

CITATION: Stenzler v. TD Asset Management Inc., 2020 ONSC 111
COURT FILE NO: CV-18-595380-CP
DATE: 20200227

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

GARY STENZLER

Plaintiff
(Moving Party)

- and -

TD ASSET MANAGEMENT INC.

Defendant
(Responding Party)

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Paul Bates, Michael Robb and Anthony O'Brien* for the Plaintiff

R. Paul Steep, Shane D'Souza and Leah Ostler for the Defendant

HEARD: January 10, 2020

MOTION FOR CERTIFICATION

[1] The plaintiff moves to certify a proposed class action on behalf of persons who purchased units of a TD Mutual Fund from a discount broker. The plaintiff alleges that

the defendant wasted Mutual Fund assets by improperly paying “trailing commissions”¹ to discount brokers, causing investor losses in the tens of millions of dollars.

[2] The defendant TD Asset Management Inc. (“TDAM”) submits that the plaintiff has no cause of action for the alleged losses and asks that the motion for certification be dismissed.

Background

[3] The plaintiff is a retired dentist. Like many Canadians saving for their retirement or their children's college education, he invests in mutual funds. For many years, he held “units” in various TD Mutual Funds that were created and managed by the defendant TDAM, a wholly-owned subsidiary of the Toronto Dominion Bank.

[4] TDAM distributed the TD Mutual Funds through full-service investment firms and through less expensive discount brokers that appealed mainly to the “do-it-yourself” investors. It is not disputed that TDAM paid trailing commissions to both the full-service and the discount firms that sold the mutual funds to their clients. The trailing commissions were paid ostensibly to cover the “service and advice” that these firms were providing to their clients.

[5] The payment of a trailing commission to the full-service firms made sense because they were legally permitted to provide investment advice to their clients and have done so. The payment of trailing commissions to the discount brokers made less sense because they were prohibited by provincial securities law from providing investment advice. Indeed, over the last ten years, the payment of trailing commissions to discount brokers has been a topic of concern in the mutual fund industry. After several years of industry-wide discussion, the Canadian Securities Administrators concluded in a July 2018 report that there was “no justifiable rationale” for paying discount brokers an ongoing trailing commission for the sale of a mutual fund. Regulatory changes are expected sometime this year. Meanwhile, the practice continues.

[6] The plaintiff purchased the units in his TD Mutual Funds from TD Direct Investing, a discount broker. Towards the end of 2017, he discovered that TDAM was paying trailing commissions to discount brokers for “service and advice” even though no

¹ Trailing commissions are fees that “trail” the sale of an investment product over its lifetime. They are generally paid on an annual basis to the dealers that sold the product to their client, ostensibly to compensate the dealer for the investment advice being provided to the client. Critics say that trailing commissions are more about kick-backs than compensation.

advice of any kind was being provided by them. He understood that TDAM's payment of these trailing commissions depleted the assets of the TD Mutual Funds which in turn reduced the value of his units and thus the overall return on his investment.

[7] The plaintiff then commenced this proposed class action. The basis of the proposed class action is that TDAM in breach of trust and in violation of its fiduciary duty improperly paid trailing commissions to discount brokers causing losses to the Funds and its unitholders.

Analysis

[8] Counsel on both sides well understand that certification is a relatively low hurdle. It has nothing to do with the merits of the action. That comes later, on a summary judgment motion or a trial of the certified common issues. As the Supreme Court noted in *Hollick*, "the certification stage is decidedly not meant to be a test of the merits of the action."²

[9] Unfortunately, counsel for the defendant wasted much time and paper arguing the merits of the plaintiff's claim. The defendant may well prevail on the merits if this action is certified as a class proceeding but at this stage the plaintiff only has to satisfy the five requirements set out in s. 5(1) of the *Class Proceedings Act, 1992* ("CPA"):³

- a. the pleadings disclose a cause of action;
- b. there is an identifiable class;
- c. the claims raise common issues;
- d. a class proceeding would be the preferable procedure for the resolution of the common issues; and
- e. there is a representative plaintiff who (i) would fairly and adequately represent the class; (ii) has a plan which sets out a workable method for the advancement of the proceeding; and (iii) does not, on the common issues, have a conflict of interest.

[10] Except for the cause of action requirement, the plaintiff only needs to provide "some basis in fact" to satisfy these requirements. Hence, the relatively low hurdle.

² *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at paras. 14–15.

³ *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

(1) Causes of action

[11] The defendant, to its credit, directs almost all of its attention to the pleaded causes of action. The plaintiff pleads seven causes of action: breach of trust, breach of fiduciary duty, knowing assistance, knowing receipt, the disallowance of improper expenses under s 23(1) of the *Trustee Act*,⁴ prospectus misrepresentation and unjust enrichment.

[12] There is no dispute about the applicable law. The test under s. 5(1)(a) of the CPA is the same as the test on a motion to strike for no reasonable cause of action: assuming the facts pleaded to be true, is it plain and obvious that the claim has no chance of success?⁵

[13] ***The breach of trust and fiduciary duty claims.*** The first two causes of action relate to breaches of trust and fiduciary duty by TDAM as trustee and manager. They turn in large part on the language found in the Declaration of Trust (“DOT”), a standard-form document that established the Mutual Funds in question and was provided to the investors.

[14] The DOT makes clear that the TD Mutual Funds are trusts, that TDAM is the trustee and holds the Funds in trust for the benefit of the unitholders. The DOT provides that TDAM has appointed itself as manager and that TDAM as trustee will pay a management fee to itself for providing the management services. As both trustee and manager, TDAM is obliged to adhere to a prescribed standard and duty of care that includes the obligation to exercise its powers and discharge its duties “in the best interests of the Fund” and exercise the degree of care, diligence and skill that a “reasonably prudent person” would exercise in the circumstances. The DOT also provides that TDAM as trustee shall be responsible for any losses that arise out of any breaches of the prescribed standard and duty of care whether by the trustee or the manager.

[15] The defendant’s core argument is that the plaintiff as unitholder has no standing to bring this action. The defendant says there is nothing in the DOT that provides unitholders with a right of action for any of the losses allegedly sustained. The DOT states that TDAM is obliged to act in the best interests of “the Fund” - not its unitholders. Indeed, section 1.9 of the DOT specifically provides that “unitholders ... have no rights other than those rights expressly provided for herein” and here, says the defendant, no right to sue the Fund (the trust) has been expressly provided.

⁴ R.S.O. 1990, c. T.23.

⁵ *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57 at paras 99 and 105.

[16] I do not agree, at least not at this stage of the proceeding. As already noted, the defendant may well prevail on the merits when the matter is fully before the court. On this motion for certification, my only concern is whether it is plain and obvious that the pleaded causes of action have no chance of success and are doomed to fail.⁶

[17] In my view, it is not at all plain and obvious on the facts as pleaded that the plaintiff as unitholder and beneficiary has no right to sue the defendant trustee in respect of the alleged breaches of the prescribed standard and duty of care. To the contrary, the following suggests that the plaintiff may well have the right to do so:

➤ The observation of the Supreme Court of Canada in *Valard Construction*:⁷

[T]he beneficiary of a trust has a right to hold the trustee to account for its administration of the trust property *and to enforce the terms of the trust*. Absent such a right, both the trustee's obligation to act in accordance with its fiduciary duty and the terms of the trust itself would be substantially unenforceable. In effect, the trustee would hold beneficial as well as legal ownership of the trust property — which would, of course, be contrary to the division of legal and beneficial ownership upon which the trust relationship is premised.⁸ [Emphasis added.]

➤ The opinion of leading commentators on the law of trusts and investment trusts:

[T]he essence of a trust is a beneficiary's right of recourse against the trustee for proper administration, and if the beneficiary is altogether denied that recourse it is highly questionable whether the settlor has created a trust at all.⁹

To say that trustees owe a duty to the trust rather than its unitholders is to assume that somehow the trust has objectives and goals distinct from its unitholders. The trust has no separate legal existence and is merely a legal relationship among its beneficiaries (unitholders) and its trustees ...

⁶ *Ibid.*

⁷ *Valard Construction Ltd v Bird Construction Co*, 2018 SCC 8.

⁸ *Ibid.*, at para. 18.

⁹ Waters et al, *Waters' Law of Trusts in Canada*, 4th ed. (2012), at s. 18.III.

It would be peculiar, as a functional matter, to outline what amounts to fiduciary obligations in the DOT, but then not allow the parties who benefit from these duties (the unitholders) from suing to enforce them.¹⁰

- The limitation of liability provision in section 10.2 of the DOT contemplates that an action may be brought by a unitholder against, *inter alia*, the trustee or manager for breach of trust or other duties, and limits liability in this regard;
- The analogy to the rights and duties set out in s. 116 of the *Securities Act*¹¹ which deals specifically with investment fund managers and refers to the “best interests of the investment fund.” This language has been held to include an obligation to “to look to and take account of the best interests of the unitholders of that fund as a whole.”¹²

[18] In short, I am persuaded that it is at least arguable that the plaintiff/unitholder can sue the defendant for the alleged breaches of the prescribed standard and duty of care. Given the points listed above, I cannot conclude that this core claim about the plaintiff’s standing to sue has no chance of success. Further, I agree with Professors Anand and Iacobucci that the law of unit trusts and the rights of the unitholders is still developing, “is not yet settled” and “should be decided at trial [and not] on a motion to strike.”¹³

[19] Having made this core finding about the plaintiff’s standing to sue, I can quickly address the trappings of the claims alleging breach of trust and fiduciary duty, all of which are properly pleaded. The claim against TDAM as trustee and fiduciary, in my view, is solidly within the four corners of the DOT and conventional trust law. The claim

¹⁰ Anand and Iacobucci, “*The Boundaries of Corporate Law and Trust Law: An Analysis of Locking v McCowan*” (2016) 62 McGill L.J. 577 at 589 and 595.

¹¹ *Securities Act*, R.S.O. 1990, c. S.5 (“OSA”).

¹² *Re Crown Hill Capital Corp*, 2013 CarswellOnt 12163, at para 109, aff’d 2016 ONSC 3041. On appeal, the Divisional Court described as “well-grounded in the jurisprudence” the OSC Panel’s conclusion that an investment fund manager’s duties under s. 116 of the OSA require the manager to, among other things, “act with utmost good faith and in the best interests of the investment fund and put the interests of the fund and its unitholders ahead of its own”: *Pushka v. Ontario (Securities Commission)*, 2016 ONSC 3041, at para. 120. See also *1426505 Ontario Inc v. Jovian Capital Corporation*, 2019 ONSC 3799, at para 65. The duty of care under s. 116(b) of the OSA has also been held to extend to the unitholders of the funds: *Re Pro-Financial Asset Management Inc*. 2017 ONSC 9, at paras. 129-130.

¹³ Anand and Iacobucci, *supra*, note 10, at 595.

against TDAM as manager and fiduciary may arguably be less solid but I agree with the plaintiff that it is not plain and obvious that it has no chance of success.

[20] ***Knowing assistance and knowing receipt.*** The knowing assistance and knowing receipt claims, however, are plainly and obviously untenable on the facts herein and must be struck. It is true that TDAM as trustee delegated management duties to itself so that TDAM was both trustee and manager - but it is still the same entity. The allegation that TDAM as manager knowingly assisted TDAM as trustee - that is, that it knowingly assisted *itself* - to breach the prescribed standard and duty of care by making improper payments of trailing commissions to discount brokers is analytically unworkable and is doomed to fail.

[21] The same can be said about the knowing receipt claim. Here the allegation is that TDAM as manager received management fees from the Fund and then improperly paid out a portion of these fees as impugned trailing commissions to discount brokers.

[22] The defendant makes several compelling submissions as to why the knowing receipt claim has no chance of success. I agree with these submissions but it is sufficient for me to note what was said by the Supreme Court in *Gold v. Rosenberg*.¹⁴ The Supreme Court made clear that the cause of action in knowing receipt arises “because the defendant has improperly received property which belongs to the plaintiff.”¹⁵ The plaintiff’s claim in essence is, “You unjustly have my property. Give it back.”¹⁶

[23] This is not the case here and no such facts are pleaded. There is no suggestion that TDAM as manager improperly received management fees that belonged to the plaintiff/unitholder. The plaintiff’s complaint is not “You have my property; give it back” but rather, “Your payment of the trailing commissions to the discount brokers was in breach of trust and fiduciary duty and caused losses in value. Pay me these losses.”

[24] The viable claim is obviously breach of trust and fiduciary duty. The knowing assistance and knowing receipt claims are square pegs that are being forced unsuccessfully into a round hole. Both are plainly and obviously doomed to fail.

¹⁴ *Gold v. Rosenberg*, [1997] 3 S.C.R. 767.

¹⁵ *Ibid.*, at para. 49.

¹⁶ *Ibid.*

[25] **Section 23.1 of the Trustee Act.**¹⁷ Section 23.1(2) provides that this court can disallow any expenses paid by a trustee from a trust account “if it is of the opinion that the expense was not properly incurred in carrying out the trust.”

[26] This appears to be a viable claim. The submissions made by the defendant as to why this statutory provision cannot apply to the action herein are not persuasive. Provincial legislation, such as the *Trustee Act*, is not ousted by the DOT: see, for example, sections 9.1 and 2.8 of the DOT which properly provide that provincial trust laws will continue to apply. TDAM also argues that s. 23.1(2) of the *Trustee Act* only applies to applications to pass accounts. I agree with the plaintiff that no such express limitation is found in s. 23.1. Nor does it necessarily follow that any judicially disallowed expense must invariably revert to the trust. Here again, I agree with the plaintiff. There is nothing in s. 23.1 of the *Trustee Act* that limits the court’s discretion to craft a remedy in law or equity that compensates the appropriate beneficiaries if an expense is disallowed. In any event, I note that the plaintiff pleads in the alternative that if the impugned trailing commissions cannot be paid to the class member/beneficiaries that they be repaid to the TD Mutual Funds.

[27] This is, to be sure, a novel application of the s. 23.1 remedy but on the facts herein it has at least a chance of succeeding. In any event, novel issues of statutory interpretation should not be decided at the certification stage.¹⁸

[28] **Prospectus misrepresentation.** The prospectus misrepresentation claim is also a viable cause of action. Mutual funds are sold to the investing public in Canada by way of a primary market distribution pursuant to a “Simplified Prospectus.” Since 2011, the Simplified Prospectus has incorporated a Fund Facts informational document.

[29] The defendant’s Fund Facts documents have consistently stated that trailing commissions are paid for the “services and advice” provided by dealers to their clients. See, for example, the representation set out in the Fund Facts document relating to the plaintiff’s purchase of the Investor Series of the TD Dividend Growth Fund:

TDAM pays your investment firm a trailing commission for as long as you own the fund ... for the services and advice your investment firm provides to you ... The trailing commission is paid out of the management fees paid to TDAM. The rate is up to 1% of the value of

¹⁷ *Supra*, note 4.

¹⁸ *Addison Chevrolet Buick GMC Ltd v General Motors of Canada Ltd*, 2016 ONCA 324, at para. 52.

your investment each year. This equals \$10 each year for every \$1,000 invested.

[30] The plaintiff pleads that this is a material misrepresentation that provides the basis for a claim under s. 130 of the OSA. It is a misrepresentation, says the plaintiff, because it falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors when in fact trailing commissions are also paid to discount brokers even though they do not provide services or advice to their clients. The trailing commissions are paid for no purpose that benefits investors. The representation is “material,” adds the plaintiff, because the unauthorized and wasteful depletion of the mutual fund and resulting reductions in the investor’s rate of return is at least arguably “a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”.¹⁹ I accept these submissions.

[31] The defendant’s submissions that the prospectus claim is statute-barred by the applicable limitation period are best left for the next stage of this proceeding. The limitations argument does not succeed at this stage of the proceeding for at least three reasons. First, if TDAM wants to rely on a limitations defence, it must plead that defence in its statement of defence²⁰ and it has not done so. Second, a limitations defence is not a bar to certification. As the Court of Appeal concluded in *Pearson*,²¹ individual limitation defences do not “negate a finding that the case is suitable for certification”.²² Third, on the facts herein, there will be discoverability issues that should not be determined on a motion for certification. Again, the Court of Appeal: “discoverability is often an individual issue that will require individual adjudication after the common issues are determined”.²³ Hence the prevailing wisdom that “the limitations issue should not be resolved on a pleadings motion or on a motion for certification.”²⁴

¹⁹ OSA, *supra*, note 11, s. 1(1) (definition of “material fact”).

²⁰ *Clark v. Ontario (Attorney General)* 2019 ONCA 311, at para. 61. Also see *Fresco v. CIBC*, 2012 ONCA 444 at para. 108: “The issue of limitations is not an ingredient of the class members’ claims, but instead may be relied on by [the defendant] in its defence.”

²¹ *Pearson v Inco Ltd*, [2005] O.J. No. 4918 (C.A.).

²² *Ibid.*, at para 63.

²³ *Smith v Inco Ltd*, 2011 ONCA 628, at para 165.

²⁴ Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada*, (2014), at 294.

[32] In short, the prospectus misrepresentation claim is properly pleaded and is not plainly and obviously doomed to fail.

[33] **Unjust enrichment.** As was the case with the knowing assistance and knowing receipt claims, the unjust enrichment claim is untenable on the facts herein, has no chance of success and must be struck. The elements of unjust enrichment are well-established. There must be: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) no juristic reason for the enrichment.²⁵

[34] In my view, it is plain and obvious that the first two elements of unjust enrichment cannot be made out on the facts as pleaded. There is a fatal disconnect between the plaintiff's alleged loss and the defendant's alleged unjust enrichment. As the Supreme Court noted in *Moore v. Sweet*,²⁶ the plaintiff must demonstrate that the loss he incurred "corresponds to the defendant's gain...this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant."²⁷ The defendant must have been enriched "at the plaintiff's expense."²⁸ The defendant's gain and the plaintiff's loss are "essentially two sides of the same coin."²⁹

[35] The plaintiff pleads that the defendant paid the impugned trailing commissions to discount brokers. There was no "gain" by the defendant. There is no pleading that the defendant kept any portion of the trailing commissions for its own benefit and enrichment. Or that the defendant was enriched "at the plaintiff's expense."³⁰ The unjust enrichment claim has no chance of success and must be struck.

(2) Class definition

[36] The plaintiff proposes the following class definition:

All persons, wherever they may reside or be domiciled, who held or hold,
at any time prior to the conclusion of the trial of the common issues in

²⁵ *Pro-Sys Consultants*, *supra*, note 5, at para 86.

²⁶ *Moore v. Sweet*, 2018 SCC 52.

²⁷ *Ibid.*, at paras. 41 and 43.

²⁸ *Ibid.*, at para. 43.

²⁹ *Ibid.*, at para. 41.

³⁰ *Ibid.* at para. 43.

this proceeding, units of a TD Mutual Fund through a Discount Broker, except for the Excluded Persons.³¹

[37] There appears to be some basis in fact for this proposed definition. The defendant, however, levels three criticisms: a limitations argument, overbreadth and indeterminacy.

[38] The limitations argument does not succeed at this stage of the proceeding for the reasons already stated above at paragraph 31. The defendant is right that the proposed class cannot be overly broad or over-inclusive.³² Here, however, the class is limited to unitholders of TD Mutual Funds who purchased their units from discount brokers and whose investment returns were adversely affected by the defendant's payment of the impugned trailing commissions. In my view, the class definition is not overly broad. Nor is it indeterminate. The defendant maintains records of all unitholders who held its funds. The unitholders can be identified and ascertained.

[39] I am satisfied that there is some basis in fact for the proposed class definition.

(3) Proposed common issues

[40] The plaintiff proposes 19 common issues. I have attached a copy of the proposed common issues ("PCIs") in the Appendix. The PCIs that depend on the causes of action that have been struck – namely PCI 7 (knowing assistance), PCI 8 (knowing receipt) and PCIs 12, 13 and 14 (unjust enrichment) – cannot be certified.

[41] The PCIs that remain must satisfy the two-part "some basis in fact" requirement: the plaintiff must provide (i) some evidence that the PCI actually exists and (ii) some evidence that it can be decided on a class-wide basis.³³ Here the two-step requirement is easily satisfied. There is no dispute that the defendant paid trailing commissions to discount brokers impacting the plaintiff's return on investment. And, because the action is based on standard-form documents (such as the DOT and the Simplified Prospectus) that were made available on a class-wide basis, there is no issue of commonality.

³¹ Such as, for example, the defendant's officers and directors.

³² *Pearson, supra*, note 21, at para. 57.

³³ Until the one-step versus two-step issue is clarified by the Court of Appeal and ideally the Supreme Court, I will continue to use the two-step approach "out of an abundance of caution": see my explanation for taking this approach in *Kaplan v. Casino Rama*, 2019 ONSC 2025, at paras. 48 to 54.

[42] I don't understand why the plaintiff is pressing to certify PCIs 2 and 5 that ask about TDAM's liability as manager when the DOT makes plain that TDAM is responsible for all losses arising out any breach of the prescribed standard and duty of care including those caused by its manager. I question whether PCIs 2 and 5 do anything to advance the litigation. However, I will not press the point and I will certify these PCIs.

[43] Assuming liability can be established, PCIs 15 to 19 then ask about the appropriate remedies and some related matters. These are questions that have been routinely certified in many other proposed class actions and I do so here as well. PCI 17, that asks about aggregate damages, is certified because the damages in question can reasonably be determined without proof by individual class members.³⁴ As already noted, class member losses can be established through the defendant's own records.

[44] PCIs 1 to 6, 9 to 11 and 15 to 19 are certified.

(4) Preferability

[45] The preferability requirement is not seriously contested by the defendant.

[46] This action is ideally suited to proceed as a class action. The determination of the common issues would advance the litigation and class member damages can be determined on an aggregate basis. The alternative, individual lawsuits, would be unduly expensive and would probably not be pursued which would undermine the important goals of access to justice and behaviour modification.

(5) A suitable representative plaintiff

[47] The defendant's only objection under this requirement is that the plaintiff's own claim is statute-barred and thus he cannot serve as a representative plaintiff. However, the plaintiff's evidence is that there is no limitations issue - he first became aware that trailing commissions were being paid to discount brokers toward the end of 2017 and the statement of claim was issued in March 2019, within the two-year period.

[48] There is some basis in fact for a finding that the proposed representative plaintiff would fairly and adequately represent the interests of the class, has produced a workable litigation plan and has no conflicts of interest on the proposed common issues.

[49] All five certification requirements as set out in s. 5(1) of the CPA are satisfied.

³⁴ CPA, *supra*, note 3, s. 24(1)(c).

Disposition

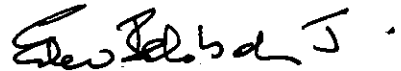
[50] The motion for certification is granted. The action is certified as a class proceeding.

[51] PCIs 1 to 6, 9 to 11 and 15 to 19 are certified as the common issues. PCIs 7 and 8, and 12 to 14 are not certified.

[52] Counsel shall prepare an order in the form contemplated by s. 8 of the CPA.

[53] If the parties cannot agree on costs, they may forward brief costs submissions to my attention – within 14 days from the plaintiff and within 14 days thereafter from the defendant.

[54] I am obliged to counsel on both sides for their assistance.



Justice Edward P. Belobaba

Date: February 27, 2020

Appendix

Proposed Common Issues

[Note: PCIs 1 to 6, 9 to 11 and 15 to 19 are certified. PCIs 7, 8, 12, 13 and 14 are not certified.]

Breach of Trust

1. Did the Defendant, as the trustee of the TD Mutual Funds, breach the Standard and Duty of Care set out in the Trust Instruments? If so, when and how?
2. Did the Defendant, as the manager of the TD Mutual Funds, breach the Standard and Duty of Care set out in the Trust Instruments? If so, when and how?
3. Is the Defendant liable to account to the Class Members?

Breach of Fiduciary Duty

4. Did the Defendant, as the trustee of the TD Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?
5. Did the Defendant, as the manager of the TD Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?
6. If the answer to the first question in (4) and/or (5) is yes, did the Defendant breach its fiduciary duty? If so, when and how?

Knowing Assistance (not certified)

7. *Did the Defendant, as the manager of the TD Mutual Funds, knowingly assist a breach of trust and/or breach of fiduciary duty by the Defendant, as the trustee of the TD Mutual Funds? If so, when and how?*

Knowing Receipt (not certified)

8. *Did the Defendant, as the manager of the TD Mutual Funds, knowingly receive trust property that was paid by the Defendant, as the trustee of the TD Mutual Funds, in breach of trust and/or breach of fiduciary duty? If so, when and how?*

Section 23.1 of the Trustee Act

9. Should the payment of the Unearned Management Fees³⁵ by the Defendant be disallowed as an expense pursuant to section 23.1 of the *Trustee Act*?

Prospectus Misrepresentation

10. Did the Fund Facts Documents, and the Simplified Prospectuses which incorporate the Fund Facts Documents, contain a misrepresentation within the meaning of the OSA (and, as applicable, the Other Canadian Securities Legislation)?
11. If the answer to (10) is yes, is the Defendant liable to the Class Members pursuant to s. 130 of the OSA (and, as applicable, the equivalent provisions of the Other Canadian Securities Legislation)?

³⁵ Unearned Management Fees are defined in the Statement of Claims to mean “trailing commissions.”

Unjust Enrichment (not certified)

12. *Has the Defendant been enriched by the receipt of the Unearned Management Fees?*
13. *If the answer to (12) is yes, have the Class Members suffered a corresponding deprivation?*
14. *If the answer to (13) is yes, is there a juristic reason for the enrichment of the Defendant?*

Remedies

15. If the Defendant is found liable on any claims asserted by the Class Members, as set out above, what remedies, including damages and/or equitable remedies, are the Class Members entitled to receive?
16. How should recoveries under each type of remedy be measured?
17. Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

Interest

18. Should the Defendant be ordered to pay an equitable rate of interest and/or pre-judgment and post-judgment interest pursuant to the *CJA*? If so, what is the appropriate measure or amount of such interest?

Administration and Distribution

19. Should the Defendant pay the costs of administering and distributing the recovery? If so, what amount should the Defendant pay?

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)	THURSDAY, THE 27 TH
)	
JUSTICE EDWARD P. BELOBABA)	DAY OF FEBRUARY, 2020
)	

B E T W E E N :

GARY STENZLER

Plaintiff

- and -

TD ASSET MANAGEMENT INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

ORDER

(CERTIFICATION)

THIS MOTION, by the Plaintiff for an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c 6 (the “CPA”) was heard on January 10, 2020 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the materials filed on this motion, the Motion Record of the Plaintiff, Responding Motion Record of the Defendant, Reply Motion Record of the Plaintiff, Supplementary Reply Motion Record of the Plaintiff, Certification Factum of the Plaintiff, Brief of Authorities of the Plaintiff, Certification Factum of the Defendant, Brief of Authorities of the Defendant, Reply Certification Factum of the Plaintiff, Reply Brief of Authorities of the Plaintiff, Brief of Documents of the Plaintiff, Brief of Documents of the Defendant, Compendium of the Plaintiff, Compendium of the Defendant, Condensed Brief of Authorities of the Defendant, and on hearing the submissions of the lawyer(s) for the Plaintiff and the Defendant:

1. **THIS COURT ORDERS** that for the purposes of this order, except to the extent that they are modified in this order, the definitions set out in the Second Fresh as Amended Statement of Claim (the “Claim”), attached hereto as **Schedule “A”**, apply to and are incorporated into this order.
2. **THIS COURT ORDERS** that the within action is certified as a class proceeding pursuant to the *CPA* as against the Defendant, subject to the provisions of this order.
3. **THIS COURT ORDERS** that the Class is defined as:
 - (a) All persons, wherever they may reside or be domiciled, who held or hold, at any time prior to the conclusion of the trial of the common issues in this proceeding, units of a TD Mutual Fund through a Discount Broker, except for the Excluded Persons.
 - (b) Excluded Persons means the Defendant; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the Defendant; and the past and present members of the independent review committee of each TD Mutual Fund.
4. **THIS COURT ORDERS** that the following issues are certified as common issues for the entire Class:

Breach of Trust

- (a) Did the Defendant, as the trustee of the TD Mutual Funds, breach the Standard and Duty of Care set out in the Trust Instruments? If so, when and how?
- (b) Did the Defendant, as the manager of the TD Mutual Funds, breach the Standard and Duty of Care set out in the Trust Instruments? If so, when and how?
- (c) Is the Defendant liable to account to the Class Members?

Breach of Fiduciary Duty

- (d) Did the Defendant, as the trustee of the TD Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?

- (e) Did the Defendant, as the manager of the TD Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?
- (f) If the answer to the first question in (d) and/or (e) is yes, did the Defendant breach its fiduciary duty? If so, when and how?

Section 23.1 of the Trustee Act

- (g) Should the payment of the Unearned Management Fees by the Defendant be disallowed as an expense pursuant to section 23.1 of the *Trustee Act*?

Prospectus Misrepresentation

- (h) Did the Fund Facts Documents, and the Simplified Prospectuses which incorporate the Fund Fact Documents, contain a misrepresentation within the meaning of the *OSA* (and, as applicable, the Other Canadian Securities Legislation)?
- (i) If the answer to (h) is yes, is the Defendant liable to the Class Members pursuant to section 130 of the *OSA* (and, as applicable, the Other Canadian Securities Legislation)?

Remedies

- (j) If the Defendant is found liable on any claims asserted by the Class Members, as set out in (a) to (i) above, what remedies, including damages and/or equitable remedies, are the Class Members entitled to receive?
- (k) How should recoveries under each type of remedy be measured?
- (l) Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

Interest

- (m) Should the Defendant be ordered to pay an equitable rate of interest and/or pre-judgment and post-judgment interest pursuant to the *CJA*? If so, what is the appropriate measure or amount of such interest?

Administration and Distribution

- (n) Should the Defendant pay the costs of administering and distributing the recovery? If so, what amount should the Defendant pay?
5. **THIS COURT ORDERS** that Gary Stenzler is appointed as the representative plaintiff for the Class.
6. **THIS COURT ORDERS** that the relief sought by the Class is as set out in the Claim.
7. **THIS COURT ORDERS** that the nature of the claims asserted on behalf of the Class are relief arising out of or under: (i) breach of trust; (ii) breach of fiduciary duty; (iii) section 23.1 of the *Trustee Act*; and (iv) section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
8. **THIS COURT ORDERS** that the Litigation Plan attached hereto as **Schedule “B”** is hereby approved.
9. **THIS COURT ORDERS** that, in respect of the relief sought in paragraphs 1(h) to (k) of the Plaintiff’s Amended Notice of Motion dated July 26, 2019, the motion is adjourned *sine die*.
10. **THIS COURT ORDERS** that the Court shall, on subsequent motion brought by the Plaintiff, approve a form of notice of certification of this action as a class proceeding (the “Notice”), the manner of dissemination of the Notice, the procedure by which Class Members may opt out of the class proceeding, and the party or parties responsible for the costs of disseminating the Notice and receiving opt outs.
11. **THIS COURT ORDERS** that the Defendant will pay \$75,000 in costs to the Plaintiff, as agreed to by the parties.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Schedule “A”



Court File No. CV-18-595380-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

GARY STENZLER

Plaintiff

- and -

TD ASSET MANAGEMENT INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**SECOND FRESH AS AMENDED
STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in this statement of claim.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$400.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by

the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date April 6, 2018

Issued by

Sylvia Slaunwhite

for N. N. Mohammad
Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, ON M5G 1E6

TO

TD Asset Management Inc.
66 Wellington Street West
TD Tower, 12th Floor
Toronto, ON M5K 1A2

CLAIM

CURRENCY AND DEFINITIONS

1. Unless otherwise stated, all dollar amounts stated herein are in Canadian dollars.
2. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following definitions apply:
 - (a) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C-43, as amended;
 - (b) “**Class**” and “**Class Members**” means all persons, wherever they may reside or be domiciled, who held or hold, at any time prior to the conclusion of the trial of the common issues in this proceeding, units of a **TD Mutual Fund** through a **Discount Broker**, except for the **Excluded Persons**;
 - (c) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
 - (d) “**CSA**” means the Canadian Securities Administrators;
 - (e) “**Current TD Managed Portfolios DOT**” means the Amended, Consolidated and Restated Declarations of Trust, dated as of November 22, 2018 (TD Managed Portfolios), as amended and supplemented from time to time;
 - (f) “**Current TD Mutual Funds DOT**” means the Amended, Consolidated and Restated Declarations of Trust, dated as of November 22, 2018 (TD Mutual Funds), as amended and supplemented from time to time;
 - (g) “**Current TD Mutual Funds Trust Indenture**” means the Amended, Consolidated and Restated Trust Indenture, dated as of July 26, 2018 (TD Mutual Funds), as amended and supplemented from time to time;
 - (h) “**Defendant**” means TD Asset Management Inc.;
 - (i) “**Discount Brokers**” means entities providing “order-execution only services” as defined in Rule 3200 of the **IIROC Rules** or entities performing a function similar to “order-execution only services” prior to the introduction of that definition in Rule 3200 of the **IIROC Rules**, including (without limitation) **TD Direct Investing**;
 - (j) “**Excluded Persons**” means the **Defendant**; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the **Defendant**; and the past and present members of the independent review committee of each **TD Mutual Fund**;

- (k) “**Form 81-101F1**” means Form 81-101F1 – *Contents of Simplified Prospectus*, as amended;
- (l) “**Form 81-101F2**” means Form 81-101F2 – *Contents of Annual Information Form*, as amended;
- (m) “**Form 81-101F3**” means Form 81-101F3 – *Contents of Fund Facts Document*, as amended;
- (n) “**Fund Facts Document**” means a fund facts document as referred to in NI 81-101 and Form 81-101F3;
- (o) “**IIROC**” means the Investment Industry Regulatory Organization of Canada;
- (p) “**IIROC Rules**” means the **IIROC** Dealer Member Rules, as amended;
- (q) “**NI 81-101**” means National Instrument 81-101 – *Mutual Fund Prospectus Disclosure*, as amended;
- (r) “**NI 81-107**” means National Instrument 81-107 – *Independent Review Committee for Investment Funds*, as amended;
- (s) “**OBCA**” means the *Business Corporations Act*, RSO 1990, c B.16, as amended;
- (t) “**OSA**” means the *Securities Act*, RSO 1990, c S.5, as amended;
- (u) “**Other Canadian Securities Legislation**” means, collectively, the *Securities Act*, RSA 2000, c S-4; the *Securities Act*, RSBC 1996, c 418; *The Securities Act*, CCSM c S50; the *Securities Act*, SNB 2004, c S-5.5; the *Securities Act*, RSNL 1990, c S-13; the *Securities Act*, SNWT 2008, c 10; the *Securities Act*, RSNS 1989, c 418; the *Securities Act*, S Nu 2008, c 12; the *Securities Act*, RSPEI 1988, c S-3.1; the *Securities Act*, RSQ, c V-1.1; *The Securities Act*, 1988, SS 1988-89, c S-42.2; and the *Securities Act*, SY 2007, c 16, all as amended;
- (v) “**Plaintiff**” means Gary Stenzler;
- (w) “**Simplified Prospectus**” means a simplified prospectus as referred to in NI 81-101 and Form 81-101F1;
- (x) “**TD Bank**” means The Toronto-Dominion Bank;
- (y) “**TD Direct Investing**” means TD Direct Investing, a division of **TD Waterhouse**, a subsidiary of **TD Bank**, or such other discount brokerage business operated by **TD Bank** from time to time;
- (z) “**TD Mutual Funds**” means all mutual fund trusts (including, without limitation, all series of units thereof) of which the **Defendant** is trustee, was trustee or may be trustee at any time prior to the conclusion of the trial of the common issues in this

proceeding (but only in respect of the period during which the **Defendant** is trustee, was trustee or may be trustee, as applicable), including, for greater certainty, (i) those mutual funds that have been or may be terminated, (ii) those mutual funds that have been or may be merged into other mutual funds, and (iii) those mutual funds that have undergone or may undergo name changes;

- (aa) “**TD Waterhouse**” means TD Waterhouse Canada Inc.;
- (bb) “**Trust Instruments**” means, collectively, all declarations of trust or similar trust instruments that govern, have governed or may govern the **TD Mutual Funds**, including, without limitation, the **Current TD Mutual Funds DOT**, the **Current TD Managed Portfolios DOT** and the **Current TD Mutual Funds Trust Indenture**;
- (cc) “*Trustee Act*” means the *Trustee Act*, RSO 1990, c T.23, as amended; and
- (dd) “**Unearned Management Fees**” means, in respect of management fees that have been paid or may be paid out of the assets of the **TD Mutual Funds**, the portion of those management fees that has been paid or may be paid to **Discount Brokers** as trailing commissions, and any taxes relating to those trailing commissions.

RELIEF SOUGHT

- 3. The Plaintiff claims on his own behalf and on behalf of the other Class Members:
 - (a) an order certifying this action as a class proceeding pursuant to the *CPA* and appointing the Plaintiff as the representative plaintiff for the Class;
 - (b) a declaration that the Defendant committed breaches of trust and breached its fiduciary duty to the Plaintiff and the other Class Members by the acts and omissions pleaded herein;
 - (c) a declaration that the Defendant is liable to the Plaintiff and the other Class Members for knowing assistance and knowing receipt;
 - (d) a declaration that the Defendant made one or more misrepresentations within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation), and that the Defendant is liable to the Plaintiff and the other Class Members

pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation);

- (e) a declaration that the Defendant was unjustly enriched by the acts and omissions pleaded herein;
- (f) an order requiring the Defendant to account to the Plaintiff and the other Class Members for the Unearned Management Fees;
- (g) damages and/or equitable compensation in the sum of \$200 million (or such other sum as this Court finds appropriate at the trial of the common issues or at a reference or references) to restore the Plaintiff and the other Class Members to the position they would have been in had the Unearned Management Fees not been paid;
- (h) if necessary, an order compelling the Defendant to compensate the Plaintiff and the other Class Members in respect of the Unearned Management Fees by means of litigation trusts to be established pursuant to the *CPA*;
- (i) an order disallowing the payment of the Unearned Management Fees as expenses pursuant to section 23.1 of the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation) and requiring the Defendant to repay the expenses to the Plaintiff and the other Class Members or to the TD Mutual Funds;
- (j) an interim and permanent order prohibiting the Defendant from seeking or obtaining indemnity or reimbursement from the assets of the TD Mutual Funds in respect of monetary relief paid or payable to the Plaintiff and the other Class Members in this action or its costs and expenses of this action;

- (k) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (l) an equitable rate of interest on all sums found due and owing to the Plaintiff and the other Class Members to compensate them for the diminution in the value of their units of the TD Mutual Funds resulting from the payment of the Unearned Management Fees;
- (m) pre-judgment and post-judgment interest pursuant to the *CJA*;
- (n) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;
- (o) pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes; and
- (p) such further and other relief as this Honourable Court may deem just.

OVERVIEW

- 4. This class proceeding arises out of the payment of excessive, inflated and/or unearned management fees to the Defendant in respect of the TD Mutual Funds. The management fees are excessive, inflated and/or unearned because unearned trailing commissions are included in, or embedded into, those management fees.
- 5. The Defendant is the trustee and manager of the TD Mutual Funds.
- 6. The Class Members are persons who hold or held units of a TD Mutual Fund through a Discount Broker, as distinct from other distribution channels through which TD Mutual Funds are sold to investors. Discount Brokers are also commonly referred to as “order-

execution only”, “DIY” and “online” brokers. Under the IROC Rules, Discount Brokers are prohibited from providing investment advice to investors.

7. The TD Mutual Funds are trusts governed by the Trust Instruments. The assets of the TD Mutual Funds are trust property that the Defendant, as trustee and a fiduciary, has undertaken to hold for the exclusive benefit of the beneficiaries, being the Class Members and the other unitholders of the TD Mutual Funds. The Defendant has a duty to preserve the trust property and maximize the value of units of the TD Mutual Funds.
8. The Defendant receives management fees out of the assets of the TD Mutual Funds. The management fees are excessive, inflated and/or unearned because a portion — described herein as the Unearned Management Fees — is collected by the Defendant for the purpose of paying trailing commissions to Discount Brokers. The Defendant has paid, and continues to pay, trailing commissions to Discount Brokers through which the Class Members held or hold the TD Mutual Funds.
9. The purpose of a trailing commission on a mutual fund is to compensate the dealer (through whom the mutual fund is sold) for providing its client with ongoing investment advice about the client’s investment in the mutual fund in respect of which the trailing commission is paid. As Discount Brokers do not and cannot provide investment advice to investors, the payment of trailing commissions to Discount Brokers in respect of the TD Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
10. Since 2011, the Fund Facts Documents that the Defendant has prepared and filed with securities regulators to permit the sale of units of the TD Mutual Funds have stated that

trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients.

11. The term “services and advice” refers to a dealer providing ongoing advice to a client with respect to the client’s investment in the TD Mutual Fund in respect of which the trailing commission is paid, and services that are specifically connected with that advice, namely determining the suitability for the client of the investment in that TD Mutual Fund and the client’s other investment holdings in light of the personal circumstances of the client. However, Discount Brokers do not and cannot provide investment advice to clients and they do not provide suitability determinations for their clients. Accordingly, the payment of trailing commissions to Discount Brokers in respect of the TD Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
12. Further or in the alternative, the Defendant has failed to ascertain the type and value of any other services purportedly provided by Discount Brokers to the Class Members to ensure that the assets of the TD Mutual Funds are being applied for proper purposes and in a reasonable amount. In fact, Discount Brokers do not provide Class Members with any other services that are specific to the TD Mutual Funds in respect of which the trailing commissions are paid and that are provided on an ongoing basis. Accordingly, the payment of trailing commissions to Discount Brokers on account of any other services is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.

13. In any event, based on the Defendant's own characterization of the purpose of trailing commissions as being for "services and advice", the full amount of the trailing commissions paid to Discount Brokers is improper, unreasonable and unjustified because the Discount Brokers have not provided "services and advice" to the Class Members. Based on the Defendant's characterization, both services and advice must be provided in consideration for the payment of trailing commissions to Discount Brokers. Discount Brokers do not and cannot provide advice to investors. Accordingly, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
14. The Unearned Management Fees represent significant sums of money and are paid by and to the Defendant on a continuous basis. The wasting of the assets of the TD Mutual Funds by the payment of the Unearned Management Fees has unjustly enriched the Defendant and damaged the value of the units of the TD Mutual Funds held by the Class Members. The Class Members have suffered, and continue to suffer, significant loss and damage as a result of the Defendant's acts and omissions pleaded herein.

THE PARTIES

The Plaintiff

15. The Plaintiff is an individual residing in Richmond Hill, Ontario.

16. The Plaintiff held units of certain series of certain TD Mutual Funds through TD Direct Investing, a Discount Broker, as follows:

- (a) in a joint RESP account with his spouse, the Plaintiff held:
 - (i) units of TD Diversified Monthly Income Fund – Investor Series (TDB159) (previously called TD Monthly High Income Fund and, prior to that, TD Balanced Fund) from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013;
 - (ii) units of TD Canadian Money Market Fund – Investor Series (TDB164) at times from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013;
 - (iii) units of TD Canadian Index Fund – Investor Series (TDB216) from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013;
 - (iv) units of TD North American Dividend Fund – Investor Series (TDB619) (previously called TD U.S. Equity Fund) from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013;
 - (v) units of TD Canadian Small-Cap Equity Fund – Investor Series (TDB628) (previously called TD Special Equity Fund) from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013;

- (vi) units of TD Emerging Markets Fund – Investor Series (TDB638) from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2013 and January 31, 2015;
 - (vii) units of TD Resource Fund – Investor Series (TDB644) from on or around January 26, 2006 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013;
 - (viii) units of Epoch European Equity Fund – Investor Series (TDB649) (previously called TD European Growth Fund) from on or around December 16, 2005 until they were finally disposed of sometime between January 31, 2011 and January 31, 2013; and
 - (ix) units of TD Dividend Growth Fund – Investor Series (TDB972) from sometime prior to January 31, 2011 until they were finally disposed of sometime between January 31, 2013 and January 31, 2015;
- (b) in an individual RRSP account, the Plaintiff held units of TD Dividend Growth Fund – Investor Series (TDB972) from sometime prior to March 31, 2011 until they were finally disposed of on or around December 5, 2017; and
- (c) in an individual TFSA account, the Plaintiff held units of TD Dividend Growth Fund – Investor Series (TDB972) from sometime prior to February 28, 2011 until they were finally disposed of sometime between January 31, 2013 and January 31, 2015.

The Class

17. The proposed Class on whose behalf this proceeding is brought is comprised of all persons, wherever they may reside or be domiciled, who held or hold, at any time prior to the conclusion of the trial of the common issues in this proceeding, units of a TD Mutual Fund through a Discount Broker, except for the Excluded Persons.

The Defendant

18. The Defendant is a corporation incorporated under the *OBCA*.
19. The Defendant's registered office and headquarters are, and were at all material times, located in Toronto, Ontario.
20. The Defendant is, and was at all material times, the trustee and manager of the TD Mutual Funds.
21. The Defendant is a wholly-owned subsidiary of TD Bank.
22. The Defendant is, and was at all material times, an "investment fund manager" as defined in the *OSA*. As an investment fund manager, the Defendant is, and was at all material times, subject to the duty under section 116 of the *OSA* and/or section 2.1 of NI 81-107 to (a) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the TD Mutual Funds, and (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

THE TD MUTUAL FUNDS

23. Each of the TD Mutual Funds is or was a trust governed by the terms of one of the Trust Instruments.

24. Each of the TD Mutual Funds is or was an “investment fund” and a “mutual fund” as those terms are defined in the *OSA*.
25. Each of the TD Mutual Funds is or was a reporting issuer in Ontario and in all other provinces of Canada.
26. To the best of the Plaintiff’s knowledge, the current TD Mutual Funds are listed in **Schedule “A”** hereto.

THE TRUST INSTRUMENTS

27. The TD Mutual Funds are presently governed by the Current TD Managed Portfolios DOT, the Current TD Mutual Funds DOT and the Current TD Mutual Funds Trust Indenture.
28. Under each of the Trust Instruments, the Defendant holds all property of each TD Mutual Fund in trust for the benefit of the unitholders of the TD Mutual Fund.
29. The Class Members are or were unitholders of the TD Mutual Funds.
30. The Trust Instruments are materially identical.
31. Pursuant to section 9.2 of the Current TD Mutual Funds DOT, section 9.02 of the Current TD Managed Portfolios DOT and section 7.1(b) of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times), the Defendant, as trustee of the TD Mutual Funds, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each TD Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

32. Pursuant to section 9.3 of the Current TD Mutual Funds DOT, section 9.03 of the Current TD Managed Portfolios DOT and section 7.2 of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times), the Defendant, as manager of the TD Mutual Funds, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each TD Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Further, under those same provisions, the Defendant, as trustee of the TD Mutual Funds, is and was at all material times responsible for any loss that arises out of the failure by the Defendant to discharge its responsibilities as manager honestly, in good faith and in the best interests of each TD Mutual Fund or to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.
33. Section 11.1 of the Current TD Mutual Funds DOT, section 11.01 of the Current TD Managed Portfolios DOT and section 9.1 of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times) state that the Defendant, as trustee, can or does delegate full responsibility for providing management services to the TD Mutual Funds to itself, as manager. The Defendant, as trustee, did delegate responsibility for providing management services to itself at all material times.
34. Pursuant to section 9.1(d)(ii) of the Current TD Mutual Funds DOT, section 9.01(d)(i) of the Current TD Managed Portfolios DOT and section 7.1(c)(ii) of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable

to the TD Mutual Funds at material times), any remuneration paid by the Defendant, as trustee, for services performed for the TD Mutual Funds must be “reasonable remuneration”.

35. Pursuant to section 13.1 of the Current TD Mutual Funds DOT, section 13.01 of the Current TD Managed Portfolios DOT and section 7.6(a) of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times), the Defendant, as trustee, pays itself, as manager, a fee for management services provided to the TD Mutual Funds. The Defendant receives management fees out of the assets of the TD Mutual Funds. The management fees are calculated as a percentage of the net asset value of each series of each TD Mutual Fund (which management fees are calculated and accrued daily and paid monthly).
36. Prior to an amendment on July 25, 2017 of a predecessor Trust Instrument of the Current TD Mutual Funds DOT, an amendment on October 26, 2017 of a predecessor Trust Instrument of the Current TD Managed Portfolios DOT and an amendment on July 27, 2017 of a predecessor Trust Instrument of the Current TD Mutual Funds Trust Indenture, the Trust Instruments set out maximum management fees, stated as being “up to” a specified percentage of the net asset value of each series of each TD Mutual Fund.
37. Section 6.1(e) of the Current TD Mutual Funds DOT, section 6.01(d) of the Current TD Managed Portfolios DOT and section 5.1(e) of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times) provide for the Defendant to accept a lower management fee with respect to units of a series of a TD Mutual Fund held by a unitholder, and the

amount of any reduction in the management fee must be distributed to the unitholder as a “management fee distribution”.

38. As stated in Simplified Prospectuses and Fund Facts Documents issued by the Defendant to permit the offering of units of the TD Mutual Funds, the Defendant, as manager of the TD Mutual Funds, may waive a portion or all of its management fees in respect of the TD Mutual Funds. The Defendant did waive a portion of its management fees in respect of certain TD Mutual Funds during the material time.
39. The payment of management fees to the Defendant out of the assets of the TD Mutual Funds reduces the net asset value of the TD Mutual Funds, which in turn reduces the value of unitholders’ units of the TD Mutual Funds. As stated in one or more of the Simplified Prospectuses disseminated by the Defendant in respect of the TD Mutual Funds, management fees are among the fees and expenses that are paid by such TD Mutual Funds, “which will reduce the value of your [the investor’s] investment in the Fund.” Similarly, as stated in one or more Fund Facts Documents disseminated by the Defendant in respect of the TD Mutual Funds, management fees “affect you [the investor] because they reduce the fund’s returns.”
40. Pursuant to sections 3.1 and 3.8 of the Current TD Mutual Funds DOT, sections 3.01 and 3.08 of the Current TD Managed Portfolios DOT and sections 3.1 and 3.8 of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times), the Defendant can redesignate or convert units of one series of a TD Mutual Fund into units of another series of the same TD Mutual Fund.

41. Pursuant to section 3.1 of the Current TD Mutual Funds DOT, section 3.01 of the Current TD Managed Portfolios DOT and section 3.1 of the Current TD Mutual Funds Trust Indenture (and the equivalent provisions of other Trust Instruments applicable to the TD Mutual Funds at material times), the Defendant can create additional series of units of the TD Mutual Funds.

TRAILING COMMISSIONS AND DISCOUNT BROKERS

42. The Defendant has paid and continues to pay a portion of the management fees that it receives out of the assets of the TD Mutual Funds to dealers, including Discount Brokers, as trailing commissions. The quantum of the trailing commission payable to a dealer is determined as a percentage of the value of the units of the TD Mutual Funds held by the dealer's clients (which trailing commission is calculated and accrued daily and paid to the dealer no less frequently than quarterly).
43. The payment of management fees, within which the trailing commissions payable to Discount Brokers are embedded, depletes the assets of the TD Mutual Funds and reduces the value of the Class Members' units of those TD Mutual Funds and thereby diminishes their return on investment in the TD Mutual Funds.
44. Among other dealers, the TD Mutual Funds are sold through Discount Brokers. Discount Brokers are entities that provide order execution only services to investors. They are regulated by IIROC as "Dealer Members". Under the IIROC Rules, Discount Brokers apply to IIROC for approval to offer an "order-execution only service", which is defined as "the acceptance and execution of orders from customers for trades that the Dealer Member has not recommended and for which the Dealer Member takes no responsibility as to the appropriateness or suitability of orders accepted or account positions held." Such

approval provides Discount Brokers with an exemption from compliance with IIROC Rules that impose requirements to assess the suitability of a client's orders and account positions. Accordingly, as a condition of the approval provided by IIROC to Discount Brokers to operate their discount brokerage businesses, Discount Brokers are prohibited from providing investment recommendations or advice to clients.

45. One of the Discount Brokers through which TD Mutual Funds are sold is TD Direct Investing, which is a division of TD Waterhouse. The Defendant and TD Waterhouse are both wholly-owned subsidiaries of TD Bank, and are affiliates of each other. Some of the Unearned Management Fees have been paid to TD Direct Investing, which is to the ultimate benefit of the Defendant's parent, TD Bank.
46. The purpose of a trailing commission on a mutual fund is to compensate the dealer (through whom the mutual fund is sold) for providing its client with ongoing investment advice about the client's investment in the mutual fund in respect of which the trailing commission is paid. As Discount Brokers do not and cannot provide investment advice to investors, the payment of trailing commissions to Discount Brokers in respect of the TD Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
47. Since 2011, the Fund Facts Documents that the Defendant has prepared and filed with securities regulators to permit the sale of units of the TD Mutual Funds have stated that trailing commissions are paid to dealers for the "services and advice" provided by those dealers to their clients.

48. The term “services and advice” refers to a dealer providing ongoing advice to a client with respect to the client’s investment in the TD Mutual Fund in respect of which the trailing commission is paid, and services that are specifically connected with that advice, namely determining the suitability for the client of the investment in that TD Mutual Fund and the client’s other investment holdings in light of the personal circumstances of the client. However, Discount Brokers do not and cannot provide investment advice to clients and they do not provide suitability determinations for their clients. Accordingly, the payment of trailing commissions to Discount Brokers in respect of the TD Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
49. Further or in the alternative, the Defendant has failed to ascertain the type and value of any other services purportedly provided by Discount Brokers to the Class Members to ensure that the assets of the TD Mutual Funds are being applied for proper purposes and in a reasonable amount. In fact, Discount Brokers do not provide Class Members with any other services that are specific to the TD Mutual Funds in respect of which the trailing commissions are paid and that are provided on an ongoing basis. Accordingly, the payment of trailing commissions to Discount Brokers on account of any other services is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
50. In any event, based on the Defendant’s own characterization of the purpose of trailing commissions as being for “services and advice”, the full amount of the trailing

commissions paid to Discount Brokers is improper, unreasonable and unjustified because the Discount Brokers have not provided “services and advice” to the Class Members. Based on the Defendant’s characterization, both services and advice must be provided in consideration for the payment of trailing commissions to Discount Brokers. Discount Brokers do not and cannot provide advice to investors. Accordingly, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.

51. The Defendant knew, or ought to have known, that the Unearned Management Fees were being paid to Discount Brokers as trailing commissions, thereby reducing the value of the Class Members’ units, in circumstances where those trailing commissions were not earned by the Discount Brokers because they are not providing services and advice to the Class Members.
52. The Simplified Prospectuses and Fund Facts Documents issued by the Defendant to permit the offering of units of the TD Mutual Funds set out the *maximum* annual percentage rates for trailing commissions payable in respect of the TD Mutual Funds. Prior to amendments made in 2017, the Simplified Prospectuses for the TD Mutual Funds set out the *maximum* annual percentage rates for management fees payable in respect of the TD Mutual Funds. Class Members are entitled to expect that the Defendant will comply with its duties to the Class Members and will not pay the maximum rate of trailing commission both to dealers that provide full advisory services to their clients and to Discount Brokers who provide no services or advice to their clients. Yet, the trailing commissions paid by the Class Members on each series of the TD Mutual Funds are identical to the trailing commissions paid on

those same series by investors who hold their TD Mutual Funds through a full-service account.

53. The Defendant never disclosed to the Plaintiff the dollar amount of the trailing commissions paid to the Plaintiff's Discount Broker in respect of the units of TD Mutual Funds held by the Plaintiff.
54. The Defendant continues the practice of paying trailing commissions to Discount Brokers in respect of the TD Mutual Funds despite criticism of the practice. On January 10, 2017, the CSA released CSA Consultation Paper 81-408 – *Consultation on the Option of Discontinuing Embedded Commissions*, which addresses issues relating to mutual fund fees, including the payment of trailing commissions to dealers. In relation to the Canadian mutual fund industry generally, CSA Consultation Paper 81-408 states that, as at December 2015, “data suggests that \$25 billion of the total \$30 billion held in mutual funds in the [discount broker] channel (83%) remains in the full trailing commission paying fund series”. It concludes that “[t]he majority of DIY investors investing in mutual funds pay full trailing commission despite not receiving advice” and “many DIY mutual fund investors in the online/discount brokerage channel indirectly pay for services they do not receive.”
55. In a press release issued on May 8, 2017 entitled “Limit Series A Sales to Channels that Permit Advice: IFIC”, the Investment Funds Institute of Canada, which styles itself as the “voice of Canada’s investment funds industry”, called on regulators to ensure that mutual

funds that carry a trailing commission are not sold through the Discount Broker channel.

The press release stated that:

The Investment Funds Institute of Canada (IFIC) is calling on regulators to establish rules to ensure that mutual funds carrying an embedded advisor fee are sold only in channels where advice is permitted.

“Investors who buy funds directly, for example through a discount broker, should be confident that they are not inadvertently overpaying by selecting a series that includes fees for services that are not available through that platform,” says Paul C. Bourque, Q.C., IFIC’s president and CEO.

Series A mutual funds bundle an advice fee within the product. Most companies already provide other series of funds with no or nominal trailer fees that investors can purchase if they are do-it-yourself investors or want to pay for advice separately. The industry’s proposal would advance the goal of ensuring that low-trailer or no-trailer funds are available to these types of investors in a more uniform and transparent way.

“IFIC members believe that consumers should be able to choose for themselves the products, services and payment methods that best meet their needs and preferences,” Bourque stated. “Today’s proposal would help to achieve a goal that the industry shares with our regulators: to ensure that fees are aligned with the services that investors receive. It reflects the industry’s commitment to provide Canadian consumers with real and meaningful investment choices.”

56. On April 9, 2018, IIROC released its final guidance regarding order-execution only services offered by Discount Brokers. In Notice of Implementation 18-0075 dated April 9, 2018, IIROC stated that Discount Brokers face a conflict of interest by making available on their platforms mutual funds that pay a trailing commission for ongoing advice (*e.g.* Series A mutual funds). The Notice of Implementation stated:

We acknowledge that funds that pay an ongoing trailing commission to registrants (often described as a payment for advice and services provided to the investor by the registrant), and are made available by OEO firms (*e.g.*, a Series A fund), raise a conflict of interest. Under our rules, a Dealer Member must address conflicts of interest considering the best interests of the client or clients.

In the Guidance, we indicate that OEO firms should consider how they will address any compensation-related conflicts when deciding which series (or series equivalent in the case of a PTF) of a fund to make (or not make) available on their platforms. We recognize that many OEO firms have already implemented practices to address this conflict.

We expect that OEO firms will make available, whenever possible, funds that do not pay a trailing commission for ongoing advice (often referred to as a Series D fund).

When a Series D fund is not available (e.g., because a fund family does not offer that type of series) and an OEO firm makes available another series that pays a trailing commission, we also expect the firm to address the conflict by rebating to the client the portion of the trailing commission for ongoing advice, or taking other similar steps.

A large majority of the publically available funds include a trailing commission. Management of the conflicts of interest relating to trailing commissions by OEO firms allows investors continued access to the widest possible range of investments.

57. On June 21, 2018, the CSA released CSA Staff Notice 81-330 – *Status Report on Consultation on Embedded Commissions and Next Steps*, in which the CSA announced its intention to publish rule changes that will prohibit the payment of trailing commissions to, and the solicitation and acceptance of trailing commissions by, dealers who do not make a suitability determination (e.g. Discount Brokers) in connection with the distribution of prospectus qualified mutual fund securities. The CSA stated in CSA Staff Notice 81-330 that:

In our view, the fees paid by a vast majority of DIY investors in this channel [*i.e.* the discount brokerage channel] do not appear to align with the execution-only nature of the services they receive. We also observe no justifiable rationale for the practice of paying discount brokerage dealers an ongoing trailing commission for the sale of a mutual fund. For example, other securities including most ETFs are commonly purchased and sold by way of an upfront transaction fee. This ongoing payment may therefore be viewed as one that incentivizes the distribution of mutual funds that pay such an ongoing fee over those that do not (*i.e.* a payment for shelf space), giving rise to a conflict of interest. This is especially the case when the discount brokerage receives the same trailing commission as that of full-service dealers (which rate is typically intended to compensate full service dealers for the costs associated with providing investment advice). Moreover, in our view this fee also limits investor awareness and understanding of the fees associated with the purchase of such products in the discount brokerage channel.

58. Further to the announcement by the CSA on June 21, 2018, on September 13, 2018 the CSA published proposed amendments to securities regulatory instruments that will, when the amendments come into force, prohibit the payment of trailing commissions by fund organizations (which includes mutual fund managers) to dealers who do not make a suitability determination, such as order-execution-only dealers (*i.e.* Discount Brokers). The proposed amendments will prohibit the payment of mutual fund trailing commissions

to Discount Brokers in any amount. The CSA stated that fund organizations will need to make available to Discount Brokers a class or series of securities of a mutual fund that does not pay a trailing commission, which will result in a corresponding reduction in the rate of the management fee charged on that class or series. Existing holdings of mutual funds will also need to be switched to the class or series of securities of the mutual fund that does not pay a trailing commission. The CSA also commented that the prohibition on the payment of trailing commissions by fund organizations to Discount Brokers will eliminate “a longstanding conflict between IFMs [investment fund managers] (who have been reluctant to offer non trailing commission-paying fund series in this channel), online/discount brokerages (who have been satisfied to accept full trailing commission-paying funds), and DIY investors.”

59. As alluded to in the above-noted press release of the Investment Funds Institute of Canada, some mutual fund families offer a series of their funds, typically called Series D, that is sold only through Discount Brokers. Series D (or similar discount series) pay a lower management fee than traditional retail series (*e.g.* Series A or Investor Series) because they include a reduced trailing commission to partially reflect the fact that “services and advice” are not being provided to investors through a Discount Broker.
60. While the Defendant currently offers Series D units for some of the TD Mutual Funds, it has not made Series D units available for all of the TD Mutual Funds. Further, even for the TD Mutual Funds that have been made available at some stage in Series D, other series of those TD Mutual Funds that carry a higher trailing commission have been held, and continue to be held, by Class Members through Discount Brokers. When the Defendant

introduced Series D units of certain TD Mutual Funds, it failed to advise, permit and/or cause the Class Members to switch their existing units into Series D units.

61. In any event, the payment of any trailing commissions to Discount Brokers in respect of the TD Mutual Funds, including on Series D units of the TD Mutual Funds, was in breach of the Defendant's duties to the Class Members, as pleaded herein.

RIGHTS OF ACTION

Breach of Trust

62. Under the Trust Instruments governing the TD Mutual Funds, the Defendant, as trustee of the TD Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.
63. The Defendant's duty, as trustee, under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.
64. Alternatively, the Defendant's duty, as trustee, under the Trust Instruments includes a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is

enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

65. Alternatively, the Defendant's duty, as trustee, under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. The TD Mutual Funds are trust relationships between the Defendant and the unitholders in respect of property held for the benefit of the unitholders. Any breach of the duty to the TD Mutual Funds causes direct loss and damage to the Class Members and the other unitholders of the TD Mutual Funds. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.
66. Under the Trust Instruments governing the TD Mutual Funds, the Defendant, as manager of the TD Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. The Trust Instruments make the Defendant, as trustee, responsible for any loss that arises out of the failure of the Defendant, as manager, to act in accordance with that standard.
67. The Defendant's duty, as manager, under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members against the Defendant as trustee.

68. Alternatively, the Defendant's duty, as manager, under the Trust Instruments includes a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members against the Defendant as trustee.
69. Alternatively, the Defendant's duty, as manager, under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the TD Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. The TD Mutual Funds are trust relationships between the Defendant and the unitholders in respect of property held for the benefit of the unitholders. Any breach of the duty to the TD Mutual Funds causes direct loss and damage to the Class Members and the other unitholders of the TD Mutual Funds. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members against the Defendant as trustee.
70. By its acts and omissions, the Defendant, as trustee, has breached its duty under the Trust Instruments and committed a breach of trust. The Defendant, as manager, has also breached its duty under the Trust Instruments and the Defendant, as trustee, is liable for the loss to the Class Members arising out of that breach. The Defendant's breaches of duty and breaches of trust include (without limitation):
- (a) paying and/or receiving the Unearned Management Fees out of the assets of the TD Mutual Funds;

- (b) without limiting the generality of paragraph 70(a), where the Trust Instruments provided for maximum management fee percentage rates, electing to pay and/or receive the Unearned Management Fees;
- (c) failing to preserve the property of the TD Mutual Funds;
- (d) failing to maximize the value of the units of the TD Mutual Funds;
- (e) paying the Unearned Management Fees to the Discount Brokers for no purpose;
- (f) failing to ascertain the nature of any services being provided by Discount Brokers to the Class Members and to ascribe a reasonable value to those services, to ensure that the assets of the TD Mutual Funds are being used for proper purposes and in a reasonable amount;
- (g) permitting series of units of the TD Mutual Funds carrying a trailing commission to be acquired and/or held through Discount Brokers;
- (h) failing to create and make available to Class Members through Discount Brokers a series of units of the TD Mutual Funds that carries no trailing commission;
- (i) failing to advise, permit and/or cause Class Members to redesignate, reclassify or convert their units of the TD Mutual Funds into a series of units that carries no trailing commission;
- (j) in the alternative to paragraphs 70(g) to 70(i):
 - (i) permitting non-Series D (or similar discount series) units of the TD Mutual Funds to be acquired and/or held through Discount Brokers;

- (ii) failing to create and make available to Class Members through Discount Brokers Series D (or similar discount series) units of the TD Mutual Funds;
- (iii) failing to advise, permit and/or cause Class Members to redesignate, reclassify or convert their non-Series D units of the TD Mutual Funds into Series D (or similar discount series) units of the TD Mutual Funds;
- (k) acting in a conflict of interest by simultaneously acting as both the trustee and the manager of the TD Mutual Funds, and thus paying the Unearned Management Fees to itself and negotiating the management fees with itself;
- (l) acting in a conflict of interest by paying trailing commissions to Discount Brokers to provide a pecuniary incentive for the Discount Brokers to sell units of the TD Mutual Funds and thereby increase the Defendant's management fees;
- (m) acting in a conflict of interest by failing to make available to Class Members holding TD Mutual Funds through Discount Brokers a series of units of the TD Mutual Funds that pays no trailing commission, or alternatively a reduced trailing commission, because of a concern that it would adversely affect the distribution of TD Mutual Funds through the full-service or advisory distribution channels and thereby reduce the Defendant's management fees;
- (n) acting in a conflict of interest by receiving a portion of the Unearned Management Fees for the purpose of paying such amount to TD Direct Investing, for the ultimate benefit of the Defendant's parent, TD Bank, when such amount could have been retained in the TD Mutual Funds for the benefit of Class Members;

- (o) failing to pay and/or accept a management fee reduced by the amount of the Unearned Management Fees and distributing (rebating) that amount to the Class Members as a “management fee distribution”;
- (p) failing to waive payment of the Unearned Management Fees; and
- (q) the Defendant, as trustee of the TD Mutual Funds, failing to adequately supervise the Defendant, as manager of the TD Mutual Funds, and failing to prevent and/or rectify the misconduct of the Defendant, as manager of the TD Mutual Funds, as particularized herein, in breach of the manager’s standard of care set out in the Trust Instruments and section 116 of the *OSA* and/or section 2.1 of NI 81-107.

71. The TD Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant’s breach of trust as particularized herein.

Breach of Fiduciary Duty

72. As trustee of each of the TD Mutual Funds, the Defendant is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members.
73. As manager of the TD Mutual Funds, the Defendant is, and was at all material times, a trustee *de son tort* of the TD Mutual Funds. Pursuant to the Trust Instruments, the Defendant at all material times undertook responsibility for the administration of the day-to-day business and affairs of each TD Mutual Fund. To carry out that responsibility as manager, the Defendant has possession or control of the property of the TD Mutual Funds and administers that property. As trustee *de son tort* of each of the TD Mutual Funds, the Defendant is, and was at all material times, in a fiduciary relationship with the Class

Members and owes, or owed at the material times, fiduciary duties to the Class Members. As a trustee *de son tort* of the TD Mutual Funds, the Defendant also has or had an obligation to abide by the duties and obligations of the trustee set out in the Trust Instruments.

74. Further or in the alternative, as manager of each of the TD Mutual Funds, the Defendant has significant discretion, power or control in relation to the business and affairs of the TD Mutual Funds and the assets of the TD Mutual Funds. The Defendant, as manager of the TD Mutual Funds, can unilaterally exercise that discretion, power or control so as to affect the Class Members' legal or substantial practical interests, including the Class Members' financial interests arising from their ownership of units of the TD Mutual Funds, the value of which are tied to the value of the assets of the TD Mutual Funds. The Class Members are peculiarly vulnerable to the Defendant holding that discretion, power or control as manager of the TD Mutual Funds. The Defendant, as manager of the TD Mutual Funds, has expressly or impliedly undertaken to act in the best interests of the Class Members, including by virtue of the standard of care imposed on the Defendant under the Trust Instruments and under section 116 of the *OSA* and/or section 2.1 of NI 81-107. Accordingly, as manager of each of the TD Mutual Funds, the Defendant is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members.
75. By its acts and omissions, including (without limitation) the acts and omissions set out in paragraph 70 hereof, the Defendant breached its fiduciary duty to the Class Members.
76. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's breach of fiduciary duty as particularized herein.

Knowing Assistance

77. The Defendant, as manager of the TD Mutual Funds, has knowingly assisted the Defendant, as trustee of the TD Mutual Funds, in its breach of trust and breach of fiduciary duty, as particularized herein.
78. The Defendant, as trustee of the TD Mutual Funds, is and was in a trust and fiduciary relationship with the Class Members.
79. The breach of trust and breach of fiduciary duty by the Defendant, as trustee of the TD Mutual Funds, as particularized herein, was fraudulent and dishonest. By paying the Unearned Management Fees out of the assets of the TD Mutual Funds when it knew that the Unearned Management Fees would be disbursed to the Discount Brokers for no purpose, the Defendant, as trustee of the TD Mutual Funds, has taken a risk with the assets of the TD Mutual Funds that the Defendant knows it has no right to take, to the prejudice of the Class Members.
80. As the same entity is both the trustee and the manager of the TD Mutual Funds, the Defendant, as manager of the TD Mutual Funds, has and had actual knowledge of, or is and was reckless or wilfully blind to, the existence of the trust and fiduciary relationship and the fraudulent and dishonest breach of trust and breach of fiduciary duty by the Defendant, as trustee of the TD Mutual Funds.
81. The Defendant, as manager of the TD Mutual Funds, has participated in or assisted the fraudulent and dishonest breach of trust and breach of fiduciary duty by the Defendant, as trustee of the TD Mutual Funds, by receiving the Unearned Management Fees and

disbursing them to the Discount Brokers and by its other acts and omissions set out in paragraph 70 hereof.

82. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's knowing assistance.

Knowing Receipt

83. The Defendant, as manager of the TD Mutual Funds, received the Unearned Management Fees out of the assets of the TD Mutual Funds that were held in trust for the Class Members.
84. The Defendant, as manager of the TD Mutual Funds, received the Unearned Management Fees in its personal capacity as manager of the TD Mutual Funds. Pursuant to the Trust Instruments, management fees are payable to the Defendant in its capacity as manager of the TD Mutual Funds.
85. The Defendant, as trustee of the TD Mutual Funds, paid the Unearned Management Fees out of the assets of the TD Mutual Funds in breach of trust and breach of fiduciary duty, as particularized herein.
86. As the same entity is both the trustee and the manager of the TD Mutual Funds, the Defendant, as manager of the TD Mutual Funds, had actual knowledge of, or was reckless or wilfully blind to, or was careless as to, or was reasonably put on notice or inquiry as to, the breach of trust and breach of fiduciary duty by the Defendant, as trustee of the TD Mutual Funds.
87. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's knowing receipt.

Disallowance of Improper Expenses Under Section 23.1 of the Trustee Act

88. The Unearned Management Fees are expenses paid by the Defendant from the trust property of the TD Mutual Funds.
89. The expenses are not properly incurred in carrying out the trust because they are on account of trailing commissions paid or payable to Discount Brokers, and such trailing commissions are not properly paid or payable to Discount Brokers because the Discount Brokers do not provide services or advice to the Class Members.
90. The payment of the expenses ought to be disallowed pursuant to section 23.1(2) of the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation).

Prospectus Misrepresentation

91. The Plaintiff asserts against the Defendant the right of action for prospectus misrepresentation in section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
92. The Defendant has prepared, filed and disseminated Simplified Prospectuses and, since January 1, 2011, Fund Facts Documents, to permit the continuous offering to the public of units of the TD Mutual Funds.
93. The Fund Facts Documents are incorporated by reference into the relevant Simplified Prospectuses and form part of those Simplified Prospectuses.
94. Pursuant to section 56(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation), the Simplified Prospectuses are and were required

to provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed under the Simplified Prospectuses.

95. The Simplified Prospectuses are prospectuses for the purposes of section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
96. The Fund Facts Documents prepared, filed and disseminated by the Defendant in respect of the TD Mutual Funds have contained at all material times a common statement that trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients.
97. That common statement is a misrepresentation within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation). It falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors, whereas in fact trailing commissions are also paid to Discount Brokers even though they do not provide services or advice to their clients. The statement is, and was at all material times, material to the Class Members.
98. The Defendant certified and signed the Simplified Prospectuses as required by NI 81-101 and Form 81-101F2, and is liable pursuant to section 130(1)(e) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
99. The offering of units of the TD Mutual Funds to which the Simplified Prospectuses and Fund Facts Documents related constituted distributions of the units in Ontario and/or distributions of units from Ontario to persons outside of Ontario. The offering was governed by the *OSA* and its subsidiary instruments and regulations, and was carried out under Ontario securities laws.

100. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's acts and omissions as particularized herein.

Unjust Enrichment

101. The Defendant has been unjustly enriched by the receipt of the Unearned Management Fees out of the assets of the TD Mutual Funds.
102. The Class Members have suffered a corresponding deprivation by the reduction in the value of their units of the TD Mutual Funds arising from the payment of the Unearned Management Fees out of the assets of the TD Mutual Funds. As stated in one or more of the Simplified Prospectuses disseminated by the Defendant in respect of TD Mutual Funds, management fees are among the fees and expenses that are paid by such TD Mutual Funds, "which will reduce the value of your [the investor's] investment in the Fund." Similarly, as stated in one or more Fund Facts Documents disseminated by the Defendant in respect of TD Mutual Funds, management fees "affect you [the investor] because they reduce the fund's returns."
103. There is no juristic reason for the enrichment of the Defendant. The Unearned Management Fees were received by the Defendant as a result of its own wrongful acts and omissions. Further, any contracts upon which the Defendant purports to rely to justify the receipt of the Unearned Management Fees do not require the receipt of the Unearned Management Fees or, alternatively, are void and illegal.

DAMAGE SUFFERED BY THE CLASS MEMBERS

104. The TD Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's acts and omissions particularized herein.

105. As a result of the payment of the Unearned Management Fees out of the assets of the TD Mutual Funds, the value of the assets of the TD Mutual Funds has been significantly reduced.
106. As a result of the payment of the Unearned Management Fees out of the assets of the TD Mutual Funds, there has been a significant reduction in the value of the units of the TD Mutual Funds held by the Class Members and/or the value of the distributions received by the Class Members on their units of the TD Mutual Funds (whether received in cash or reinvested in additional units).
107. The Plaintiff and the other Class Members have also suffered loss and damage as a result of the loss of opportunity to earn a reasonable return on investment if the Unearned Management Fees had not been paid out of the assets of the TD Mutual Funds.
108. The Plaintiff and the other Class Members who continue to hold units of the TD Mutual Funds are suffering ongoing loss and damage as a result of the Defendant's acts and omissions particularized herein.
109. The Defendant knew, or ought to have known, that as a result of its acts and omissions particularized herein, the Class Members would suffer loss and damage.

REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO

110. The Plaintiff pleads that this action has a real and substantial connection with Ontario because, among other things:
 - (a) the Plaintiff is resident in Ontario;
 - (b) the Defendant is domiciled in Ontario;
 - (c) the Defendant carries on business in Ontario;

- (d) each of the TD Mutual Funds is, or was at material times, a reporting issuer in Ontario;
- (e) the Simplified Prospectuses and Fund Facts Documents referred to herein were disseminated in Ontario;
- (f) a substantial portion of the Class Members reside in Ontario; and
- (g) a substantial portion of the damages sustained by the Class were sustained by persons and entities domiciled in Ontario.

RELEVANT LEGISLATION

111. The Plaintiff pleads and relies on the *CJA*, the *CPA*, the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation), the *OSA* (and, if necessary, the Other Canadian Securities Legislation) and the *OBCA*.

PLACE OF TRIAL

112. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario, as a proceeding under the *CPA*.

April 6, 2018

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SCHEDULE "A"
CURRENT TD MUTUAL FUNDS

1. TD Canadian Money Market Fund
2. TD Premium Money Market Fund
3. TD U.S. Money Market Fund
4. TD Ultra Short Term Bond Fund
5. TD Short Term Bond Fund
6. TD Canadian Bond Fund
7. TD Income Advantage Portfolio
8. TD Canadian Core Plus Bond Fund
9. TD Corporate Bond Plus Fund
10. TD Real Return Bond Fund
11. TD Global Income Fund
12. TD Global Core Plus Bond Fund
13. TD Global Unconstrained Bond Fund
14. TD High Yield Bond Fund
15. TD Global Conservative Opportunities Fund
16. TD Global Balanced Opportunities Fund
17. TD Monthly Income Fund
18. TD Tactical Monthly Income Fund
19. TD U.S. Monthly Income Fund
20. TD U.S. Monthly Income Fund – C\$
21. TD Balanced Income Fund
22. TD Diversified Monthly Income Fund
23. TD Strategic Yield Fund
24. TD Balanced Growth Fund
25. TD Dividend Income Fund
26. TD Canadian Low Volatility Fund
27. TD Dividend Growth Fund
28. TD Canadian Equity Fund
29. TD Canadian Value Fund
30. TD Canadian Small-Cap Equity Fund
31. TD U.S. Risk Managed Equity Fund
32. TD U.S. Low Volatility Fund
33. TD U.S. Low Volatility Currency Neutral Fund
34. TD North American Dividend Fund
35. TD U.S. Dividend Growth Fund

36. TD U.S. Blue Chip Equity Fund
37. TD U.S. Quantitative Equity Fund
38. TD U.S. Equity Portfolio
39. TD North American Small-Cap Equity Fund
40. TD U.S. Mid-Cap Growth Fund
41. TD U.S. Small-Cap Equity Fund
42. TD Global Risk Managed Equity Fund
43. TD Global Low Volatility Fund
44. TD International Growth Fund
45. TD Emerging Markets Low Volatility Fund
46. TD Asian Growth Fund
47. TD Emerging Markets Fund
48. Epoch U.S. Shareholder Yield Fund
49. Epoch U.S. Large-Cap Value Fund
50. Epoch Global Shareholder Yield Fund
51. Epoch Global Shareholder Yield Currency Neutral Fund
52. Epoch Global Equity Fund
53. Epoch International Equity Fund
54. Epoch European Equity Fund
55. TD Resource Fund
56. TD Precious Metals Fund
57. TD Global Entertainment & Communications Fund
58. TD Science & Technology Fund
59. TD Health Sciences Fund
60. TD Canadian Bond Index Fund
61. TD Balanced Index Fund
62. TD Canadian Index Fund
63. TD Dow Jones Industrial Average Index Fund
64. TD U.S. Index Fund
65. TD U.S. Index Currency Neutral Fund
66. TD Nasdaq Index Fund
67. TD International Index Fund
68. TD International Index Currency Neutral Fund
69. TD European Index Fund
70. TD US\$ Retirement Portfolio
71. TD Retirement Conservative Portfolio
72. TD Retirement Balanced Portfolio

73. TD Advantage Balanced Income Portfolio
74. TD Advantage Balanced Portfolio
75. TD Advantage Balanced Growth Portfolio
76. TD Advantage Growth Portfolio
77. TD Advantage Aggressive Growth Portfolio
78. TD Comfort Conservative Income Portfolio
79. TD Comfort Balanced Income Portfolio
80. TD Comfort Balanced Portfolio
81. TD Comfort Balanced Growth Portfolio
82. TD Comfort Growth Portfolio
83. TD Comfort Aggressive Growth Portfolio
84. TD Fixed Income Pool
85. TD Risk Management Pool
86. TD Canadian Equity Pool
87. TD Global Equity Pool
88. TD Tactical Pool
89. TD Income Opportunities Pool
90. TD Opportunities Pool
91. TD Canadian Low Volatility Pool
92. TD Risk Reduction Pool
93. TD Risk Reduction Pool – US\$
94. TD Canadian Corporate Bond Fund
95. TD U.S. Corporate Bond Fund
96. TD Canadian Diversified Yield Fund
97. TD Canadian Blue Chip Dividend Fund
98. TD Canadian Large-Cap Equity Fund
99. TD Core Canadian Value Fund
100. Epoch U.S. Blue Chip Equity Fund
101. Epoch U.S. Blue Chip Equity Currency Neutral Fund
102. TD International Stock Fund
103. TD Managed Income Portfolio
104. TD Managed Income & Moderate Growth Portfolio
105. TD Managed Balanced Growth Portfolio
106. TD Managed Aggressive Growth Portfolio
107. TD Managed Maximum Equity Growth Portfolio
108. TD FundSmart Managed Income & Moderate Growth Portfolio
109. TD FundSmart Managed Balanced Growth Portfolio

- 110. TD FundSmart Managed Aggressive Growth Portfolio
- 111. TD Managed Index Income Portfolio
- 112. TD Managed Index Income & Moderate Growth Portfolio
- 113. TD Managed Index Balanced Growth Portfolio
- 114. TD Managed Index Aggressive Growth Portfolio
- 115. TD Managed Index Maximum Equity Growth Portfolio
- 116. TD Managed Income ETF Portfolio
- 117. TD Managed Income & Moderate Growth ETF Portfolio
- 118. TD Managed Balanced Growth ETF Portfolio
- 119. TD Managed Aggressive Growth ETF Portfolio
- 120. TD Managed Maximum Equity Growth ETF Portfolio
- 121. TD Global Equity Focused Fund

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**SECOND FRESH AS AMENDED
STATEMENT OF CLAIM**

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Schedule “B”

**SCHEDULE “B”
PROPOSED LITIGATION PLAN**

Court File No. CV-18-595380-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GARY STENZLER

Plaintiff

- and -

TD ASSET MANAGEMENT INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF’S LITIGATION PLAN

A. DEFINED TERMS

1. Capitalized terms that are not defined in this litigation plan (“**Plan**”) have the meanings attributed to them in the Fresh as Amended Statement of Claim dated July 4, 2018.

B. REPORTING AND COMMUNICATION

2. Siskinds LLP and Bates Barristers P.C. (together, “**Class Counsel**”) have posted information about the nature and status of this action on the Siskinds LLP website, www.siskinds.com/mutual-fund-trailing-commissions (“**Website**”). That information will be updated regularly. Copies of important, publicly available court documents, court decisions, notices, documentation, and other information relating to the action are or will be accessible on the Website.

3. The Website also contains a communication feature that permits Class Members to submit inquiries to Class Counsel, which are sent directly to a designated member of the Class Counsel team, who will promptly respond.

C. DOCUMENT MANAGEMENT

4. Class Counsel will use data management systems to organize, code and manage the documents produced by the Defendant and all relevant documents in the Plaintiff's possession. The agreement of the Defendant's counsel will be sought to facilitate the electronic exchange of documents. Once the volume of documents to be produced in this action is determined, Class Counsel may retain the services of a third party document management firm for assistance.

D. LITIGATION SCHEDULE

5. The Plaintiff has brought a motion seeking certification of the action as a class proceeding pursuant to the *CPA* ("**Certification Motion**").
6. The Plaintiff may ask the Court to order the Defendant to deliver its statement of defence in advance of the hearing of the Certification Motion.
7. Following disposition of the Certification Motion, absent agreement among counsel, the Plaintiff will ask the Court to set a litigation schedule for the remaining steps in the action.
8. From time to time, the Plaintiff may ask that the litigation schedule be amended.

E. EXPERTISE AND MEDIATION

9. The Plaintiff has retained Class Counsel as his counsel in this action. Class Counsel have the experience, resources and expertise to prosecute this action on behalf of the Class.

10. Expert witnesses may be retained as the action proceeds.
11. The Plaintiff will participate in a mediation if the Defendant is prepared to do so. If the parties reach a proposed settlement of the action and the Court approves the settlement, this Plan will require amendment.

F. NOTICE OF CERTIFICATION AND OPT OUT PROCEDURE

12. If this action is certified as a class proceeding, the Plaintiff proposes that a notice of certification (“**Certification Notice**”) be circulated to advise Class Members, among other things, that:
 - (a) the Court certified the action as a class proceeding;
 - (b) a person may only opt out of the class proceeding by sending a written opt out election to the recipient designated by the Court, before a date and time fixed by the Court;
 - (c) a person may not opt out of the class proceeding after the date fixed by the Court; and
 - (d) if the common issues are resolved in favour of the Class, the Class Members may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.
13. The Certification Notice, in a form approved by the Court, will be distributed and published in the following manner:
 - (a) posted by Class Counsel on the Website, in English and French;

- (b) provided by Class Counsel to any person who requests it or who has previously contacted Class Counsel for the purposes of receiving notice of developments in the action;
 - (c) posted by the Defendant in a prominent location on its website;
 - (d) disseminated as a press release in Canada across a newswire service (in English and French);
 - (e) published once in the national edition of *The Globe and Mail*, in English;
 - (f) published once in *La Presse*, in French; and
 - (g) sent electronically and/or in paper form to appropriate discount brokers in Canada, with a cover letter requesting that they bring the Certification Notice to the attention of their clients who acquired TD Mutual Funds.
14. The Plaintiff is seeking an order on the certification motion requiring the Defendant to deliver to the Plaintiff by a date fixed by the Court an affidavit listing, to the best of the Defendant's knowledge, information and belief, the name and last known postal address, email address and telephone number for each Class Member known to the Defendant. If that order is made, the Plaintiff will send the Certification Notice directly to the Class Members using the contact information provided by the Defendant.
15. The Plaintiff proposes to appoint an independent person to receive the opt-out notices and report to the Court the names and addresses of the persons who opt out by the date fixed by the Court.
16. In the absence of agreement with the Defendant, the Plaintiff may ask the Court to order that the Defendant pays the costs of disseminating the Certification Notice.

Alternatively, the Plaintiff will pay the costs in the first instance, reserving his right to seek recovery of these costs from the Defendant by order of the judge presiding at the common issues trial.

G. REFINEMENT OF COMMON ISSUES

17. Following the completion of discovery, the parties may seek an amendment of the order certifying this action to deal with any necessary refinements to the common issues.

H. TRIAL OR SUMMARY JUDGMENT ON THE COMMON ISSUES

18. If appropriate, the Plaintiff may seek summary judgment on one or more of the common issues.
19. If the Plaintiff does not seek summary judgment on common issues, or if any common issues remain following a motion for summary judgment, the Plaintiff will seek the early appointment of the common issues trial judge. The Plaintiff will address issues of trial management in advance of the trial to ensure the orderly and efficient determination of any remaining common issues.
20. The Plaintiff will ask the Court to hold the hearing on the merits (whether a motion for summary judgment or common issues trial) no later than one (1) year after the completion of examinations for discovery and the production of information required by any undertakings and any motions related thereto.

I. CLAIMS PROCESS, INDIVIDUAL ISSUES AND DISTRIBUTION

(i) Preliminary Matters

21. If the Plaintiff obtains judgment on some or all of the common issues, then it will ask the Court to appoint a claims administrator (“**Administrator**”) and a referee (“**Referee**”),

with such rights, powers and duties as the Court directs, to receive and evaluate claims (including submissions and evidence) and to address any outstanding individual issues and the assessment of damages, pursuant to sections 24 and 25 of the *CPA* (“**Claims Process**”).

22. Class Members will be required to complete and submit an approved claim form (“**Claim Form**”) to the Administrator in order to participate in the Claims Process. The structure and content of the Claim Form will depend upon the findings of the judge(s) on summary judgment or at the common issues trial.
23. The Plaintiff will ask the Court to approve the form, content and method of distribution of the notice of resolution of the common issues (“**Common Issues Notice**”). The Common Issues Notice will advise Class Members of the Claims Process and requirements as set out herein.
24. In order to simplify the Claims Process, the Administrator and the Referee will, wherever practical, utilize:
 - (a) a paperless, electronic state-of-the-art web-based technology system that will include a secure database incorporated into the Website;
 - (b) standardized claims forms and filing procedures for evidence and submissions; and
 - (c) summary methods of introducing documentary evidence.
25. Each claimant will be required to provide, with the completed Claim Form, (i) full particulars of each unit of TD Mutual Funds held during the relevant period, and (ii) information relating to any individual issues (as necessary or required). The types of

information or records which shall constitute sufficient proof of a claim shall be specified in a protocol to be approved by the Court.

26. The Plaintiff will seek an order pursuant to sections 24(5) and/or 25(2) and (3) of the *CPA* that the completed and timely submitted Claim Form, with supporting documents, be treated as *prima facie* evidence of each claimant's eligibility and damages if accepted by the Administrator. The Claim Form must be signed by each claimant as if under oath.
27. The Claim Form will contain an authorization to permit the Administrator to obtain information from each claimant's discount broker(s). This will permit the Administrator to carry out an audit function.
28. The Court will be asked to set a deadline ("**Claims Deadline**") by which Class Members must file their claims with the Administrator.
29. Any person who does not file a claim with the Administrator before the Claims Deadline will not be eligible to participate in the Claims Process without leave of the Court.
30. The precise structure of the Claims Process will depend upon the findings of the judge at the common issues trial or summary judgment:
 - (a) with respect to any claims for which an aggregate assessment of damages is made, the Plaintiff will argue that the Claims Process need only deal with the calculation of the claimant's distribution from the gross recovery;
 - (b) if the Court does not make an aggregate assessment of damages, the Plaintiff will argue that the claims process need only deal with class membership (*i.e.* whether the claimant is a Class Member) and the calculation of the claimant's quantum of individual damages; and

- (c) if it is necessary to deal with individual issues to establish liability on certain of the claims, the Class Members will be given the opportunity to come forward to prove the individual issues and damages.

(ii) Process if there has been an aggregate assessment of damages

- 31. This part of the Plan presupposes that the Defendant is found to be liable to the Class Members after judgment on the common issues and the Court awards an aggregate assessment of damages on one or more claims. The Plaintiff will argue that the Defendant is not entitled to participate in the Claims Process if an aggregate assessment of damages has been made.
- 32. The Administrator's role will be to (i) determine whether each claimant is a Class Member; and (ii) calculate the claimant's individual distribution in accordance with the protocol approved by the Court.
- 33. After reviewing the Claim Form, the Administrator shall make a decision and promptly notify the claimant of (i) whether the person is a Class Member and entitled to participate in the recovery; and (ii) the amount of the person's distribution.
- 34. The Administrator shall communicate its decision electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the Court.
- 35. The claimant may advise the Administrator, within a time period fixed by the Court, of any disagreement with its decision. After being advised of a disagreement, the Administrator shall consider any additional information provided and determine whether to revise its decision on eligibility and/or the amount of the person's distribution.

36. If any claimant disagrees with the Administrator's final decision, they may elect to have the Administrator's decision reviewed by the Referee.
37. The Referee will carry out the review of the Administrator's decision in the least expensive, most summary manner possible in accordance with a protocol to be approved by the Court and shall give all necessary procedural directions.
38. The Referee will deliver a written decision. There shall be no right of appeal from the Referee's decision.
39. The Referee, in his or her discretion, may order the Defendant to pay the claimant's costs of the review. A claimant seeking the review of a decision of the Administrator shall be required to make a deposit of \$150, which shall be refunded only in the event that the review is determined in the claimant's favor.

(iii) Process if Class Members are not required to prove facts other than class membership and damages

40. This part of the Plan presupposes that the Defendant is found to be liable to the Class Members after judgment on the common issues, and only issues of class membership and damages need to be addressed on an individual basis.
41. The Administrator's role will be to (i) determine whether each claimant is a Class Member; and (ii) calculate the claimant's damages in accordance with the formula fixed by the Court.
42. The Defendant will be given an opportunity to review the Claim Forms and to advise the Administrator in writing whether it disputes a claim and the basis for the dispute. The claimant will be entitled to respond in writing to any dispute by the Defendant.

43. After reviewing the Claim Form, the Administrator shall make a decision and promptly notify the claimant of (i) whether the person is a Class Member and entitled to participate in the process; and (ii) the amount of the person's damages.
44. The Administrator shall communicate its decision electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the Court.
45. After the claimant and the Defendant have reviewed the Administrator's decision concerning eligibility and the damage calculation, the claimant or the Defendant can advise the Administrator, within a time period fixed by the Court, of any disagreement.
46. After being advised of a disagreement by the claimant or the Defendant within the period fixed by the Court, the Administrator shall consider any information provided and determine whether to revise its decision on eligibility and/or the damages calculation.
47. If any claimant or the Defendant disagrees with the Administrator's decision, they may elect to have the Administrator's decision reviewed by the Referee. The review will be conducted in accordance with paragraphs 37 to 38 above.
48. Class Counsel may assist claimants with these procedures, if requested. The Class Member will pay Class Counsel for these services in addition to the fees, disbursements and taxes approved by the Court for the resolution of the common issues.

(iv) Process if Class Members are required to prove facts other than class membership and damages

49. This part of the Plan presupposes that the common issues are decided in the Class Members' favor against the Defendant, and individual issues regarding liability (other than Class membership and damages) must be proven.

50. The Administrator's role will be to (i) determine whether each claimant is a Class Member; (ii) determine whether the claimant has proven the remaining individual facts to establish liability on any particular right of action; and (iii) calculate the claimant's damages in accordance with the formula fixed by the Court.
51. The Claim Form will require claimants to particularize the facts and evidence on which they rely to prove the remaining individual issues. The Claim Form and supporting documents will be treated as affidavit evidence and the Defendant may elect to challenge the assertions in writing. The claimant will be entitled to respond in writing to any dispute by the Defendant.
52. The Administrator will evaluate the Claim Form, the supporting evidence, and any submissions by the Defendant and promptly notify the claimant and Defendant of (i) whether the claimant is a Class Member; (ii) whether the claimant has proven the remaining individual facts to establish liability; and (iii) the calculation of the claimant's damages in accordance with the formula fixed by the Court.
53. The Administrator shall communicate its decision electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the Court.
54. If a claimant or the Defendant disagrees with the Administrator's decision relating only to class membership and/or calculation of damages, they may ask the Administrator to review its decision. If any claimant or the Defendant disagrees with the Administrator's final decision regarding class membership and/or calculation of damages, they may elect to have decision reviewed by the Referee. The review will be conducted in accordance with paragraphs 37 to 38 above.

55. If a claimant or the Defendant disagrees with the Administrator's decision regarding whether the claimant has established liability (and, if applicable, class membership and/or damages), they may elect to have a reference before the Referee. The reference shall be held in the least expensive, most efficient manner. The procedure at the reference will be established by the Referee subject to the following paragraphs.

Small Claims (under \$25,000)

56. The Referee's determination of claims of less than \$25,000 requiring individual determination shall proceed in writing. Class Members with claims of less than \$25,000 wishing to proceed with such claims will be required to file affidavit evidence setting out their evidence with respect to the individual issues remaining to be proven. The Defendant may cross-examine affiants on their affidavit by written interrogatories (in accordance with Rule 35 of the *Rules of Civil Procedure*) should the Defendant wish to challenge the evidence. The Referee will then issue a written decision with respect to the Class Member's claim on the basis of the affidavit evidence and the answers to the written interrogatories.

Simplified Procedure Claims (\$25,000–\$100,000)

57. Class Members with claims worth between \$25,000 and \$100,000 wishing to proceed with such claims shall proceed by analogy with the simplified procedure set out in Rule 76 of the *Rules of Civil Procedure*. Such Class Members will be required to file:
- (a) an affidavit of documents prepared in accordance with Rule 76.03; and
 - (b) affidavit evidence relating to the individual issues remaining to be proven.

58. Each party will be permitted to engage in up to two hours of oral examination for discovery.
59. The Referee may make decisions on the claims of the Class Member on the basis of the record or may, in his or her discretion, conduct a summary trial of such claims in accordance with Rule 76.12 of the *Rules of Civil Procedure*. The Referee shall deliver a written decision.

Large Claims (over \$100,000)

60. Class Members with claims in excess of \$100,000 wishing to proceed with such claims will be required to:
- (a) serve on the Defendant an affidavit of documents prepared in accordance with Rule 30.03 of the *Rules of Civil Procedure*; and
 - (b) attend for oral examination for discovery (in accordance with Rule 34 of the *Rules of Civil Procedure*), or provide answers to written interrogatories (in accordance with Rule 35 of the *Rules of Civil Procedure*), as the Defendant wishing to examine them may elect.
61. The Referee may, in his or her discretion, make a decision on the individual issues based on the documentary and discovery evidence, or conduct a trial of such claims.
62. The Referee shall deliver a written decision.

Costs and Appeals

63. The Referee, in his or her discretion, may order the Defendant to pay the claimants' costs of the references, regardless of the amount at issue. There shall be no costs payable by claimants under any circumstances.

64. If any claimant disagrees with the Referee's decision relating to the determination of issues of liability and the claim is for an amount exceeding \$100,000, they may appeal to the Ontario Superior Court of Justice in respect of such liability issues only within a time period fixed by the Court.
65. Except as provided in paragraph 64, the Referee's decisions will be final and there shall be no right of appeal from such decisions.

(v) Distribution to Eligible Class Members

66. After the Claims Process is completed, the Court will decide the amount the Defendant must pay to the Administrator.
67. The Administrator shall hold all amounts received from the Defendant in trust, in a manner to be approved by the Court, until an order of the Court authorizes distribution in whole or in part.
68. As soon as practicable after the completion of the Claims Process, the Administrator will, by motion, report to the Court the name and address of each Class Member entitled to receive a distribution, the amount of their share of the monies on hand, including their share of prejudgment interest ("**Distribution List**").
69. The Distribution List shall be distributed and/or made accessible in accordance with the Court's direction.
70. Each Class Member whose name appears on the Distribution List shall comply with any condition precedent to distribution that the Court may impose.
71. The Court will authorize payments to those Class Members whose names are on the Distribution List. The Court may authorize interim distributions.

72. If the total compensation available for distribution to Class Members is not fully disbursed within a period of time fixed by the Court, the unpaid amount shall be distributed *pro rata* to all Class Members that have filed claims with the Administrator or distributed to designated *cy-près* recipients in such manner and on such terms as the Court may direct.

(vi) Administrator's Reports to the Court

73. The Administrator shall deliver reports to the Court as required. The subject matter of the reports will depend on the findings of the common issues trial judge.
74. Copies of the Administrator's reports shall be served on the Defendant and Class Counsel. The Administrator shall also report on a regular basis on the accumulating cost of administration.
75. After the Administrator makes its final distribution, it shall report to the Court and be discharged as the Administrator.

J. MOTIONS FOR DIRECTIONS

76. Class Counsel, the Defendant and the Administrator may apply at any time to the Court for directions.

K. CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION

77. After the trial of the common issues or summary judgment, the Plaintiff will ask the Court to approve an agreement respecting fees and disbursements between him and Class Counsel. To the extent that the approved Class Counsel's fees, disbursements and applicable taxes are not completely paid by the costs recovered from the Defendant, the

Plaintiff will ask the Court to order that the unpaid balance be a first charge on any recovery either by way of aggregate or individual assessment.

78. If the Court awards damages in the aggregate, Class Counsel will ask the Court to order payment of their fees, disbursements and applicable taxes as a first charge on the aggregate amount.
79. If the Court does not award damages in the aggregate and requires the Class Members to prove their damages through individual assessments, Class Counsel will ask the Court to order payment of their fees, disbursements and applicable taxes as a first charge on the awards made at individual assessments.
80. The Plaintiff will ask the Court to order that the Defendant pay all administration costs, including the costs of all notices associated with the process and the fees and disbursements of the Administrator and the Referee as those costs are incurred.

L. FURTHER ORDERS CONCERNING THIS PLAN

81. This Plan may be amended from time to time by directions given at case conferences or by further order of the Court.

M. EFFECT OF THIS PLAN

82. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the Court whether or not they make a claim under the Claims Process.

GARY STENZLER
Plaintiff

and

TD ASSET MANAGEMENT INC.
Defendant

Court File No.: CV-18-595380-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**ORDER
(CERTIFICATION)**

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