

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Wadden v. BMO Nesbitt Burns*, 2015 NSCA 48

**Date:** 20150514

**Docket:** CA 424852

**Registry:** Halifax

**Between:**

Calvin Wadden, Andrea Wadden and  
3019620 Nova Scotia Limited

Appellants

v.

BMO Nesbitt Burns

Respondent

- 
- Judge:** The Honourable Justice Linda L. Oland
- Appeal Heard:** November 17, 2015, in Halifax, Nova Scotia
- Subject:** Fresh Evidence - Negligence – Breach of Contract – Costs
- Summary:** The appellants moved their investment accounts to BMO Nesbitt Burns. They claimed that BMO did not tell them of requirements and restrictions it placed on their accounts, and it refused to sell shares in their accounts when directed. The trial judge heard their claim with several others involving another financial institution, and issued a single decision. He held that BMO was not liable in negligence or for breach of contract, and awarded costs against the appellants jointly and severally. The appellants brought a motion to introduce fresh evidence on the appeal, and appealed his decision on liability. One also appealed the joint and several liability aspect of the costs award.
- Issues:** Whether to permit the introduction of fresh evidence on appeal.  
Whether the trial judge erred by:
- (a) Failing to render a decision on the appellants’ claim independent from that pertaining to the other

- proceedings;
- (b) Failing to consider the evidence or deliver any reasons in dismissing the claims of Andrea Wadden or 3019620 Nova Scotia Limited;
  - (c) Making findings of fact not based on the evidence;
  - (d) Making findings of fact based on BMO's submissions;
  - (e) Finding that Mr. and Mrs. Wadden were not credible;
  - (f) Failing to draw an adverse inference against BMO for its failure to call any material witnesses;
  - (g) Not requiring BMO to produce all relevant documents;
  - (h) Finding that BMO was entitled to rely on the representations of a third party in freezing the appellants' accounts;
  - (i) Finding that the freezing of their accounts did not cause any losses;
  - (j) Finding that, after their accounts were unfrozen, the appellants failed to mitigate their losses; and
  - (k) Making the appellants jointly and severally liable for costs.

**Result:**

The motion for admission of fresh evidence on appeal was dismissed. The criteria were not satisfied.

The grounds of appeal pertaining to BMO's liability to the appellants are directed to findings of fact and credibility, drawing of inferences of fact, and mixed questions of fact and law without an extricable question of law. The applicable standard of review is palpable and overriding error. This Court was not persuaded that the judge made any such error which would warrant appellant interference.

An award of costs is in the trial judge's discretion and should be set aside only if the judge made an error in principle or the award is plainly wrong. Neither criteria was met here.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 31 pages.*