MONEY IN CANADIAN LAW

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In this article, the author critically examines the concept of money in Canadian law in the context of the Canadian payments system. Money, currency and legal tender are defined, distinguished and illustrated by reference to statutory provisions and Canadian and English case law. The Canadian payments system is described and Canadian judicial decisions touching upon the question of what constitutes money are evaluated in terms of their capacity to provide a comprehensive legal theory of money. Legal tender and payment are described and contrasted as incidents of contract law. Foreign currency payment obligations are discussed and analyzed in light of the current statutory framework and recent English judicial decisions in order to expose the inadequacy of existing law in light of the monetary character of such obligations. Various strategies which might be pursued with regard to the enforcement of foreign currency obligations are discussed and the current legislative framework is criticized. The author concludes that the legal concept of money ought to be enlarged to embrace rapidly advancing technological developments in the area of payments, failing which the law may become out of date and irrelevant.

L'auteur de cet article examine d'un oeil critique ce qu'est la monnaie en droit canadien dans le contexte du système canadien de paiements. Il donne une définition de tous les aspects de ce terme, les comparant et les illustrant au moyen des dispositions législatives et de la jurisprudence canadienne et anglaise. Il décrit le système canadien de paiements et analyse les jugements canadiens ayant trait à la nature de l'argent, dans le but de donner à l'argent, en droit, un sens théorique complet. Il décrit le cours légal et le paiement comme faisant partie du droit des obligations. Il analyse les obligations de paiement en monnaie étrangère à la lumière de la législation actuelle et des jugements anglais récents afin de montrer les imperfections du droit actuel en ce qui concerne l'aspect monétaire de ces obligations. Il propose divers moyens de mise en execution d'obligations en monnaie étrangère et critique le cadre législatif actuel. Il en conclut qu'il faudrait donner en droit un sens plus large à la monnaie afin d'inclure les développements technologiques rapides dans le domaine des paiements, faute de quoi le droit risquerait d'être dépassé et de ne plus pouvoir s'appliquer.

Introduction

There are few things more important to society than stable money and efficient and reliable means of transferring it from one person to another. Money is the common denominator of economic activity and the means of discharging the obligations thereby created. It has been said that few

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subjects are so much talked about and so little understood as money. In its legal aspect, money is a complex, variable and multi-faceted phenomenon. Payment, when properly described in contracts and legal documents to reflect the true intention of the parties, gives potency to obligations. It is simply not possible in most commercial dealings to discharge obligations in the manner contemplated by the general law, that is to say, by the delivery of legal tender by the debtor to the creditor at the creditor's place of business.[1] The exigencies of modern-day commerce virtually always require that payment be effected by cashless means of payment and forms of money such as cheques, bank drafts, electronic credit transfers and foreign currency, all of which derive their power to discharge obligations solely by the agreement of the parties. This being the case, lawyers must have a clear understanding of the related concepts of money and payment in order to fill the void between the common law notion of payment by legal tender and the requirements of the parties to commercial transactions as to how, when, and where contractual obligations are to be discharged.

This paper will examine the concept of money in Canadian law in the context of the Canadian payments system. Part I will describe the statutory basis of various forms of money and the organization of the Canadian payments system itself, Part II will examine the concept of money in the law, Part III will consider legal tender and payment, and Part IV will examine the status of foreign currency in Canadian law.

I. *The Regulation of Money*

Money, as that term is generally understood, takes either of two forms: cash, comprised of coin and paper currency; or transferable deposits maintained in banks and other financial institutions. Although cash is still the most frequently used means of effecting everyday transactions, in value it constitutes only twenty-five per cent of the stock of money available to the economy for payments. Seventy-five per cent of the money in a form available for payment is comprised of deposits transferable by order and held in deposit-taking institutions such as chartered banks, caisses populaires, trust and loan companies, credit unions, and government savings institutions.[2] The most common means of transferring deposits is by cheque, approximately two billion of which are written every year in Canada, constituting ninety-one per cent of cashless payments. Other means include credit cards (about 150 million transactions or seven per cent of total), pre-authorized debits (50 million transactions or two per cent), direct credit transfers (used mainly for payrolls) and interbank transfers.[3] "Electronic" payments and transfers are nothing

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[1] A.G. Guest (ed.), Chitty on Contracts (24th ed., 1977), p. 621, para. 1297.

[2] Payment Systems in Eleven Developed Countries, (Manual of the Bank for International Settlements, February 1985), p. 27 (hereinafter Payment Systems).

[3] *Ibid.*, at p. 31.

more than credit transferred by a communications facility either internally within a financial institution, or from its computerized accounting system to that of another financial institution.[4]

Currency and coinage, the issuance of paper money, and legal tender are all matters of exclusive federal jurisdiction under the Constitution Act, 1867.[5] Parliament has exercised its jurisdiction over these matters through the Currency Act,[6] the Bank of Canada Act[7] and the Bank Act.[8] The transfer of bank deposits is governed primarily by the Bills of Exchange Act[9] and the Canadian Payments Association Act.[10]

A. *The Dollar*

The statutory basis for Canadian currency is found in section 3 of the Currency Act which establishes the dollar as the monetary unit of Canada and specifies its denominations, namely, cents and mills, the mill being one-tenth of a cent. The Act goes on to provide that all public accounts shall be kept in the currency of Canada and that any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.[11] Under Section 12 of the Act, every contract or matter relating to money or involving the payment of money must be made in terms of the currency of Canada unless made according to the currency of another country or a *unit of account* that is defined in terms of the currencies of two or more countries. Thus, the proper way to refer in contracts and other legal documents to the Canadian monetary unit, as opposed to the money of another country, is to say "Canadian dollars" or "Canadian currency". Although references to "lawful money of Canada" are often found in legal documents, the expression is a

[4] Guy David, Electronic Funds Transfer: Technological Developments and Legal Issues (1985), 2 Canadian Computer Law Reporter, Part 1: No. 4, 65, at p. 67. Electronic payments and transfers seem destined to dominate the Canadian payments system in the future. The emerging legal issues in this regard have already been identified in various studies which have been prepared for the federal Government. See, *e.g.*, Changing Times: Banking in the Electronic Age (Interdepartmental Steering Committee on the Electronic Payments System, S. Goldstein, Chairman, 1979). For a more recent report and analysis, see Report on the Legal Aspects of Electronic Funds Transfer (Prepared by Gowling & Henderson for the Department of Consumer and Corporate Affairs, August, 1984) (hereinafter, The Gowling & Henderson Report).

[5] 30 & 31 Vict., c. 3 (U.K.), s. 91(14) Currency and Coinage; (15) Banking, Incorporation of Banks and the Issue of Paper Money; (20) Legal Tender.

[6] R.S.C. 1970, c. C-39. This Act was originally known as the Currency and Exchange Act, the title having been shortened to its present form by S.C. 1983-84, c. 9, s. 1.

[7] R.S.C. 1970, c. B-2.

[8] S.C. 1980-81-82-83, c. 40, repealing R.S.C. 1970, c. B-1.

[9] R.S.C. 1970, c. B-5.

[10] S.C. 1980-81-82-83, c. 40, Part IV, ss. 54-89.

[11] S. 11.

misnomer based on American antecedents and has no real meaning in Canadian law.[12]

Any discussion of the meaning of the term "money" must inevitably encounter the theories of "nominalism" and "metallism".[13] The latter identifies the unit of a particular currency with a unit of metal, that is with "a definite quantity of purchasing power",[14] whereas under the former theory the monetary unit is an arbitrary unit of account which is always equal in value to the value it expresses. In addition to being an incident of money, nominalism is also a principle of contract law. In this regard, it is derived from the intention of the parties or is imposed by statute,[15] and requires that "existing debts follow the depreciation of the monetary unit".[16] Under the nominalistic principle, changes in the value of money have no bearing upon the nominal amount or quantum of monetary obligations.[17] In the eyes of the law, monetary obligations contracted with respect to a particular currency as the money of account are unaffected by a change in the external value of the currency or its purchasing power.[18] The nominalistic principle applies to both domestic and international contracts. Article 1779 of the Quebec Civil Code succinctly states the principle as follows:

> The obligation which results from a loan in money is for the numerical sum received.
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> If there be an increase or diminution in the value of the currency before the time of the payment, the borrower is obliged to return the numerical sum lent, and only that sum, in money current at the time of payment.

[12] A. Nussbaum, Money in the Law (1939), p.41. The author goes on to state that the term is "an inheritance from colonial times" and "from a logical point of view unfortunate . . . since lawful money in the original sense of the word, may lack legal tender effect". Although in *Gray* v. *Worden* (1869), 29 U.C.Q.B.R. 535 there are references to "lawful money of Canada", the court does not indicate how it is using the expression.

[13] For a discussion of these theories, see Nussbaum, *ibid.*, pp. 12-17, and F.A. Mann, The Legal Aspect of Money (4th ed., 1982), p. 80 ff.

[14] Nussbaum, *ibid.*, p. 17.

[15] Chitty on Contracts, *op. cit.*, footnote 1, p. 626, para. 1309; Mann, *op. cit.*, footnote 13, pp. 85, 96.

[16] Nussbaum, *op. cit.*, footnote 12, p. 17.

[17] There are fundamental differences in law between debts and obligations to pay unliquidated sums of money. A debt is a monetary obligation, whereas an obligation to pay an unliquidated amount usually is not. Mann, *op. cit.*, footnote 13, p. 63 describes the difference as follows: "Monetary obligations primarily exist where the debtor is bound to pay a fixed, certain, specific, or liquidated sum of money." He goes on (p. 115) in the following vein:

> The extent of unliquidated amounts depends upon the principles applicable to the relationship in issue rather than the law of money: it is the law of damages, breach of trust, unjustified enrichment, agency, and so forth that must decide upon the relevance and impact of variations of monetary value.

[18] Mann, *ibid.*, p. 81.

The general rule in domestic and international commercial transactions is that by selecting a particular currency of account, the parties are presumed to have agreed to deal on the basis of the nominal value of the currency selected.[19] In the absence of evidence of a contrary intention, the parties to a contract are deemed to have chosen as the currency of account the currency of the jurisdiction whose law is the proper law of the contract.[20]

"Legal tender" is that form or those forms of money which the law recognizes for use in a tender of money.[21] In this respect, section 7(1) of the Currency Act provides as follows:

> Subject to this section, a tender of payment of money is a legal tender if it is made
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> (a) in gold coins issued under the authority of section 4;
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> (b) in subsidiary coins that are current under the provisions of section 6; or
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> (c) in notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* intended for circulation in Canada.

The exception referred to in section 7(2) is that a tender of payment of money in coins is only a legal tender below various specified limits according to the denomination of the coin. The wording of section 7(2)[22] tends to indicate that the legal tender limits set with respect to the various denominations of coins may be cumulated in discharging a single debt. Because there is no legal duty on a payee to make change, the exact amount must be proferred.[23]

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[19] The presumption is rebutted by the use of index clauses or other means of adjusting obligations to changes in the value of money. See generally Nussbaum, *op. cit.*, footnote 12, pp. 20-23.

[20] *Adelaide Electric Supply Co.* v. *Prudential Assurance*, [1934] A.C. 122 (H.L.).

[21] "Legal tender is money which a creditor has no privilege to refuse if tendered by a debtor in payment of his debt.": Nussbaum, *op. cit.*, footnote 12, p. 327. "Legal tender is that kind of coin, money or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount.": Black's Law Dictionary (Rev. 4th ed., 1968), p. 1637. Although a creditor may not lawfully refuse such a tender without justification, until he does in fact accept it, payment cannot be said to have been made. The distinction between tender and payment will be discussed more fully in Part III of this paper.

[22] *Supra*, footnote 6, as amended S.C. 1977-78, c. 35, s. 2. A tender of payment of money in coins specified in s. 7(1) is a legal tender:

(a) in the case of coins of a denomination greater than ten dollars, for payment of any amount, if the tender consists of not more than one coin;

(b) in the case of coins of the denomination of ten cents or greater but not exceeding ten dollars, for payment of an amount not exceeding ten dollars but for no greater amount;

(c) in the case of coins of the denomination of five cents or greater but less than ten cents, for payment of an amount not exceeding five dollars but for no greater amount; and

(d) in the case of coins of the denomination of one cent or greater, but less than five cents, for payment of an amount not exceeding twenty-five cents, but for no greater amount.

[23] Chitty, *op. cit.*, footnote 1, p. 634, para. 1324.

B. *Coinage*

The Currency Act also regulates the issuance of gold coins and provides standards for "subsidiary coins",[24] defined as coins other than gold coins, all of which are now issued by the Royal Canadian Mint. The Act specifies which coins are "current". Under Section 6, "a current coin shall pass current for the amount in the currency of Canada that appears on the coin".

Full-bodied coins are coins which are worth their weight in precious metal.[25] No such coins are currently issued in Canada because in order to function as money a coin must have a real value equal to or less than the nominal value it represents. When the real value of a coin exceeds its nominal value, the coin is removed from circulation and hoarded as a valuable commodity or melted to extract the precious metal from it. Since the value of metal fluctuates, all coins are issued for nominal amounts well above their worth in metal. Coins can easily cease to function as money, as is well illustrated by the case of *Ottoman Bank of Nicosia* v. *Chakarian*.[26] The demonetization of the Turkish one pound gold coin followed the introduction in Turkey, beginning in 1915, of paper currency to replace the gold one pound coin. As Lord Wright so aptly put it:[27]

> At all material times since the commencement of the war the paper notes have been legal tender and although the gold £ is still legal tender, the paper currency has, in accordance with Gresham's Law,[[28]] driven out from circulation the gold currency, so that in practice gold has ceased to circulate as legal tender. The Turkish gold coins are now, for all practical purposes, only dealt with as a commodity or bullion.

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[24] *Supra*, footnote 6, s. 5.

[25] The "full-bodied" concept has an obvious relationship with the theory of metallism. Nussbaum, *op. cit.*, footnote 12, writes (p. 15) that "the doctrine that the monetary unit is logically or legally identified with a definite quantity of metal is only a sublimated formula for the proposition of metallistic policy. That doctrine dominated the legal literature of the nineteenth century. Only full-bodied coin was believed to be 'money proper'". An Ontario illustration of this approach is to be found in *Gray* v. *Worden*, *supra*, footnote 12.

[26] [1938] A.C. 260 (H.L.).

[27] *Supra*, footnote 26, at p. 270.

[28] Gresham's Law is defined in H.H. Binhammer, Money, Banking and the Canadian Financial System (1977), p. 9 as follows:

> With the official debasement of coin and with the depreciation of coin resulting from wear and tear or through the practices of clipping and sweating, much of the coin ceased to be full-bodied and was only token. As a result, full-bodied coin or "good money" was hoarded because of its high metallic content, while token coin or "bad money" passed from hand to hand. Today this phenomenon is known as Gresham's Law after Sir Thomas Gresham (1519-1579), Queen Elizabeth's Chancellor of the Exchequer, who formulated the theory that "cheap money" drives "dear money" out of circulation.

Mann, *op. cit.*, footnote 13, p. 19, discusses Gresham's Law in similar terms but at n. 94 takes issue with the notion that Gresham is solely responsible for discovering this "law".

The primary and largely ineffective legal techniques available to government to prevent demonetization are simple prohibitions against melting the coinage and restrictions on export.[29]

C. *Paper Money*

The issuance of paper money is regulated by the Bank Act[30] and the Bank of Canada Act.[31] Prior to the incorporation of the Bank of Canada in 1934, the notes of the chartered banks circulated along with legal tender bills issued by the federal Government. An early Canadian case dealing with paper money issued on the authority of the federal Government held that "[Canada bills] are not money or specie. They have no intrinsic value as coin has. They represent only, and are the signs of value".[32] By contrast, in England, the monetary character of bank notes which circulated even without being legal tender was recognized as early as 1758. In *Miller* v. *Race*,[33] Lord Mansfield characterized bank notes as money in the following terms: "They are as much money, as guineas themselves are; or any other current coin, that is used in common payments, as money or cash."[34]

The note issuing power of the chartered banks was gradually curtailed over the ten years following the creation of the Bank of Canada.[35] Today, section 23 of the Bank of Canada Act gives the central bank the sole right to issue "notes intended for circulation" in Canada, and imposes a duty on the bank to supply such notes as are required for circulation in Canada. Section 311(1) of the Bank Act makes it an offence for anyone (other than the Bank of Canada) to issue any type of note or other instrument intended to circulate as money or as a substitute for money. Post-1967 notes of the Bank of Canada are neither promissory notes nor bills of exchange within the meaning of the Bills of Exchange Act.[36] This was made explicit by an amendment to the Bank of Canada Act following the

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[29] See, *e.g.*, section 10 of the Currency Act, *supra*, footnote 6, which probibits the melting of coins, and items 5666 and 5667 of the Export Control List, C.R.C. 1978, c. 601, made pursuant to the Export and Import Permits Act, R.S.C. 1970, c. E-17, relating to the exportation of one cent coins and of silver coins dated 1968 or earlier.

[30] *Supra*, footnote 8.

[31] *Supra*, footnote 7.

[32] *Gray* v. *Worden*, *supra*, footnote 12, at p. 540, per Wilson J.

[33] (1758), 1 Burr 452, 97 E. R. 398 (K.B.).

[34] *Ibid.*, at pp. 457 (Burr), 401 (E.R.). For an excellent recent discussion of the monetary aspects of bank notes, see the dissenting reasons of Laskin C.J.C. in *Bank of Canada* v. *Bank of Montreal*, [1978] 1 S.C.R. 1148, at pp. 1150-63.

[35] Chartered banks in Canada have not had the right to issue their own notes since 1945: Bank Act, S.C. 1944, c. 30, ss. 60, 61. The Bank Act, S.C. 1934, c. 24, provided in ss. 60-63 for the gradual reduction from year to year of such privately issued bank notes intended for circulation in favour of Bank of Canada notes.

[36] *Supra*, footnote 9.

decision in *Bank of Canada* v. *Bank of Montreal*.[37] Notes of the Bank of Canada are not and never have been redeemable or convertible into anything but other notes issued by the Bank. Bank of Canada notes in circulation never mature. They retain their character of legal tender as long as they remain of sufficiently good quality to be recognized as currency.

The notes of the Bank of Canada are a first charge against its assets and appear as a liability on the central bank's balance sheet.[38] However, the side of the Bank of Canada's balance sheet on which the note issue appears is to a much greater extent a matter of custom than an indication that the holder of a note has a claim to anything but another note of equal value.[39] Their particular value derives solely from the quality of being legal tender which is conferred on them by section 7(1)(c) of the Currency Act. The Bank of Canada does not maintain reserves of gold in its own right, and an examination of its balance sheet reveals that its assets are comprised mainly of federal Government securities. The stocks of unissued notes maintained by the Bank of Canada do not have any monetary value for the Bank and are not recorded on the Bank's balance sheet. In the famous case of *Banco de Portugal* v. *Waterlow and Sons, Limited*,[40] unissued bank notes were mistakenly delivered by the printers to thieves who put them into circulation. The Banco de Portugal was then forced to withdraw all of the notes which it had itself genuinely issued and exchange them for other notes. It was held by the House of Lords that the proper measure of damages was the exchange value expressed in sterling of the genuine currency, together with the cost of printing the notes. This decision has been widely criticized. Nussbaum correctly points out that "the real loss of the bank of issue was lost interest at the discount window [on

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[37] *Supra*, footnote 34. This decision is discussed at some length in Part II of this paper. The Bank of Canada Act, *supra*, footnote 7, was amended by S.C. 1980-81-82-83, c. 40, Part III, s. 49 so that s. 21(6) of the Act now reads as follows:

> (6) Notes of the Bank are neither promissory notes nor bills of exchange within the meaning of the *Bills of Exchange Act*.

[38] See section 21(1) and Schedule B, respectively, of the Bank of Canada Act, *supra*, footnote 7.

[39] See *Bank of Canada* v. *Bank of Montreal*, *supra*, footnote 34, at pp. 1159-1160, where Laskin C.J.C. approves the following statement of Nussbaum (*op. cit.*, footnote 12, p. 84):

> Despite the fact that paper money has become practically inconvertible and no longer evidences a debt, such notes must, for reasons of accounting, appear on the liability side of the balance sheet of the bank or other institution of issue. There should be no misapprehension, however, of the legal nature of the notes. The "debtor" has disappeared. . . Realization of the assets of the [central] bank would be impossible, such assets, in the situation supposed, usually consisting mostly of government debts.

[40] [1932] A.C. 452 (H.L.). This decision is discussed in Mann, *op. cit.*, footnote 13, pp. 26-28.

the infrequent loans it makes to commercial banks for liquidity purposes] —not the face value of its notes''.[41]

D. *The Payments System*

The various laws, regulations, institutional arrangements and practices which govern the means of transferring deposits in banks and other institutions in Canada collectively constitute the Canadian payments system. Financial institutions which accept deposits transferable by order to a third party, that is chequable deposits, constitute the core of the system. At their centre is the Bank of Canada—the country's central bank—which each day adjusts the accounts maintained with it to effect the final settlement of clearing balances among the members of the system. In its fiscal agency role, it also acts as banker for the system's largest user of payment services, the federal Government.[42] The other important players in the system include provincial governments, utilities and non-deposit-taking financial institutions such as insurance companies, investment dealers, and sales finance organizations.[43]

Until 1980, the clearing and settlement system was operated by the Canadian Bankers Association, pursuant to a loose statutory framework provided by its incorporating statute,[44] the Bank Act and the Bills of Exchange Act. The Canadian Bankers Association had neither a public duty nor a mandate to provide a clearing system, but included in its objects was the power to "establish in any place in Canada a clearing house for banks, and make rules and regulations for the operations of such a clearing house''.[45]

In 1980, as part of the decennial revision of the Bank Act, Parliament passed legislation creating the Canadian Payments Association.[46] In 1983, the Canadian Payments Association assumed full responsibility for the operation of the national clearing and settlement system from the Canadian Bankers Association.[47] The membership of the Canadian Payments Association is comprised exclusively of institutions that accept chequable deposits. There are two categories of members: statutory members, namely, chartered banks, savings banks, and the Bank of Canada; and voluntary members such as trust and loan companies, credit unions

[41] Nussbaum, *op. cit.*, footnote 12, p. 79. For a contrary opinion, see Mann, *ibid.*, p. 28, n. 141.

[42] The federal Government accounts for about ten per cent, by volume, of the items handled by the payments system. Payment Systems, *op. cit.*, footnote 2, p. 137.

[43] *Ibid.*, pp. 30, 122-127.

[44] An Act to Incorporate the Canadian Bankers' Association, S.C. 1900, c. 93.

[45] *Ibid.*, s. 7.

[46] Canadian Payments Association Act, *supra,* footnote 10.

[47] Payment Systems, *op. cit.*, footnote 2, p. 121.

and caisses populaires, and government savings institutions. Contrary to the situation prevailing in the United States where, since the Monetary Control Act[48] was passed by Congress in 1980, all institutions that accept transferable deposits are entitled to full access to the Federal Reserve System, in Canada, membership as of right in the Canadian Payments Association is restricted to statutory members.[49] Non-statutory members must satisfy certain criteria relating to deposit insurance and financial management[50] and are admitted to membership only on application.[51]

Since the passage of the Canadian Payments Association Act, there can be little disagreement that the payment system itself is essentially a public institution. The Act is unique in its approach, however, in that it confers responsibility for managing and planning the evolution of this public system on a private association of interested parties. The Act contains various provisions designed to protect the public interest, including requirements that the chairman be appointed by the Bank of Canada[52] and that the Association's by-laws be approved by the Governor in Council.[53]

Section 58 of the Act appears to confer upon the Canadian Payments Association an exclusive mandate, although not in so many words, "to establish and operate a national clearings and settlements system and to plan the evolution of the national payments system".[54]

Beyond the usual corporate rights associated with membership in a rule-making and self-governing body, the essential rights and duties of members of the Canadian Payments Association are set forth in section 83 of the Act which provides:

> Members may present payment items and shall accept and arrange for settlement of payment items in accordance with the by-laws and rules.

Clearing is the presentation of payment items, primarily cheques, while *settlement* is the payment for items received. As the system pres-

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[48] Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132 (1980).

[49] Canadian Payments Association Act, *supra*, footnote 10, s. 57(1)(a) (the Bank of Canada), (b) (every bank), (c) (every savings bank to which the Quebec Savings Banks Act applies).

[50] *Ibid.*, s. 57(2)-(4).

[51] *Ibid.*, s. 57(1)(d).

[52] *Ibid.*, s. 69(1).

[53] *Ibid.*, s. 72(2).

[54] Support for the exclusivity of the CPA's role is derived from reading sections 58 and 59 together. Section 59—the 'powers' section—refers to "establishing and operating *the* national clearings and settlements system." (Emphasis added). This is to be read with the use of the word "the" in relation to the evolution of the national payments system in section 58. The use of the unambiguous definite article 'the' in section 59 removes, by interpretation, the ambiguity from the use of the indefinite article "a" in section 58. In addition, the power of the CBA to operate clearing houses has been repealed (S.C. 1980-81-82-83, Part V, c. 40, s. 90(3)).

ently operates, payment items presented by one member to another before the daily cut-off time are settled for value as of the day of exchange. This is done by adjustment of the accounts of "direct clearers" (those who maintain a Bank of Canada clearing account) at the Bank of Canada to reflect net balances of the clearings owing by or to each direct clearer for its own account and for the accounts of the institutions for which it acts as clearing agent, for value as of the date on which the items were exchanged.[55] "Indirect clearers" (members which do not maintain a clearing account with the Bank of Canada) maintain a clearing account with a direct clearer, through which final settlement for their items is effected.[56]

II. *The Legal Concept of Money*

Since the quality of being "money" is derived from the economic functions it serves, economics is a good starting point for an analysis of the concept of money.[57] In economic terms, money may be defined as any

[55] See generally the CPA Clearing By-law, By-law No. 3, December 16, 1982. As to the concept of back-dating settlement values to the date of exchange, John Roberts, General Manager of the Canadian Payments Association, has stated as follows:

> Given the practical impossibility, as I have described, of moving to true same-day settlement of the entire clearings system in any near-term future; given the existence of same-day settlement already in some parts of that system; given the obvious risk of manipulation if different settlement lags persist, what does one do? Put the whole system on a next-day settlement basis? That would not only lose most of the benefit of automation, of course; electronic transfers are increasingly likely to involve very high-value items, and lengthening the settlement lag for them would open wider a window of risk that everyone is trying very hard to close.
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> The better answer, with the benefit of hindsight, is pretty obvious and has in fact been a topic for discussion in banking circles for some time past: you leave the mechanism of the clearing and settlement system more or less exactly as it is; you simply back-date the final settlement entries on the books of the Bank of Canada to the day on which the underlying exchanges of paper actually took place.
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> Nothing is quite that simple, of course; to arrive at the correct entries to be back-dated, you also have to back-date any advances needed from the Bank of Canada; you have to back-date the early-morning draw-down or redeposit of Receiver-General balances; and you have to *retard* by one day the settlement vouchers representing the values of items exchanged on magnetic tape, which will otherwise get back-dated to the day *before* the payments are actually made.

Remarks to the Toronto Cash Management Society, The Cash and Treasury Management Association, and The Insurance Companies Cash Management Group (Address by John S. Roberts, General Manager, Canadian Payments Association, Toronto, February 25, 1986).

[56] The clearing and settlement system is more fully described in Payment Systems, *op. cit.*, footnote 2, pp. 136-137.

[57] This is not so much a principle of law as a question of fact which appears to be acknowledged by most judicial decisions dealing with money.

medium of exchange which is widely accepted in payment for goods and services or in final discharge of debts.[58]

In the opening pages of his Treatise on Money,[59] Keynes distinguishes the description of money from the actual concrete manifestations answering to that description which are used to discharge obligations:[60]

> Money-of-account, namely that in which debts and prices and general purchasing power are *expressed,* is the primary concept of a theory of money.
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> A money-of-account comes into existence along with debts, which are contracts for deferred payment, and price-lists, which are offers of contracts for sale or purchase. Such debts and price-lists, whether they are recorded by word of mouth or by book entry on baked bricks or paper documents, can only be expressed in terms of a money-of-account.
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> Money itself, namely that by delivery of which debt-contracts and price-contracts are *discharged,* and in the shape of which a store of general purchasing power is *held,* derives its character from its relationship to the money-of-account, since the debts and prices must first have been expressed in terms of the latter. Something which is merely used as a convenient medium of exchange on the spot may approach to being money, inasmuch as it may represent a means of holding general purchasing power. But if this is all, we have scarcely emerged from the stage of barter. Money-proper in the full sense of the term can only exist in relation to a money-of-account.
>
> Perhaps we may elucidate the distinction between *money* and *money-of-account* by saying that *the money-of-account is the description or title and the money is the thing which answers to the description.* Now if the same thing always answered to the same description, the distinction would have no practical interest. But if the thing can change, whilst the description remains the same then the distinction can be highly significant.

Despite the fact that the importance of the title or description ("money-of-account") increases as the thing itself ("money") becomes less tangible and more ephemeral, the traditional approach of the law has been to focus on money as a concrete object. The classical legal definition of money from this perspective is that which was adopted by Darling J. in *Moss* v. *Hancock*:[61]

> [T]hat which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities.

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[58] J.K. Galbraith, Money: Whence it Came, Where it Went (1975), p. 5: "The reader should proceed in these pages in the knowledge that money is nothing more or less than what he or she always thought it was—what is commonly offered or received for the purchase or sale of goods, services or other things."

[59] J.M. Keynes, A Treatise on Money, Vol. I: The Pure Theory of Money (1930).

[60] *Ibid.*, p. 3. Emphasis is in the original, other than the passage "the money-of-account. . .to the description" in the last paragraph.

[61] [1899] 2 Q.B. 111, at p. 116 (Q.B.D.) (quoting from F.A. Walker, Money, Trade and Industry (1882)).

[62] Mann, *op. cit.*, footnote 13, p. 8.

Mann,[62] the English legal scholar on monetary law, also focusses on money as a concrete object but finds the *Moss* v. *Hancock* definition unsatisfactory from a legal standpoint because, "though perfectly correct from the viewpoint of economics, it does not explain money in the legal sense". He suggests instead "that, in law, the quality of money is attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as a universal means of exchange. . .".[63] According to Mann, as a legal concept money has four essential characteristics: (1) it is a chattel personal, coins and bank notes being chattels in possession, with notes being, in addition, choses in action; (2) it must be issued under the authority of law, this characteristic being commonly referred to as the "*state theory of money*";[64] (3) it must be denominated with reference to a distinct unit of account; and (4) even where it possesses the foregoing characteristics, it must be meant to serve as a universal medium of exchange.[65] From this point of view, the legal concept of money is restricted to legal tender, that is to say, the concrete object which actually circulates in a society as a medium of exchange by force of law.[66]

Nussbaum, the author of the classic United States treatise Money in the Law,[67] does not subscribe to Mann's characterization of money as a chattel. To him, money is "a thing which, irrespective of its composition, is by common usage treated as a fraction, integer or multiple of an ideal unit".[68] Thus, despite referring to money as a "thing", this approach bears resemblance to Keynes' money-of-account distinction in so far as "money" is viewed not as an actual object available for paying obligations, but, rather, as a way of referring to a measurable portion of overall purchasing power.

The essential differences in approach to the concept of money between Mann and Nussbaum typify the different approaches available in law for examining the same phenomenon. To Mann, money is an actual object which serves as a medium of exchange, while to Nussbaum money is a unit of account by reference to which means of payment are denominated. Nussbaum notes in this regard that:[69]

> [T]he dollar concept existing at any given time is as little susceptible of definition as, say, the concept of "blue". No more can be said than that "dollar" is the name for a value which, at any definite moment, is understood in the same sense through-

[63] *Ibid.*

[64] G.F. Knapp, Staatliche Theorie des Geldes (1923), reprinted in English as State Theory of Money (1924), cited in Mann, *ibid.*, p. 13, n. 63.

[65] These factors are set out and discussed in Mann, *ibid.*, pp. 7-25.

[66] See footnote 21, *supra,* and accompanying text.

[67] *Op. cit.*, footnote 12.

[68] *Ibid.*, p. 5.

[69] *Ibid.*, p. 6.

out the community, and since goods and services are evaluated in terms of the dollar, that unit is a measure or a standard of value.

From the standpoint of the payments system, Mann's focus on money as a concrete object has the shortcoming of restricting the legal concept of money to cash, which plays a relatively minor role in monetary transactions as compared with transferable deposits. Thus, it does not allow for evolution in the means of exchange, the result being that non-cash methods of discharging obligations might not fall within the definition of money for legal purposes.

The "chattel" approach of viewing money only as a concrete object does not necessarily exclude other approaches in law.[70] The notion of units of account as a legal concept in relation to money received judicial recognition long before the more recent developments in the evolution of money and payment which have tended to relegate the means of exchange function to secondary importance. In *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*,[71] the House of Lords held that where an English company doing business in Australia altered its articles to pay dividends in Australian as opposed to English pounds, the company had discharged its obligations with respect to the nominal amount of the dividend warrants. In short, a pound was a pound whether English or Australian. The decision is noteworthy for its use of the term "money of account" and its stress on the identity of the unit of account between England and Australia.[72]

The only authoritative case in Canadian law which deals specifically with the concept of money as such is *Reference re Alberta Statutes*.[73] Duff C.J.C. and Davies J., speaking for the majority of the Supreme Court of Canada, advanced the proposition that "[a]ny medium which, by practice, fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the word even though it may not be legal tender. . .".[74] The court, in following the approach of Darling J. in *Moss* v. *Hancock*,[75] adopted a definition describ-

[70] See footnote 86, *infra*.

[71] *Supra*, footnote 20.

[72] Although the decision was unanimous with respect to the fact that the appellant company had properly discharged its obligations, the law lords differed in their manner of arriving at that conclusion. For an analysis of the decision, see Mann, *op. cit.*, footnote 13, pp. 55-58, 234-239.

[73] [1938] S.C.R. 100. In this paper, cases dealing with the interpretation of the word "money" in wills are intentionally excluded because they are concerned primarily with determining the testator's intention rather than with circumscribing the concept of money in legal terms. See, *e.g.*, *Re Sainthill*, [1933] 3 D.L.R. 231 (N.S.C.A.) ("money" construed strictly so as to exclude bonds and shares); *Re Murphy*, [1943] 4 D.L.R. 736 (Ont. C.A.) ("money" construed liberally so as to include more than cash).

[74] *Ibid.*, at p. 116.

[75] *Supra*, footnote 61.

ing money as an economic phenomenon and showed little interest in trying to circumscribe the legal characteristics of the phenomenon. Duff C.J.C. analyzed the Alberta legislation establishing the social credit scheme[76] in terms of the relation of government created "credit", when used as a medium of exchange for the purchase of goods and services, to "currency" and "banking" as used in the heads of jurisdiction "Currency and Coinage" and "Banks and Banking" in the Constitution Act, 1867. The social credit legislation established an administrative scheme in which "Alberta credit" replaced legal tender and bank credit as the means of payment within Alberta. The Chief Justice concluded that such a government sponsored scheme of payment designed to constitute money fell within the fields of constitutional jurisdiction designated by "currency" and "banking", but without saying what constituted currency and what constituted banking.[77]

What is important in the context of the modern payments system is that in order to arrive at the result it reached in *Reference re Alberta Statutes,* the court was obliged to conclude that "money" is something broader than legal tender. At the time the decision was made, the main forms of money were legal tender government notes and coins, notes issued by chartered banks, and deposits transferable by cheques drawn on banks. While this decision is open to criticism on several grounds,[78] it is important not only as an indication of the scope of federal jurisdiction over credit specifically intended to serve as money, but also for its implicit recognition that credit, when intended to be used as a means of payment, constitutes money.[79] Thus, it seems to go beyond Mann's more restricted view whereby "money" is confined to the thing itself as a chattel.

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[76] *Supra,* footnote 73, at pp. 109-114.

[77] He said, *supra,* footnote 73, at p. 117:

> In substance, we repeat, this sytem of administration, management and circulation of credit (if, and in so far as it does not fall under the denomination "Currency") constitutes in our view a system of "banking" within the intendment of section 91; and the statute in our opinion is concerned with "banking" in that sense.

[78] Not least of all because of its vagueness with respect to the head of federal Government power under which "credit" falls. *Cf.* Duff C.J.C., who said, *ibid.,* at p. 116:

> Our conclusion is that it is not within the power of the province to establish statutory machinery with the functions for which this machinery is designed and to regulate the operation of it. Weighty reasons could be urged for the conclusion that, as subject matter of legislation, in part at least, it comes within the field designated by "Currency" (no. 14 of section 91). We think the machinery in its essential components and features comes under head no. 15, Banks and Banking; and if the legislation is not strictly within the ambit of no. 14 or no. 15, or partly in one and partly in the other, then we are satisfied that its subject matter is embraced within category no. 2, Trade and Commerce, and that it does not come within section 92.

[79] This would seem to provide a constitutional basis for uniform regulation of the payments system and the activities of financial institutions relating to the acceptance of

Despite the Supreme Court of Canada's inclination in *Reference re Alberta Statutes* to take an economist's approach to the concept of money, the characterization of money is far from settled in Canadian law. Not only is there a dearth of case law on the question, but in the recent decision of *Bank of Canada* v. *Bank of Montreal*[80] the Supreme Court was evenly divided on whether to take a legalistic or a liberal approach to the concept of money. The former approach is to focus strictly on the private law attributes of the means of payment at issue, whereas the latter is to subordinate the private law attributes of the means of payment in question to its monetary character where the two are not compatible. At issue was whether a five dollar note of the Bank of Canada bearing on its face the words "pay to bearer on demand" as required by law was a promissory note within the meaning of section 176(1) of the Bills of Exchange Act.[81] If so, the accidental destruction of the note would have given the holder the private law remedy of entitlement to a duplicate note from the Bank of Canada under section 156 of the Act. The position of Laskin C.J.C. in opposition to this proposition and in support of the view that the monetary character of the note excluded the applicability of private remedies against the Bank of Canada is summarized in the following passages from his judgment:[82]

> What is said to be an unconditional promise to pay a sum certain in money is itself money. The words on the face of the paper money, "will pay to the bearer on demand", cannot alter its character as money and turn it into a different document which calls for the payment of money . . .
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> . . . I find it impossible to isolate the Bank of Canada's note issuing authority from its host of operations as a public institution and then, by such segregation, to adapt the *Bills of Exchange Act* to the characterization of its notes. Indeed, reliance on cases dealing with commercial banks can only be misleading if used to establish a parallel with a central bank like the Bank of Canada . . .
>
> . . . if there is to be some remedy against the Bank of Canada in respect of a claim to have destroyed notes replaced, it should be given under appropriate legislation and not be forcing that result through the *Bills of Exchange Act*.

In support of the contrary, private law conclusion, Beetz J., and the three members of the court who agreed with him,[83] upheld the decision of the

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transferable deposits and the collection of cheques. To date, however, the federal Government has opted for a voluntary regulatory scheme in so far as non-bank deposit-taking institutions are concerned. See the Canadian Payments Association Act, *supra*, footnote 10.

[80] *Supra*, footnote 34.

[81] *Supra*, footnote 9.

176(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

[82] *Supra*, footnote 34, at pp. 1154, 1159. On this point, Martland, Judson and Dickson JJ. were in agreement with the Chief Justice.

[83] Ritchie, Pigeon and DeGrandpré JJ.

Ontario Court of Appeal to the effect that this was a promissory note which subjected its maker to a duty to replace it:[84]

> The use on bank-notes of the words "will pay to the bearer on demand" was not a matter of choice for the Bank of Canada. It was an obligation imposed upon the Bank during more than thirty years by several statutes. Had Parliament wished a bank-note not to be a promissory note, it would not have required that it be in the form of a promissory note. It seems to me that if Parliament insisted that bank-notes be in that form, it also wished such legal consequences as flow from the use of that form to attach to bank-notes . . .
>
> In many cases bank-notes have been held to be promissory notes or have been considered as if they were promissory notes or negotiable instruments. . . . Counsel for the Bank of Canada tried to distinguish those cases on the ground that the bank-notes they dealt with were the notes of chartered banks, or were redeemable in gold or were not legal tender. Again, I do not think it matters.

The question appears to be completely open, therefore, as to whether in a future case the court would determine the existence of rights and obligations in light of the monetary character of the matter at issue, or whether it would act on the basis of private law legal principles. The legalistic approach of Beetz J. would tend to limit the scope of the concept of money, whereas the more liberal approach of Laskin C.J.C. would have the opposite effect.

As we progress into the electronic age, there is little doubt that the courts will have further opportunities to grapple with the problem of the legal characterization of money as they are called upon to examine forms of payment denominated in dollars but evidenced by various types of credit. The number of payments effected by the transfer of credit in financial institutions through cheques, plastic payment cards and other means invites us to expand the legal characterization of money beyond the traditional concepts expressed by Mann and generally accepted in English law. A failure to do so for purposes of constitutional jurisdiction may well leave the question to be determined by local regulation by the provinces. Obviously, the Supreme Court of Canada was cognizant of this fact in 1938 when it rendered its decision in *Reference re Alberta Statutes*.[85]

Of course, the lawyer is justified in asking whether it is legally satisfactory to attribute the quality of being money to anything described

[84] *Supra,* footnote 34, at pp. 1170, 1175.

[85] Duff C.J.C. stated, *supra,* footnote 73, at p. 115:

> The categories (of s. 91) mentioned having been committed for legislative action to Parliament, which represents the people of Canada as a whole, we find it difficult to suppose that it could have been intended, under the general headings Property and Civil Rights, Matters merely local or private, that a single province might direct its powers of legislation under section 92 to the introduction, maintenance and regulation of this novel apparatus for all commercial, industrial and trading operations.

as such in the sense of being denominated in dollars and functioning as a means of payment. The better view may very well be that the phenomenon of money has an intrinsic nature requiring an approach in law narrower than that which prevails in economics, whereby any widely accepted medium of exchange would typically qualify. The traditional legal position that bank credit is not itself money appears to be premised on the notion that money and legal tender are the same thing in law.[86] However, as already noted, this was expressly rejected by the Supreme Court of Canada in *Reference re Alberta Statutes*.

Constitutional considerations aside, basically, two approaches are possible. The first, narrower approach is to equate money with legal tender; the second is to equate money with any medium, tangible or intangible, specifically adopted as a means of effecting payments. The former would effectively limit the legal concept of money to that which is prescribed by statute, whereas the latter would permit the law relating to the discharge of monetary obligations to keep pace with the actual means employed to discharge such obligations, and would imply a conceptual flexibility better suited to accommodate changing customs and advances in technology. It is submitted that the latter approach is more conducive to the development of a comprehensive legal theory of money, and would be more likely to result in uniformity in the legal terminology used to describe the various means currently employed to discharge monetary obligations. The former approach, on the other hand, would probably encourage the further development of *sui generis* payment means which would be governed primarily by the law of contract. The importance of the distinction between these competing approaches does not lie in a determination in functional terms of how to actually effect payments, but, rather, in organizing and making uniform the rules which are to govern the means by which payments are effected.

Very soon, this issue will need to be faced as a matter of legal policy as the specific rules relating to the electronic transfer of credit to effect payments begin to evolve. The monetary theory approach which finds expression in Laskin C.J.C.'s judgment in *Bank of Canada* v. *Bank of Montreal*[87] is favoured in the United States, and seeks to make adjustments by statute to the rules otherwise applicable in order to achieve the desired result. The alternative, as expressed in Beetz J.'s judgment in the same case, can be described as a contractual approach; the existing legal framework is left intact and the parties contract out of any undesired consequences.

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[86] Mann, *op. cit.*, footnote 13, pp. 6, 7. It should be noted that Mann generally rejects the idea of transferable deposits being considered in law as money (pp. 5-8). Nussbaum, *op. cit.*, footnote 12 points out the similarities between corporeal money and transferable deposits but concludes (p. 104) that "the corporeal notion of money . . . alone offers a clear cut basis for a juridical doctrine of money".

[87] *Supra*, footnote 34.

The logic which compelled the Supreme Court of Canada to conclude in *Reference re Alberta Statutes*[88] that a provincial system of credit designed to serve as money impinged upon the exclusive federal jurisdiction over currency compels one to conclude that the system for transferring bank credit which serves as money is something which falls within the public rather than the private domain.[89] Viewing the payment system in light of the "state theory of money" assists in understanding how a series of essentially private bilateral and multilateral relationships, when taken as a whole, transcend the domain of the law of agency, contract, and banking, and fall within the sphere of the law of money.

As the Canadian Payments Association sets out to fulfill its "second mandate", namely, to "plan the evolution of the national payments system",[90] the recognition of the public nature of its mandate should allow it to adopt approaches based on the monetary function of transferable deposits. Several amendments to the Bills of Exchange Act would be warranted if cheques were to be considered essentially as a means for the payment of money instead of as negotiable instruments of credit.[91] In sum, an express recognition of the monetary nature of transferable bank deposits would be conducive to the adoption of statutory principles whereby the legal nature of the relationships between the various participants in the payments system could be established on the basis of the monetary function of the means of payment, regardless of its form, rather than on the private law aspects of individual forms of payment.

III. *Legal Tender and Payment*

The payment of money is a consensual act which is essentially independent of the notion of legal tender.[92] A creditor is always at liberty to refuse

[88] *Supra*, footnote 73.

[89] This is particularly true of various aspects involved in electronic funds transfer systems such as control of communications facilities, the impact of electronic transfers on the existing law of evidence, etc. For a fuller analysis see The Gowling & Henderson Report, *op. cit.*, footnote 4.

[90] Canadian Payments Association Act, *supra*, footnote 10, s. 58.

[91] Among the useful possible departures from the existing private law rules applicable to the transfer of bank deposits, there could be included amendments to the Bills of Exchange Act, *supra*, footnote 9, to allow for the radical truncation of cheques, *i.e.* their retention and eventual destruction by the payee's bank; a recognition in law of the role of MICR encoding in relation to cheque processing; a recognition of the practice of remote "presentment" of cheques at cheque processing data centres; an easing of some of the forgery and conversion rules which put the burden for forgeries on the banks rather than on customers who are often in a better position to protect against them; an abolition of the rules giving a collecting bank the status of holder in due course; the adoption of clear rules with respect to charge-back and finality of payment; the amendment of the rules of contract which can render a bank liable for consequential damages to its customer in the event of negligence in effecting a payment.

[92] For a definition and discussion of legal tender see footnote 21, *supra*, and accompanying text.

to accept payment, and a debtor cannot force payment upon a creditor.[93] Consequently, legal tender is not a means of *payment;* it is a means by which *tender of payment* may be made. Payment occurs, and only occurs, if the tender is accepted by the creditor.

As described by Chitty,[94] tender of money is only possible in respect of monetary obligations, namely, obligations to pay debts or other liquidated sums. Unliquidated amounts such as damages may only be settled by accord and satisfaction. The unaccepted tender of money does not discharge a debtor's liability to pay a sum owed. The debt remains, but tender stops the accrual of interest (unless the debt arose from a loan) and also constitutes a bar to a claim to damages arising after the tender. Furthermore, in such a case the creditor will be liable to pay a debtor's costs where he brings an action to recover a debt for which the money owing was previously tendered.[95]

There are two situations in Canada where a tender of payment may be made in a form other than that prescribed by the Currency Act.[96] The first is where the parties have expressly or implicitly prescribed a particular manner of payment, such as banker's draft or certified cheque. Tender of payment may be made in the form of money or by the means of payment specified in the contract. Secondly, where an amount is payable in foreign currency, a tender may be made (and may only be made) in the foreign currency.[97]

In the normal situation, coins and bank notes, being legal tender, are transferred by delivery and payment is final once the money has been

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[93] Mann, *op. cit.*, footnote 13, p. 71.

[94] *Op. cit.*, footnote 1, pp. 633-639, para. 1322-1334.

[95] *Ibid.*, p. 633, para. 1323.

[96] *Supra*, footnote 6, as amended S.C. 1976-77, c. 38, s. 1.

12.(1) Every contract, sale, payment, bill, note, instrument and security for money and every transaction, dealing, matter and thing whatever relating to money or involving the payment of or the liability to pay any money, that is made, executed or entered into, done or had, shall be made, executed, entered into, done and had according to the currency of Canada, unless it is made, executed, entered into, done or had, according to

(a) the currency of a country other than Canada; or

(b) a unit of account that is defined in terms of currencies of two or more countries.

[97] In *Derwa* v. *Rio de Janiero Tramway Light and Power Co. Ltd.* (1928), 62 O.L.R. 669 (Ont. S.C.) a tender in legal tender in the foreign currency followed by a tender of the equivalent amount in Canadian legal tender currency converted at the rate of exchange in effect at the time of tender were held to be valid. But in *White* v. *Baker* (1865), 15 U.C.C.P. 292, a tender in Canadian currency in respect of a foreign currency obligation was held invalid on the ground that there was a triable question as to the amount of Canadian currency which should have been tendered as the equivalent of the amount payable in foreign currency. As to English law generally on tender of foreign currency, see *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming*, [1921] 3 K.B. 459 (K.B.D.).

delivered from debtor to creditor. A *bona fide* recipient of coins or paper currency need not be concerned with the right or title of the payor to the money paid, nor with the payor's creditworthiness. However, the form of money prescribed by the state as being legal tender is strictly a matter of custom and convenience. Therefore, it seems that there should be no impediment in principle to conferring upon certified cheques or bank drafts the quality of being legal tender for the discharge of certain debts in certain circumstances.[98] But, because the function of legal tender is primarily theoretical, one may well ask whether anything would be gained in practical terms by expanding the notion of legal tender in this way.

Because of the consensual nature of payment which results from the fact that no one can be forced to accept a tender of payment, the law does not generally concern itself with how payment is to be effected and leaves the matter to the agreement of the parties. Tender, on the other hand, being a unilateral act, is the subject of detailed rules. The normal method required by law to effect a proper tender of money is the delivery of legal tender currency. This is obviously unsatisfactory with respect to transactions involving large sums of money: it is simply not practical to conduct commerce on a cash basis. However, in practice, the consensual nature of the contract of payment will invariably provide the answer as to how tender is to be effected; the parties will previously have agreed on the method and means of payment and that will determine the consequent tender of payment. As noted by Cairns L.J. in *The Brimnes,*[99] an English case involving charterparty payments to be made in cash in United States currency: "It would be absurd in modern business conditions to suppose that payment in dollar bills was contemplated."[100] A similar conclusion was arrived at in *Shockey* v. *Molnar,*[101] a decision of the Alberta Court of

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[98] If such a law were imposed, fairness would require that the government or the payment system itself guarantee the solvency of the institution whose credit is being offered in payment, for it would be unfair to require the creditor to assume the credit risk of that institution. A partial step in this direction is to be found in section 84 of the Canadian Payments Association Act, *supra,* footnote 10, which imposes the preferred status of "priority payment item" on certified cheques drawn on, and drafts issued by, members of the Association which become insolvent prior to such items being settled for.

One problem which will have to be addressed at some point in the future is how to *prove* payment has been made in the situation where funds are transferred electronically. The common law has developed adequate rules regarding the transfer of that "thing" called money from one person to another. Where the "thing" being transferred is an electronic message from one bank to another, the question may become more complicated. For a fuller analysis of the question of proof of payment in electronic fund transfers see The Gowling & Henderson Report, *op. cit.,* footnote 4, p. 5-3 ff.

[99] *The Brimnes: Tenax Steamship Co. Ltd.* v. *The Brimnes (Owners),* [1975] Q.B. 929 (C.A.).

[100] *Ibid.,* at p. 968.

[101] [1949] 1 D.L.R. 328 (Alta. App. Div.).

Appeal which subsequently was affirmed by a unanimous decision of the Supreme Court of Canada.[102] This case involved an option to purchase land for "the sum of $5,932, payable in cash".[103] Tender was made by way of bank draft. Harvey C.J.A. of the Alberta Appellate Division stated that "[o]ne would be very much surprised to know that parties contemplated a tender of nearly $6,000 to be made in currency".[104] He went on to note that what was intended was a cash transaction as opposed to an agreement for payment on terms or on credit. He confirmed the applicability of the rule in English law to the effect that if no objection is made to the form of tender at the time of tender, any defect as to the form of money tendered is presumed to have been waived.[105] Rand J., speaking for the Supreme Court of Canada, said of the requirement for payment in cash, "I take it to mean that it is ready money as distinguished from credit for any part of the price".[106] It is difficult to imagine a situation involving a large sum of money in which the requirement for a tender in legal tender currency would be upheld. In fact, the proposition might safely be advanced that, to be effective, tender should be made in the form of payment contemplated by the parties or, alternatively, in legal tender.

It would be wrong to read the provisions of the Currency Act as circumscribing the concept of money in our monetary system. The very definition of legal tender as "a tender of payment of *money*".[107] supports the notion that "money" need not be limited to legal tender money. That the only forms of money given the quality of being "legal tender" are paper money and coin issued under authority of the federal Government is of little significance when money is considered in the context of payment. The essential importance of legal tender money is not in relation to the concept of money, but to the law of contract. Moreover, a distinction has already been made between money and legal tender by the Supreme Court of Canada in *Reference re Alberta Statutes*[108] in terms which appear to have settled the question.

The main attributes in law of paper currency and coin as money, namely, that they are self-contained, transferable by delivery without any title problems and embody their own value, are their main disadvantages in functional commercial terms. Hence, despite its lofty position in law, legal tender money as a means of payment has been relegated to small value transactions where payor and payee meet face to face. The quality

[102] *Molnar* v. *Shockey*, [1949] 4 D.L.R. 302 (S.C.C.).

[103] *Supra*, footnote 101, at p. 329.

[104] *Ibid.*, at p. 335.

[105] *Ibid.*

[106] *Supra*, footnote 102, at p. 304.

[107] Currency Act, *supra*, footnote 6, s. 7(1). See text accompanying footnotes 21 and 22, *supra*.

[108] *Supra*, footnote 73.

of being legal tender ensures the compulsory circulation of the legal tender medium[109] and provides a concrete manifestation of money in support of the notion of a monetary unit. In a sense, legal tender money facilitates the process of dealing with money in the abstract forms required by the exigencies of commerce by anchoring the ultimate performance of obligations to physical concepts which are capable of being dealt with by the law both simply and with certainty. Thus, legal tender money may be said to bridge the gap between the money-of-account or description of money and the thing which answers to the description, although, as this paper has tried to show, other "things" answering to the description of money aside from legal tender currency are available for inclusion within the description and should be so included for the reasons already outlined.

IV. *Foreign Currency*

Whenever foreign currency is involved in an obligation, it is desirable to distinguish between the money or currency of *account* and the currency of *payment*. Lord Denning plainly describes the distinction in the following terms:[110]

> The *money of account* is the currency in which an obligation is measured. It tells the debtor *how much* he has to pay. The *money of payment* is the currency in which the obligation is to be discharged. It tells the debtor *by what means* he is to pay.

The use of foreign currency as money of account is specifically authorized by the Currency Act.[111] Although the general law as confirmed by the Currency Act countenances the use of foreign currency as the money of account, the same cannot be said with respect to the choice of foreign currency as the money of payment. In *The Custodian* v. *Blucher*[112] the Supreme Court assumed that "the court has generally no jurisdiction to order payment in any other currency"[113] and the assumption has been echoed as recently as 1973 by the New Brunswick Court of Queen's Bench.[114] However the question has not been the object of rigorous legal analysis due to section 11 of the Currency Act which provides that "any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada". Accordingly, it appears to be well settled in this country that courts will not award judgment in foreign currency. As a result, most of the case law deals mainly with the

[109] See Nussbaum, *op. cit.*, footnote 12, pp. 41 and 42, where he discusses the "compulsory circulation" of legal tender in light of the French legal term "cours forcé".

[110] *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Product Marketing Co. Ltd.*, [1971] 2 Q.B. 23, at p. 54 (C.A.).

[111] *Supra*, footnote 6, s. 12(1). See footnote 96, *supra*.

[112] [1927] S.C.R. 420.

[113] *Ibid.*, at p. 426, per Newcombe J.

[114] *General Instrument Corp.* v. *Maritime-Ontario Freight Lines Ltd.* (1973), 8 N.B.R. (2d) 376 (N.B.Q.B.).

issue of the date of conversion to be applied to the foreign currency for purposes of a judgment in Canadian dollars.[115]

In English as well as American law, the courts adhered for many years to the "commodity theory"[116] with respect to obligations payable in foreign currency. According to this theory, foreign currency was not treated as money in the sense of a medium of exchange, but as a commodity in the sense of an object of a commercial transaction.[117] In this respect, foreign currency transactions were on more than one occasion likened to transactions involving chattels such as cows.[118] The commodity theory

[115] *Baumgartner* v. *Carsley Silk Co. Ltd.* (1971), 23 D.L.R. (3d) 255 (Que. C.A.): appeal from a judgment ordering the payment of a specified sum in U.S. dollars; *Farmer's National Bank* v. *Coles* (1981), 33 N.B.R. (2d) 248 (N.B.Q.B.): claim for damages by survivor under the Fatal Accidents Act; *First National Bank of Oregon (First Interstate Bank of Oregon, N.A.)* v. *A.H. Watson Ranching Ltd.* (1984), 34 Alta. L.R. (2d) 110 (Alta. Q.B.): action by holder in due course of promissory note negotiated in the U.S., with terms of payment in U.S. funds and executed in Alberta; *Presse* v. *Serra* (1985), 153 A.P.R. 87, 52 Nfld. and P.E.I.R. 87 (P.E.I.S.C.): action for breach of contract of sale made in Italy, in Italian funds.

[116] This theory has an obvious historical affinity with "metallism" (see, footnotes 13 and 14 and accompanying text, *supra*) as is shown by the following description of the commodity theory in Binhammer, *op. cit.*, footnote 27, p. 342:

> Since the first kind of money to serve as a medium of exchange consisted of articles of common use, the value of money was considered to be determined by the same laws that determine the value of ordinary commodities. This concept of the value of money carried over to the period when money no longer consisted of immediately useful articles but of metals. The concept was still prevalent when money had come to consist of a paper claim on a specified amount of metal. Those who adhered to this school of thought were known as the commodity theorists or metallists. The commodity theory of money, probably the oldest explanation of the value of money, was valid as long as the non-monetary use of the commodity over-shadowed its monetary use. The theory was no longer tenable when gold became the most important commodity associated with the monetary unit.

In the modern context, Mann describes the commodity theory this way (*op. cit.*, footnote 13, p. 185):

> Foreign money may be money, but it is not always money. Commodity is not a legal but an economic concept; a commodity is that which is the object of commercial intercourse . . . Thus foreign money is dealt in and quoted on the foreign exchange market, and is there a commodity.

[117] For cases adhering to the commodity theory, see: *Re British American Continental Bank, Ltd., Credit Général Liégeois' Claim*, [1922] 2 Ch. 589, at p. 595 (Ch.D.); *Rhokana Corp., Ltd.* v. *Inland Revenue Commissioners*, [1936] 2 All E.R. 678, at p. 681 (K.B.D.), rev'd. [1937] 1 K.B. 788 (C.A.), but aff'd. on other grounds [1938] A.C. 380 (H.L.); *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581, at p. 592 (C.A.); *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.* (1927), 27 Ll. L. Rep. 288 (C.A.); *The Baarn (No. 1)*, [1933] P. 251, at p. 272 (C.A.); *Pyrmont, Ltd.* v. *Schott*, [1939] A.C. 145, at p. 156 (P.C.); *Marrache* v. *Ashton*, [1943] A.C. 311, at pp. 317, 318 (P.C.); *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544, at pp. 562, 563 (H.L.). In the United States see *Leavitt* v. *de Launy*, 4 N.Y. 363 (N.Y.C.A., 1850).

[118] The following colourful equating of Italian lire with cows is to be found in the judgment of Lord Wrenbury in *The Volturno, supra*, footnote 117, at p. 563.

never found favour in Canadian jurisprudence and was expressly rejected by the Supreme Court in 1927 in *The Custodian* v. *Blucher.*[119] In the context of a claim for non-payment of dividends payable in United States currency, the court rejected the propriety of a claim for damages in respect of the payment default and held that "the dividends constitute a debt. . . . In substance there is a liquidated demand in money, and the withholding of payment is the cause of action".[120] This decision makes good sense from the standpoint of freedom of contract and consensualism, for, in the absence of a direct prohibition, the parties should be free to contract in whatever money of account or money of payment they choose.

The Supreme Court of Canada implicitly held in *The Custodian* v. *Blucher* that the date of breach of a monetary obligation payable in foreign currency was the proper date for conversion into Canadian dollars.[121] This rule was unequivocally confirmed by the court in 1945 in *Gatineau Power Company* v. *Crown Life Insurance Company,*[122] and since then Canadian jurisprudence has generally held the date of breach to be the date for conversion of a claim in foreign currency into Canadian dollars.[123] The irony in this is that the breach-date rule originated in England and the United States as a corollary of the commodity theory[124] which itself was clearly rejected in Canada in *The Custodian* v. *Blucher.*

In *Batavia Times Publishing Co.* v. *Davis,*[125] the Ontario High Court considered the question of the rate of exchange to be applied to a judgment to enforce a foreign judgment calling for payment in United States

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There is no difference of principle arising from the fact that the loss is of lire as distinguished from (say) cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150£. Adjudge that the plaintiff recover from the defendant 150£. It would be nihil ad rem to say that in July similar cows would have cost in the market 300£. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having, on January 1, deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already . . . [T]he defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows: the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

[119] *Supra,* footnote 112.

[120] *Ibid.,* at p. 426, per Newcombe J.

[121] *Ibid.,* at p. 427.

[122] [1945] S.C.R. 655.

[123] See cases mentioned in footnote 115, *supra.*

[124] See the cases referred to in footnote 117, *supra.*

[125] (1978) 20 O.R. (2d) 437 (Ont. H.C.).

currency. The court held that it was not bound by previous authority dealing with actions based on the original cause of action, and that, therefore, the date of the Ontario judgment should be the conversion date. Since *Batavia*, courts have consistently chosen the judgment date as the date for conversion where the action has been for the purpose of enforcing a foreign judgment.[126]

Certain recent cases, influenced no doubt by the significant change in English law since the landmark decision of the English Court of Appeal in *Miliangos* v. *George Frank (Textiles) Ltd.*,[127] (subsequently affirmed by the House of Lords[128]) suggest that in appropriate circumstances section 11 of the Currency Act will not prevent a court from ordering a payment in foreign currency.[129]

Miliangos was an action on a foreign debt. The court held that, where the obligation under the contract is one of a money character to pay foreign currency under a contract, the proper law of the contract is that of the foreign country and the money of account is of that country or (possibly) some country other than the United Kingdom, an English court is entitled to give judgment for a sum of money expressed in foreign currency.[130] The claim in such a case should be specifically for the foreign currency or, in the alternative, its sterling equivalent, with conversion as of the date of payment. Since the decision in *Miliangos*, a judgment may be entered in England directly in a foreign currency or the sterling equivalent at the date of payment and whether the claim is based on tort,[131] damages for breach of contract[132] or an unpaid debt (*Miliangos*) and whether the proper law of the contract is that of a foreign country (*Miliangos*) or of the forum.[133]

Despite the indiscriminate injunction contained in section 11 of the Currency Act, it is worthwhile to analyze the various situations in which

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126 *Airtemp Corp.* v. *Chrysler Airtemp Canada Ltd.* (1980), 31 O.R. (2d) 481 (Ont. Div. Ct.); *Royal Bank of Canada* v. *Paletta* (1983), 44 O.R. (2d) 29 (Ont. S.C.—Master).

127 [1975] 1 Q.B. 487 (C.A.).

128 [1976] A.C. 443 (H.L.).

129 *Woodpulp Inc. (Canada)* v. *Jannock Inds. Ltd.* (1979), 26 N.B.R. (2d) 358 (N.B.S.C.); *Sandy Frank Film Syndication Inc.* v. *CFQC Broadcasting Ltd.*, [1983] 4 W.W.R. 360 (Sask. C.A.); *ACLI Ltd. (A.C. Israel Woodhouse Co. Ltd.)* v. *Cominco Ltd/Ltée.* (1985), 61 B.C.L.R. 177 (B.C.C.A.).

130 *Supra*, footnote 128, at p. 467.

131 *The Despina R*, [1979] A.C. 685 (H.L.).

132 *The Despina R.*, *ibid.*; *Jean Kraut A.G.* v. *Albany Fabrics Ltd.*, [1977] Q.B. 182 (Q.B.D.).

133 *Barclay's Bank International Ltd.* v. *Levin Brothers (Bradford) Ltd.*, [1977] Q.B. 270 (Q.B.D.); *Federal Commerce and Navigation Co. Ltd.* v. *Tradax Export S.A.*, [1977] Q.B. 324 (C.A.); *Ozalid Group (Export) Ltd.* v. *African Continental Bank Ltd.*, [1979] 2 Lloyd's Rep. 231 (Q.B.D.).

foreign currency obligations arise, and to consider how they are affected by this section.

The simplest contract involving foreign currency is the exchange contract: A agrees to purchase from B 100 United States dollars at a price of 136 Canadian dollars. One way of viewing this contract is that the currency of account and the currency of payment are the Canadian dollar. The United States dollar is the object of the contract and may be regarded as being treated as a commodity. B's obligation may be described as requiring the delivery of 100 United States dollars. Hence, B does not agree to *pay* anything, but, rather, to deliver a commodity. Therefore, if B failed to perform his obligation, A could institute a claim for damages in Canadian dollars pursuant to the applicable Sale of Goods Act.[134] In this case, A would be entitled to recover for the loss "directly and naturally resulting in the ordinary course of events from the seller's breach of contract".[135] This translates into the value of the currency converted into Canadian dollars at the date of breach. Although fluctuations in the value of the "commodity" occurring after the date of breach are arguably foreseeable, damages are not awarded in respect of such fluctuations because the buyer is expected to purchase in the market as soon as possible after the breach.[136] Hence, the remedy would be similar to that available in a claim for non-payment of a foreign currency obligation.

Alternatively, A could also pursue his claim as *seller* of Canadian dollars under a contract, the currency of account and currency of payment of which is the United States dollar. If he were to frame his claim in this manner, A would be viewed as the creditor of a United States dollar monetary obligation, and, in accordance with the decisions in *Blucher*[137] and *Gatineau Power*,[138] conversion into Canadian dollars would be calculated as of the date of breach.

[134] R.S.O. 1980, c. 462.

[135] *Ibid.*, s. 49(2).

[136] Where there is an available market for the goods in question, *prima facie* the measure of damages is ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver (*ibid.*, s.49(3)). The market price, rather than any price based on extraneous contracts made by the buyer, is taken to be the true value of the goods to the purchaser. The relevant date is normally the date when the breach occurs. However, where there is no available market in which the buyer can purchase equivalent goods to replace those undelivered under the contract, damages will be based on the direct and natural result of the seller's breach and may include recovery for consequential losses such as, for example, loss of use, expenses made necessary or rendered futile by the breach, and loss of anticipated profits where these are foreseeable on the *Hadley* v. *Baxendale* ((1854), 9 Ex. 341, 156 E.R. 145) principle. (*Richmond Wineries Western Ltd.* v. *Simpson et al.*, [1940] S.C.R. 1; *Mahinder Singh* v. *Acme Sawmills* (1958), 14 D.L.R. (2d) 361 (B.C.C.A.); *Freedhoff* v. *Pomalift Industries Ltd.*, [1971] 2 O.R. 773 (Ont. C.A.)).

[137] *Supra*, footnote 112.

[138] *Supra*, footnote 122.

If A were to frame his claim as creditor of an obligation for delivery of a commodity, specific performance would not be precluded by section 11 of the Currency Act.[139] Although under section 11 "money or money value" statements in legal proceedings must be stated in Canadian currency, this should not constitute a bar to the claim for specific performance of an obligation to deliver foreign currency because the decree would not be a "statement as to *money* or *money value* ". Rather, it would relate to the delivery of a commodity which happens to be money.[140] Specific performance of an obligation to deliver a commodity would probably not be available under the Sale of Goods Act[141] because it requires that the goods be specific and ascertained. However, if A framed his claim as the creditor of a United States dollar monetary obligation, Mann[142] suggests that specific performance might be available on the basis of the principle established in the landmark English case of *Beswick* v. *Beswick*,[143] a decision of the Court of Appeal (affirmed by the House of Lords[144]) which granted specific performance of a purely monetary obligation.

It is submitted that section 11 of the Currency Act should not preclude the decree of specific performance. The court could, in a single stroke it seems, avoid the breach-date rule as well as the arbitrary injunction of section 11 of the Currency Act. Interestingly, the decision in *Beswick* was the rationale for allowing the direct recovery of foreign currency as established in *Miliangos*,[145] on the basis that the relief granted was in the nature of specific performance. In sum, therefore, section 11 should not of itself bar the courts of Canada from following *Miliangos*.

Where a debtor's obligation in relation to foreign currency can be characterized as being more than purely monetary, that is, where the obligation cannot be satisfied by the simple delivery of legal tender, (and where the foreign currency is not treated as a commodity) then according to Mann, specific performance is the appropriate remedy.[146] The most

[139] *Supra*, footnote 6. See the discussion in the text accompanying footnotes 111-115, *supra*.

[140] See, for example, s. 18(1)(b) of the Bank of Canada Act, *supra*, footnote 7, as amended S.C. 1980-81-82-83, c. 40, Part III, s. 48(2), which provides that the "Bank may . . . *buy* and *sell* foreign currencies". See also the discussion on the commodity theory at footnote 116, *supra*.

[141] *Supra*, footnote 134, s. 50.

[142] F.A. Mann, Specific Performance of Foreign Money Obligations (1968), 31 Mod. Law Rev. 342.

[143] [1966] Ch. 538, [1966] 3 All E.R. 1 (C.A.).

[144] [1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.).

[145] *Supra*, footnote 127.

[146] Mann, *op. cit.*, footnote 13, p. 194.

common example of such a case would be a borrower's obligation to repay a United States Euro-dollar loan.[147]

In this situation, the debtor's repayment obligation is to provide the creditor with a Euro-dollar deposit in the amount borrowed plus interest at the agreed rate. The fine print of the loan agreement or promissory note evidencing the loan will most likely provide that payment is to be made in funds which are for same day settlement through CHIPS, the New York Clearing House Interbank Payment System.[148] If the debtor failed to repay the loan, the creditor's alternative remedies in Canada would be: (1) a decree of specific performance obliging the debtor to make available the Euro-dollar deposit in the form agreed upon; or (2) damages quantified in Canadian dollars. The true object of the agreement between debtor and creditor is more than simply foreign currency in the usual sense of the word, it is a United States dollar-denominated deposit booked outside of the United States with a bank that has membership in a specified closed system of interbank transfers, namely, CHIPS. In this situation, a decree of specific performance ordering the debtor to make available a Euro-dollar deposit in the agreed amount with interest at the agreed rate to the date of payment would be the only totally responsive remedy to the creditor's claim.

There is no justification for the continued existence of section 11 of the Currency Act. Where a person has freely contracted a valid obligation, the law should lend its power to the enforcement of that obligation regardless of the currency or form of payment chosen. It is a fallacy to say that the courts do not have the means of enforcing foreign currency obligations. All freely tradable foreign currencies are available in Canada. This fact alone would justify the courts either forcing judgment debtors to obtain the foreign currency necessary to discharge their foreign currency obligations, or allowing execution creditors to convert any pro-

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[147] A Euro-dollar is a United States dollar *deposit* with a non-U.S. (typically London) branch of a bank. For a more detailed explanation of this modern monetary phonemenon, see Binhammer, *op. cit.*, footnote 27, pp. 125-126, 597-598, and 609-612.

[148] The following description of CHIPS is from Payment Systems, *op. cit.*, footnote 2, p. 300:

> *Clearing House Interbank Payments System (CHIPS)*—CHIPS is a private facility for international funds transfers operated by the New York Clearing House Association, which has as its controlling members the twelve largest New York City commercial banks. It handles almost 90 per cent of the daily dollar value of international transactions processed in the United States.
>
> Before CHIPS began operations in 1970, internationally related payments in New York were effected with official cheques that were carried by hand to the Clearing House and transferred to payee banks in one of several daily cheque exchanges. However, the traditional practice of using cheques became too cumbersome and error-prone as the expanding international business of US banks and a growing pool of Euro-dollars resulted in a rapid increase in transaction volumes . . . .

ceeds received into foreign currency for purposes of accounting with respect to such execution. By far, the vast majority of Canadian cases dealing with foreign currency will involve United States dollars. In this respect, it is noteworthy that all forms of American money available in the United States are also available in Canada. Moreover, Canadian banks offer United States dollar chequing accounts which provide faster funds availability at the retail level than is generally provided in the United States. In addition, most Canadian banks are members of CHIPS and thereby capable of transferring large dollar deposits on a same-day basis. Since the passage in the United States of the Monetary Control Act of 1980,[149] Canadian and other foreign banks operating in the United States have also had full access to all services provided by the Federal Reserve System, the central bank of the United States. This includes the right to use FedWire,[150] the Federal Reserve operated electronic funds transfer system for large dollar transfers which provides immediately available funds in the form of deposits with a Federal Reserve Bank. It is obvious, therefore, that a court's territorial jurisdiction need not extend to the United States or any other country in order for it to enforce execution of United States dollar or other obligations payable in freely tradable foreign currencies.

In 1984, the Province of Ontario adopted statutory provisions governing the conversion of foreign currency claims instituted before the courts of Ontario.[151] The new Ontario rule provides that conversion from

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[149] *Supra*, footnote 48.

[150] The following description of FedWire is from Payment Systems, *op. cit.*, footnote 2, p. 299:

> *FedWire*—Although the Federal Reserve's wire funds transfer service (FedWire) dates back to 1913, the system was not fully automated until late 1973. In 1982 the Federal Reserve implemented a new packet-switching communications network, called FRCS-80. This network connects the twelve Federal Reserve Banks and has improved the speed and efficiency of funds transfer services. All transactions are credit transfers and on initiation are immediately debited to the account of the payer.
>
> The network handles transfers of reserve account balances (almost exclusively in large dollar amounts) from one depository institution to another and transfers of US Government and federal agency securities. The transfer of reserve account balances is used for the purchase and sale of Federal funds, the movement of correspondent bank balances and credit transfers on behalf of bank customers. Bank customers request transfers on their behalf for a number of purposes, including: the purchase and sale of commercial paper, bonds and other securities; payment and cash management operations affecting corporate demand deposit accounts; and transfers of mutual fund balances.

FedWire and CHIPS together account for average daily transfers of a staggering $500 *billion* (U.S.). *Ibid.*

[151] Section 131, the Courts of Justice Act, 1984, S.O. 1984, c. 11, provides as follows:

> 131. (1) Subject to subsections (3) and (4), where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an

foreign currency into Canadian dollars shall take place at the date of payment, unless the obligation being enforced provides for a manner of conversion, in which case the court is required to give effect to the contractual provision. While the new Ontario provisions take the law one step forward, it is submitted that they also take it one step back.

There is no doubt that the Ontario provision has effectively done away with the breach-date rule. What is objectionable about the Ontario provision is that it appears to exclude the remedy of specific performance of a foreign currency obligation: "the order shall require payment of an amount in *Canadian* currency".[152] Consequently, the cracks developing in section 11 of the Currency Act[153] since the *Miliangos* decision have been firmly sealed in Ontario, and the possibility of successfully raising an argument as to the unconstitutionality of section 11 (a matter suggested in certain quarters and hinted at in recent cases) has been rendered all but futile.[154]

Conclusion

The Canadian payments system provides the highway for domestic economic activity and the gateway to international trade. Money is the vehicle which circulates on that highway. Virtually every commercial activity involves the payment of money, Canadian or foreign, of one form or

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amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

(2) Where more than one payment is made under an order referred to in subsection (1), the rate of conversion shall be the rate determined as provided in subsection (1) for each payment.

(3) Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario on such other day as the court considers equitable in the circumstances.

(4) Where an obligation enforceable in Ontario provides for a manner of conversion to Canadian currency of an amount in a foreign currency, the court shall give effect to the manner of conversion in the obligation.

(5) Where a writ of seizure and sale or notice of garnishment is issued under an order to enforce an obligation in a foreign currency, the day the sheriff, bailiff or clerk of the court receives money under the writ or notice shall be deemed, for the purposes of this section and any obligation referred to in subsection (4), to be the day payment is received by the creditor.

[152] *Ibid.*, s. 131(1). (Emphasis added).

[153] See the cases referred to in footnote 129.

[154] See Brian Riordan, The Currency of Suit in Actions for Foreign Debts (1978), 24 McGill L.J. 422, at p. 438.

another. Common sense tells us that it would be desirable for the law to keep pace with developments in the means of payment, not only to provide certainty of result, but also to avoid undesired results arising from the poor fit between the ordinary rules of contract and the realities of modern payment methods. However, in order for the law to keep in pace with evolving means of payment, the concept of money in the law may itself need to evolve.

The existing regulatory scheme governing cash is satisfactory but largely irrelevant. On the other hand, the monetary character of most cashless forms of payment has not been judicially recognized sufficiently explicitly for a legal theory of money to develop around the notion of payment. Selected passages from certain decisions of the Supreme Court of Canada provide evidence of judicial recognition that money as a matter of public law is something distinct from the private law rules governing various means of payment. Thus, in *The Custodian* v. *Blucher*[155] there is a statement that a claim for a sum payable in foreign currency constitutes "a liquidated demand in money"; in *Reference re Alberta Statutes*[156] it was implicitly held that the concept of money in the ordinary sense of the word was the relevant concept for defining "currency" and "banking" in relation to constitutional heads of jurisdiction as between the federal and provincial government; and in *Bank of Canada* v. *Bank of Montreal,*[157] four judges of the Supreme Court of Canada were prepared to suspend the application of private law rules to Bank of Canada notes intended to circulate as money because of their monetary character. But taken together, these decisions are not enough to provide insight into how the Supreme Court would rule in a subsequent case, let alone to provide guidance to the lower courts or to form the basis of any comprehensive theory of money in the law.

As we enter the age of electronic payments, as our use of foreign and international currencies such as the United States dollar and the ECU (European Currency Unit) increases, and as we grapple with the problem of devising a regulatory framework to govern the financial system in the twenty-first century, the opportunity is ripe for inclusion of a theory of money within the legal framework governing these matters. The alternative, which is to regulate twenty-first century economic and commercial concepts with eighteenth and nineteenth century legal principles, is not appealing and risks rendering the law irrelevant.

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[155] *Supra,* footnote 112.

[156] *Supra,* footnote 73.

[157] *Supra,* footnote 34.