

More on Official Images of Cheques

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1. Introduction

In a previous legislative note in this journal published in 2008,¹ I commented on six sections² that were added to the *Bills of Exchange Act*³ to enable banks to destroy each cheque at the point of deposit and to deal thereafter for all purposes, particularly including presentment for payment, with a digital image of the original. In anticipation of imminent implementation of the new powers, and for the protection of the public, the new sections also dealt extensively with the details required to ensure the legal equivalence of the images and the originals for all purposes.⁴

At the time, the banks were well advanced in their preparations for the new procedure, which had been introduced at their request as a cost-saving measure. Accordingly, the new sections were drafted in such a way that all the technical specifications of the new process, and the instruments to which the new provisions would apply, were left to be determined by appropriate action by the Canadian Payments Association (CPA).⁵ This approach recommended itself in accordance with the general principle that technical detail is best left to delegated legislation by experts. In addition, as the Board of Directors of the CPA is chaired by a delegate of Bank of Canada⁶ and its by-laws and rules are subject to approval by the Minister of Finance,⁷ no loss of governmental control was involved in such delegation.

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¹ Bradley Crawford, “Electronic Presentment of Cheques in Canada: Official Images of Eligible Bills” (2008) 87 Can. Bar Rev. 205 [Crawford, “Electronic Presentment”].

² Sections 163.1 to 163.6, added by S.C. 2007, c. 6, s. 398.

³ R.S.C. 1985, c. B-4.

⁴ I discussed these in detail in my earlier legislative note, *supra* note 1.

⁵ The definitions of two key terms, “eligible bill” and “official image,” in s. 163.1 referred to material to be provided by by-law, rule or standard of the Canadian Payments Association (CPA).

⁶ See *Canadian Payments Act*, R.S.C. 1985, c. C-25, s. 15(1); and see Crawford, *The Law of Banking and Payment in Canada* (Aurora, Canada Law Book, looseleaf edn. current to January 2010) at §6:40 [Crawford, *Law of Banking*].

⁷ *Canadian Payments Act*, *ibid.*, s. 19.1; see Crawford, *ibid.* §6:50.10.

Soon after that note appeared, however, concerns within the banking community over the credit crisis and rising costs of implementing the new procedures for electronic presentment led the CPA to cancel the project.⁸ However, the official notice suggested that the initiative would not fail completely, as some of the sections of the Act that dealt with matters other than electronic presentment would be brought into effect at a later time:

The decision not to proceed [with electronic presentment] impacts only the plan for cheque image exchange between financial institutions (FIs) for clearing purposes. Most FIs are well advanced in a broader transition to cheque images for other purposes, such as internal record retention and delivery to customers, and this transition is expected to continue. Since most FIs are now offering, or planning to offer, image-based services to their customers, most of the anticipated benefits of the image environment will be available for businesses and consumers [when the other parts of the new law are implemented].

This promise of partial implementation for purposes other than truncation at the point of deposit has now been fulfilled. In late 2009 the Board of Directors of the CPA approved a new rule, which took effect on June 1, 2010.⁹ It defines, for the purposes of the new sections of the *Bills of Exchange Act*, the instruments eligible to be converted into official images and specifies the requirements to be met by banks when converting original documents to images, destroying the originals and archiving the images.

In implementing the 2007 amendments only partially, however, the new rule requires some further consideration and explanation.

2. Eligible Bills

Although the project initially contemplated truncation of a variety of payment items that are currently processed in paper form, ACSS Rule A10 limits its scope of application to cheques that are acceptable for exchange in accordance with the other ACSS Rules of the CPA. Applying definitions found in the *Bills of Exchange Act* and ACSS Rules A1¹⁰ and K1,¹¹ that

⁸ See Canadian Payments Association, *forum*, October 2008: “CPA Board Decides Not to Proceed Further with Image-Based Clearing Initiative” online: <http://www.cdnpay.ca> (accessed June 21, 2010).

⁹ ACSS Rule A10 – Images of Cheques (© 2010), quoted with consent of the CPA, online: <http://www.cdnpay.ca> (accessed 26 July 2010).

¹⁰ Canadian Payments Association, ACSS Rules, Rule A1 - General Rules Pertaining to Items Acceptable for Exchange for the Purpose of Clearing and Settlement, (© 2009).

¹¹ Canadian Payments Association, ACSS Rules, Rule K1 - Bulk Exchange and Settlement of U.S. Dollar Paper Items, (© 2009).

effectively means that only bills of exchange drawn on a member of the CPA¹² and payable on demand in Canada in either Canadian or US dollars for a sum less than \$25 million are eligible bills for these purposes.¹³ Images created by banks of other types of payment items paid by them and charged to accounts of customers remain subject to the general law regarding copies of business records.

3. Official Images

There is a slightly confusing, but ultimately immaterial, difference between the statutory definition of “official image” and the definitions used in ACSS Rule A10. In part, this represents the different assumptions of the two documents. When section 163.1 was enacted, the assumption was that images would be created by the bank of deposit and used primarily for the purposes of electronic transmission to the drawee for presentment and payment. As implemented to date, however, ACSS Rule A10 contemplates that cheques will continue to be presented for payment in physical form; images of them will be captured by the drawee bank. Thus it is that the statutory definition included “data in relation to the eligible bill prepared in accordance with” the CPA’s by-laws and rules, and the CPA definition does not. Those data were thought to be necessary because the design specifications for the project at that time contemplated that the drawee would process descriptions of the cheques being presented electronically, rather than processing the images themselves.

The statutory definition of “official image” also included “a display, a printout, a copy or any other output of [an] image.” Thus, under the statutory scheme, there was no distinction between an image in electronic form and a printout; both were “official images.” That has not been continued by ACSS Rule A10. It defines “image” more simply as “a digital representation of the front and back of a cheque,”¹⁴ and must be understood as meaning an electronically recorded and reproduced image, since it introduces the new term “Image Printout” to represent any “paper output of an image.”¹⁵

Another, possibly more significant, difference between the two definitions is that the statutory definition, in contemplation of the

¹² This includes deposit-taking financial institutions and others in addition to banks: see Crawford, *Law of Banking*, *supra* note 6 at §6:30.20.

¹³ Individual items may be disqualified by various defects, which I discuss in Crawford, *Law of Banking*, *ibid.* at §11:20.60(3)(a) and §11:30.60(1) for Canadian and US dollar items respectively.

¹⁴ ACSS Rule A10, s. 3(f).

¹⁵ *Ibid.*, s. 3(g).

possibility of many images of a single cheque existing at the same time, used the modifier “official” to indicate that some validating action would be taken by the bank that produced the image from the original, to certify it in some way as a true and complete copy of the original eligible bill. This was for the protection of the parties to the instrument in any litigation, dispute resolution or other formal legal procedures, to ensure that a printout of an image of a cheque that might be proffered by a party, was an authentic and reliable image of the original. This requirement has been met by ACSS Rule A10 in a different way. Not every printout of an image will be certified in that way, but, in accordance with s. 5 of the Rule,

Upon request by its customer for an official image, or similar request, a drawee ... shall provide the customer with an Image Printout along with a statement certifying that the image and Image Printout were created by or on behalf of the drawee in accordance with CPA by-laws, rules and standards.

That provision seems sufficient to implement the statutory requirement that official images be so designated in some way, in order to provide assurance of their authenticity. There could, however, be a slight difficulty with the Rule for persons other than the customer of the drawee. Note that the duty of the drawee to provide the statement is triggered only by a request from “its customer,” that is, the payee. Unless the words “or similar request” that follow are interpreted as including a request from the drawer, or from an interested endorser, any request by such a person for an official statement will have to be transmitted through the payee, as the customer of the drawee bank. Since such persons are often opposed in interest in litigation or dispute resolution procedures, a narrow interpretation of the duty of the drawee would be unfortunate and very likely problematic.

On the other hand, it must be clear that the Rule greatly facilitates the use of images for all purposes. Neither the statute nor ACSS Rule A10 requires that the person making an image or a verifying statement accompanying an Image Printout must have any particular qualifications or personal knowledge to do so. Such statements do not have to be sworn to be admissible in evidence, nor need they be supported by foundation evidence of their reliability as has been required by some evidence statutes in the past with reference to the admissibility of electronic reproductions of business documents.

4. Image Quality

Section 7 of ACSS Rule A10 expresses the basic obligation that underlies this development in cheque processing and record-keeping:

Each Capturing Member¹⁶ is responsible for creating images or image printouts that are usable.¹⁷

The basic premise of this reform was to ensure that the public would be fully protected if the banks were permitted to destroy the originals of customers' cheques as a cost-saving measure. Section 7 is the assurance that will be the result. Either every cheque will be successfully converted to an image or Image Printout, or a bank that fails to perform that function effectively will be liable in damages to any person prejudiced thereby.¹⁸ Note that a drawee that fails to capture a usable image of any particular cheque cannot escape liability under the Act, provided that it "purported" to do so. In other words, failures of the drawee's image-capturing processes do not excuse it with respect to any cheque that was submitted to those processes. Loss or destruction of a cheque by the drawee prior to processing will continue to be dealt with by the general law of conversion.¹⁹

5. Other Issues

I do not think it necessary to discuss the other provisions of the new law further here, since I referred to them in detail in my first legislative note. In brief, they addressed: (i) the rebuttable presumptions in favour of the validity and accuracy of the image;²⁰ (ii) the provisions establishing the legal equivalence of the official image for all purposes for which the original instrument might have been used;²¹ and (iii) those preserving the rights and obligations of all parties to it despite the destruction of the original.²² I discussed, as well, (iv) the provision ensuring the admissibility of official images in evidence without further proof of the circumstances of their creation;²³ and (v) that discharging the original bill and all images of it upon payment of any one of them.²⁴ Finally, I drew attention to the provisions by which the bank that creates the official image (vi) warrants

¹⁶ A Capturing Member is the bank or other member of the CPA that first makes an image of a cheque, or purports to do so. It includes the data processing and specialty servicing firms that provide cheque processing services to many banks.

¹⁷ Usable is defined in the Rule as "a clearly represented digital picture of a cheque."

¹⁸ S. 163.6(1); and see Crawford, "Electronic Presentment," *supra* note 1 at 224-27

¹⁹ See Crawford, *Law of Banking*, *supra* note 6 at §23:40.60(2).

²⁰ Ss. 163.4(1) and (3); see Crawford, "Electronic Presentment," *supra* note 1 at 215-16.

²¹ Ss. 163.2 and (5)(b); see Crawford, *ibid.* at 216-19.

²² S. 163.5; see Crawford, *ibid.* at 220-22.

²³ S. 163.4(2); see Crawford, *ibid.* at 222-24.

²⁴ S. 163.3(2); see Crawford, *ibid.* at 224.

its authenticity and accuracy;²⁵ and (vii) becomes liable to any person who suffers damage as a result of a breach of that warranty.²⁶ All of those provisions have now come into full force and effect with the passage of ACSS Rule A10.

6. Conclusion

ACSS Rule A10 effectively implements all parts of the 2007 amendments to the *Bills of Exchange Act* except those provisions intended to authorize electronic transmission by the bank of deposit to the drawee of the eligible bill for presentment and payment. In the process, the Rule strongly supports the increased use of digital images of cheques by banks in reporting account activity to their customers. It greatly simplifies and clarifies the law governing the use of such images for all purposes, without creating any new risk to the public.

²⁵ S. 163.6(1); see Crawford, *ibid.* at 224-27.

²⁶ *Ibid.*