B.M.P. Since the contractual duty to collect the proceeds of a cheque is owed to the customer in whose account the cheque is deposited, it would have been more precise to say that the collecting bank acts as agent for the person in whose account the cheque has been deposited. This choice of words in a case dealing with mistake of fact and tracing cannot serve as a basis for holding that a collecting bank has a contractual relationship with someone other than the holder of the account to which the cheque is credited.
- [33] In the case at bar, the only instructions received were to deposit the cheques to the credit of the joint account, and it is these instructions that triggered the duty to collect the proceeds of the cheques. The contract that incorporates the implied term imposing on the bank the duty to proceed to collect on the cheque is the one between Trustco and the holders of the joint account. There is no contract between a bank and a payee in his or her capacity as payee.
- [34] This approach is not formalistic. No significance is attached to the fact that the cheques were processed through the clearing system. Trustco's acceptance of the cheques for deposit in the joint account could not have resulted in a liability to pay the Receiver General: the obligation resulting from that acceptance was to the holders of the joint account, and Canada concedes that the funds in the joint account could not be attached.
- [35] Canada nonetheless contends that the focus should be on the fact that Mr. McLeod was acting in this case in his capacity as payee and as a creditor of Trustco by virtue of his status as holder of the trust account, and that he was demanding payment from Trustco in its capacity as drawee. Since the Chief Justice accepts this argument, I will now explain why it must fail.

B. Obligation of a Drawee

[36] *Schroeder v. Central Bank of London* (1876), 34 L.T. 735 (C.P. Div.), is important to an understanding of the nature of the obligations of a drawee bank to the payee. In it, the payee contended that the cheque constituted an absolute assignment of the funds in his hands and that he was therefore entitled to receive payment from the drawee bank. The drawee bank countered that a bank on which a cheque is drawn is under no liability to pay the holder of the cheque. The court agreed with the bank (at p. 737):

A cheque is a request to pay and nothing more; it does not purport to be an assignment, and it is impossible, therefore, to regard it as an assignment of so much money. The bankers hold their customer's money on an implied contract to pay his cheques up to the amount of his balance in their hands, for breach of which they would be liable in damages to the drawer. But there is no contract by the bankers with the payees of the cheque, and they can have no remedy against the bank unless by the statute.

[37] This approach is consistent with the reasoning in *Foley v. Hill*. A banker's obligation arises out of the debtor-creditor relationship created when a bank account is opened. The payee is not a party to this contractual relationship, and the mere fact of being a payee does not entail such a relationship with the drawee.

[38] For the purpose of determining whether, absent any contractual relationship with the payee of a cheque, a drawee bank owes the payee any duty, the definition of a cheque in the BEA is relevant: "A cheque is a bill drawn on a bank, payable on demand" (s. 165(1)). A bill is defined as follows (s. 16(1) BEA):

16. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.

[39] In addition, the BEA explicitly states that the mere issuance of a cheque does not operate as an assignment of funds in the hands of the drawee (s. 126 BEA):

126. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.

[40] These provisions, read together, mirror the principles stated in *Schroeder* and incorporate them into the statute. A cheque operates neither as an assignment of funds in the hands of the payee nor as an assignment of funds in the hands of the drawee. It is a document by means of which a customer orders his or her banker to pay funds the banker owes the customer to a person or to the order of that person out of the account specified on it. In and of itself, a cheque imposes no obligation on a drawee bank to the payee. This interpretation is well entrenched in our law and was accepted by Canada at trial: *Schroeder; Thomson v. Merchants Bank of Canada* (1919), 58 S.C.R. 287, at p. 298; *Schimnowski Estate, Re*, [1996] 6

W.W.R. 194 (Man. C.A.), at para. 19.

[41] The statutory duty of a bank to pay a cheque is governed by the rules applicable to presentment. With some exceptions, as I mentioned above, presentment is mandatory (s. 84(1) BEA). The general rule for presentment of a cheque is as follows (s. 86(1) BEA):

86. (1) Presentment of a bill must be made by the holder or by a person authorized to receive payment on his behalf, at the proper place as defined in section 87, and either to the person designated by the bill as payer or to his representative or a person authorized to pay or to refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found.

A bank may incur other liabilities in circumstances which do not arise in the case at bar, upon acceptance within the meaning of s. 34 of the BEA , for example. That is not the case here. At the time of presentment, Mr. McLeod was no longer a holder. Only Trustco had the rights and powers of a holder in due course.

[42] Bank of Montreal illustrates clearly that the duty to honour the customer's cheque is triggered only at the time the holder presents the cheque to the drawee for payment. In that case, requirements to pay had been issued to the Bank of Montreal in relation to tax owed by a customer of the bank who held a trust account there. The tax debtor drew cheques payable to himself on the trust account and endorsed them in blank. The cheques were subsequently endorsed by his wife and presented to the Bank of Montreal for payment. Garon T.C.C.J. found, correctly in my view, that

[i]n the present case the moneys payable by virtue of the two cheques in issue were not payable to the tax debtor, since at the time of presentment of the cheques to the bank, after the endorsement by Mrs. Lynn Morgan, Mr. Morgan was no longer the bearer of these cheques. He was not at that point in time entitled to receive the proceeds of the cheques. [p. 2294]

[43] This Court applied the same rule in *Capital Associates Ltd. v. Royal Bank of Canada* (1976), 65 D.L.R. (3d) 384, aff'g (1973), 36 D.L.R. (3d) 579 (Que. C.A.). In that case, Capital Associates Ltd. deposited a cheque in its account at the Royal Bank. The cheque was drawn by All-Canadian Group Distributors Ltd. on an account at the same branch of the Royal Bank. After the cheque had been deposited, All-Canadian ordered the bank to stop payment on it. All-Canadian's account had not yet been debited at the time of the stop payment order. The Royal Bank refused payment. In the Court of Appeal, Rivard J.A., with whose reasons this Court agreed, adopted the view that the facts in that case should be distinguished from those of a case in which the bank pays in cash or certifies a cheque. He explained the process as follows (at pp. 583-84):

[translation] I do not accept the proposition submitted by the appellant that in depositing the cheque with the Royal Bank, it was presenting it for payment.

Capital, in depositing the cheque, did not demand payment, but gave authority to the bank to present the cheque for payment to All-Canadian. All-Canadian refused to pay, and the bank cannot be responsible to Capital.

[44] Capital Associates illustrates not only the distinction between delivery of a cheque for deposit and presentment for payment, but also the rationale for the rules that a bank to which a payee delivers a cheque owes no duty to that person as payee and that it is only when the cheque is presented to the bank in its capacity as drawee that it is requested to disburse the funds. Between the time the cheque is issued and the time it is presented for payment, many intervening circumstances are possible: for example, payment could be stopped as in Capital Associates, the cheque could be negotiated to a third party, an excessive delay could occur, or the drawer could become insolvent or incapacitated. In general, a bank does not assume any risks that may be incurred between the time it receives the cheque for deposit and the time it presents the cheque to the drawee for payment. The funds used by the drawee bank to pay the cheque are funds of the drawer. It is the drawer who transfers funds using the cheque mechanism. As is stated in the BEA, it is the drawer who promises that upon presentment, payment will be made (s. 129 BEA):

129. The drawer of a bill by drawing it

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; . . .

[45] It is clear from the rules applicable to presentment that the drawee bank's obligation — to make payment to the holder of the cheque — is to the drawer only and that this obligation is triggered only when the cheque is presented to it. It is also clear that, except as provided in the BEA, the drawee is obliged, as between itself and the drawer, to disburse the funds only upon presentment of the bill by the holder — the person who is entitled to receive them — or by the holder's agent.

[46] In addition, it is clear from the above discussion that, viewed either from the angle of Mr. McLeod being the payee or from that of Trustco being the drawee, the mere fact that cheques payable to Mr. McLeod were delivered to Trustco for deposit did not make the latter liable to make a payment to the former within the meaning of s. 224(1) of the ITA.

[47] In her reasons in this case, the Chief Justice relies on a comment by Prof. Ogilvie in support of the proposition that there may be a contract between the payee and the drawee bank (Bank and Customer Law in Canada, at pp. 288-91). With respect, I do not read Prof. Ogilvie's comment as supporting this broad proposition. Rather, it is in explaining the different recourses available to a bank's customer in respect of a delayed payment in a scenario in which a cheque has been deposited in the payee's account and the accounts of both the payee and the drawer are at the same bank that she states that the payee can bring an action in breach of contract against the bank — in her example, the bank would have breached its duty to its client to present the cheque within a reasonable time. It should be noted that, in

such circumstances, the bank that causes the delay happens to be the collecting bank — a party to the contract with the holder of the account in which the cheque is deposited. It cannot, in my view, be inferred from Prof. Ogilvie's comment that there is a contractual obligation to pay the amount of a cheque to the payee merely because the payee and the drawer are customers of the same bank. If a bank has a contractual duty to a customer, it flows from the fact that the customer has either given the bank instructions as the drawer of the cheque and holder of the account from which the cheque is to be paid, or instructed the bank to collect the cheque as the holder of the account in which the cheque is deposited. I would add that the situation is different where, as in the case at bar, the payee is not the sole holder of the account in which the cheque is deposited.

- [48] In this case, Mr. McLeod's rights as the holder of an account with the bank do not inform or affect his rights as payee of the cheques. If we assume for the sake of argument that the requirements to pay did not exist and that Canada did not make the concessions it has made, Trustco would, had Mr. McLeod presented the cheques at his branch for immediate payment to himself (i.e. cashed them), have been in breach of its contractual obligations to Mr. McLeod as the holder of the trust account had it failed to pay. In any event, this is not what happened. Not only were the cheques deposited, anonymously, to the credit of a joint account, but they had to go through the clearance system first before being presented for payment. Capital Associates makes it clear that presentment for payment and deposit are not synonymous. This distinction is critical to the disposition of this case.
- [49] The fact that Trustco received the cheques both for deposit and for payment as drawee — although not simultaneously — has complicated the resolution of the dispute. The English case of *Boyd v. Emmerson* (1834), 2 Ad. & E. 184, 111 E.R. 71, is one that involved facts similar to those of the instant case. In *Boyd*, the plaintiff had told the cashier of a bank to place a cheque to his credit. The same bank was the drawee. It refused to honour the cheque, because the drawer did not have sufficient funds. Lord Denman C.J. held that the bank was within its right to refuse the payment, because it had taken the cheque for collection. The bank had followed its customer's instruction to credit the cheque to his account. As a result, the credit was subject to the contingency of there being sufficient funds in the drawer's account.
- [50] *Boyd*, Bank of Montreal and Capital Associates are relevant to the case at bar. The fact that the cheques were drawn on and deposited with Trustco did not alter Trustco's legal position. It did not receive the cheques as drawee, and the instructions to deposit the funds made it a collecting bank. In that capacity, it was not liable to pay any funds to Mr. McLeod.

II. Conclusion

- [51] The fact that a person is designated as payee on the face of a cheque does not on its own mean that the bank is liable to make a payment to the person. First, a drawee is answerable to the drawer. Second, the question is to whom the drawee may make the payment. What is on the back of the cheque — the instructions or the endorsement — is crucial to this question. In this case, the instructions were to deposit the cheques into the joint account. There were no instructions that made the moneys payable to Mr. McLeod, the tax debtor.
- [52] Canada cannot say that the joint account is out of reach while at the same time treating the holders of that account as one and the same person, namely Mr. McLeod. As Canada takes the position that it could attach neither of the accounts, Trustco's liability to pay moneys to Mr. McLeod personally cannot be confused with its liability to pay moneys to the holders of the joint account. Canada had to show either that Trustco was liable to pay Mr. McLeod as payee, which, as I have demonstrated above, it cannot do, or that it had the right to attach the funds deposited into the joint account, which Canada has conceded it cannot do.
- [53] A bank's liability to pay can arise only under a statute, at common law or under a contract. In this case, Canada can rely on none of these sources. This outcome is perfectly consistent with Canada's concessions that it cannot attach funds in either the trust account or the joint account, and with the fact that the funds were credited by Trustco to the joint account, not paid to Mr. McLeod.
- [54] To accept Canada's position would mean that the presentment for payment was made by the payee to the drawee before the cheques were deposited. That is not what happened in this case. To accept that Trustco became liable to pay Mr. McLeod would also mean that a drawee bank which honours a cheque makes payment to the payee without determining who the holder of the cheque is. Canada's position is inconsistent with the fact that a bank that accepts a cheque for deposit does not in so doing act in the capacity of a drawee even if it also happens to be the drawee. Canada's interpretation would also mean that whenever demands are made by third parties, banks would have to determine whether payees — who, when cheques are negotiated, are often not even their customers — are liable to make payments. No such requirement exists at common law or is provided for in the BEA .
- [55] For these reasons, I would allow the appeal, set aside the decisions of the Federal Court of Appeal and the Tax Court of Canada and vacate the assessments with costs throughout.

The reasons of McLachlin C.J. and Fish and Abella JJ. were delivered by

- [56] The Chief Justice (dissenting) — Having read the reasons of Deschamps J., I am respectfully of the view that the appeal should be dismissed.
- [57] While I agree with much of Deschamps J.'s analysis, there are two narrow points that divide us, and that lead us to a different result in this case. First, according to Deschamps J., when a customer delivers a cheque to his or her bank with instructions to deposit the funds into his

or her account, the bank becomes the holder of the cheque, and therefore any funds collected from the cheque are paid to the bank itself. In my view, the bank does not become the holder of a cheque, but rather collects the funds as agent for its principal: *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504, at para. 83.

- [58] Second, Deschamps J. relies on the alternative argument that where funds are deposited into a joint account, as they were here, the funds are payable to both account holders, rather than just payable to the payee of the cheque. I do not agree. In my view, a “bank receives the funds as the payee’s agent” (*B.M.P.*, at para. 83 (emphasis added)), and while they are in transit the funds are only payable to the payee. I develop these points below.
- [59] In this appeal, Canada Trustco Mortgage Company (the “Bank”) concedes that the only live question is whether it was liable to make a payment to the tax debtor (“Mr. McLeod”) as a result of the cheques he wrote to himself. If it was, the Bank’s obligation to pay the Receiver General was triggered, and the Bank would be liable for failure to remit the funds pursuant to the requirement to pay.
- [60] It is central to the analysis that follows that we are dealing exclusively with the circumstances in which a tax debtor draws a cheque in favour of him- or herself, and not a third party. It is also important to bear in mind that, in this case, the drawee bank is the same as the collecting bank.
- [61] I will first briefly review the applicable legal principles. I will then go on to explain the application of s. 224(1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”), to the facts before us.

I. The Law

A. The Operation of Section 224(1) of the Income Tax Act

- [62] The operation of s. 224(1) of the ITA informs the subsequent analysis, and it is necessary to understand how it works before proceeding. The requirement to pay provision may be restated for present purposes as follows:
224. (1) Where . . . a person is . . . liable to make a payment to another person . . . (. . . the “tax debtor”), the Minister may . . . require the person to pay . . . the moneys otherwise payable to the tax debtor . . . to the Receiver General on account of the tax debtor’s liability
- [63] There is no special, technical definition ascribed to the precondition that the person served with the requirement to pay be “liable” to the tax debtor. As stated in *National Trust Co. v. Canada* (1998), 162 D.L.R. (4th) 704 (F.C.A.), at paras. 46-47:

The ordinary meaning of the word “liable” in a legal context is to denote the fact that a person is responsible at law. Hence, I am in respectful agreement with McLachlin J. (as she then was) when she stated in *Discovery Trust Company v. Abbott*, a case in which a section 224(1) requirement was served upon a trustee, that:

... the demand on third parties [a subsection 224(1) requirement] by which the Crown's claim is made in this case is not confined to a debtor-creditor relationship, as is a garnishee order; it is stated to extend to any case where the trustee is "liable to make a payment to the taxpayer". [Emphasis added.]

It is my respectful view, therefore, that the Tax Court Judge was wrong in law to limit the phrase "liable to make a payment" only to situations where a debtor-creditor relationship exists. In so doing, he precluded himself from asking the only relevant question when one is confronted with construction of the subsection. It is this: did the respondent have a responsibility at law to make a payment to the tax debtor on 1 February 1994? [Text in brackets in original.]

[64] Nor is there a particular construction for the prerequisite that the funds be "payable" to the tax debtor. Again, *National Trust Co.* holds, at paras. 61-62:

I turn now to consider the issue whether the proceeds were "payable" within the meaning of subsection 224(1) . In my view this issue is governed by *DeConinck*, supra, and the decision of this Court in *Canada v. Yannelis* where Stone J.A., for the Court, said at 636:

The word "payable" is not a term of art. Nor is it defined in the regulations. I do not see that it was used in any special sense. In my view, therefore, it should be interpreted in the light of ordinary dictionary definitions . . .

And 638:

I have come to the conclusion that the word "payable" in s. 58(8)(b)(i) [of the *Unemployment Insurance Act*] refers to the point in time when vacation pay is due to a claimant in the sense that he is entitled by his contract of employment or by the general law to have it paid to him and his employer is under an obligation to pay it. In other words, it is payable when a claimant is in a position at law to enforce payment. [Text in brackets in original.]

[65] I take from the authorities that the person or institution served by the Minister with a requirement to pay must have a responsibility at law to make a payment to the tax debtor. The scope of the operation of s. 224(1) is not narrowly confined, but exists wherever the tax debtor is in a position at law to enforce payment from the party served with the requirement to pay. To adopt a more restrictive view of its content would be to undermine the proper functioning of the power the provision grants the Minister.

[66] With this understanding of the governing provision in mind, I turn now to the nature of the legal relationship between the bank and its customer and how it plays out within the parameters of s. 224(1) .

B. The Nature of the Legal Relationship Between Bank and Customer

- [67] The relationship between a bank and its customer is one of creditor and debtor, where the bank is the debtor: *Foley v. Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002. The duty of repayment is triggered when the customer makes a demand for payment from the bank. A demand for repayment may be made for payment in cash or by cheque.
- [68] Ordinarily, the bank on which a cheque is drawn (the drawee bank) is under no liability to pay the payee of a cheque; its legal obligations are owed exclusively to its customer (the drawer): *Schroeder v. Central Bank of London* (1876), 34 L.T. 735 (C.P. Div.); *Thomson v. Merchants Bank of Canada* (1919), 58 S.C.R. 287, at p. 298; *Schimnowski Estate, Re*, [1996] 6 W.W.R. 194 (Man. C.A.), at para. 19. This principle is confirmed by ss. 16(1) and 126 of the Bills of Exchange Act, R.S.C. 1985, c. B-4 (“BEA”). The legal relationship between the drawer and the drawee bank arises from the banking contract between them; if the payee is not a party to this contract, it is not in privity with the bank.
- [69] However, where the payee and the drawer are the same person, i.e. when an individual writes a cheque to him- or herself, the bank is liable to the payee once the cheque is presented. This is so because the bank has a duty to repay its customer the funds on deposit when the customer makes a demand: *Foley*. When a customer writes a cheque to him- or herself, seeking to draw on the funds on deposit at the bank, the bank is under a contractual duty to pay the cheque once it is presented and once it has ensured that it is properly payable.
- [70] The authorities also suggest that the drawee bank is liable to the payee if the payee is also a customer at the same bank. In such cases, there is a contract between the payee and the drawee bank. As stated by M. H. Ogilvie, “[w]here the drawer and payee are customers of the same bank, the payee can sue directly in breach of contract, as well for a delay in collection” (*Bank and Customer Law in Canada* (2007), at p. 291).

C. Is a Deposited Cheque Payable to the Payee/Customer or to the Bank?

- [71] According to the Bank, once the cheques were deposited, they were no longer “payable” to Mr. McLeod, but “were now payable to the Bank pursuant to subsection 165(3) of the Bills of Exchange Act” (Factum, at para. 51). The Bank argues that once a cheque is delivered to a bank for collection, the bank becomes the holder of the cheque, and any payment made on the cheque is made to the bank alone. Consequently, s. 224(1) of the ITA cannot be triggered, because the Bank is never liable to make a payment to the payee (Mr. McLeod), but only to itself as intermediary. The reasons of Deschamps J. accept this proposition. With respect, I cannot.
- [72] In my view, the appellant misstates the relationship between a bank and its customer who deposits a cheque. First, a bank that collects the funds from a deposited cheque receives the funds as agent for the customer (the payee): *B.M.P.*; see also *Westminster Bank Ltd. v. Hilton* (1926), 43 T.L.R. 124 (H.L.), at p. 126. This involves two transactions. The funds are initially

“credit[ed] . . . to its principal”, the payee/customer: B.M.P., at para. 77, per Deschamps J. The bank then “receive[s] them back under the banking contract” (ibid.). The fact that these transactions follow one on the other does not change the conclusion that, legally, they are two distinct episodes. As such, a deposited cheque is payable to the customer when it is deposited; at no time is the cheque payable to the bank.

[73] In B.M.P. (at para. 83), this Court argued against employing a formalistic analysis to describe transactions through the clearing system, stating that

the clearing system should be a neutral factor I prefer to assess the traceability of the asset after the clearing process and not see that process as a systematic break in the chain of possession of the funds. Just as the collecting bank receives the funds as the payee’s agent, the clearing system is only a payment process. [Emphasis added.]

Where a customer draws a cheque in favour of him- or herself and deposits that cheque into another account, we should attach no significance to the fact that the moneys pass through a clearing process and the fact that a bank handles the funds as agent for its customer.

[74] Second, s. 165(3) of the BEA does not establish that the bank becomes a holder of the cheque. Rather, that provision establishes:

165. . . .

(3) Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

[75] There is an important distinction between an actual holder of a cheque to whom the cheque is payable, and merely acquiring “all the rights and powers of a holder in due course”. This distinction was underlined by the majority in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at paras. 69-70, per Iacobucci J., and by B. Crawford, *The Law of Banking and Payment in Canada* (loose-leaf), at p. 10-83. The narrow object of s. 165(3) was described by Iacobucci J. in *Boma* as follows:

When a collecting bank is presented with a cheque for deposit to the credit of the payee, the bank is entitled, essentially, to assume that it was truly the intention of the drawer that the payee receive the proceeds of the cheque. [para. 78]

[76] Subsection 165(3) sought to clear the collecting bank from liability when it deposits fraudulent cheques. This limited objective is achieved by granting the collecting bank “all the rights and powers of a holder in due course”, and does not require the bank to be actually designated a holder in due course: Crawford, at p. 10-83. Accordingly, I agree with the respondent that the Bank’s use of this provision bears no relation to its purpose and should be rejected.

[77] On this basis, I conclude that a deposited cheque is payable to the payee, and at no time is it payable to the bank other than as agent for the payee.

D. Is There Legal Significance to the Fact That the Cheques Were Deposited Into a Joint Account?

[78] The reasons of Justice Deschamps further argue that if the Bank was not itself the holder of the cheque, then the Bank was only ever liable to the two account holders jointly. With respect, it seems to me that the result of the majority is wrong in law and unfortunate in its impact.

[79] I agree that the Minister could not garnish moneys once they were in the joint account. However, it does not follow that the Minister could not intercept funds in transit before they arrived in the joint account. A requirement to pay in s. 224(1) of the ITA intercepts funds while they are in transit.

[80] Once funds are irrevocably deposited in a joint account, they become the property of joint account holders jointly under the terms of their banking contract. At this point, the funds cannot be garnished by the Minister because they are no longer the sole property of the tax debtor: *Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535 (C.A.); *Hirschorn v. Evans*, [1938] 2 K.B. 801 (C.A.); *Westcoast Commodities Inc. v. Chen* (1986), 55 O.R. (2d) 264 (H.C.J.); M. H. Ogilvie, “Why Joint Accounts Should Not Be Garnished — *Westcoast Commodities Inc. v. Jose Chow Chen*” (1986-1987), 1 B.F.L.R. 267. Professor Ogilvie identified the following rationale for the rule against garnishment of joint accounts:

Since all monies deposited in a joint account are deemed to be joint property, neither joint account holder individually may sue the bank for recovery of funds in the account. Such an action is one in debt . . . and the joint creditors of the bank, the joint account holders, must sue jointly. [Emphasis added; pp. 270-71.]

Since neither joint account holder could sue the bank on his or her own for recovery of the funds, it follows that the account cannot be garnished when only one of the two account holders owes a debt to a third party.

[81] However, before the funds arrive in the joint account and while the funds are being transferred, the drawee bank is only liable to make a payment to the payee of the cheque. The other joint account holder had no right to the funds before they arrived in the account. Mr. McLeod could have sued the Bank on his own if the Bank failed to honour his cheque. Therefore, it is only the tax debtor’s status as payee that matters for the purpose of triggering s. 224(1) , in the presence of a joint account.

[82] I would add that when a requirement to pay is issued, the Minister must indicate the identity of the tax debtor involved. Banks issued with a requirement to pay are thus never put in the position of having to monitor the liabilities of unknown third parties: they are only required to redirect payments that they are liable to make to tax debtors specifically named by the Minister.

[83] I am also concerned that Deschamps J.'s view of the legal significance of the joint account in this case may negatively impact other areas of the law. There are potentially dangerous repercussions of a restrictive interpretation of garnishment powers when applied, for example, to family maintenance. Child and spousal support ought not be defeated by the mere existence of a joint account.

II. Application to the Facts

[84] Applying this analysis to the case at bar, once the Bank received Mr. McLeod's cheques to himself, its liability to its customer was triggered. The Bank was therefore contractually bound to honour its customer's demand to pay him. As such, all of the requirements of s. 224(1) were met, and the requirement to pay attached to the money in transit between Mr. McLeod's accounts.

III. Conclusion

[85] For these reasons, I would dismiss the appeal with costs.

Appeal allowed with costs, McLachlin C.J. and Fish and Abella JJ. dissenting.

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7951/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/canada-trustco-mortgage-co-v-canada-2011>

Prepared on 29 October 2026 · Esheria