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BANK ACCOUNT VERIFICATION AGREEMENTS ARE CONSTRUED AGAINST THE BANK

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It is probably generally understood amongst those who provide and consume banking type services that in most situations, where a fraudster has forged a bank's customer's cheque and funds have thereby been removed from the customer's account, as between the bank and its customer, the bank is responsible for the loss and must recredit its customer's account. Section 48(1) of the *Bills of Exchange Act* (Canada) unequivocally states that a forged signature on a cheque is "wholly inoperative".

There are many ways in which funds may be removed from a customer's account without the customer's authorization. Fraud is often behind an unauthorized removal, but sometimes an unauthorized removal occurs by reason of mistake. In an attempt to minimize their responsibilities for unauthorized removals, most banks (and other deposit taking financial institutions) will usually require their customers to enter into an "Account Verification Agreement" or "Account Operation Agreement". These arrangements will typically provide that if there is an unauthorized withdrawal, it must be reported to the bank within a limited period of time (usually 30 days) from when the bank provides its customer with a written summary of the customer's account's activity over the immediately previous period (usually, a one month period).

The recent (July, 2010) Ontario Court of Appeal decision[1] (hereinafter, the "SNS Products Case") illustrates how the Courts will interpret the provisions of these types of agreements strictly **against** their authors (i.e, the banks). In the SNS Products Case, a fraudster, over a period of time, forged a number of cheques on the customer's account, but the customer did not complain to the bank until after having received a number of account statements which (one supposes) would have - if the customer had carefully reviewed same - revealed the fraud. The bank claimed that it wasn't responsible for the customer's losses on the basis that the wording in its account verification agreement completely excused it from having to reimburse its customer if the customer failed to notify the bank of the losses within the specified time limit. The agreement referred to the need for the customer to report to the bank (in a timely manner) any "error", "irregularity" or "omission". The agreement did **not** contain any references to unauthorized withdrawals caused by forgery or other fraud. The Court held that in the absence of specific language referring to forgery and fraud, the agreement did **not** protect the bank, with the result that the bank had to make good the amount of the forged cheques.

While arguably "error" and "omission" do not properly describe forgery or other fraud, one could argue that forgery or fraud constitute an "irregularity". Nevertheless, the Court took the traditional (and thus well established) position that documents are to be construed **against** those who create them, and that accordingly, it is up to the author of a document to be as

[1] S.N.S. Industrial Products Limited v. Bank of Montreal, 2010 ONCA 500 (CanLII)

explicit as possible in the wording used, in particular, for those provisions of the document which are intended to protect the interests of the document's author.

From a practical perspective, the SNS Products Case suggests:

1. Banks and other financial institutions taking deposits against which cheques may be written will have to shore up the protective language contained in their account agreements; and

2. Customers of such institutions should pay close attention to their bank statements and to the cancelled cheques or other payment instruments which usually accompany same.

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