

## Litigation - Canada

### Appeal court provides assurance to banks with the right verification requirements

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**Facts**  
**Decision**  
**Grounds for appeal**  
**Appellate court decision**  
**Comment**

The Ontario Court of Appeal's decision in *Bunan v Toronto-Dominion Bank* (2015 ONCA 226) provides assurance to financial institutions that they can effectively limit liability for claims regarding unauthorised transactions through properly worded account verification clauses.

#### Facts

The appellant was defrauded by his cousins after he agreed to lend more than C\$1 million to a partnership owned and controlled by them. They perpetrated the fraud by making withdrawals from a bank account that the appellant had established with the respondent, the Toronto-Dominion Bank.

The appellant sued his cousins under certain personal guarantees and promissory notes respecting the debts of the partnership. He also sued the bank for, among other things, breach of contract and negligence stemming from the withdrawals made from the bank account.

The bank denied liability for losses attributable to the bank account because the appellant had signed a financial services agreement (FSA). While the bank was unable to locate a copy of the agreement actually signed by the appellant, its standard-form FSA required the appellant to report any account errors within 30 days. If he failed to do so within this timeframe, the bank was released from liability. A portion of the language used in the FSA read as follows:

*"You will notify us in writing of any errors in the account, transaction, information or the Instruments. If we don't receive notice from you within 30 days of the statement date, passbook update date or, for electronic method, the transaction date, you accept the statement, update, transaction information and Instruments as valid and correct..."*

#### Decision

At trial, the judge granted the appellant's claim against his cousins and dismissed the claim against the bank. The trial judge found that the appellant had signed the FSA and, therefore, its verification provisions discharged it from any liability.

#### Grounds for appeal

The appellant appealed the dismissal of the claim against the bank on two grounds:

- The trial judge gave insufficient reasons for the finding that the FSA had been signed by the appellant.
- The FSA did not relieve the bank of liability.

#### Appellate court decision

The Ontario Court of Appeal dismissed the appeal.

The court found that there was ample evidence in the record to support the trial judge's finding that the appellant had, in fact, signed an FSA. In particular, the court noted the evidence of the bank's practices and standard procedure, which required confirmation of execution of the FSA at various stages. The court also relied on another FSA signed by the appellant for another account with the bank and a signature card for the bank account, which confirmed receipt of the FSA. This aspect of the decision highlights the importance of standard practices and procedures in the opening and operation of client accounts.

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The appellant also argued that the FSA did not protect the bank from liability for two reasons. He argued that a separate clause of the agreement imparted a reasonableness requirement into the 30-day notice period – rendering the notice period applicable only if the client failed to take reasonable care with respect to his account.

The appellant maintained that he had met this reasonableness requirement. He claimed that he was denied the means to monitor his account because the bank did not send him statements and he did not have online access. Further, as the account was a savings account, he did not expect any withdrawals to have been made. The court found that the notice period in the FSA was not subject to a reasonableness requirement. While another clause of the FSA required the appellant to take reasonable care with respect to his cheques and other instruments, the account verification provision was entirely separate. The agreement, read as a whole, required the appellant to review his account transactions periodically and to report errors within 30 days. Savings accounts were not exempt from this requirement.

Further, the court ruled that even if there was a reasonableness requirement with regard to the notice provision, the appellant did not meet it. The bank gave the appellant three options for reviewing his account when he opened it: a passbook, statements by mail or electronic access. The appellant opted for electronic access, but subsequently forgot his password. He made no enquiries of the bank to recover the password and reviewed a print-out of the transactions only after his brother-in-law had coordinated recovery of the password. Even then, the appellant waited nearly a year to report errors with respect to transactions completed between three and seven years earlier.

### Comment

This decision of the Ontario Court of Appeal provides strong authority that a clearly worded verification requirement in an account operating agreement can be a complete defence to a claim for unauthorised transactions. Careful drafting is required, but a financial institution can limit its risk by clearly stating that it is the client's responsibility to inspect transaction records and report errors.

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