

**SUPREME COURT OF CANADA**

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| **Citation:** Teva Canada Ltd. *v.* TD Canada Trust, 2017 SCC 51, [2017] 2 S.C.R. 317 | **Appeal Heard:** February 24, 2017  **Judgment Rendered:** October 27, 2017  **Docket:** 36918 |

Between:

Teva Canada Limited

Appellant

and

TD Canada Trust and Bank of Nova Scotia

Respondents

- and -

Canadian Generic Pharmaceutical Association

Intervener

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 76) | Abella J. (Moldaver, Karakatsanis, Gascon and Brown JJ. concurring) |
| **Joint Dissenting Reasons:**  (paras. 77 to 156) | Côté and Rowe JJ. (McLachlin C.J. and Wagner J. concurring) |

Teva Canada Ltd. *v.* TD Canada Trust, 2017 SCC 51, [2017] 2 S.C.R. 317

Teva Canada Limited Appellant

v.

TD Canada Trust and

Bank of Nova Scotia Respondents

and

Canadian Generic Pharmaceutical Association Intervener

**Indexed as:** Teva Canada Ltd. ***v.*** TD Canada Trust

2017 SCC 51

File No.: 36918.

2017: February 24; 2017: October 27.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for ontario

*Commercial law — Bills of exchange — Fraudulent cheques — Conversion — Defences — Banks — Approach to determine whether payee is “fictitious or non‑existing” within meaning of s. 20(5) of Bills of Exchange Act — Employee implementing fraudulent cheque scheme using similar or identical names of employer company’s real customers to whom company owed no debt — Employer’s accounts payable department issuing cheques with mechanically applied signatures —* *Employee opening bank accounts in names of registered businesses and depositing fraudulent cheques — Whether company or collecting banks should bear loss resulting from fraud — Whether collecting banks liable to company for conversion — Whether cheques payable to fictitious or non‑existing person — Bills of Exchange Act, R.S.C. 1985, c. B‑4, s. 20(5).*

T, a pharmaceutical company, was the victim of a fraudulent cheque scheme implemented by one of its employees, M. M’s scheme involved drafting false cheque requisition forms for business entities with similar or identical names to those of T’s real customers, to whom no debt was owed. Based on M’s fraudulent forms, T’s accounts payable department issued the cheques and mechanically applied the requisite signatures. M registered the business names as sole proprietorships and opened bank accounts at several banks. In total, he deposited 63 fraudulent cheques totaling $5,483,249.40 into these accounts and eventually removed the funds.

T filed an action claiming that the collecting banks involved in negotiating the fraudulent cheques are liable for conversion, a strict liability tort. The banks argued that the payees in this case were fictitious or non‑existing and that they were not, as a result, liable for conversion. Under s. 20(5) of the *Bills of Exchange Act*, it is a defence to the tort of conversion if cheques are made out to “fictitious or non‑existing” payees. The defence operates by rendering the impugned cheque “payable to bearer”, such that mere delivery — without endorsement — effects negotiation. The cheque would otherwise be “payable to order”, require an endorsement, and, without such endorsement, be wrongly converted by the bank.

The motions judge found that the payees were not fictitious or non‑existing within the meaning of s. 20(5); therefore, the banks could not rely on that defence and were ordered to pay T the full amount owing. The Court of Appeal concluded that the motions judge erred in determining that the banks should bear the loss and T’s action for conversion could not succeed.

Held (McLachlin C.J. and Wagner, Côté and Rowe JJ. dissenting): The appeal should be allowed and the decision of the motions judge restored.

*Per* Abella, Moldaver, Karakatsanis, Gascon and Brown JJ.: The question at the heart of this case is which innocent party — T or the collecting banks — should bear the loss resulting from fraud? The *Bills of Exchange Act* should be interpreted in such a way that drawers and banks are exposed to the risks created by the fraudulent use of the system, but the banks are the more significant beneficiaries of the bills of exchange system. It is therefore appropriate, in certain circumstances, for them to bear risks and losses associated with that system. To allocate losses to the drawer for having failed to identify and detect the fraud is inconsistent with the strict liability tort of conversion, which makes any negligence on the part of the drawer or the banks in preventing the fraud irrelevant. The Court has, in multiple decisions, provided a two‑step framework which outlines what a bank must prove to demonstrate that a payee is fictitious or non‑existing. The first step — the subjectivefictitious payee inquiry — asks whether the drawer intends to pay the payee. A payee is fictitious when the drawer does not intend to pay the payee, meaning that the payee’s name is inserted by way of pretence only. The underlying rationale behind the fictitious payee rule is that if the drawer did not intend that the payee receive payment, such as in cases of fraud, the drawer should not be able to recover from the bank. As a result, if the drawer does not intend to pay the payee, the payee will be fictitious, the cheque will be payable to bearer, and the banks will be able to rely on the defence in s. 20(5). In this sense, the fictitious payee analysis is subjective. The Court’s interpretation of fictitious payees as incorporating a subjective standard is deeply rooted in the common law, which s. 20(5) of the *Bills of Exchange* *Act* was intended to codify. This approach is also sensitive to commercial realities. Attributing an intention to pay recognizes that, particularly in a large corporation, a specific intention by the guiding mind of the corporation is not directed to each individual cheque. To require such an intention would ignore the realities of the cheque issuing process in many organizations.

If the bank proves that the drawer lacked such intent to pay the payee, then the payee is fictitious and the drawer is liable. If the bank does not prove that the drawer lacked such intent, then the payee is not fictitious, and the analysis proceeds to step two. The second step — the objectivenon‑existing payee inquiry — asks if the payee is either (1) a legitimate payee of the drawer; or (2) a payee who could reasonably be mistaken for a legitimate payee of the drawer. If neither of these is satisfied, then the payee does not exist, and the drawer is liable. If either is satisfied, then the payee exists, and the bank is liable. Whether a payee is non‑existing is a simple question of fact, not depending on anyone’s intention.

There is no reason to create a new version of this test. In enacting s. 20(5), Parliament intended to codify the common law false payee defence, including subjective considerations. No express language in s. 20(5) ousted these subjective considerations. There are no compelling reasons that the past precedents of the Court were wrongly decided and should be overruled. The fact that there are dissenting opinions on this issue is not a basis for overruling a precedent. Further, there is no evidence that the jurisprudence on fictitious and non‑existing payees reflects unsound public policy on the allocation of risk. Banks are well‑situated to handle the losses arising from fraudulent cheques, allowing those losses to be distributed among users, rather than by potentially bankrupting individuals or small businesses which are the victims of fraud.

In this case, since M was not lawfully entitled to the cheques, the banks are *prima facie* liable for conversion. It is accepted that T did not participate in the fraud. It follows that none of the payees were fictitious. Further, all payees were either (1) known customers of T’s; or (2) companies whose names could reasonably have been mistaken for its actual customers, such that all payees existed. Therefore, none of the payees in this case were either fictitious or non‑existing. As a result, the defence in s. 20(5) does not apply and the banks are liable for conversion.

*Per* McLachlin C.J. and Wagner, Côté and Rowe JJ. (dissenting): A simplified, objective approach to the interpretation of s. 20(5) of the *Bills of Exchange Act* should be followed. The current focus placed on subjective intentions and the existence of reasonable beliefs in the mind of the drawer brings uncertainty to Canada’s negotiable instruments and payment system. The payees here are fictitious and non‑existing on an objective interpretation of s. 20(5), and therefore, the banks should be entitled to rely on s. 20(5) as a defence to the tort of conversion. The appeal should be dismissed and past precedents from the Court which adopted a subjective approach should be overruled.

Under this proposed approach, the first step in determining whether an instrument ought to be considered as payable to bearer under s. 20(5) of the Act involves determining whether the payee is a non‑existing person. Under an objective approach, a payee will be non‑existing where the payee does not in fact exist at the time the instrument is drawn. The non‑existence of the payee obviously makes endorsement by this person impossible. Thus, such a cheque may be treated as payable to the bearer, providing the banks with a defence to the tort of conversion.

If the payee is an existing person, then a second inquiry is required to determine if the payee is fictitious. A payee will be fictitious where there is no real transaction between the drawer and the payee. By definition, or necessary implication, a payee who is non‑existing is also fictitious (given that there can be no real transaction with a person that does not exist). But a payee who is a real person can nevertheless be fictitious. This is the case where the payee, despite being a real person, is not entitled to the proceeds of the cheque because there is no underlying transaction with the drawer.

This approach does away with all considerations of intent. Where a cheque is drawn to the order of a person who does not in fact exist, or to the order of a person who exists but who is not entitled to the proceeds of the cheque, s. 20(5) will apply, regardless of the intent of the parties involved in the creation of the cheque. It does not matter that such a situation is the result of a deliberate choice, of an innocent mistake by the drawer, or, as is the case here, of fraud committed on the drawer. This approach to s. 20(5) is not novel. Rather, it returns Canadian jurisprudence to the principles underlying the earliest interpretation of s. 20(5).

This interpretation supports the purpose of the bills of exchange system. The principles of negotiability, certainty, and finality are integral to the operation of the Act. To give effect to these principles, the negotiability of a cheque must be determinable on its face. Otherwise, the efficiency created by the bills of exchange system would be undermined as collecting banks would be required to conduct an investigation into subjective factors to determine the validity of every cheque. Rather than requiring a bank to verify subjective intent and drawer belief, it is more congruent with the purpose of the Act to adopt an interpretation that encourages drawers, prior to the drawing of a cheque, to ensure that the cheque is drawn for a real transaction. A bank’s legal position will no longer depend on facts unknown to it.

The policy rationales for this approach are significant. First, the proposed objective approach allocates the risk of losses from cheque fraud to the party in the best position to detect and minimize such fraud: the drawer. Where a drawer is fraudulently induced into drawing a cheque to the order of someone with whom the drawer has no real transaction, the drawer will bear the loss. It matters not whether the fraudster was an employee or a third party, whether the fraudster might be the directing mind, or whether the payee is real. In all such a cases, the banks will be able to successfully avail themselves of the protection granted by s. 20(5) against an action in conversion by the drawer. The drawer is the party in the best position to detect and prevent cheque fraud, since it is able to implement cheque approval policies and fraud detection measures such as audits. By contrast, banks are not in the best position to prevent cheque fraud on the drawer. The second policy rationale for this approach is that it simplifies the analysis to be performed *ex post facto* by courts to determine whether a payee is non‑existing or fictitious under s. 20(5).

The Court should not continue to apply an interpretation of s. 20(5) that is inconsistent with the purpose of the Act and the principles underlying the bills of exchange system. Although the Court does not lightly depart from its own precedents, there are compelling reasons to do so in this case. Courts have struggled to apply the subjective approach. The proposed objective approach will add much needed predictability to the s. 20(5) analysis and increase certainty. It offers a needed course correction that will return the jurisprudence to a proper interpretation of s. 20(5).

In this case, two payees were invented by M and did not in fact exist. They are therefore non‑existing under s. 20(5). The other four payees are real entities. However, the cheques were for false purchase orders and thus there were no underlying transactions with the payees. Accordingly, all payees in this second group were fictitious under s. 20(5). In the result, the banks were entitled to treat all the cheques as payable to bearer.

**Cases Cited**

By Abella J.

**Applied:** *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727; *Fok Cheong* *Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456; **not followed:** *Bank of England v. Vagliano Brothers*, [1891] A.C. 107; **referred to:** *Metroland Printing, Publishing and Distribution Ltd. v. Canadian Imperial Bank of Commerce* (2002), 158 O.A.C. 111; *Clutton v. Attenborough & Son*, [1897] A.C. 90; *Vinden v. Hughes*, [1905] 1 K.B. 795; *North and South Wales Bank Ltd. v. Macbeth*, [1908] A.C. 137; *Harley v. Bank of Toronto*, [1938] 2 D.L.R. 135; *Bank of Toronto v. Smith*, [1950] 3 D.L.R. 169; *Banque de Montréal v. Barbeau*, [1963] B.R. 753; *Fix Fast Ltd. v. Royal Bank of Canada*, Que. Sup. Ct., No. 681,011, May 21, 1970; *Metroland Printing, Publishing & Distribution Ltd. v. Canadian Imperial Bank of Commerce* (2001), 14 B.L.R. (3d) 212; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K.B. 1010.

By Côté and Rowe JJ. (dissenting)

*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727; *Clutton v. Attenborough & Son*, [1897] A.C. 90; *Bank of England v. Vagliano Brothers*, [1891] A.C. 107; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Grant v. Vaughan* (1764), 3 Burr. 1516, 97 E.R. 957; *Minet v. Gibson* (1789), 1 R.R. 754; *Tatlock v. Harris* (1789), 3 T.R. 174, 100 E.R. 517; *Vinden v. Hughes*, [1905] 1 K.B. 795; *North and South Wales Bank Ltd. v. Macbeth*, [1908] A.C. 137; *Fok Cheong* *Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia* (2004), 71 O.R. (3d) 723, aff’g 2002 CanLII 7479; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *Metroland Printing, Publishing & Distribution Ltd. v. Canadian Imperial Bank of Commerce* (2001), 14 B.L.R. (3d) 212, aff’d (2002), 158 O.A.C. 111; *Rouge Valley Health System v. TD Canada Trust*, 2012 ONCA 17, 108 O.R. (3d) 561; *R. v. Robinson*, [1996] 1 S.C.R. 683.

**Statutes and Regulations Cited**

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*Bills of Exchange Act, 1882* (U.K.), 45 & 46 Vict., c. 61, ss. 7(3), 97(2).

*Bills of Exchange Act, 1890*, S.C. 1890, c. 33, s. 7(3).

*Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

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APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Laskin and Cronk JJ.A.), 2016 ONCA 94, 129 O.R. (3d) 1, 344 O.A.C. 344, 52 B.L.R. (5th) 171, 394 D.L.R. (4th) 298, [2016] O.J. No. 581 (QL), 2016 CarswellOnt 1483 (WL Can.), setting aside a decision of Whitaker J., 2014 ONSC 828, [2014] O.J. No. 799 (QL), 2014 CarswellOnt 1955 (WL Can.). Appeal allowed, McLachlin C.J. and Wagner, Côté and Rowe JJ. dissenting.

Colby Linthwaite, Fred Tayar and Daniel Baum, for the appellant.

Frank J. McLaughlin, Paul Steep and Shanique M. Lake, for the respondent TD Canada Trust.

Martin Sclisizzi, Caitlin Sainsbury and Heather Pessione, for the respondent the Bank of Nova Scotia.

Irwin I. Liebman and Moe F. Liebman, for the intervener.

The judgment of Abella, Moldaver, Karakatsanis, Gascon and Brown JJ. was delivered by

1. Abella J. — A pharmaceutical company was the victim of a fraudulent cheque scheme implemented by one of its employees. It claimed that the collecting banks involved in negotiating the fraudulent cheques are liable for conversion. Under s. 20(5) of the *Bills of Exchange Act*,[[1]](#footnote-1) it is a defence to the tort of conversion if cheques are made out to fictitious or non-existing payees.
2. The banks argued that the payees in this case were fictitious or non-existing and that they were not, as a result, liable for conversion.
3. The tort of conversion involves the wrongful interference with the goods of another. Where a collecting bank pays out on a forged endorsement, it will be liable for conversion. Conversion is a strict liability tort. As a result, a bank may be held liable whether or not it was negligent. Any alleged contributory negligence on the part of the drawer is, as a result, also irrelevant.
4. Liability for conversion can be avoided if a bank can bring itself within s. 20(5) of the *Act*,which states:

**Fictitious payee**

**(5)** Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

1. This Court explained the implications of s. 20(5) in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, as follows:

[Section 20(5)] provides that, where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.  The significance of a cheque that is payable to bearer, rather than to order, is that it can be negotiated by simple “delivery” to the bank; endorsement is not required.  The presence or absence of a legitimate or forged endorsement is irrelevant to a bearer cheque.  A bank becomes the lawful holder of a bearer cheque simply through delivery.  By contrast, in order for a bank to become the lawful holder of a cheque that is payable to order, not only must the cheque be delivered to effect negotiation, but the cheque must also be endorsed.  If the cheques in question were payable to fictitious persons, and could accordingly be treated as bearer cheques, the bank would become a “holder in due course” pursuant to s. 73 of the Act despite the forged endorsements and the missing endorsements; to repeat, negotiation of a bearer cheque is achieved simply by delivery. [para. 45]

1. In other words, when a bank transfers funds to an “improper” recipient, it is liable under the strict liability tort of conversion unless a statutory defence succeeds. And the statutory defence in s. 20(5) operates by rendering the impugned cheque “payable to bearer”, such that mere delivery — without endorsement — effects negotiation. The cheque would otherwise be “payable to order”, require an endorsement, and, without such endorsement, be wrongly converted by the bank.
2. This Court has also, in multiple decisions, provided what is, in essence, a two-step framework which outlines what a bank must prove to demonstrate that a payee is fictitious or non-existing. Step one — the subjectivefictitious payee inquiry — asks whether the drawer intends to pay the payee. If the bank proves that the drawer lacked such intent, then the payee is fictitious, the analysis ends and the drawer is liable. If the bank does not prove that the drawer lacked such intent, then the payee is *not* fictitious, and the analysis proceeds to step two. Step two — the objectivenon-existing payee inquiry — asks if the payee is either (1) a legitimate payee of the drawer; or (2) a payee who could reasonably be mistaken for a legitimate payee of the drawer. If neither of these is satisfied, then the payee does not exist, and the drawer is liable. If either is satisfied, then the payee exists, and the bank is liable.
3. It is accepted that Teva did not participate in the fraud. It follows that none of the payees were fictitious. Further, all payees were either (1) known customers of Teva’s; or (2) companies whose names could reasonably have been mistaken for its actual customers, such that all payees existed. In my respectful view, therefore, and based on this Court’s jurisprudence, none of the payees in this case were either fictitious or non-existing. As a result, the defence in s. 20(5) does not apply and the banks are liable for conversion.

Background

1. Neil Kennedy McConachie was Teva Canada Limited’s Finance Manager. He implemented a fraudulent scheme which involved drafting false cheque requisition forms for business entities with similar or identical names to those of Teva’s real customers. Based on McConachie’s fraudulent forms, Teva’s accounts payable department issued the cheques and mechanically applied the requisite signatures. McConachie registered the business names as sole proprietorships and opened bank accounts at several banks, including the Bank of Montreal, Bank of Nova Scotia and TD Canada Trust. He deposited 63 fraudulent cheques totaling $5,483,249.40 into these accounts and eventually removed the funds.
2. The fraudulent cheques were made payable to payees with six different names. Two of those names, PCE Pharmacare and Pharma Team System, resembled the names of existing customers to whom no debt was owed: PCE Management Inc. and Pharma Systems. The four other names, Pharmachoice, London Drugs, Pharma Ed Advantage Inc. and Medical Pharmacies Group, were legitimate Teva customers to whom no debt was owed.
3. When Teva discovered the fraud in 2006, it fired McConachie.
4. In June 2007, Teva filed a claim against the collecting banks claiming that they were liable for conversion.
5. TD Canada Trust and Bank of Nova Scotia raised the following defences before the motions judge, Whitaker J.:

* The cheques were made payable to either a non-existing entity or a fictitious entity, and therefore became payable to the bearer pursuant to s. 20(5) of the *Bills of Exchange Act*. As bearer instruments, the cheques were properly delivered to the banks and no endorsement was required.
* The cheques were deposited to the credit of the account holder, with the account holder being the named payee of the cheques, and the banks were holders in due course pursuant to s. 165(3) of the *Bills of Exchange Act*. No endorsements were therefore required.
* The claim is statute-barred under the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

1. Only the banks’ first defence, based on s. 20(5) of the *Bills of Exchange Act*, is at issue in this appeal.
2. Whitaker J. found that the payees were *not* fictitious or non-existing within the meaning of s. 20(5) of the *Act* and that there was “a rational basis for concluding that cheques were apparently made payable to existing clients” (2014 ONSC 828, at para. 33 (CanLII)). He also found that “the payees could plausibly be understood to be real entities and customers of the plaintiff” (para. 34). As a result, based on this Court’s decision in *Boma* and the Ontario Court of Appeal’s decision in *Metroland Printing, Publishing and Distribution Ltd. v. Canadian Imperial Bank of Commerce* (2002), 158 O.A.C. 111, the banks could not rely on the defence in s. 20(5) of the *Act* and were ordered to pay Teva the full amount.
3. The Court of Appeal concluded that the motions judge erred in determining that the banks should bear the loss (129 O.R. (3d) 1). It found that the two payees whose names were invented by McConachie — PCE Pharmacare and Pharma Team System — were non-existing within the meaning of s. 20(5) of the *Act*. It also concluded that the four payees with names identical to existing customers of Teva were fictitious. As a result, the banks were entitled to treat all the cheques as payable to bearer, and Teva’s action for conversion could not succeed.

Analysis

1. The question at the heart of this case is which innocent party — Teva or the collecting banks — should bear the loss resulting from the fraud?
2. The *Bills of Exchange* *Act* does not define the terms “fictitious” or “non-existing”. As a result, the contours of these terms have been left to the courts to determine. It must fairly be acknowledged that in dealing with loss arising from cheque fraud, the apportionment between two innocent parties is inevitably challenging — and has often been challenged. Yet in my view, the policy choices made by this Court seem to me to strike the appropriate balance and assist in maintaining the efficiency and efficacy of the bills of exchange system.
3. It is helpful to set out the history that led to this Court’s interpretation of s. 20(5). Section 20(5) of the *Bills of Exchange Act*, like most of the *Act*, was largely based on the U.K. *Bills of Exchange Act, 1882*, 45 & 46 Vict., c. 61. Section 7(3) of the U.K. *Act* stated that “[w]here the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.” This language, adopted in the Canadian legislation in 1890 (*The Bills of Exchange Act, 1890*, S.C. 1890, c. 33, s. 7(3)), has not been amended since.
4. Prior to the legislation, the common law rule with respect to fictitious and non-existing payees was articulated as follows:

In the hundred years that elapsed between the early English cases and the great codifications of negotiable instruments law, the rule was generally accepted to be that “a bill payable to a fictitious person or his order is in effect a bill payable to bearer, and may be declared on as such, in favor of a bona fide holder . . . against all the parties knowing that the payee was a fictitious person.” [Footnote omitted.]

(Comment,“The Fictitious Payee and the UCC — The Demise of a Ghost”(1951), 18 *U.* *Chicago L. Rev.* 281, at p. 282)

1. Professor Benjamin Geva highlighted the rationale behind this rule:

The pre-Act rationale of the fictitious payee rule, as stated in the case law, was estoppel against a party with knowledge of the fraud. That is, a drawer or acceptor who knew that the bill did not reflect a real transaction was estopped, usually as against a discounting bank, from raising a defence based on the forged endorsement of the payee whose name was inserted by the creator of the instrument by way of pretense only in order to create a misleading appearance of real transactions between the drawer and acceptor, as well as between the drawer and the payee. [Footnote omitted.]

(“Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee — *Boma v. CIBC*”(1997), 28 *Can. Bus. L.J*. 177, at p. 194; see also J. S. Rogers, *The Early History of the Law of Bills and Notes* (1995), at pp. 223-49.)

1. The common law therefore weighted subjective considerations under the false payee defence: when a drawer *knowingly* made out a cheque to a fictitious or non-existent payee, therefore *not intending* that the cheque carry any commercial validity, the drawer was estopped from denying that the cheque be payable to its bearer.
2. After the enactment of the U.K. *Bills of Exchange Act, 1882*, the terms “fictitious” and “non-existing” found in s. 7(3) were interpreted and applied in four influential U.K. cases: *Bank of England v. Vagliano Brothers*,[1891] A.C. 107 (H.L.); *Clutton v. Attenborough & Son*,[1897] A.C. 90 (H.L.); *Vinden v. Hughes*,[1905] 1 K.B. 795 (per Warrington J.); and *North and South Wales Bank Ltd. v. Macbeth*,[1908] A.C. 137 (H.L.).
3. The House of Lords briefly departed from the common law requirement of knowledge in 1891 in *Vagliano*, where it held that s. 7(3) of the U.K. *Bills of Exchange Act* had modified, not codified the common law. Referring to the omission of any reference to the drawer’s knowledge, the Earl of Selborne observed that “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 construction” (p. 130).
4. This interpretation of s. 7(3), however, did not last long. In 1905, in *Vinden*, Warrington J. refused to follow the objective approach to “fictitious” and “non-existing” payees. The House of Lords itself rejected this approach in 1908 in *Macbeth*, which reintroduced, with full force, the requirement of knowledge under s. 7(3). It has remained steadfastly in place for a century.
5. Based on these cases and Canadian jurisprudence such as *Harley v. Bank of Toronto*, [1938] 2 D.L.R. 135 (Ont. C.A.); *Bank of Toronto v. Smith*,[1950] 3 D.L.R. 169 (Ont. C.A.), and *Banque de Montréal v. Barbeau*,[1963] B.R. 753(Que. C.A.), Dean Falconbridge summarized the approach to fictitious and non-existing payees as follows:

Whether a named payee is non-existing is a simple question of fact, not depending on anyone’s intention. The question whether the payee is fictitious depends upon the intention of the creator of the instrument, that is, the drawer of a bill or cheque or the maker of a note.

In the case of a bill drawn by [the drawer] upon [the drawee] payable to [the payee], the payee may or may not be fictitious or non-existing according to the circumstances:

(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 [the payee], 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.

(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.

(*Falconbridge on* *Banking and Bills of Exchange* (7th ed. 1969), by A. W. Rogers, at pp. 482-86)

1. This Court applied Falconbridge’s four propositions in the three appeals in which it considered s. 20(5): *Fok Cheong Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456; and *Boma* in 1996.
2. In *Fok Cheong*, a case dealing with whether the payee was “fictitious”, the president of a company, Chan, made out a cheque payable to one of the company’s creditors, Looing Weir, never intending that she receive the funds. Chan fraudulently endorsed the cheque in her name and appropriated the funds. In attempting to recoup its losses against the bank, the company argued that the cheque was not payable to bearer because the payee was not fictitious within the meaning of s. 21(5) (subsequently changed to s. 20(5)) of the *Bills of Exchange Act*). The company stressed that the payee was a real person to whom the company owed a real debt.
3. This Court nevertheless found that the payee was fictitious, concluding that

the cheque in question was from the very outset intended not to be cashed by the payee but rather that it should through a cleverly designed forgery be so negotiated as to be payable to the drawer himself. [p. 490]

The finding of fraudulent intent on the part of the drawer, the president of the company, was held to be sufficient to conclude that the payee of the cheque was fictitious. The bank was therefore entitled to treat the cheque as payable to bearer.

1. In arriving at its conclusion, this Court applied the rationale articulated in *Vagliano*, where Lord Herschell said:

. . . 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, and that the bill may, in each case, be treated by a lawful holder as payable to bearer. [p. 153]

(Cited in *Fok Cheong*, at p. 490.)

1. This Court next considered the meaning of “fictitious payee” in *Concrete Column*. An employee of Concrete Column prepared over 1,000 cheques made payable to two sets of payees who were not entitled to them: individuals whose names came from unknown sources; and individuals employed by Concrete Column but to whom no money was owed. An authorized officer mechanically signed a large number of cheques that included the disputed ones. The dishonest employee took the cheques to the bank and received the amounts stipulated on them. When Concrete Column attempted to recover the lost amount from its bank, the bank invoked what is now s. 20(5) and argued that the payees were non-existing or fictitious. It was therefore entitled to treat the cheques as payable to bearer.
2. The first set of payees, the imaginary ones, who were not known to Concrete Column, were found to be “non-existing” by the trial judge. Based on existing jurisprudence, the trial judge found that the question of whether a payee is non-existing was to be assessed as a question of fact, without regard to the intent of the drawer. As a result, he held that because the payees were not known to the drawer, they were non-existing. The cheques made out to this set of individuals were therefore payable to bearer, and the claim against the bank for those cheques was dismissed. This finding was not appealed.
3. With respect to the second set of payees — workers who had been employed by Concrete Column but to whom nothing was owed for the relevant pay period, the trial judge found that the payees were not fictitious. The bank was therefore liable for conversion for this set of cheques. The Court of Appeal upheld the trial judge.
4. In this Court, Pigeon J., writing for the majority, upheld the trial judge’s conclusion that the employees were not fictitious, relying on the fourth Falconbridge proposition, which, as previously noted, states:

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.

1. Pigeon J. dismissed the bank’s argument that the authorized signing officer could not have formed an intention to pay the payees because he signed the cheques mechanically:

Counsel for the appellant maintained that in the case at bar, where the person authorized to sign the cheques did mechanically place his signature on a large quantity of cheques without knowing any of the payees personally, it is not possible to apply the same rule as when a cheque is signed relying on an explicit false declaration, as it was in most of the cases which gave rise to the above-mentioned decisions. I cannot see any valid reason for making such a distinction. On the contrary, in an age when cheques are processed by computer, it is even more necessary to avoid facilitating fraudulent operations. [p. 484]

Though the drawer mechanically placed his signature on a large quantity of cheques, the Court attributed to the drawer an intention to pay the named payee. Or, phrased in terms of the governing legal framework, the bank bears the burden of proving that the drawer participated in the fraud. The drawerneed not prove the opposite, i.e. that it formed an intention to pay any signed cheque to the intended payee. In this way, the drawer could be said to benefit from a presumed intent to pay its cheques. But, it is worth emphasizing, it is ultimately the bank who must prove fraudulent intent to rely on the defence in s. 20(5).

1. In holding the bank liable for the losses, Pigeon J. invoked the following rationale:

By making banks responsible for cheques cashed on a false endorsement, our *Bills of Exchange Act* certainly has the effect of making it more difficult to cash a cheque fraudulently. It is common knowledge that as a result, public agencies and private enterprises rely heavily on the responsibility of those who pay the cheques they issue, to counteract all kinds of fraud and at the same time to protect those for whom the payments are intended. [p. 484]

1. In dissent, Spence J. would have allowed the appeal. He found that the intent of the dishonest employee should be determinative, rather than that of Concrete Column. He noted that the dishonest employee had “never intended that any of the persons named should receive the amount of the cheque in his name” (p. 487) and that the bank, as a result, was not liable.
2. Laskin C.J., also in dissent, would have allowed the appeal on the basis that the payees were fictitious. Since “the cheques presented for signature to the signing officer were signed in batches without verification” (p. 481), the signing officer could not have formed an intention to pay the payees. He disagreed with the trial judge’s finding that “some of the payees were known to the drawer as being former employees to whom payment was intended” because this “can only be taken as a *post facto* conclusion arrived at by an examination of the cheques after the forgeries were discovered” (pp. 481-82).
3. In *Boma*, this Court’s most recent consideration of s. 20(5), the Court clarified the meaning of both “fictitious” and “non-existing”, explained the purpose of the fictitious payee rule and clarified whose intention was relevant when considering the s. 20(5) defence.
4. The factual background in *Boma* was that a bookkeeper, Donna Alm, who was a duly authorized signing officer for two related companies, Boma Manufacturing Ltd. and Panabo Sales Ltd., arranged for the issuance of 155 fraudulent cheques. She signed 146 of them, and arranged to have Boris Mange, a director and officer of both companies, who was not involved in the fraud, sign 9 of them. A number of the fraudulent cheques were payable to Boris Mange and his wife Ursula, or to existing employees of the companies. Almost all of the remaining 114 cheques were payable to a “J. Lam” or “J. R. Lam”, a name that resembled that of a subcontractor used by the companies, Van Sang Lam. Alm deposited all 155 cheques totalling $91,289.54 into one of her accounts at Canadian Imperial Bank of Commerce. Many of the cheques were accepted by CIBC for deposit without endorsement, while others bore the forged endorsement of the payee.
5. The two companies sought to recover the $91,289.54 from CIBC. The bank argued that the payees were fictitious or non-existing pursuant to s. 20(5). This Court found that they were neither. Consequently, the defence did not apply.
6. Iacobucci J., writing for the majority, cited the four Falconbridge propositions as defining. He noted that the policy rationale underlying s. 20(5) was 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” (para. 46).
7. The question was whose intention was relevant for the purposes of applying the rule: Alm, the dishonest bookkeeper, or Boris Mange, the guiding mind of the drawer companies who knew nothing of the fraudulent scheme?
8. The Court found that it was the intention of Boris Mange, as drawer, which was significant for the purpose of s. 20(5), not that of the bookkeeper. As Iacobucci J. observed:

To my mind, it is quite evident that it is the intention of the drawer, in the sense of the entity from whose account the cheques will be drawn, that is of relevance. In some cases, it may be that the signatory is effectively also the drawer. But in this case, however, this is not so.

. . .

. . . It is the intention of the drawer that is significant for the purpose of s. 20(5), not the intention of the signatory of the cheque. While a “drawer” is often defined to mean “[t]he person who signs or makes a bill of exchange” (cf. *The Dictionary of Canadian Law* (2nd ed. 1995)), in my view, it is important in the circumstances of this case to distinguish between the signatory and the drawer. The drawer, in this case, is the entity out of whose bank account the cheques were drawn, that is, the appellant companies. Alm was not the drawer, but was simply the signatory. Thus, it is the intention of the appellant companies, as the drawer, that must be determined. In my view, it is wrong to conclude that Alm, as an authorized signing officer of the appellants, could somehow be taken as expressing the intention of the appellant drawer. [paras. 55 and 58]

1. In the absence of a challenge to the validity of the cheques, it must be *presumed* that the drawer intended the payees to receive the proceeds of the cheques:

The validity of the cheques is not challenged; therefore, it must be presumed that the drawer intended the payees to receive the proceeds of the cheques. Clearly, the appellants had no intention of transferring over $90,000 to Alm, rather than the payees, for no reason and via the circuitous route of third party cheques. [para. 57]

The intention, in other words, is attributed. Again, it is the bank, not the drawer, who bears the burden of proving the drawer’s participation in the fraud under the fictitious payee inquiry.

1. With respect to the cheques written to Boris or Ursula Mange, or to employees of the corporations, that is, to real persons known to the companies (i.e. existing payees), the Court relied on the fourth Falconbridge proposition applied by the Court in *Concrete Column*, and also held that the cheques were not payable to fictitious persons. It could not be demonstrated that the drawer had placed the names there by way of pretence. As the payees were neither fictitious nor non-existing, the cheques were therefore payable to order and the bank was liable in conversion.
2. With respect to the cheques written to “J. Lam” and “J. R. Lam”, individuals who were unknown to the drawer, Iacobucci J. accepted — pursuant to Falconbridge’s first proposition — that these payees were technically non-existing, and that the cheques would, as a result, normally be considered payable to bearer.
3. But Iacobucci J. concluded that when the name of a payee can reasonably be mistaken for the name of a real person known to the drawer, the payee can be considered under the fourth Falconbridge proposition:

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 . . . 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.

Accordingly, the cheques made out to “J. Lam” and “J. R. Lam” also fall within the fourth category, and could not be treated by the CIBC as payable to bearer.  Rather, the cheques were payable to order, and in order to be negotiable to the bank, delivery alone was not sufficient.  Valid, non-forged endorsements were required. [paras. 60-61]

1. The Court conducted an objective analysis. Although Mr. Mange only reviewed and signed 6 of the 114 cheques payable to J. Lam or J. R. Lam, since “J. Lam” and “J. R. Lam” closely resembled the name of a subcontractor known to and used by the companies, the Court concluded that an intention to pay should be attributed to all 114 cheques. This led to the conclusion that the payees were neither non-existing nor fictitious. Notably, Mr. Mange’s partial review of the cheques was not material to the legal outcome. Rather, the proximity between the payee’s name (“J. Lam” and “J. R. Lam”) and the name of a true payee (“V. S. Lam”) was dispositive.
2. Iacobucci J. also emphatically rejected the bank’s argument that the drawer’s negligence should be taken into consideration when apportioning liability:

. . . the notion of strict liability involved in an action for conversion is *prima facie* antithetical to the concept of contributory negligence. [para. 32]

In his view, “[i]f the contributory negligence approach is to be introduced into this area of the law, I would leave that innovation to Parliament” (para. 35).

1. The state of the law as can be seen from this history has treated “fictitious” and “non-existing” as two distinct notions. A payee is fictitious when the drawer does not intend to pay the payee, meaning that the payee’s name is inserted by way of pretence only. The underlying rationale behind the fictitious payee rule is that if the drawer did not intend that the payee receive payment, such as in cases of fraud, the drawer should not be able to recover from the bank:

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.

(*Boma*, at para. 46; see also *Fok Cheong.*)

1. As a result, if the drawer does not intend to pay the payee, the payee will be fictitious, the cheque will be payable to bearer, and the banks will be able to rely on the defence in s. 20(5) (*Fok Cheong*). In this sense, the fictitious payee analysis is subjective. But a specific intention to pay the payee need not be given by the drawer for any cheque (*Concrete Column*, *Boma*). Intent to pay is presumed or attributed.
2. This approach is sensitive to commercial realities. Attributing an intention to pay recognizes that, particularly in a large corporation, a specific intention by the guiding mind(s) of the corporation is not directed to each individual cheque. To require such an intention would ignore the realities of the cheque-issuing process in many organizations. As Pigeon J. noted in *Concrete Column*:

Counsel for the appellant maintained that in the case at bar, where the person authorized to sign the cheques did mechanically place his signature on a large quantity of cheques without knowing any of the payees personally, it is not possible to apply the same rule as when a cheque is signed relying on an explicit false declaration, as it was in most of the cases which gave rise to the above-mentioned decisions. I cannot see any valid reason for making such a distinction. On the contrary, in an age when cheques are processed by computer, it is even more necessary to avoid facilitating fraudulent operations. [p. 484]

1. As for non-existing payees, the jurisprudence traditionally determined whether a payee was non-existing from a factual perspective, regardless of an intent to pay. Falconbridge wrote that “[w]hether a named payee is non-existing is a simple question of fact, not depending on anyone’s intention.” In *Fix Fast Ltd. v. Royal Bank of Canada*, Que. Sup. Ct., No. 681,011, May 21, 1970, for example, the trial judgment which was appealed ultimately to this Court in *Concrete Column*, the Superior Court found that payees who lacked an established relationship with the drawer were non-existing. These included payees whose names may have existed only in the imagination of the fraudulent employee, were taken from a phone directory, or were the names of persons the fraudulent employee might have known some way. The Superior Court assessed the notion of non-existing payee based on whether there was a relationship between the payee and the drawer that could possibly give rise to a debt owed to the payee. The Superior Court’s finding with respect to non-existing payees was not under appeal in this Court.
2. In *Boma*, this Court modified the approach to non-existing payees slightly by finding that the payee was not non-existing in cases where the drawer could reasonably have mistaken the payee for a payee with an established relationship with the drawer. This was an objective assessment.
3. As a result, according to *Boma*, a payee will be non-existing when the payee lacks an established relationship with the drawer, *unless* the drawer could reasonably have mistaken the payee to be one with such a relationship (*Boma*, at para. 60; *Metroland Printing, Publishing & Distribution Ltd. v. Canadian Imperial Bank of Commerce* (2001),14 B.L.R. (3d) 212 (Ont. S.C.J.)).
4. Therefore, under the non-existing payee rule a cheque payable, for example, to “Snow White”, a payee the drawer could not reasonably have mistaken for a plausible payee, will be considered payable to bearer. A payee may therefore be non-existing without necessarily being fictitious.
5. That is the current state of the law. Unlike my colleagues, I see no reason to create a new version of the false payee defence whereby a payee would be “fictitious” when there is no real underlying transaction or debt. This overrules this Court’s decision in *Concrete* *Column*, and its confirmation in *Boma*. It also nullifies Iacobucci J.’s approach to “non-existent” payees in *Boma* and replaces it with an approach whereby a payee reasonably mistaken by the drawer for a payee with an established relationship would be considered fictitious on the basis that any payee who is not factually real cannot have an underlying transaction with the drawer. A payee would therefore only be deemed “non-existent” when the payee does not in fact exist at the time the cheque is drawn. This means that only in rare cases would there be liability for the banks, namely where the converted cheque is drawn to the order of a real person entitled to the proceeds.
6. This Court’s interpretation of “fictitious” payees as incorporating a subjective standard is deeply rooted in the common law, which s. 20(5) of the *Act* was intended to codify. When enacted in 1882, the U.K. *Bills of Exchange Act* bore the title “*An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes*” and its drafter reported that his aim in drafting the language of s. 7(3) “was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects” (B. Crawford, Q.C., *The Law of Banking and Payment in Canada* (loose-leaf), vol. 3, at p. 21-30.3, citing M. D. Chalmers, *A Digest of the Law of Bills of Exchange, Promissory Notes & Cheques* (3rd ed. 1887), at p. xxxvi). In fact, an earlier draft of the legislationexpressly required the drawer’s knowledge of the fraud:

When the payee is a fictitious or non-existing person, no person shall be capable of making title to, or enforcing payment of the instrument, provided that, when a *bill has knowingly been drawn payable to a fictitious or non-existing person* and purports to bear his endorsement, it shall be valid for all purposes in the hands of a holder in due course, and a holder with notice may enforce it against the drawer or any endorser thereof, or against the *acceptor if, when he accepted, he was aware of the facts.* [Emphasis added; emphasis in original deleted.]

(Crawford, at p. 22-35, quoting M. D. Chalmers, “Vagliano’s Case” (1891), 7 *L.Q.R.* 216, at p. 220.)

1. A broadly worded provision was ultimately preferred in committee to ensure that s. 7(3), as enacted, would reflect the state of the common law (J. D. Falconbridge, *Banking and Bills of Exchange* (6th ed. 1956), at pp. 462-63; Chalmers (1891), at pp. 220-21). To guarantee the continuity of the common law, s. 97(2) of the U.K. *Bills of Exchanges Act* provided that “[t]he rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.”
2. By including s. 9 of the *Act*, which reproduced the exact wording of s. 97(2), Parliament ensured that the rules of common law were also maintained in Canada “save in so far as they are inconsistent with the express provisions of this Act”. It follows that in enacting s. 20(5), Parliament intended to codify the common law false payee defence, including subjective considerations. It equally follows that my colleagues’ purely objective inquiry can only be justified if the *express* language in s. 20(5) ousted those subjective considerations. No such ousting language exists, nor do my colleagues offer an interpretive analysis based on the language of the provision (R. Sullivan, *Sullivan on the* *Construction of Statutes* (6th ed. 2014), at pp. 537-41 and 543-44).
3. The concerns behind the enactment of s. 20(5) of the *Act*, and s. 7(3) in the United Kingdom, arose in the context of estoppel, of which knowledge is an essential component. A drawer who knowingly drew a cheque to a fictitious or non-existent payee was estopped from denying that the cheque was payable to its bearer. The same result is reached in conversion today: where a drawer does not intend that a cheque carry commercial validity, the bank does not act without the drawer’s authority where it pays the cheque to bearer rather than to order. In either case, it was never the drawer’s intention for the named payee to receive the proceeds of the cheque in the first place. Paying proceeds to bearer cannot, therefore, be inconsistent with the authority given to the bank.
4. The case of *Vagliano*, on which my colleagues rely so heavily, offers no basis for concluding that the common law was changed by s. 20(5). It bears repeating that *Vagliano* survived for less than 20 years before it was categorically rejected by the House of Lords in 1908. It is difficult to see any basis for resuscitating it now.
5. Moreover, and contrary to my colleagues’ assertion, Dean Falconbridge’s fourth proposition was not intended to accord with the facts and outcome in *Vagliano*. His original articulation of the four propositions came in the wake of the House of Lords’ decision in *Macbeth*, which reintroduced the requirement of knowledge in s. 7(3). As previously noted, the fourth proposition addresses the situation whereby if the payee is a real person intended by the drawer to receive payment, the payee is neither fictitious nor non-existing, regardless of whether the drawer was induced by fraud to draw the cheque. These were the circumstances in *Macbeth* where the plaintiff was induced by the fraud of Mr. White to draw a cheque in favour of one T. A. Kerr, an existing person, whom the plaintiff had intended would receive the proceeds.
6. Given this history, and before this Court jettisons a whole line of jurisprudence only to return to an older jurisprudence that has been consistently rejected since 1905, great care should be taken. This is not an argument for jurisprudential stagnation, but for a recognition that the public relies on our disciplined ability to respect precedent. There is no doubt that our jurisprudence on s. 20(5) has its critics. But as the Court noted in *Canada* *v.* *Craig*, [2012] 2 S.C.R. 489, to overrule its own decisions “the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled” (para. 25). All this to ensure certainty, consistency and institutional legitimacy (para. 27). I do not share the view that such “compelling reasons” exist in this case.
7. Nor is the fact that there are dissenting opinions, on its own, a basis for overruling a precedent. Dissenting opinions are a useful way to see a different way of approaching the case, but they are the views that a majority rejected. Again, unless compelling reasons emerge to vitalize their validity and cogently demonstrate the wrongness of the majority’s view, that view continues to prevail.
8. *Boma* and *Concrete Column* have together served the commercial world for 40 years without serious complaint from that world. There is no evidence that the jurisprudence on fictitious and non-existing payees reflects unsound public policy on the allocation of risk. Banks are well-situated to handle the losses arising from fraudulent cheques, allowing those losses to be distributed among users, rather than by potentially bankrupting individuals or small businesses which are the victims of fraud. As Bray J. observed in the early case of *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K.B. 1010, at p. 1026, “[t]o the individual customer the loss would often be very serious; to the banker it is negligible.”
9. The Court in *Boma* weighed these policies and concluded, as did the Court in *Concrete Column*, that the *Act* should be interpreted in such a way that drawers *and* banks are exposed to the risks created by the fraudulent use of the system, but as noted by Iacobucci J., the banks are the more significant beneficiaries of the bills of exchange system. It is therefore appropriate, in certain circumstances, for them to bear risks and losses associated with that system:

To some, the allocation of risk in the bills of exchange system may seem arbitrary, but in my view a necessary and coherent rationale sustains this allocation. With respect to forged endorsements, for example, no party in particular is in any better position to detect the fraud than any other. It is a risk that all parties must bear, including collecting banks. It is a price that must be paid if one wishes to enjoy the significant benefits of the bills of exchange scheme, not the least of which is, from the bank’s perspective, the facilitation of huge numbers of financial dealings conducted rapidly, and without overwhelming transaction costs. While the banks are accorded the important advantage of holder in due course status in many situations, it would not be appropriate . . . to exempt any party, including collecting banks, from all exposure to the risk and consequence of fraud. [para. 80]

1. Moreover, and significantly, to allocate losses to the drawer for having failed to identify and detect the fraud is inconsistent with strict liability. Conversion is a strict liability tort. This makes any negligence on the part of the drawer or the banks in preventing the fraud irrelevant. The question therefore is which of two innocent parties should bear the loss occasioned by fraud and not, as my colleagues suggest, who is more at fault?
2. It is true that the dissent in *Boma* preferred a different approach, one that warned that “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” (para. 97). From this, and without any evidentiary support, my colleagues conclude that the current system is too burdensome on the banks and assert that, as a result, losses resulting from fraud ought to be reallocated to the drawer exclusively. Revisiting the same policy arguments advanced, weighed and ultimately rejected by the Court in prior cases does not, by itself, warrant judicial reconsideration of this Court’s decisions (see e.g. *Boma* majority, at para. 80; *Boma* dissent, at paras. 95-97).
3. Negotiability is only one factor animating our bills of exchange system. The assertion that cheques would be rendered less easily negotiable because of this Court’s interpretation of s. 20(5) is theoretical. Subjective factors have now been part of the law for decades in Canada and there is no suggestion that banks have not processed, or have had difficulty processing, cheques throughout that period. If Parliament has concerns about the way this Court has balanced these complex policies, it is of course open to it to change the *Act*.

Application

1. Since McConachie was not lawfully entitled to the cheques, the banks are *prima facie* liable for conversion, as the Court of Appeal observed. This is because they dealt with the cheques “under the direction of one not authorized”, and then made “the proceeds available to someone other than the person rightfully entitled to possession” (*Crawford and Falconbridge, Banking and Bills of Exchange* (8th ed. 1986), by B. Crawford, vol. 2, at p. 1386).
2. The issue then is whether the banks can rely on s. 20(5). This, in turn, depends on whether the six payees named on the cheques are fictitious or non-existing.
3. In this case, Teva was not complicit in the fraud. Though only four of the names used were those of existing customers, the other two names used were very similar to names of Teva’s real customers. The motions judge found that there was “a rational basis for concluding that cheques were apparently made payable to existing clients”, and that “the payees could plausibly be understood to be real entities and customers of the plaintiff”.
4. As a result, the payees were not fictitious or non-existing.
5. I would therefore allow the appeal with costs and restore the decision of Whitaker J.

The reasons of McLachlin C.J. and Wagner, Côté and Rowe JJ. were delivered by

1. Côté and Rowe JJ. (dissenting) — Two innocent parties. Each asks that the other bear the loss occasioned by a fraudster. Resolution of this appeal requires us to interpret the statutory defence to the tort of conversion found in s. 20(5) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 (“*BEA*”):

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

1. A bank will be liable to an account holder in conversion if it deals with a cheque “under the direction of one not authorized, by collecting it and making the proceeds available to someone other than the person rightfully entitled to possession” (*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at para. 83). This would be the case, for example, where a cheque is drawn to the order of a real person entitled to the proceeds and the bank makes those proceeds available to some other person. Conversely, a bank will not be liable in conversion if it pays out on a cheque payable to bearer. A cheque may be treated as such if the payee is fictitious or non-existing, pursuant to s. 20(5) of the *BEA*.
2. This appeal turns on the meaning this Court gives to the terms “fictitious” and “non-existing”. Our colleague Justice Abella adopts a subjective approach to the interpretation of these two terms: a payee will be fictitious if the drawer did not *intend* to make the payment to the payee, and will be non-existing if the payee is neither a legitimate payee of the drawer, nor one that the drawer *reasonably but mistakenly believes* is a legitimate payee. In our view, the focus placed on subjective intentions and the existence of reasonable beliefs in the mind of the drawer brings uncertainty to Canada’s negotiable instruments and payment system.
3. We therefore propose a simplified, objective approach to the interpretation of s. 20(5). Under our approach, a payee will be deemed “non-existing” where the payee does not in fact exist at the time the instrument is drawn. A payee will be “fictitious” where there is no real underlying transaction or debt ― that is, where the payee is not entitled to the proceeds of the cheque.
4. As we will explain, this objective approach has strong roots in the jurisprudence. An objective approach to “non-existing”, consistent with *Clutton v. Attenborough & Son*, [1897] A.C. 90 (H.L.), was taken consistently in Canada until *Boma*. An objective approach to “fictitious” is consistent with the principles that emerged from the House of Lords’ decision in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107.
5. Adopting our objective approach aligns with the purpose of the bills of exchange system by supporting negotiability, certainty, and finality of payment. Policy considerations also buttress our approach since it fairly and effectively allocates risk and simplifies the s. 20(5) analysis.
6. We recognize, however, that returning to an objective test for “non-existing” would require overturning this Court’s decision in *Boma*, and that returning to an objective test for “fictitious” would require overruling this Court’s decision in *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456. Overturning precedent is not a step that this Court should undertake lightly (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24). Yet, as we will explain, we are of the view that such a step is warranted in the present case.
7. Facts
8. We agree with our colleague’s exposition of the facts, set out at paras. 9‑12 of her reasons. We add only the following. First, two of the payees named on the cheques requisitioned by McConachie, PCE Pharmacare and Pharma Team System, were entities that did not in fact exist. Second, the four other payees, Pharmachoice, London Drugs, Pharma Ed. Advantage Inc. and Medical Pharmacies Group, did in fact exist: they were or had been customers or providers of Teva. However, none of the cheques requisitioned by McConachie to the order of these payees was for a legitimate debt owed by Teva.
9. Analysis
   1. Proposed Approach to Section 20(5)
10. The first step in determining whether an instrument ought to be considered as payable to bearer under s. 20(5) of the *BEA* involves determining whether the payee is a non-existing person. Under our objective approach, a payee will be non-existing where the payee does not in fact exist at the time the instrument is drawn (see B. Crawford, *The Law of Banking and Payment in Canada* (loose-leaf), vol. 3, at pp. 22-31 and 22-32). The non-existence of the payee obviously makes endorsement by this person impossible. Thus, such a cheque may be treated as payable to the bearer, providing the banks with a defence to the tort of conversion.
11. If the payee is an existing person, then a second inquiry is required: Is the payee fictitious? As we will explain, this step has a troubled history in Canadian case law, but we are of the view that it can be rehabilitated as an appropriate allocator of risk and efficient arbiter of disputes. In our view, a payee will be fictitious where there is no real transaction between the drawer and the payee. By definition, or necessary implication, a payee who is non-existing is also fictitious (given that there can be no real transaction with a person that does not exist). But a payee who is a real person can nevertheless be fictitious. This is the case where the payee, despite being a real person, is not entitled to the proceeds of the cheque because there is no underlying transaction with the drawer.
12. For some time, an objective test to non-existence was applied by Canadian courts, following *Clutton*. Dean Falconbridge similarly stated that non-existence was a “simple question of fact, not depending on anyone’s intention” (J. D. Falconbridge, *Banking and Bills of Exchange* (6th ed. 1956), at pp. 468-69). However, the majority’s decision in *Boma* changed this. Under the modification introduced by Justice Iacobucci, if a payee is factually non-existent, but the drawer plausibly thought the payee was real, then the payee is not considered to be non-existent (*Boma*, at para. 60). This subjective approach, which imports considerations of the drawer’s belief, is affirmed by our colleague in her reasons.
13. The effect of our approach to “fictitiousness” is that the *Boma* subjective approach to “non-existing” will be moot. This is so because any payee who is not factually real, but was plausibly thought to be real by the drawer, could not in fact have had an underlying transaction with the drawer. Thus, the bank will have a s. 20(5) defence under our objective approach to “fictitious”.
14. Our approach to “non-existent” and “fictitious” does away with all considerations of intent. Where a cheque is drawn to the order of a person who does not in fact exist, or to the order of a person who exists but who is not entitled to the proceeds of the cheque, s. 20(5) will apply, regardless of the intent of the parties involved in the creation of the cheque. It does not matter that such a situation is the result of a deliberate choice, of an innocent mistake by the drawer, or, as is the case here, of fraud committed on the drawer.
15. Our approach to s. 20(5) is not novel. Rather, it returns Canadian jurisprudence to the principles underlying the earliest interpretation of s. 20(5). A careful examination of the case law reveals substantial support for our objective approach to both “non-existing” and “fictitious”, and brings to light the policy rationale for it. Starting with a review of the case law, we will show that the first *Bills of Exchange Act, 1882* (U.K.), 45 & 46 Vict., c. 61, was interpreted objectively by the House of Lords such that “fictitious” meant that there was no underlying transaction. Unfortunately, their interpretation was distorted and subsequently a subjective approach was ― incorrectly, in our view ― adopted by Canadian courts. The case law also shows that an objective approach to “non-existing” was taken until recently. As we will then reveal, there is significant jurisprudential, purposive, and policy support for our proposed homecoming. We will conclude by providing justification for overturning *Concrete Column* and *Boma*.
    1. Jurisprudential Support
16. Tracing the law from before the enactment of the first *Bills of Exchange Act*, through various interpretations of s. 20(5), reveals judicial precedent for an objective approach to determining non-existence and fictitiousness. Canadian jurisprudence has taken a different path by embracing a subjective approach which turns on the drawer’s intention.
    * 1. English Common Law Prior to the *Bills of Exchange Act*
17. Prior to legislative intervention, the common law in England treated as payable to bearer any bill made payable to obviously inanimate objects such as “cash”. For example, in *Grant v. Vaughan* (1764), 3 Burr. 1516, 97 E.R. 957, a bill worded “pay to ship ‘Fortune,’ or bearer” was found to be payable to the bearer, thus allowing an action for its payment: “If this bearer cannot bring an action upon it, no-body can: for as it is not made payable to any particular person by name, no action can be brought in the name of such particular person” (pp. 962-63).
18. The common law also addressed bills drawn in favour of imaginary, but realistically named, payees. In a series of cases addressing such bills, courts held that the drawers and acceptors “who knew of the fictitious nature of the indorsement were estopped as against the plaintiff (a holder for value who had no notice of the circumstances) from setting up the fictitious character of the bill as a defence” (*Minet v. Gibson* (1789), 1 R.R. 754, at p. 755; see also *Tatlock v. Harris* (1789), 3 T.R. 174, 100 E.R. 517). The defendants were liable to pay the bearer “generally on the ground that they were estopped to take advantage of their own fraud. The judges felt that the defendants must have intended something by their actions in putting the bills into circulation” (Comment, “The Fictitious Payee and the UCC ― The Demise of a Ghost” (1951), 18 *U. Chicago L. Rev.* 281, at p. 282 (footnote omitted)). In other words, the parties who intended the fraud were required to honour the bills as payable to the bearer (Crawford, at p. 22-35).
    * 1. Interpretation of the British *Bills of Exchange Act* in *Vagliano*
19. Roughly 100 years later, the British Parliament enacted the first *Bills of Exchange Act, 1882*. Section 7(3) of that Act contained language identical to today’s s. 20(5) of the *BEA*: “Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.”
20. Interpreting the new legislation fell to the House of Lords in *Vagliano*. In that case, a clerk in service of Vagliano Brothers fraudulently prepared bills with the name of Vucina (a foreign associate of Vagliano) as drawer and C. Petridi & Co. (a genuine supplier of Vagliano) as payee. The clerk used forged letters of advice so as to procure the genuine acceptance of Vagliano. He then forged the endorsement of C. Petridi, obtained payment of the bills at Vagliano’s bank, and absconded with the proceeds. In a split decision, the Law Lords found in favour of the Bank of England by holding that the payee was fictitious and thus the bill was payable to the bearer.
21. An important issue raised in *Vagliano* was whether s. 7(3) of the *Bills of Exchange Act, 1882* should be interpreted as importing the knowledge and intent requirement that existed at common law prior to the enactment of that statute. Six of the eight Law Lords found that it should not.
22. A majority of the House of Lords affirmed that the *Bills of Exchange Act, 1882* — a codifying statute — should not be construed in accordance with the common law that preceded it. This view was best captured by the following passage from Lord Herschell’s speech:

. . . 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 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. [Emphasis added; pp. 144-45.]

Lord Herschell’s interpretive approach was widely accepted and applied by various other courts, including Canadian courts interpreting the *BEA* (W. F. Craies, *A Treatise on Statute Law* (4th ed. 1936), at pp. 309-10; Crawford, at pp. 21.30.2 to 21.33). In fact, Sir Mackenzie Chalmers, who drafted the parliamentary bill that would later become the *Bills of Exchange Act, 1882*, described it as “what appears to be the true canon for construing a codifying statute” (M. D. Chalmers, “Vagliano’s Case” (1891), 7 *L.Q.R.* 216, at p. 220).

1. Focusing on the text of s. 7(3), Lord Halsbury L.C. stated 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” (p. 120).
2. This textual interpretation also accords with the provision’s legislative history.  An earlier draft of s. 7(3) read as follows:

When the payee is a fictitious or non-existing person, no person shall be capable of making title to, or enforcing payment of the instrument, provided that, when a bill has knowingly been drawn payable to a fictitious or non-existing person and purports to bear his endorsement, it shall be valid for all purposes in the hands of a holder in due course, and a holder with notice may enforce it against the drawer or any endorser thereof, or against the acceptor if, when he accepted, he was aware of the facts. [Emphasis added; emphasis in original deleted.]

(Crawford, at p. 22-35, citing Chalmers, at p. 220.)

This draft was heavily amended in committee, however, and all references to the knowledge requirement that existed at common law were removed.  Our colleague suggests that this was done to better reflect the state of the common law at the time.  In our view, the authority cited for this proposition actually supports the opposite conclusion — that a court analyzing the legislative history of this provision *would have come to the same result as the House of Lords* in interpreting s. 7(3) without reference to the common law knowledge requirement (Chalmers, at p. 220). As we understand it, the amendments made to this draft provision in committee strongly indicate an intention on the part of Parliament to remove any subjectivity associated with the “fictitious and non-existing payee”, and instead to have those terms be interpreted objectively (Chalmers, at pp. 221-22).

1. The foregoing supports the proposition that the *Bills of Exchange Act, 1882* was not intended merely to codify the common law, but also to modify it where Parliament saw necessary (J. M. Holden, *The History of Negotiable Instruments in English Law* (1955), at p. 201). This is also reflected in comments made by Chalmers, who stated that “[t]he Bill as originally drafted was intended to reproduce the then existing law as exactly as possible, but certain amendments of the law were introduced in committee” (*Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (18th ed. 2017), by S. J. Gleeson, at para. 1-006, quoting Sir M. D. Chalmers, *A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques, and Negotiable Securities* (9th ed. 1927), at p. 2 (emphasis added)). Section 7(3) was among the 25 provisions of the *Bills of Exchange Act, 1882* that Chalmers listed as having altered the law of negotiable instruments (Chalmers (1927), at p. 2). It therefore appears that Lord Herschell was correct in noting that

[t]he 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. [Emphasis added; p. 145.]

1. For these reasons, a majority of the Law Lords held that the terms “fictitious” and “non-existing” as used in s. 7(3) should not be construed as importing the knowledge requirement that previously existed at common law. Applying this interpretation to the facts, the House of Lords found that the payee was fictitious, and that the bank was therefore not liable.
2. A number of principles can be drawn from this decision. The first principle is that the party sought to be charged with a bill need not have knowledge that the payee was fictitious in order for the payee to be deemed fictitious. This can be contrasted with the common law rule based on estoppel which required knowledge. Under the British Act, a bill with a fictitious payee may be treated as payable to bearer against not only the drawer, but also the acceptor ― even if the acceptor was not aware of the fiction. Lord Herschell said (at p. 147):

. . . 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.

Underscoring this liberation of the right to treat a bill as payable to bearer was Lord Herschell’s point that fictitiousness is a matter of fact, independent of the knowledge of the party sought to be charged with the bill (pp. 145-46):

Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. “Where the payee is a fictitious or non-existent person” means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

. . . I have a difficulty in seeing how a payee, who is in fact a “fictitious” person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world — how such a payee can be “fictitious” as regards one person and not another.

1. The second principle that emerges from *Vagliano* is that the intention of the drawer is not relevant. Lord Halsbury L.C., with the majority, rejected an interpretation of the statute under which “one must dive into the mind of the hypothetical forger to determine whether the character be fictitious or not . . . . [W]hereas, if it is pure imagination, then it is the name of a fictitious person” (pp. 121-22). Lord Bramwell, in dissent, similarly could not accept an interpretation of the statute where the “bill means one thing or another, according to the intent of the drawer” (p. 138). As Bradley Crawford argues, both the majority and dissenting Law Lords agreed that s. 7(3) should *not* be interpreted as being dependent upon the intention of the parties charged on the bill (p. 22-39).
2. We pause here to recognize that a passage from Lord Herschell has caused confusion regarding the relevance of intention. In finding that it mattered not whether the payee was a “creature of the imagination” that the drawer “invents . . . himself” (p. 151), or a real person to whom payment was not intended (but the name was inserted as a “mere pretence” (*ibid.*)), Lord Herschell said (at pp. 151-52):

. . . why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person, the drawer in neither case intending a person so designated to receive payment[?] . . .

. . . Do the words, “where the payee is a fictitious person,” apply only where the payee named never had a real existence? I take it to be clear that by the word “payee” must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word “fictitious” is exclusively used to qualify that which has no real existence. [Emphasis added.]

As we will see, this passage was subsequently relied upon for a rule that the drawer’s intention is key ― that a fictitious payee exists where “the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment”. Yet it is clear from his entire reasons that Lord Herschell was determining whether “fictitious” includes imaginary payees of “no real existence” as well as real payees whose name was inserted “by way of pretence only”. The state of “no intention” was merely part of his “hypothesis”.

1. The third principle to be found in *Vagliano* becomes apparent after removing the subjective inquiries into knowledge and intent. What remains is a purely objective test. As the Earl of Selborne said for the majority: “. . . 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 [Vagliano’s] state of mind” (p. 130). Bradley Crawford similarly sums up the *ratio* of *Vagliano*: “As I interpret the ruling, there being no real transaction, the payee had no right to the bills or their proceeds and, therefore, the bank could not be faulted for failing to obtain the payee’s endorsement” (p. 22-38). In our view, the objective test remaining is whether or not there is a legitimate underlying transaction (an underlying debt). If there is not, then the payee must be fictitious as there is no basis for the cheque.
2. These three concepts ― the acceptor need not be aware of the fictitious nature of the payee; the intention of the drawer is not relevant; and where there is no genuine transaction the bank is entitled to treat the bill as payable to bearer ― supported a finding in *Vagliano* in favour of the Bank. The payee was fictitious, and thus the Bank had a defence.
3. Section 7(3) of the *Bills of Exchange Act, 1882*, and its interpretation in *Vagliano*, changed the law. Rather than looking to the knowledge and intention of the drawer, and holding the drawer to his or her word based on estoppel as the common law had done, the British *Bills and Exchange Act* looked objectively at whether the payee is fictitious. As Professor Benjamin Geva points out (“The Fictitious Payee Strikes Again: The Continuing Misadventures of BEA s. 20(5)” (2015), 30 *B.F.L.R.* 573, at p. 591), the result was also

to expand the fictitious payee rule from one concerned only with fraud committed *by* a party liable on the bill to a rule concerned also with fraud committed *against* such a party. Each such party was to become liable to an innocent party and thus bears the fraud loss. The rule applies whether the party liable is the perpetrator or victim of the fraud. [Emphasis in original.]

* + 1. Departure From an Objective Approach

1. Unfortunately, the law was not settled for very long. In a decision that significantly influenced Canadian jurisprudence, Justice Warrington in *Vinden v. Hughes*, [1905] 1 K.B. 795, focussed on Lord Herschell’s statement that a payee is fictitious if “the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment” (pp. 801-2). Warrington J. resurrected intention ― the common law element put to rest by the House of Lords in *Vagliano* ― and made it the decisive criterion for “fictitious”. As Professor Geva observes (at p. 591): “In hindsight this marked the turning point leading to the misunderstanding [of] *Vagliano* and consequently the continuous misapplication of *BEA* s. 20(5).”
2. It was the turning point because *Vinden* was followed three years later by the House of Lords in *North and South Wales Bank Ltd. v. Macbeth*, [1908] A.C. 137, where Lord Loreburn approved the statement: “. . . when there is a real drawer who has designated an existing person as the payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious” (p. 139). Intention, or lack thereof, becomes decisive. As Bradley Crawford reads this decision (at pp. 22-40 and 22-41):

The fact that there is no legitimate transaction between the drawer and payee, or that the drawer has been induced to draw the cheques to that person by the fraud of an employee, or was careless in trusting a supposed intermediary, is considered to be irrelevant. . . .

That highly questionable reasoning would have a disastrous influence on the development of the Canadian case law. [Footnote omitted.]

1. Dean Falconbridge enshrined the starring role for intention with his two principles and four propositions (at pp. 468-69):

Whether a named payee is non-existing is a simple question of fact, not depending on anyone’s intention. The question whether the payee is fictitious depends upon the intention of the creator of the instrument, that is, the drawer of a bill or cheque or the maker of a note.

In the case of a bill drawn by Adam Bede upon John Alden payable to Martin Chuzzlewit, the payee may or may not be fictitious or non-existing according to the circumstances:

(1) If Martin Chuzzlewit is not the name of any real person known to Bede, but is merely that of a creature of the imagination, the payee is non-existing, and is probably also fictitious.

(2) If Bede for some purpose of his own inserts as payee the name of Martin Chuzzlewit, 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 Martin Chuzzlewit is the name of a real person known to Bede, but Bede names him as payee by way of pretence, not intending that he should receive payment, the payee is fictitious, but is not non-existing.

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

1. Falconbridge’s fourth proposition describes the facts in *Vagliano*. The payee (C. Petridi & Co.) was real. The drawer (Vucina) was fraudulently induced into intending that the payee receive payment. In *Vagliano*, the House of Lords found the payee to be fictitious. Yet, under Falconbridge’s fourth proposition, the payee is neither fictitious nor non-existing ― a result that is inconsistent with the holding in *Vagliano*. This is critical to recognize: Falconbridge’s fourth proposition is directly at odds with *Vagliano*.
2. Majority decisions of this Court have assessed s. 20(5) in accordance with these propositions and not pursuant to *Vagliano*. In *Concrete Column*, a fraudster payroll clerk prepared over 1,000 cheques ― some payable to former employees, and some payable to names that were pure inventions of the clerk. Justice Pigeon for the majority looked to Falconbridge’s fourth proposition for those cheques made payable to former employees (real payees). Accordingly, he found those cheques were neither non-existing nor fictitious and the Royal Bank was liable for having accepted them. The cheques payable to “pure inventions” were objectively non-existent, and thus the Bank was entitled to treat them as payable to bearer.
3. In dissent, the reasoning of Chief Justice Laskin and Justice Dickson (as he then was) reflected the *ratio* in *Vagliano* ― where there is no underlying transaction (no underlying debt), the bill is to be treated as payable to bearer. They would have found all the cheques to be fictitious (pp. 480 and 482):

The matter has crystallized when the payroll clerk, charged to make up the payroll, has introduced payees, whether imaginary or existing persons, to whom no money is owing, and the actual drawer makes out cheques payable to them.

. . .

. . . No distinction can be drawn between the cheques payable to imaginary persons or persons who were not former employees and those who were formerly in the drawer’s employ. None of these were entitled to the proceeds of the cheques, and I can see no basis for distinguishing these two classes of cases as to fictitiousness. [Emphasis added.]

1. In *Fok Cheong Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488, a unanimous Court relied on Falconbridge’s third proposition. In that case, the company president, Chan, wrote a cheque to a real creditor, but never intended the creditor to obtain the funds. Instead, the president forged the signature of the creditor and cashed the cheque. Justice Ritchie for a unanimous Court reasoned that “the finding of fraudulent intent on the part of Chan in drawing the instrument in question makes the payee of this cheque a fictitious person within the meaning of the authorities” (p. 490). Ritchie J. took from *Vagliano* guidance that a payee is fictitious whenever the name is inserted “by way of pretence merely, without any intention that payment shall only be made in conformity therewith” (p. 490, quoting *Vagliano*, at p. 153), and he cited Falconbridge’s third proposition as support for the importance of the drawer’s intention.
2. This Court’s decision in *Boma* introduced a subjective approach to non-existence. Justice Iacobucci, for the majority, also confirmed the subjective approach to fictitiousness adopted by the Court in *Concrete Column* and applied in *Fok Cheong*.
3. In *Boma*, a fraudster clerk, Ms. Alm, prepared cheques for signature by her supervisor, Mr. Mange. Of the 155 cheques so prepared, 146 were in fact signed by Ms. Alm. Existing employees or officers, to whom no money was owing, constituted 41 of the cheques. The remaining 114 of the cheques were made to payees whose names were invented by Ms. Alm but were similar to that of a real creditor. Justice Iacobucci, for the majority, held that none of the payees were fictitious or non-existing. For the cheques payable to existing employees or officers, Justice Iacobucci presumed that the drawer intended the payees to receive the proceeds (para. 57). For the invented names, Justice Iacobucci expanded Falconbridge’s fourth proposition to include the invented names as real payees because Mr. Mange was “reasonably mistaken” and “honestly believed that the cheques were being made out for an existing obligation to a real person known to the companies” (para. 60).
4. In dissent, Justice La Forest, with the concurrence of Justice McLachlin (as she then was), identified the jurisprudential division that had developed since *Vagliano* and embraced an approach based on *Vagliano*. Notably, by this time even the editor of Falconbridge’s textbook criticized Falconbridge’s endorsement of *Vinden* in earlier editions of the text. Justice La Forest explained (at para. 93):

It is fair to say that Dean Falconbridge’s fourth rule, which encompasses the situation of the fraudulent employee, merely reflects one line of reasoning within the jurisprudence (see *Vinden v. Hughes*, [1905] 1 K.B. 795, and *Harley v. Bank of Toronto*, [1938] 2 D.L.R. 135 (Ont. C.A.)), and does not take into account various decisions that have gone the other way (see *London Life Insurance Co. v. Molsons Bank* (1904), 8 O.L.R. 238 (C.A.), and *Metropolitan Life Insurance Co. v. Quebec Bank* (1916), 50 C.S. 214). This fact has been acknowledged in the latest edition of the textbook (Crawford and Falconbridge, *Banking and Bills of Exchange* (8th ed. 1986), vol. 2), where the editor, Bradley Crawford, is critical both of the fourth rule and the cases that have produced it (at pp. 1259 and 1261):

The Canadian courts have been led into error by Warrington J. in *Vinden v. Hughes* and Dean Falconbridge’s endorsement of that judgment in early editions of this treatise.

. . .

It is probably of no use to point out that Falconbridge’s fourth proposition never was in accord with the actual result in *Vagliano*’s case where, it may be recalled, the acceptor was deceived by his clerk into signing bills he thought represented real transactions with real persons.

1. In our view, it is time to return to the principles available in *Vagliano* for determining “fictitious” and the state of the law before *Boma* for determining “non-existing”. Subjective inquiries into the knowledge and intention of the drawer are unnecessary and bring confusion. Rather, non-existence depends on whether the payee exists in fact, while fictitiousness depends on whether there is an underlying transaction.
2. Before moving on, however, we wish to address our understanding of s. 97(2) of the *Bills of Exchange Act, 1882*, which was subsequently imported into s. 9 of the *BEA*. Our colleague interprets this provision as guaranteeing the continuity of the common law as it existed before the *Bills of Exchange Act, 1882* (paras. 60-61). Respectfully, our view is that this provision should not be construed as requiring that the *BEA* be interpreted in conformity with pre-Act common law. Rather, as Professor Geva puts it, reference to the rule of common law “may well refer to the dynamic and continuing process of law-making in the common law, or more specifically to the potential of a newly-recognized policy to affect the reading of the language of a section by providing a different rationale” (B. Geva, “The Fictitious Payee and Payroll Padding: *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*” (1978), 2 *Can. Bus. L.J.* 418, at p. 425). In this way, s. 9 of the *BEA* should be understood as providing room for the common law to evolve and grow, so long as it does not conflict with the *express* provisions of the statute.
   1. Purposive Support
3. Our interpretation supports the purpose of the bills of exchange system. The *BEA* establishes a bills of exchange system that is based on the principles of negotiability, certainty, and finality. In *Boma*, Justice La Forest explained it thus (at para. 97):

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. Whether one is talking about the situation where a signing officer has acted fraudulently, or the situation where a payroll clerk induces an innocent signing officer to sign a fraudulent cheque, 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. . . . Besides being impractical, such a procedure is simply not in keeping with the purpose or the scheme of the Act.

1. We agree. The principles of negotiability, certainty, and finality are integral to the operation of the *BEA*. To give effect to these principles, the negotiability of a cheque must be determinable on its face. Otherwise, the efficiency created by the bills of exchange system would be undermined as collecting banks would be required to conduct an investigation into subjective factors to determine the validity of every cheque.
2. The interpretation of s. 20(5) by the majorities in *Boma* and *Concrete Column* requires just that. It therefore weakens the fundamental principle of negotiability in the bills of exchange system. If a bank wishes to avoid future claims, *Boma* and *Concrete Column* ask the bank to verify the drawer’s intent, and whether the payee is real or the drawer’s “guiding mind” reasonably mistook the payee to be real (see *Concrete Column*, at pp. 483-84; *Boma*, at paras. 58 and 60-61). Professor Crawford points out how this runs counter to the objective of negotiability (at pp. 22‑31 and 22-50.18d to 22-50.18e):

Despite the obvious need for rules that enable persons dealing with payment instruments to judge them by what appears on their face, and to judge the rights of the holder of a payment instrument by what they know or ought reasonably to know of his conduct with relation to it, the decisions over the past 100 years have introduced rules that give effect to the subjective intentions of the drawer, whether known to all parties, or not.

. . .

With all due respect, it appears to be highly questionable to approve of a policy governing negotiable instruments on the ground that it makes them less easily negotiable. The logical extension of that policy foundation would be to deny the negotiability of cheques entirely. An impractical solution. The defects of the concept as a foundational policy is, to my mind, rendered particularly acute when it refers, without criticism, to the laxity of the drawers of cheques in failing to “counteract all kinds of fraud” at the point of origin. The unexamined and unexpressed premise seems to be that one of the proper functions of the banks as members of the payments system is to save members of the public from the effects of their own carelessness or gullibility. It is not.

(See also N. Rafferty and J. W. 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, at p. 448.)

1. Finality and certainty is also undermined since a failure to confirm subjective intent could, as in this case, lead to a conversion claim years after the cheques were accepted. If a claim does arise, the bank’s legal position is necessarily murky if it depends on facts unknown to it: the subjective intention of the drawer, or the existence of a reasonable belief in the mind of the drawer that a payee was real.
2. In our view, the interpretation of s. 20(5) adopted in *Concrete Column* and *Boma* frustrates the objectives of negotiability, certainty, and finality that lie at the heart of our bills of exchange system. In contrast, our proposed approach seeks to invigorate them. It does so first, by relying on upstream rather than downstream controls. Rather than requiring a bank to verify subjective intent and drawer belief, our approach looks to upstream controls in place at the time the cheque is drawn. A drawer’s internal controls are best positioned to weed out fraud before cheques enter into circulation, thus increasing negotiability and finality. In our view, it is more congruent with the purpose of the *BEA* to adopt an interpretation that encourages drawers, *prior* to the drawing of a cheque, to ensure that the cheque is drawn for a real transaction.
3. Second, our proposed interpretation enhances negotiability, certainty, and finality by relying on objectively ascertainable meaning. It does not require a bank to go behind the face of the cheque. A bank’s legal position will no longer depend on facts unknown to it. When a payee is not, in fact, a real person, the payee will be “non-existing” and the bank will be entitled to treat the cheque as payable to bearer. When a payee is a real person, but the drawer is not indebted to that payee (that is, there is no real transaction between the payee and drawer), the payee will be “fictitious”. The party to bear the loss in a conversion claim is more easily determined, promoting finality and avoiding unnecessary and costly litigation.
4. This Court should not continue to apply an interpretation of s. 20(5) that is inconsistent with the purpose of the *BEA* and the principles underlying our bills of exchange system.
   1. Policy Support
5. The policy rationales pulling in favour of our interpretation of “fictitious” and “non-existing” under s. 20(5) are significant. Our approach has the effect of allocating the loss resulting from cheque fraud on the party in the best position to detect and minimize such fraud, which is both effective and fair. Further, our approach would provide courts with a much simpler analytical framework. We will expand on these advantages in turn.
6. First, our proposed approach allocates the risk of losses from cheque fraud to the party in the best position to detect and minimize such fraud. This is effective and fair. Under our objective approach, the risk of loss due to cheque fraud falls on the drawer. Where a drawer is fraudulently induced into drawing a cheque to the order of someone with whom the drawer has no real transaction, the drawer will bear the loss. It matters not whether the fraudster was an employee or a third party, whether the fraudster might be the “directing mind”, or whether the payee is real. In all such cases, the banks will be able to successfully avail themselves of the protection granted by s. 20(5) against an action in conversion by the drawer. By contrast, the effect of the current framework is to place the risk of loss resulting from cheque fraud entirely on the banks.
7. In our view, the drawer is the party in the best position to detect and prevent cheque fraud. The drawer is able to implement cheque approval policies and fraud detection measures such as audits (*Boma* dissent, at para. 95). For example, as noted by Justice La Forest, the fraudulent employee in *Boma* was only able to continue her fraud because no audit was conducted (para. 95). Professor Ogilvie has come to similar conclusions:

The primary responsibility, *in fact*, for the fraud rests with the employer who has failed to provide either adequate accounting procedures or supervision for the employee so as to prevent fraud, or due diligence in employment of that person in the first place. [Emphasis in original.]

(M. H. Ogilvie, “The Tort of Conversion and the Collecting Bank: *Teva Canada Ltd. v. Bank of Nova Scotia*” (2012), 91 *Can. Bar Rev.* 733, at p. 734; see also M. Mohamed and J. McJannet, “The Employer, the Bank, and the Fraudster: Vicarious Liability and *Boma Manufacturing Ltd. v. CIBC*” (2005), 20 *B.F.L.R.* 465, at p. 477; Geva (2015), at p. 583.)

1. By contrast, banks are not in the best position to prevent cheque fraud on the drawer. In fact, the ability of collecting banks “to confirm or challenge the identity of their customer has not improved in the 100 years or so since the problem of fictitious or non-existing payees first arose” (Crawford, at p. 22-50.21). Justice La Forest’s reasoning in this regard is apposite (*Boma*, at para. 95):

As between the employer/drawer and the accepting bank, the questions are who should bear the risk of any loss and who is in the best position to minimize that risk. The answer to both these questions must, I suggest, be the employer/drawer. . . . Since the named payee is generally a stranger to the bank, the requirement of an endorsement on the cheque will more often than not be ineffective in protecting against fraud. As demonstrated by the facts of this case, it is easy enough for the perpetrator to forge the endorsement of the named payee and there is no way for the bank to verify the authenticity of the signature. On the other hand, the drawer/employer is in a much better position to put a stop to fraud of this type and is at least in an equal position to bear any loss. . . . In short, the party in the best position to stop the fraudulent activity was, and generally is, the drawer/employer. In such a situation it makes sense to allocate the risk of loss to the drawer so that the proper steps can be taken to minimize such losses.

1. Since drawers are in the best position to effectively minimize cheque fraud, it makes sense to provide incentives for them to do so. If they don’t, they bear the risk of loss. This puts the incentives where they are the most effective. In addition, allocating risk of loss to the party in the best position to prevent or stop fraud has greater fairness than assigning risk of loss to a party that can do comparatively little to address the fraud. Many commentators have noted that the current framework allocates loss in a way that is unfair and arbitrary (Crawford, at p. 22-34; Mohamed and McJannet, at p. 476; Ogilvie, at p. 735). This is especially true with respect to the collecting bank, which Professor Ogilvie has described as “likely the most innocent of all the parties” (p. 735). Whereas a drawee bank is bound by contract to the drawer, and will usually include protective clauses in that contract, the collecting bank does not have the benefit of any such protective clause. It has no contractual relationship with the drawer (Ogilvie, at p. 735).
2. Our colleague expresses concern for small businesses, and suggests that banks are in a position to distribute the losses from fraud among many users. With respect, it is contrary to public policy to make bank customers the insurers against fraud for companies that fail to exercise effective control over the actions of their employees. Those very bank customers may themselves be small businesses or individuals. Moreover, small businesses are “in an excellent position to detect the fraud at an early stage and in that way minimize the loss” (*Boma* dissent, at para. 95). Encouraging them to do so is a more sound policy than asking bank customers to backstop sloppy management. We note as well that the drawer in this case is a large pharmaceutical company capable of refunding tens of millions of dollars to its customers. It is hardly a small business.
3. Regardless of the size of business involved, all parties benefit from reducing fraud. Thus, we accept the importance of deterrence (see Mohamed and McJannet). As the drawer is in the best position to implement procedures that will deter fraud, we are of the view that the risk of loss should also rest with the drawer. Doing so places the incentive with the party who can take action.
4. Our colleague points out that banks are significant beneficiaries of the bills of exchange system, and should therefore carry the risk of loss. We would place the risk of loss on the party best able to prevent it. Both businesses and banks benefit from the bills of exchange system. As Justice La Forest explained (*Boma*, at para. 96):

There is no doubt that the chartered banks, and trust companies for that matter, benefit from the existence of the chequing system. However it is also true that the business community in general also depends on the same chequing system to facilitate the function of commerce.

Allocating the risk of loss to banks simply because they would be better able to absorb the loss compared to their customers does little to prevent fraud at its source. Faced with two innocent parties, a much stronger justification exists for placing the risk of loss on the party best able to control that risk (*Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 54). Furthermore, corporate clients can benefit from fraud insurance, transferring the risk to an insurance company — another institution well placed to absorb any such losses.

1. In summary, the drawer is in the best position to identify and detect fraud. Ergo, it is sound policy for the drawer to assume the risk of not doing so. We highlight, however, that under our approach, s. 20(5) will not always find application and thus the banks will not always have a defence. Our approach increases the scope of s. 20(5), but it does not make its application automatic. Rather, the effect of our interpretation is to limit successful actions in conversion to situations where the converted cheque is payable to a real person who is entitled to the proceeds of the cheque. This will happen for example where a person, whether an employee of the drawer or a third party, steals a cheque issued by the drawer for a real transaction and cashes it on a forged endorsement. In such cases, the loss is allocated to the banks by virtue of s. 48 of the *BEA*.
2. The second policy rationale for our approach is that it simplifies the analysis to be performed *ex post facto* by courts to determine whether a payee is non-existing or fictitious under s. 20(5). The adoption of a subjective approach by Canadian jurisprudence has led courts to struggle with the question of whose intention is relevant, and, as in the present case, of whether the relevant intention can be presumed or inferred. In cases where non-existence has been in issue, courts have had to undertake a delicate analysis of whether the person whose intention was relevant had a reasonable and honest but mistaken belief that the payee was legitimate (e.g. *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia* (2004), 71 O.R. (3d) 723 (C.A.)).
3. In our view, the objective approach we propose avoids these convolutions. Under our approach, the court tasked with determining whether s. 20(5) applies to a cheque only has to assess whether the cheque was made to a payee who does not exist, or to a payee with whom the drawer has no real underlying transaction. This assessment is solely based on objective facts ― not on anyone’s intention.
   1. Stare Decisis
4. The rule of precedent, or *stare decisis*, is essential to the common law. It “promotes predictability, reduces arbitrariness, and enhances fairness, by treating like cases alike” (*Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 18). By safeguarding certainty and consistency, adherence to precedent allows for an orderly administration of justice predicated on the rule of law.
5. Accordingly, this Court does not lightly depart from its own precedents. There must be compelling reasons to do so (*R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1352-53; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 130; *Craig*, at para. 25). The Court is especially reluctant to overturn recent precedents that are the product of strong majorities (*Fraser*, at para. 57; *Craig*, at para. 24; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at paras. 23-24).
6. When deciding whether to overrule a precedent, this Court must balance the certainty that comes with adhering to precedent with the benefit of correcting the jurisprudence (*Craig*, at para. 27). The “benefits must outweigh the costs” (*Sriskandarajah*, at para. 19). As Justice Rothstein (concurring in the result) explained in *Fraser* (at paras. 133 and 139):

What the courts are doing when deciding whether to overrule a precedent is a balancing exercise between two important values: correctness and certainty. A court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty or to correct the error. . . .

. . .

. . . Fundamentally, the question in every case involves a balancing: Do the reasons in favour of following a precedent — such as certainty, consistency, predictability and institutional legitimacy — outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld and perpetuated?

1. Generally, adhering to precedent enshrines certainty. However, in some instances continued recognition of prior decisions has the effect of *creating* uncertainty. For example, in *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, Dickson J. (as he then was) found that “adherence to the *stare decisis* principle would generate more uncertainty than certainty” and he therefore refused to follow it (p. 528). In that case, the continued recognition of the concept of *persona designata* “approved by this Court in *Commonwealth of Puerto Rico v. Hernandez*, [[1975] 1 S.C.R. 228], can only have the effect of creating doubt” (p. 528). Chief Justice Dickson later explained the rationale for the *Ranville* decision (*Bernard*, at p. 858):

The prior decision itself was a cause of uncertainty, and therefore following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law.

This view was echoed by Chief Justice Lamer in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, where he explained that justification for overruling precedent may be found where “the rule or principle under consideration has created uncertainty or has become ‘unduly and unnecessarily complex and technical’” (p. 778).

1. In our view, the instant appeal falls into this category. Adhering to *Concrete Column* and *Boma* creates, rather than ameliorates, uncertainty. There is “an excessive accumulation of technical precedents” (B. Geva, “Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee ― *Boma v. CIBC*” (1997), 28 *Can. Bus. L.J.* 177, at p. 197) which lay down unnecessarily complex and elusive rules. This has undermined certainty as courts have struggled to apply the subjective approach adopted in *Concrete Column* and *Boma*.
2. While both *Concrete Column* and *Boma* consider subjective intention, each relies on, and attributes to the drawer, the subjective intention of a different corporate actor. In *Concrete Column*, the majority attributed the intention of the company’s signing officer to the drawer. The cheques at issue were prepared fraudulently by a payroll clerk at the company, but were signed mechanically by an officer. Based on the signing officer’s intention, the Court presumed that the drawer intended to issue cheques and thus found the fictitious payee defence inapplicable. But in *Boma*, regarding cheques issued to imaginary persons, Justice Iacobucci held that the intention of a signing officer of the company was not relevant (para. 40). Rather, the “relevant intention” is that of the “directing mind of the corporate” drawer (para. 40).
3. This inconsistency added to the difficulty in applying *Concrete Column* and *Boma*. Courts have struggled to determine whose intention is relevant and whether the relevant intention can be presumed or inferred. For example, in *Metroland Printing, Publishing & Distribution Ltd. v. Canadian Imperial Bank of Commerce* (2001), 14 B.L.R. (3d) 212 (Ont. S.C.J.), aff’d (2002), 158 O.A.C. 111, the court presumed that the drawer intended to pay non-existing payees, even though no guiding mind or officer of the company reviewed the cheques. And in *Westboro Flooring & Décor Inc. v. Bank of Nova Scotia*, 2002 CanLII 7479 (Ont. S.C.J.), aff’d (2004), 71 O.R. (3d) 723 (C.A.), the Court of Appeal for Ontario inferred that the drawer formed an honest but mistaken belief regarding the cheques despite only mentioning the company’s signing officer, not its guiding mind. However, in a more recent decision of that court, it held that the drawer’s honest but mistaken belief could not be inferred or presumed because “no one responsible for running [the company] considered any of the cheques” (*Rouge Valley Health System v. TD Canada Trust*, 2012 ONCA 17, 108 O.R. (3d) 561, at para. 40).
4. Even if a court successfully discerns whose subjective intention is pertinent to each branch of s. 20(5), courts may have difficulty identifying the guiding mind of a corporate drawer. Justice Iacobucci did not define the term “guiding mind” — “its boundaries are not clear” (Geva (2015), at p. 583). Even if the guiding mind is identified, rightly or wrongly, a court may have difficulty determining “what was in the employer’s mind as to the payee when the cheque was drawn” (Ogilvie, at p. 742). In other words, proving his or her intention may require costly litigation fraught with uncertainty.
5. The objective approach we propose avoids these uncertainties. Under our approach, the court tasked with determining whether s. 20(5) applies to a cheque only has to assess whether the cheque was made to a payee who does not exist, or to a payee with whom the drawer has no real underlying transaction. This assessment, which is solely based on objective facts and not on anyone’s intention, will add much needed predictability to the s. 20(5) analysis. Thus, in this case, we are of the view that departing from precedent will increase certainty.
6. Turning to the correctness side of the balancing exercise, we are of the view that overruling *Concrete Column* and *Boma* offers a needed course correction that will return the jurisprudence to a proper interpretation of s. 20(5). Our objective approach mirrors that found in *Vagliano* ― the intention of the parties charged is not relevant, and where there is no genuine transaction the bank is entitled to treat the bill as payable to bearer. As we have explained, this interpretation is grounded in the text and history of the provision.
7. Further, as we have explained, our approach aligns with the purpose of the bills of exchange system as guided by the *BEA*: negotiability, certainty, and finality. The interpretation in *Concrete Column* and *Boma* does not. A precedent’s failure to align with legislative purpose is a compelling reason to depart from *stare decisis* (*Henry*, at para. 45).
8. Overturning precedent in this case is supported by additional factors. For example, significant judicial and academic criticism may justify abandoning precedent (*Craig*, at para. 29; *Rascal Trucking*, at para. 28; *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 39). Here, there has been both. Justice La Forest, supported by Justice McLachlin (as she then was), offered such a criticism of *Concrete Column* in *Boma*.
9. Tellingly, Falconbridge’s text, relied upon by the majority in *Concrete Column*, responded in its 8th edition by supporting the dissenting opinions: “. . . the reasoning of the dissents is more likely to do justice” (p. 1261). And the majority’s interpretation of “fictitious”, based on the intention of the drawer, has been described as “hardly plausible” (Geva (1978), at p. 424).
10. The academic criticism has only grown following *Boma*. It has been the subject of “continuous” and “harsh” criticism (Mohamed and McJannet, at pp. 466 and 476). There have been repeated pleas for this Court to revisit its interpretation of s. 20(5) (see e.g. Ogilvie, at p. 745; Geva (2015), at p. 593).
11. Many of the specific concerns identified in scholarly publications have been noted elsewhere in these reasons. It is sufficient here to point out two themes that emerge. First, the interpretation of s. 20(5) embraced by the majority in *Concrete Column* and *Boma* undermines negotiability, a purpose behind the bills of exchange system (see e.g. Rafferty and Hamilton; Crawford, at p. 22-50.18d). Second, the Court has “failed to see the forest for the trees” (Geva (1997), at p. 197). The meaning of s. 20(5) “has been buried under an avalanche of rules, sub-rules, and distinctions, which may not be always easily appreciated” (B. Geva, “The Fictitious Payee After *Teva v. BMO*: Has the Pendulum Swung Back Far Enough?” (2016), 31 *B.F.L.R.* 607, at p. 619). As Professor Ogilvie opines (at p. 744):

Top courts appear to have lost sight of what these cases are about, perhaps because they have been mesmerized by small factual distinctions in the means by which the defalcations have been executed, technical interpretations of the *BEA* somewhat distant from the original intentions of the draftsman, and possibly even too great a desire to ensure that a bank pays rather than a customer, notwithstanding that it will be the bank’s other customers who will bear the loss caused by the fraud rather than the employer who was in the best position to prevent and to detect early any fraudulent conduct.

1. In summary, we are of the view that *Concrete Column* and *Boma* ought to be overturned in favour of the objective approach we have proposed. The balancing of certainty and correctness heavily favours doing so. Decades of academic and judicial criticism plot the course. And the earlier jurisprudence reveals a path.
2. We note that an objective approach to “fictitious” would be dispositive in this case (none of the cheques were for an underlying transaction). Thus it is not strictly necessary to overrule the subjective approach to “non-existent” introduced in *Boma*. However, adopting an objective approach to fictitious would, as we have explained, make the *Boma* approach to non-existence moot. In the interest of clarity in the jurisprudence, we would explicitly overrule *Boma*.
   1. Application
3. In the instant case, the payees PCE Pharmacare and Pharma Team System were invented by McConachie and did not in fact exist. They are therefore non-existing under s. 20(5). The payees London Drugs, Pharma Ed Advantage, Medical Pharmacies Group, and Pharmachoice are real entities. However, the cheques were for false purchase orders (Whitaker J., 2014 ONSC 828, at para. 12 (CanLII)), and thus there were no underlying transactions with the payees. Accordingly, all payees in this second group were fictitious under s. 20(5). In the result, the banks were entitled to treat all the cheques as payable to bearer.
4. Disposition
5. We would dismiss the appeal, and overrule *Concrete Column* and *Boma*.

*Appeal allowed with costs,* McLachlin C.J. *and* Wagner*,* Côté *and* Rowe JJ*. dissenting.*

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1. *Bills of Exchange Act*,R.S.C. 1985, c. B-4. [↑](#footnote-ref-1)