IN FOR A PENNY, IN FOR A POUND,[1] OR WHY NOT ACCEPTING CASH IS AT THE PERIL OF THE VENDOR

By: Devin M Klassen[*]

GANGE AN MYNET OFER EALNE ÞÆS CYNGES ANWEALD & ÞÆNE NAN MAN NE FORSACE[2]

LET THERE BE ONE COIN THROUGHOUT THE REALM. AND LET NO MAN REFUSE IT

-Edgar (A.D. 943-975), King of the English, The Dooms of Edgar At Andover

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[1] According to "The Phrase Finder (UK)" this idiom originated from an obscure 17th century comical play by Edward Ravenscroft the "Canterbury Guests" and means that a person who invests in something must complete it even at full or further cost, applicable to this article.

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[2] A great thanks to Phyllis Wicks of "The English Companions (Ða Engliscan Gesiðas)" for finding this original wording when I was having trouble. See them at https://tha-engliscan-gesithas.org.uk

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INTRODUCTION

In the words of Saruman from Peter Jackson and Fran Walsh's film rendition of J.R.R. Tolkien's the Lord of the Rings the Two Towers:

The world is changing…

I think it is safe to say that even before the Covid-19 pandemic many people eschewed paying for their products and services with cash. Since the pandemic this tendency has been sent into overdrive. Card transactions are the rule and cash the exception. But is this shift from coin to card without risk? Not for the vendor. In this article I explore the risks to a vendor in running a "card only" business. The basis of the risk to the vendor is found in the law of debt and how a vendor may not *practically* refuse to accept payment for a debt when given in legal tender, or rather the creditor vendor does so at the vendor's ultimate risk. While this risk is likely insubstantial to most, any vendor who renders a service and then proceeds to demand payment by card could find themselves ultimately forced to accept the cash they had refused minus significant legal costs. However, the same vendor may be surprised to learn that they probably have no obligation to give change, e.g., when the bill comes to $37.99, and the purchaser hands them a "fifty" there is no presumed obligation to give the purchaser a return of $12.01. The intersection of the law of debt, legal tender, contracts, and equity is not exactly considered a popularly exciting party conversation, and yet that is where we are going to go, do not blame me you decided to read this article.

INSPIRATION

Why am I writing about this? First, I am genuinely lame enough to enjoy these philosophical and legal problems. But second, it was stoked one day when I came across a sign on the outside of a "Poke" restaurant that boldly proclaimed that the business would not accept any cash payments, all payments were to be done by credit or debit card. I was not going in, I can chop up raw vegetables and fish at home, but it caught my eye. Immediately I wondered "is this something this restaurant can do?" and I continued with my day, wondering the whole way. Upon returning to the office, I decided to investigate this and now we have an article. My ultimate determination is that, yes, a restaurant or business or anyone really can decide to only accept card payment, however that was not the end of the story. While anyone can insist on card payment by making

it a transaction term of the contract, provided this was done in advance,[3] this does not mean that they could actually *enforce* the card payment term at the end of the day, or rather the termination or completion of the contract. A conveyancing solicitor might right away understand what I mean by the difference between insisting on a mechanism of completing a transaction versus whether that mechanism can be enforced, I will describe the difference below as between contractual terms of performance versus a debt that accrues pursuant to a contract. And so, again, we have an article. What are the risks and remedies to a creditor vendor and a debtor purchaser where the vendor insists on payment by card (or by another negotiable instrument such as a cheque) and the purchaser tenders (legal) cash instead? We are about to find out.

DEFFINITIONS: DEBT, CURRENCY, AND LEGAL TENDER

Debt is the beating heart of the problem to the creditor vendor in our scenarios. More precisely the question of when debt is generated. A debt comes into existence when Party A expends some sort of labour or cost in favour of Party B with Party B soliciting, agreeing, or otherwise being lawfully liable to pay for Party A's cost generating actions or representations. The definition of debt itself has largely been simplified by the courts in Canada as:

> A debt is defined to be a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time.[4]

Black's Law Dictionary defines debt with more length and precision, describing a debt as (emphasis added to the sub-definitions applying to our scenarios):

> **debt. (13c) 1.** <u>*Liability* on a claim; a specific sum of money due by agreement or otherwise</u>. **2.** The aggregate of all existing claims against a person, entity, or state. **3.** A nonmonetary thing that one person owes another, such as goods or services. **4.** A common-law writ by which a court adjudicates claims involving fixed sums of money – Also termed (in sense 4) *writ of debt*
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> > "The action of debt lies where a party claims the recovery of a debt; that is; a liquidated or certain sum of money due him. <u>The action is based upon contract, but the contract may be implied, either in fact or law, as well as express: and it may be either a simple contract or a specialty. The most common instances of its use are for debts: (a) Upon unilateral contracts express or implied in fact. (b)</u>

[3] I am not so sure a sign on the door is sufficient notice in advance, thinking back to the "car park" cases of English common law, e.g. Lord Denning in: *Thornton v. Shoe Lan Parking Ltd.*, [1970] EWCA Civ 2.
[4] *Coast Capital Savings Credit Union v. British Columbia (Attorney General)*, 2011 BCCA 20, at para 57.

> Upon quasi-contractual obligations having the force and effect of simple contracts. (c) Upon bonds and covenants under seal. (d) Upon judgments or obligations of record. (e) Upon obligations imposed by statute." Benjamin § 52, at 132 (Henry Winthrop Balliantine ed., 3d ed. 1923).[5]

What we can learn from the above two definitions are that a debt is the owing of moneys, performance of services or the provision of property, from one party to another upon the crystallization of an obligation by express or implied contract, or otherwise under the law. Now knowing what a debt is, and inferring when a debt arises, in comes the *Currency Act* section 13(1) which says (emphasis added):

> **Contracts, etc.**
>
> 13(1) Every contract, sale, payment, bill, note, instrument and security for money **and every transaction, dealing, matter and thing relating to money or involving the payment of or the liability to pay money** shall be made, executed, entered into, done or carried out in the **currency of Canada**, unless it is made, executed, entered into, done or carried out in
>
> (a) the currency of a country other than Canada; or
>
> (b) a unit of account that is defined in terms of the currencies of two or more countries.[6]

Great, so what is the "currency of Canada"? Rather annoyingly, it is not expressly defined in a simple sectional definition but instead must be inferred from the same *Currency Act* as being the aggregate of sections 3 to 16 under Part I. Part I is titled in bold as "Currency and Coinage". I will summarise instead of reproducing sections 3 to 16. Under Part I of the *Currency Act* the currency of Canada are those coins and notes (sections 7 and 7.1 accordingly) that make up the Canadian dollar and for which are "legal tender" (section 8).[7] There are some exceptions such that a person may refuse to accept coins tendered above certain amounts for payment (section 8(2)). I would imagine this is to ensure that someone does not try to pay a $60,000 vehicle purchase with rolls of quarters. However, there is no such limitation on notes (paper money) so presumably they could tender the $60,000 in 12,000 five-dollar bills.

From our definitions above we know: (1) a debt is a liquified—that is determinable—liability to pay moneys or provide goods or services that arises out of an implied or express contract or by operation of the law. (2) a debt is a debt whether it is to be paid immediately or at some future moment. (3) In Canada, under the *Currency Act*, all contracts, and transactions, including the

[5] *Black's Law Dictionary*, 9th ed, *sub verbo* "debt."
[6] *Currency Act*, R.S.C., 1985, c. C-52, s.13(1).
[7] *Ibid*, ss.3-16.

liability to pay money, shall be entered into in the currency of Canada (ignoring foreign currency exceptions which do not affect us here). (4) the currency of Canada are those coins and notes lawfully issued under the laws of Canada. And (5) "legal tender" are those notes and coins so lawfully issued. As we can see the currency of Canada is legal tender and legal tender is the currency of Canada, and transactions are to be done or carried out in the currency of Canada.

Those technical legal definitions dealt with I offer a practical example, say one were to go into Subway Sandwiches[8] and walk up to the glass case, greet the attendant, and say "I would like a foot long Turkey on whole wheat please" that requesting person we will call Party B, Party A is the attendant on behalf of the franchise owner of that Subway who will then generate a debt that Party B is responsible for the moment A applies a sauce or vegetable or takes some other action that makes the transaction irrevocable. By taking an irrevocable action Party A has or is claiming that a debt has been created in A's favour such that Party B is now a debtor and shall pay for the debt at a future time probably two minutes later down the lane at the register. Conversely, if Subway decided to randomly make a sandwich and call you up out of the blue and demand you pay, well that would not have the prior approval necessary to bind you as Party B. Once Party A takes an action on the goods such that they cannot at law or in reasonable fact be put to the use of another customer, and in our case they have done so at B's request, they have committed themselves to the completion of the transaction or to be prepared to suffer a loss, in this case the sandwich materials and I suppose technically 1/10th of the hourly wage of the employee.[9] Like our above definition of debt, party B has expressly requested and impliedly entered into a contract wherein A provides a service and product that B shall pay for upon the fulfilment of A's provision of the same. What this is intended to describe is that once a vendor takes an irrevocable reliance upon the purchaser's representation or an action toward a good or service such that it cannot be rendered to another customer without a loss that is when a debt is generated, at least for our purposes. Importantly, the law governing a contract for services and a debt accrued thereby may be interrelated, but they are not equivalent, and this is namely due to equity. The difference between a debt and a contractual requirement is that a debt normally survives the termination or repudiation of the contract.[10] A contractual agreement might prescribe how the parties are to behave while the contract is in force but where the contract is repudiated or terminated a debt usually remains while the prescribed performance under the contract dissolves. It is in this distinction that a demand to pay by card may be a contractual term but where a person priorly acceded to pay by a card but then decides not to pay with a card the contract could

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[8] I am not sponsored, I am not even particularly a fan, I do not understand the markup on those sandwiches.

[9] *Chitty on Contracts: Consolidated Mainwork Incorporation Second Supplement,* vol 1 – General Principles – Part 7 – Performance and Discharge – Chapter 21 – Performance – Section 5 - Tender, 32nd ed (London, UK: Sweet & Maxwell, 2017), at 26-153 ["*Chitty*"].

[10] But a debt will not survive the cancellation of a contract as a "debt", but perhaps as an equitable action in quantum meruit, disgorgement, account of profits, etc… see a related discussion of recission versus termination in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.,* [1971] SCR 562, at page 571.

terminate for breach of the card payment term, but the debt would likely persist in some alternate equitable form. The problem for a card only vendor is that the law of debt has a much more favourable approach to paying with cash, or rather legal tender. As we will see the common law starts with the presumption that payment by legal tender is the rule, and an agreement to accept a card payment, cheque, negotiable instrument, or something else is really a waiver of the creditor vendor's right to demand legal tender rather than a prohibition on the debtor purchaser to offer to pay by legal tender.

Certainly, the Subway example is low cost, and no sane person would seek the power of Her Majesty's courts to recoup such a debt. However, now imagine a troop of wealthy debutants trapezes into a fine restaurant ordering Kobe beef steaks, Tuscan wines, and forty-year scotches, and quickly racks up a bill in the thousands of dollars. Perhaps this establishment has a sign on the front window saying, "we do not accept cash! card only!" or "This establishment insists on payment by card" but when the bill comes the table pulls out a bag of 100-dollar bills and says, "I'll give you 110 of these, I do not have a card". Or more realistically in an everyday person's life, picture mechanics or other service providers who might commit to the entirety of the work on a car or other machine, similarly be expecting card or cheque payment, and yet be faced with only cash when rendering the bill. Increasingly in a digitized payment age there is a non-insubstantial risk to going card only. For the mechanic could they hold the car? Could they do a mechanic's lien? That is not for this article.

THE RIGHT TO INSIST ON CARD AS A MECHANISM FOR CLOSING THE TRANSACTION

But does a creditor vendor have a right to run a business in expectation and demand of payment by card or non-negotiable instrument, are they even allowed to deny legal cash tender? Yes, a creditor vendor can, there is no magic here, a party can insist in advance on a mechanism for closing a transaction including the payment method during negotiation of the terms. But that is the key, during the negotiation of the terms or at least before the time for performance.[11] As many service-oriented businesses generate a debt before taking payment this article is for them. It is easy enough that a store that sells goods loses nothing and gets paid in the method they choose before they generate a debt, but for a restaurant or a landscaper or a… contracting marine biologist, the debt will often be generated and then payment demanded. As I mentioned above unless you *actually* take card payment *before* generating the debt a person could agree to your card only payment term and then just break that term after the debt was generated. The debt remains but the contract is presumably repudiated, they broke the payment term. So now when they have

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[11] *Walker v. Blades*, 2007 BCCA 436, at paras 23-24.

cash you are faced with accepting the cash for the debt. What this boils down to is that anyone can insist on a card only method of payment but unless they accept payment before doing the action that generates the debt, they will not have a practical or legal means to enforce payment by card, that is what the rest of this article is about. Otherwise, there is nothing at contract law that specifically prevents a vendor from insisting on card only payment. Although there may be further statutory hurdles that I will mention toward the end of the article.

I briefly add three further points. (1) A creditor vendor who demands card payment before generating a debt and informs the prospective debtor purchaser that they will not accept cash can probably refuse to perform the transaction and send the prospective purchaser away.[12] (2) If the creditor vendor accepts and takes a card payment from the prospective debtor purchaser *before* generating a debt, then actually the two parties have swapped sides in the transaction. As the purchaser has now paid money to the vendor before the vendor has done anything, it is now the vendor that owes a debt to the purchaser, recall example 3 of *Black's Law Dictionary* definition of a debt we discussed above. Now the shoe is on the other foot, the vendor is now the debtor vendor to the creditor purchaser, and the debt is the service or product to be rendered to the purchaser. (3) Lastly, where the creditor vendor who demands payment by card is met by the debtor purchaser with an offer of legal cash tender sufficient to cover the debt, the creditor will not be able to treat the debtor as committing a crime of theft or fraud. The good faith tender means the vendor has no recourse to call the police. Likely, any attempts to call the police will be ignored or worse could result in further costs to the vendor for wasting public police resources.

THE RISK IN NOT ACCEPTING LEGAL TENDER IN PAYMENT FOR A DEBT

It is not mere theatrics that I invoked the words of a near 1200-year-old dead King Edgar. Okay it was, but it has philosophical importance. What the words of King Edgar symbolise is that the sovereign decides with whom and how the business and debt of the kingdom are to be accounted for and the sovereign has minted a physical means of such, and us peasants on the Clapham Omnibus do not get a say. Cash, or legal tender, is not some antiquated idea but a direct and purposeful demonstration of the power of the sovereign. His or Her face emblazoned across the coin or upon the bill is to remind all those who take the cash item that the King shall honour and enforce the value held within and that all property, at its heart, is the property of the crown. Romanticism aside, as I am sure a mechanic or a realtor alike would not care, there is legal

[12] I say "probably" because there is some discussion that requiring persons to have contractual relations with banks or credit unions in order to enter into a transaction with you could potentially breach certain business practices, or other statutory laws.

importance to these philosophical ideas. We have already mentioned section 13(1) of the *Currency Act* and this section carries on the mandate of King Edgar.

The "liability to pay money" was discussed above and the creation of a debt generates that liability.[13] A business who renders a service, demands payment, and then expects payment be made by digital means will have no *practical* legal remedy to collect its debt if the debtor refuses *those means* but proffers a full accounting for the moneys owed in legal cash tender at the time of the demand. The creditor we shall see, ends up *effectively* estopped, or rather prevented from collecting what is owed to them afterwards at least by the mechanism they insisted upon. This is where we get to the elucidated risk to a card only business. The dangers of corporate and natural persons who expect payment after they render a service or transfer a good and then insist that payment be done by debit or credit or some other negotiable instrument. There are two issues here. The first issue is that moneys issued by the government according to the appropriate currency act are legal tender, capable of discharging any debt. The second issue is that once a service is rendered, the debt is created, and the debt may be satisfied by the debtor offering said legal tender in a full amount to satisfy that debt. What is important in the idea that a debt is created is that a debtor may discharge a debt according to the law, and according to the law a person may proffer to discharge a debt by tendering legal currency and while the creditor vendor does not *have* to accept our purchaser debtors tender of cash for the debt, our seller is not going to enjoy paying the legal costs of the purchaser if he seeks to have the court enforce payment. It is the practical and equitable effect of tendering cash for the debt that puts the card only vendor at risk. And here is how all of this works.

At this point I am indebted, pun intended, to an article from 1986 by Guy David titled "Money in Canadian Law" (herein "*MCL*").[14] To be immodest, I had suspected all the things Guy David discusses before I found the article, but self-discovery is apparently *verboten* if someone has not written about it before then it does not exist. A thank you to Mr David for an interesting and comprehensive read that was refreshingly prescient and has not aged much despite being written in 1986.

In *MCL*, and in *Chitty on Contracts* which is cited extensively in *MCL*, and also here, we come to learn that the default method of payment for contracts in the common law world is by legal tender.[15] We learn that the *Currency Act* sets the definition of what legal tender is, which is coins and bills.[16] And we learn that a vendor is expected to accept legal tender and that where a vendor insists on payment by negotiable instruments or non-legal tender the vendor is actually waiving

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[13] For contrast, a fine is not a debt but still is a liability to pay money. Although a fine can be turned into a debt upon default or court order.

[14] Guy David, *Money in Canadian Law*, 1986 CanLiiDocs 35 [*MCL*]. (at the time of writing this Mr David is a partner with Gowling WLG out of their Ottawa office).

[15] *Chitty*, supra above note 8, at 21-088 [*Chitty*].

[16] Supra above note 5.

their debt collection right of insisting on legal tender.[17] *Chitty on Contracts* has this to say (footnotes omitted, emphasis added, footnotes omitted):[18]

> Where a debtor is obliged to pay a specific sum of money to a creditor a successful plea of tender does not discharge the debt, <u>but if the creditor subsequently sues for the debt, the debtor may, by paying the money into court and by proving the tender and its continued willingness to pay the debt since the tender, bar any claim for interest or damages after the tender</u> ; **the creditor will also be liable to pay the debtor its costs of the action, on the ground that the action should not have been brought**. A claim for unliquidated damages, not being a claim for a specific sum of money, cannot be met by a plea of tender.

The above excerpt from *Chitty* does give our card-only-vendor the ability to refuse to accept a legal tender of cash at the time of tendering and the debt is not extinguished merely by the refusal.[19] But the rest of the paragraph seems to imply that if that vendor goes off to court to enforce payment and that purchaser is willing to pay that cash into court as a security, the only outcome is the vendor inevitably receiving the very cash they refused and being liable to pay the legal costs of the purchaser for a frivolous suit.[20] One can see the risk, were our creditor vendor to pursue the debt in court the only outcome would be to receive the very same moneys but at the loss of the legal costs of her own legal counsel and that of the debtor purchaser's. While most of the cited case law in *Chitty* originates from the United Kingdom, *Chitty* is still a persuasive text in Canada.[21] In the footnoted cases, such as in *Griffith v. Ystradyfodwg School Board*, and in *Dixon v. Clark*, the creditor was actually charged interest against the debt in favour of the debtor where cash was offered but refused and paid into court; or a mortgagee was ordered to pay the mortgagor's costs in the action.

While the *MCL* article is mostly concerned with the equally interesting (to me at least) legal theory of moneys, including metallism and nominalism,[22] Guy David does have some comments on our topic. Much with *Chitty*, David notes that the demand for payment of a debt is not the same thing as a demand for legal tender, and that a creditor can always refuse legal tender.[23] David further notes in agreement with *Chitty* that the offer of legal tender (presuming

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[17] *Chitty*, supra above note 8, at 21-089.
[18] *Ibid*, at 21-086.
[19] *Chitty*, supra note 8, at 21-086; *Dixon v. Clark*, (1848) 5 C.B. 365; *Canmer International Inc v. UK Mutual S.S. Assurance Association (Bermuda) Ltd (The 'Rays')*, [2005] EWHC 1694 (COMM).
[20] *Ibid*; *Kinnaird v. Trollope*, (1889) 42 Ch. D. 610; *Dixon v. Clark*, (1848) 5 C.B. 365; *Barratt v. Gough-Thomas*, [1951] 2 All E.R. 48; *Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch); *Griffith v. Ystradyfodwg School Board*, (1890) 24 Q.B.D. 307.
[21] For instance, as recently as 2021 the Supreme Court of Canada has invoked this voluminous tome; *Corner Brook (City) v. Bailey*, 2021 SCC 29, at paras 22, 23, and 29.
[22] Metallism is a reference to the theory that a money's value correlates directly to the value of the material it made out of, like a gold coin; nominalism is tied to the value declared on the money and not its property, more akin to a fiat currency.
[23] *MCL*, supra above note 11, at page 210.

it is of a sufficient amount to cover the debt) at the time demanded for the debt will at least estop the accrual of interest for the creditor, would bar claims to damage that the refusing creditor alleges arise from non-payment, and would likely result in the creditor paying the legal expenses of the debtor were the action to go to court enforcement.[24]

That a creditor vendor will be estopped at the minimum and required to pay for the costs of court enforcement at the maximum when a debtor offers legal tender in full satisfaction; such appears to be a creature of equity rather than contract or the common law. There is nothing I can think of that should prevent any term whatsoever from being valid at the common law barring an insult to the crown's public policy. For instance, in *Graham v. Seal* a mortgagee was ordered to pay the legal costs of the mortgagor in an action to foreclose where the mortgagor had tendered the cash necessary to redeem when the debt was demanded.[25] Relief from forfeiture under the common law of contract and the right to redeem was founded in the chancery and equity.[26] A debt on a mortgage is no different in principle to a debt owed on a burrito made but not yet paid for, and so too equity may step in. This idea is further represented, at least in British Columbia, by section 17 of the *Law and Equity Act* (emphasis added):[27]

> **Power of court to discharge mortgagor on payment of mortgage money**
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> **17** Where an action is brought on a bond for payment of the money secured by a mortgage or performance of its covenants or where an action of ejectment is brought by a mortgagee or his or her heirs, personal representatives or assigns for the recovery of the possession of mortgaged land, and no suit is pending concerning the foreclosing or redeeming of the mortgaged land, if **the person who has the right to redeem the mortgaged land** appears and becomes a defendant in the action **and at any time, pending the action, pays to the mortgagee or, in the case of the mortgagee's refusal, brings into court where the action is pending all the principal money and interest due on the mortgage, and all costs spent in any proceeding on the mortgage,** the money for principal, interest and costs to be calculated by the court, the money so paid to the mortgagee or brought into **court is in full satisfaction and discharge of the mortgage,** and the court must and may discharge the mortgagor or defendant from the mortgage accordingly and must and may, by the rules of the court, compel the mortgagee, at the expense of the mortgagor, to assign, surrender or reconvey the mortgaged land and the estate and interest that the mortgagee has in it, and deliver up all deeds, evidences and writings in the mortgagee's custody relating to the title of the mortgaged land to the mortgagor who has paid or brought the money into the court, the mortgagor's heirs, personal representatives or to the person the mortgagor appoints for that purpose.

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[24] *Ibid*, at page 211.

[25] *Graham v. Seal,* (1918) 88 L.J. Ch, 31.

[26] *Vernon v. Bethell,* 1762, 2 Eden, 110, 838.

[27] *Law And Equity Act,* [RSBC 1996], Chapter 253, s.17.

What is captured in the verbose section 17 above[28] is very much what *Chitty* and Guy David in *MCL* are referring to where a creditor refuses tender of moneys for the satisfaction of a debt. The only difference to section 17 and the common law or equitable law on debt is that section 17 expressly allows, but does not require, the court to charge the mortgagor for the costs of clearing the mortgage rather than compel the mortgagee to do so. Otherwise, when it comes to a debt for services or products it would seem that the creditor vendor who seeks court enforcement against a debtor purchaser who readily offered sufficient legal tender and continues to do so, that creditor vendor should expect to be forced to discharge the debt for those moneys and also to expect to pay the debtor's legal costs in bringing the action to the court.

It is sufficient to conclude that a vendor who demands non-legal tender payment for a debt they have generated and who is then met by the debtor purchaser with sufficient legal tender to satisfy that debt will be forced practically to either accept the cash in satisfaction for the debt or risk paying the costs of taking the debt to court for enforcement. As mentioned earlier a card only vendor may refuse to perform the debt action before payment and that may reverse the roles, but if the vendor performs the action that causes the debt to arise, they will face this risk.

That is to say: if you do the work and then ask for payment and the payee offers legal tender, you either accept it or understand that a lawsuit over that debt will probably cost you more than just accepting the cash. However, one benefit to the vendor is that there is no common law requirement to give change. It is the debtor purchaser's obligation to tender the exact debt amounts, if they tender more than that the vendor has no common law obligation to give change.[29]

Now we move to a final discussion on whether there are other legal barriers to running a card only business.

OTHER ISSUES: BUSINESS PRACTICES, HRC, AND PERSONAL INFORMATION PROTECTION ACT

I will be relatively brief on this part. But there may be other laws, at least in British Columbia, that could cause problems for a vendor who seeks to run a card only business. The ones that I

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[28] As if I am one to talk on "verbosity".
[29] *Chitty*, supra above note 8, at 21-087.

have identified are the *Business Practices and Consumer Protection Act*, the *Human Rights Code*, and the *Personal Information Protection Act*.[30] I will outline what I identify as a potential problem found in each of the above three enactments as follows.

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

The *Business Practices and Consumer Protection Act* has section 8 titled “Unconscionable acts or practices” and section 8(1) prohibits such practices while section 8(3) adds some examples of an unconscionable act or practice, but does not limit the definition of an unconscionable act or practice. Section 8(1)(e) says:[31]

> (e)that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

I mention as a comment without deciding, that it could very well be “harsh or adverse” to demand that a potential customer have a contract of debt or credit with a bank or credit union in order to transact with the card only business. By refusing to accept legal tender the only outcome appears to be that the card only business demands the potential purchaser must enter into contractual obligations with a third party in order to be entitled to even treat with the vendor for their products or services. There seems to be an argument that such an insistence to contract with a third party is so harsh or adverse to the consumer as to be inequitable.

HUMAN RIGHTS CODE

As for British Columbia’s *Human Rights Code* Section 8(1)-(2) of the *Human Rights Code* prohibits a person from refusing, without a bona fide and reasonable justification, the use of accommodations, services, or facilities normally available to the public, because of a number of generally immutable characteristics. One such characteristic is physical or mental disability, and another is age.[32]

Persons of incompetence, and infants may be prevented by law or by the business practices of banks and credit unions from being granted debit or credit cards and therefore cannot shop at a business that is card only. In such a circumstance it *could* be argued that a card only business was breaching those persons’ human rights under the *Human Rights Code*.

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[30] Respectively: [SBC 2004] CHAPTER 2; [RSBC 1996] CHAPTER 210; and [SBC 2003] CHAPTER 63.

[31] *Business Practices and Consumer Protection Act*, [SBC 2004] CHAPTER 2, s.8(1)(e).

[32] *Human Rights Code*, [RSBC 1996] CHAPTER 210, s.8.

PERSONAL INFORMATION PROTECTION ACT

As I have prior written in "*B.C. Restaurants And Venues Beware – Take Dr. Bonnie Henry's Advice At Your Own Peril*"[33] (herein "*BC Venues Beware*") the *Personal Information Protection Act* (herein "*PIPA*") of British Columbia puts certain prohibitions on British Columbia businesses. Section 7(2) of *PIPA* prohibits an organization (and pretty well all private businesses in B.C. are organizations) from (emphasis added):[34]

> (2)An organization must not, <u>as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information beyond what is necessary to provide the product or service</u>.

As in *BC Venues Beware*, it seems to be that to demand a person enter into a banking or credit union contract, replete with SIN number, driver's license, and other information, in order to enter negotiations to buy a burrito from a business, that would likely be in violation of *PIPA* section 7(2). By demanding that every potential purchaser have a credit or debit card the business is effectively demanding that person give up, as a condition of offering products or services, their personal information to a third party, the grantor of that card.

And as I have discussed in detail in *BC Venues Beware*[35] the necessity exemption is narrowly tailored and does not allow for mere convenience, vendor desire, or the preference of other customers; that the vendor would rather not use cash is not something that is sufficient to make the personal information necessary and thereby not sufficient to demand the potential customer share their personal information with a third-party bank or credit union.

APPLICATION TO OTHER COMMON LAW COUNTRIES

Chitty is a United Kingdom based contract law compendium and so the conclusions above, apart from the three mentioned B.C. statutes, largely apply to at least England if not the devolved areas

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[33] See: http://devinklassen.com/wp-content/uploads/2022/04/Restaurants-and-venues-beware-dr-bonnie-henry-advice-own-peril-1.pdf [*BC Venues Beware*].
[34] *Personal Information Protection Act*, [SBC 2003], Chapter 63, s. 7(2).
[35] Supra above note 33.

of Scotland, Wales, and Northern Island (and the crown dependencies like Isle of Man, Gibraltar, etc…). Australia also has a currency act that largely mirrors that of Canada's.[36] Like Canada,[37] Australia has exclusively assigned the federal parliament legislative jurisdiction over currency and legal tender.[38] Unlike Canada and Australia, but like the United Kingdom of Great Britain and Northern Ireland, New Zealand is a unitary state with no supervening constitutional document that assigns legislative jurisdictions. Yet just like with Canada and Australia, New Zealand's *Decimal Currency Act 1964* also largely reproduces the requirement that liabilities to pay money must be done in the currency of the country and that the currency of the country is legal tender and legal tender is the currency of the country.[39]

The Constitution of the United States of America also assigns the federal congress and its peer executive the jurisdiction over the "coining of money" and defines the dollar monetary unit.[40] In the U.S.A., currency, banking, and legal tender, are governed by a mishmash of modern and 200-year-old laws. I would not dare to look further into whether the above paper applies in the U.S.A., but it may have some relevance.

I warrant no ultimate accuracy as to the applicability of our discussion to other Common Law countries, but there is an arguable case for such consideration.

PROVINCIAL IMPOTENCE

One may be tempted to wonder if the provinces, with their constitutionally granted power over property and civil rights, could pass laws that allow card only businesses to eschew cash without risk.[41] I cannot see this as within the power of a province to do, for two main reasons. The first reason is that the power over currency is expressly assigned to parliament, as I alluded to earlier.[42] The second reason is that the province of Alberta already tried to meddle with parliament's currency power in the 1930s by creating a system of provincial "social credit" that would lay alongside and presumably replace, the Canadian dollar. This did not go down well with the Supreme Court of Canada nor the Privy Council for reasons that included and went beyond the province's attempt to meddle with parliament's exclusive right to legislate for currency and legal

[36] *Currency Act 1965* (Aus), ss.9-17.
[37] *Constitution Act 1867*, 30 & 31 Victoria, c. 3 (U.K), s.91(14) [*Constitution Act 1867*].
[38] *Commonwealth of Australia Constitution Act* (Aus), s.51(xii).
[39] *Decimal Currency Act 1964* (NZ), ss.6-14.
[40] *Constitution of the United States of America*, Article I, ss.8-10.
[41] *Constitution Act 1867*, s.92(13).
[42] *Ibid*, s.91(14).

tender.[43] At this time it is hard to see any ability of the provinces to provide for businesses to run card only businesses and be relieved from the risks where someone tenders cash payment.

CONCLUSION

I will try to give the conclusion simply and efficiently. A vendor may have the right to run a "card only" business. But this right may be qualified by potential challenges under the *BPCPA*, *Human Rights Code*, and *PIPA* acts. Those aside, the card-only-vendor may do so under the common law. The card-only-vendor may also accept a tender of cash from the debtor purchaser that is greater than the debt and have no obligation to give change. However, at the end of the day, and in most cases, a card-only-creditor-vendor will practically risk not collecting on their debt at all, or collecting their debt less the debtor's legal fees, where they refuse to accept the sufficient legal cash tender of the debtor and decide to pursue court action to collect on that debt for which the debtor was ready, willing, and able, to satisfy. These conclusions may also apply to United Kingdom, Australia, New Zealand, and perhaps even the United States of America. Lastly, the provinces are likely incompetent to provide any remedy to the risks posed. I take no formal position, but I suspect parliament could alter the *Currency Act* in someway that could relieve or affect the risks we have discussed, but this could potentially face *Charter* challenges, another article for another day.

Maybe if you or your business generates a debt before accepting payment, consider just accepting cash.

[43] *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100; *Alberta (Attorney General) v. Canada (Attorney General)*, 1938 CanLII 251 (UK JCPC).