CITATION: Parkin v. The Toronto-Dominion Bank, 2025 ONSC 1201
COURT FILE NOS.: CV-24-00720906-00CP; CV-24-00721491-00CP; and CV-24-00724998-00CP
DATE: 20250221

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No. CV-24-00720906-00CP **BETWEEN:** ANGELA PARKIN, OMER DZEHVEROVIC, AND THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND Plaintiffs **– and –** THE TORONTO-DOMINION BANK, BHARAT B. MASRANI, LEOVIGILDO SALOM, GREG BRACA, KELVIN VILUAN TRAN, RIAZ AHMED, ALAN N. MACGIBBON, MARY A. WINSTON, BRIAN M. LEVITT, MICHAEL BOWMAN, MIA LEVINE, KEVIN DOHERTY, AND ALLEN LOVE and NANCY TOWER Defendants	*Joel Rochon, Peter Jervis, Douglas Worndl, Golnaz Nayerahmadi, Sarah J. Fiddes,* lawyers for the Plaintiffs *Peter Proszanski*, lawyer for the Plaintiff *Linda M. Plumpton, J. Tosh Weyman, and Julie Lowenstein,* lawyers for the Defendants
Court File No.: CV-24-00721491-00CP **BETWEEN:** GERALD A. GAZAREK and the PUBLIC SCHOOL TEACHERS' PENSION & RETIREMENT FUND OF CHICAGO Plaintiffs **-and-**	*Jean-Marc Leclerc, Matthew W. Taylor, and Maria Arabella Robles and David Sterns*, lawyers for the Plaintiffs

TORONTO-DOMINION BANK, RIAZ AHMED, AYMAN ANTOUN, AJAI BAMBAWALE, MICHAEL BOWMAN, ANDREW CLARKE, JEAN-RENÉ HALDE, BRIAN C. FERGUSON, MONICA KOWAL, BHARAT MASRANI, BRIAN M. LEVITT, ALAN N. MACGIBBON, KEITH G. MARTELL, HERBERT MAZARIEGOS, IRENE R. MILLER, CLAUDE MONGEAU, S. JANE ROWE, LEO SALOM, KELVIN VI LUAN TRAN, NANCY G. TOWER AND MARY A. WINSTON Defendants	)	*Linda M. Plumpton, J. Tosh Weyman, and Julie Lowenstein,* lawyers for the Defendants
Court File No.: CV-24-00724998-00CP **BETWEEN**: GENEVA NAM Plaintiff	)	*Paul Bates, Eli Karp and Hadi M. Davarinia,* lawyers for the Plaintiff
-and- THE TORONTO-DOMINION BANK, BHARAT B. MASRANI, RIAZ AHMED AND KELVIN VI LUAN TRAN Defendants	)	*Linda M. Plumpton, Gillian Dingle, J. Tosh Weyman, Julie Lowenstein*, lawyers for the Defendants
	)	**HEARD: January 27, 2025**

Proceedings under the *Class Proceedings Act, 1992*

REASONS FOR DECISION ON CARRIAGE MOTION

LEIPER, J.

I. Introduction

[1] Three proposed class actions seek carriage of investors' claims against Toronto-Dominion Bank ("TD" or "the bank") and its officers and directors.

[2] Listed in chronological order, these actions are: *Parkin v. TD Bank* (the "Parkin action"), *Gazarek v. TD Bank* (the "Gazarek action"), and *Nam v. TD Bank* (the "Nam action").

[3] Each action seeks statutory and common law remedies on behalf of investors for losses linked to TD's alleged inadequate anti-money laundering ("AML") controls, the alleged failure to disclose the inadequate controls, and the regulatory/criminal investigations and consequences flowing from its acknowledged inadequacies.

[4] I conclude that the Parkin action is best suited to advance class members' claims in an efficient and cost-effective manner. These are my reasons for that decision.

II. The Legal Framework

[5] The considerations and timing applicable to carriage motions is set out in section 13.1 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (the "*Act*"):

> **Carriage motions**
>
> **13.1** (1) In this section,
>
> "carriage motion" means a motion for an order under this section.
>
> **Stay of other proceedings**
>
> (2) Where two or more proceedings under this Act involve the same or similar subject matter and some or all of the same class members, the court may, on the motion of a representative plaintiff in one of the proceedings, order that one or more of the proceedings be stayed.
>
> **Timing**
>
> (3) A carriage motion shall be made no later than 60 days after the day on which the first of the proceedings was commenced, and shall be heard as soon as is practicable.
>
> **Considerations**
>
> (4) On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner, and shall, for the purpose, consider,
>
> (a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;

(b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;

(c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and

(d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements as defined in section 33.1, and the sufficiency of such funding in the circumstances. .

Decision final

(5) The decision of the court on a carriage motion is final and not subject to appeal.

Bar on proceedings without leave

(6) In making an order under this section, the court shall also bar the commencement, without leave of the court, of any proceeding under this Act involving the same or similar subject matter and some or all of the same class members.

Costs

(7) Solicitors for the representative plaintiffs who are parties to the carriage motion shall bear the costs of the motion, and shall not attempt to recoup any portion of the costs from the class or any class member, or from the defendant.

Bar on proceedings without leave following motion period

(8) Despite section 2, a proceeding may not be commenced under that section without leave of the court if,

(a) the proceeding would involve the same or similar subject matter and some or all of the same class members as an existing proceeding under this Act; and

(b) more than 60 days have passed since the existing proceeding was commenced.

[6] The objective of a carriage motion is to select the counsel and proceeding that will best advance the interests of the class members, in a cost-effective and efficient manner: *Buis v. Keurig Canada Inc.*, 2023 ONSC 87, at para. 15.

[7] Subsection 13.1(4) requires the court to consider how each proposed action will achieve access to justice for the members of the class, and the extent to which the competing theories of the case may lead to a disproportionate effort in comparison to the potential benefit: *Blackford-Hall v. Simply Group,* 2021 ONSC 8502*; Bonnick v. Crown Crest Capital Management Corp*., 2021 ONSC 8503, at para. 10.

[8] In *Longair v. Akumin Inc,* 2022 ONSC 2571, at para. 8, Akbarali, J. affirmed that carriage motions require "a case by case analysis of the efficiency, productivity and proportionality and the needs of Class Members, as distinct from the wants of class counsel."

[9] Before I analyze the competing actions, the Nam action has moved to stay the Parkin action for failing to register its action on time as required by the Act. In the alternative, the Nam action seeks leave to commence its action out of time pursuant to s. 13.1(8) of the Act. I will address these issues first.

III. Preliminary Issue: The Impact of Late Registration of a Class Proceeding Under s. 2(1.1) of the *Act*

[10] A class proceeding must be registered with the National Class Action Database of the Canadian Bar Association (the "CBA Database") on the same day it is issued: the Act, s. 2(1.1); O. Reg 497/20, s. 1(2). Any subsequent action may not be commenced more than 60 days after the first action, without leave of the court.

[11] The chronology of relevant events unfolded as follows:

Date	Litigation Step
May 24, 2024	Parkin issues a Notice of Action.
June 4, 2024	Gazarek Action issues a Notice of Action. Gazarek Action registers the Action with the CBA Database
June 18-19, 2024	Parkin issues an Amended Notice of Action on June 18, 2024. Parkin registers the action with the CBA Database on June 19, 2024.
August 2, 2024	Nam issues a Statement of Claim Nam registers the action with the CBA Database.

[12] The Nam action seeks a stay of the Parkin action because it was not registered on the day that it was commenced. The Nam action submits that this important requirement should be treated like a limitation period and that the Parkin action should be declared a nullity.

[13] In the alternative, the Nam action seeks relief from the leave requirement to commence its own action. It reasons that by failing to comply with the registration requirement, the Parkin action was not "commenced" on May 24, 2024. The Nam action argues that the Gazarek action started the 60-day "clock" because it was properly commenced by registering its action on June 4, 2024. If I accept this submission, then the Nam action is not out of time and does not require leave of the court.

[14] However, if the Parkin action was commenced on May 24, 2024, then the Nam action was brought more than 60 days after the Parkin action and does not comply with s. 13.1 (3) of the Act. The Nam action would then need leave of court under s. 13.1(8).

[15] I consider the following issues raised by the Nam action:

a. When did the 60-day motion period under the Act begin?

b. Is the Parkin action a nullity for failing to register its action on the same day it was commenced?

c. If the Parkin action is not a nullity, should Nam receive leave to participate in the carriage motion?

[16] Statutory interpretation is required to resolve these issues. The starting point in statutory interpretation is Driedger's modern principle, which states that the words of a statute must be read in context, given their ordinary meaning and harmoniously with the scheme and object of the *Act* and the intention of the legislator: *Rizzo & Rizzo Shoes Ltd.* (Rd), [1998] 1 S.C.R. 27, at para. 21. I must first answer the following interpretive question: does the failure to register a proceeding in accordance with s. 2(1.1) mean that a proceeding has not commenced within the meaning of s. 2?

The Legislative Framework

[17] Section 2 of the Act deals with commencing a class proceeding, registration, and provisions for the motion for certification. Subsections 2(1)-(4) read as follows:

> **Plaintiff's class proceeding**
>
> **2** (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class. 1992, c. 6, s. 2 (1).
>
> **Registration of proceeding**
>
> (1.1) A person who commences a proceeding under subsection (1) shall register the proceeding in accordance with the regulations. 2020, c. 11, Sched. 4, s. 3 (1).
>
> **Motion for certification**
>
> (2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. 1992, c. 6, s. 2 (2); 2020, c. 11, Sched. 4, s. 3 (2).
>
> **Proof of registration**
>
> (3) The person shall, in an affidavit filed for use on the motion for certification, provide proof that the proceeding was registered in accordance with subsection (1.1). 2020, c. 11, Sched. 4, s. 3 (3).

[18] O. Reg 497/20 under the Act (the "Regulation") directs those who commence a proceeding to register the action as follows:

> **Registration of proceedings**

1. (1) In this section,

"National Class Action Database" means the National Class Action Database of the Canadian Bar Association, available on the Association's website.

(2) For the purposes of subsection 2 (1.1) of the Act, a proceeding shall be registered, on the day it is commenced, by submitting a copy of the originating process as issued by the court to the National Class Action Database and completing the steps for registration specified on the Canadian Bar Association's website.

(3) For greater certainty, the timing of the publication of the proceeding in the National Class Action Database has no bearing on whether the proceeding was registered in accordance with subsection (2).

(4) In the case of an action commenced by the issuance of a notice of action, the person who registered the proceeding shall, on the day the statement of claim in the action is filed with the court, submit a copy of the statement of claim to the National Class Action Database.

(5) The person shall, in an affidavit filed for use on the motion for certification, provide proof that the statement of claim was submitted in accordance with subsection (4).

[19] Section 2 of the Regulation deals with certain class proceedings where leave is required under the Ontario *Securities Act*, R.S.O. 1990. c. S.5 (the "*SA*"). This provision applies here because all three actions include statutory claims under the *SA* which require leave. Section 2 of the Regulation reads:

Commencement of certain proceedings

2. A proceeding any part of which may only be commenced with leave of the court under section 138.8 of the *Securities Act* shall be considered, for the purposes of the following provisions, to have been commenced under section 2 of the Act on the day the originating process is issued, regardless of when the motion for leave is made:

1. Section 13.1 of the Act (carriage motions).

2. Section 29.1 of the Act (mandatory dismissal for delay).

3. Section 39 of the Act (transition).

4. Section 1 of this Regulation (registration of proceedings).

Analysis

When did the 60 day motion period under the Act begin?

[20] Subsection 13.1(3) creates a 60-day motion period for all carriage motions; the clock starts to run on the "day on which the first of the proceedings was commenced." Thus, the 60-day motion period is connected to when the first action commenced proceedings.

[21] The Nam action submits that the mandatory registration requirement in s. 2(1.1) of the Act means that a class proceeding is not "validly commenced" until it has been registered.

[22] I disagree. Reading ss. 2(1) and 2(1.1) together, those provisions do not make the commencement of the proceeding conditional on registration. The "commencement of a proceeding" is not equivalent to, or dependent upon registration on the CBA Database. Rather, s. 2(1), under the heading "Plaintiff's class proceeding" permits one or members of a class to commence a proceeding in the court on behalf of the members of the class (emphasis added).

[23] A "proceeding" is defined as an action or an application: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 103. A proceeding "is commenced" by issuing either a statement of claim or a notice of action: *York Region Standard Condominium Corporation No. 1206 v. 520 Steeles Developments Inc.*, 2020 ONCA 63, 444 D.L.R. (4th) 415, at paras. 46-48 6 ("*YRSCC No. 1206"*).

[24] Once a proceeding is commenced, then s. 2(1.1), under the heading "Registration of proceeding", requires that a person who commences a proceeding under subsection (1) "shall register the proceeding in accordance with the regulation." A plain reading of the provisions demonstrates that these are two discrete events.

[25] The Regulation is consistent with this interpretation. Subsection 1(2) of the Regulation contemplates that "commencing an action" does not include registration, because it says:

> For the purposes of subsection 2 (1.1) of the Act, a proceeding shall be registered, on the day it is commenced, by submitting a copy of the originating process as issued by the court to the National Class Action Database and completing the steps for registration specified on the Canadian Bar Association's website (emphasis added).

[26] The Regulation links the commencement of a proceeding to the court's issuance of the originating process. Once "commenced," the proceeding must be registered by delivering a copy of the issued originating process to the CBA Database. These are two distinct requirements.

[27] Further, in actions that require leave under s. 138.3 of the *SA,* as is the case here, section 2 of the Regulation confirms that for the purposes of a carriage motion, the proceeding shall be considered… "to have been commenced under section 2 of the *Act* on the day the originating process is issued". The Regulation explicitly identifies the proceeding's date of commencement as the day the originating process is issued for actions that require leave under the *SA*.

[28] I find that the 60-day motion period began to run from the date of commencement of the first action, that is, when the Parkin notice of action was issued.

[29] I turn next to the consequences of the failure of the Parkin action to register the proceeding in accordance with the Regulation on the day that it commenced the action.

Is the Parkin action a nullity for failing to register its action on the same day it was commenced?

[30] The Nam action acknowledges that there are no legislated consequences for an action that does not register, or registers late. Here, the Parkin action did not register a May 24, 2024 notice of action. Instead, it amended its notice of action on June 19, 2024 and registered it the next day. In the interim, the Gazarek action was issued and registered, putting both the Parkin action and the Nam action on notice that there was a competing class proceeding.

[31] In considering Nam's first submission, that the Parkin action is a nullity, I begin first with the text. There is no remedy stipulated for any failure of a party to register in accordance with the Regulation. A finding that any such claim is a nullity is not supported by the legislation. However, the next question is how should I exercise my discretion to remedy the Parkin action's failure to carry out a mandatory step?

[32] I begin with the context and policy underpinnings for class proceedings. The jurisprudence, legal texts, and 2019 report of the Law Commission of Ontario (the "LCO") all describe the purpose of class actions as: a legal procedure that enables large groups of people who suffer a common harm to seek a legal remedy. Class actions are intended to achieve three public policy purposes: access to justice, behaviour modification and judicial economy: Winkler, Perell, Kalajdic and Warner, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters Canada Limited, 2014), at p. 2; Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms*: *Final Report* (Toronto: July 2019), at p. 2; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; *AIC Limited v. Fischer,* 2013 SCC 69, [2013] 3 S.C.R. 949.

[33] Class proceedings' legislation should be construed generously to give effect to its goals: *Hollick,* at para. 14; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 109.

[34] Proceedings are registered on the CBA Database to notify potential competing actions. The LCO Report of 2019 identified concerns with delay and the costs associated with "carriage battles". The subsequent amendments to the Act aim to reduce those problems. Registration is an important step and should not be ignored due to carelessness or to obtain strategic advantage.

[35] However, I disagree with the Nam action that Parkin's delay in registration means that their proceeding should be found to be a nullity. This is an early stage of the proceedings. The legislation is intended to facilitate access to justice and is silent on the consequences of failing to comply. Declaring the Parkin action a nullity would be disproportionately harsh, because there are other ways to respond to a failure to comply with the same-day registration requirement.

[36] If non-compliance with s. 2 (1.1) in any circumstance automatically nullifies a proceeding, this could doom meritorious actions and deprive class members of access to justice. I conclude that the preferable approach, given the nature and purpose of the legislation, is to treat the registration timing requirement as a procedural requirement, with any default being a procedural defect.

[37] In making this finding, I apply by analogy the reasoning in *YRSCC No. 1206*. There, the Court of Appeal overruled its prior decision in *York Condominium Corp. No. 46 v. Medhurst, Hogg*

& Associates Ltd. et al. (1983), 41 O.R. (2d) 800 (C.A.) by finding that non-compliance with notice provisions in s. 23(2) of the *Condominium Act* should not mean that an action is a nullity.

[38] In *YRSCC No. 1206*, the Court of Appeal considered the consumer protection objectives of the *Condominium Act, 1998*, S.O. 1998, c. 19 and the impact of finding an action to be a nullity for statutory non-compliance: at para. 28. In applying that framework to the notice period at issue, the Court of Appeal concluded that declaring an action to be a nullity could result in injustice by operating to defeat a meritorious action: *YRSCC No. 1206*., at para. 33.

[39] The Act accords the court broad remedial procedural powers to ensure fairness and expeditiousness in the conduct of class proceedings. Section 12 of the Act reads:

> 12. The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[40] The Nam action fairly points out that it was prejudiced by the Parkin action's failure to register – it led to their action needing leave. There are, however, other ways to remedy any such prejudice on the motion for leave which I discuss below. There may be other consequences for procedural defects, including considering it as a factor in the analysis of the experience of counsel on a carriage motion. The court has discretion to decide what the consequence of non-compliance should be based on the extent of that non-compliance and any prejudice suffered because of the defect: *YRSCC No. 1206*., at para. 37.

[41] Declaring the Parkin proceeding a nullity would be a harsh penalty for non-compliance. It is inconsistent with the liberal approach to construing the Act as adopted in *Hollick*. Although important, procedural formalities should not be enforced at the expense of class members' access to justice. I do not find that the Parkin action should be declared a nullity.

[42] I turn next to Nam's alternative submissions.

c. If the Parkin action is not a nullity, should Nam receive leave to participate in the carriage motion?

[43] Given my finding that the Parkin action is not a nullity, the date of the commencement of the Parkin action places the Nam action outside the 60-day carriage motion period. Consequently, the Nam action requires leave of the court to participate.

[44] The Parkin and Gazarek actions do not oppose the court granting leave to the Nam action participating in the carriage motion. I would grant leave and adopt similar criteria to that used to determine whether to extend time to file an appeal.

[45] Similar to motions to extend time on appeal, I consider whether the "justice of the case" informed by the circumstances supports an extension: *Rizzi v. Mavros*, 2007 ONCA 350, at para. 17; *Monteith v. Monteith,* 2010 ONCA 78, at para. 11; *Issai v. Rosenzweig*, 2011 ONCA 112, at para. 4; *Krawczynski v. Ralph Culp and Associates Inc.*, 2019 ONCA 399, at para. 9.

[46] I propose to consider the following factors in deciding whether to grant the Nam action leave participate in the carriage motion:

a. The length of the delay;

b. The reason for the delay;

c. Any prejudice; and,

d. The justice of the case.

[47] Here, the length of Nam action's delay is brief: 60 days from May 24, 2024, the date the Parkin action commenced, is July 23, 2024. The Nam action was commenced 11 days later, on August 2, 2024. The reason for the delay is connected to Nam's position that the Parkin action is a nullity.

[48] The prejudice here is minor, because the parties sought and received case management directions from Justice Akbarali on how to approach the issue. All parties had notice of each other's positions and material. The court was served by a range of competing actions on carriage. This was to the benefit of the class.

[49] Overall, the justice of the case favours granting the Nam action leave to participate in the carriage motion. I grant the Nam action leave to participate.

[50] I turn next to the substance of the carriage motion, beginning with a brief description of the background to the actions.

IV. Background to the Carriage Motion

[51] TD is a reporting issuer and a responsible issuer as defined in the *SA*. TD is headquartered in Ontario. It's shares trade on the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE).

[52] All three actions arise from a series of allegedly untimely or incomplete disclosures related to TD's AML measures. These events culminated in the first ever guilty plea by a bank in the U.S. to the criminal charge of conspiracy to commit money laundering.

[53] While there are some common law claims, all three actions agree that the most significant aspect of each of the claims competing for carriage are the damages claims for misrepresentation under the *SA*.

[54] The *SA* creates a statutory right of action in damages for secondary market misrepresentations under s. 138:

> **Liability for secondary market disclosure Documents released by responsible issuer**
>
> 138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that

contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

[55] The *SA* defines what is meant by a "misrepresentation" and a "material fact", both of which, form part of the definition of what constitutes a misrepresentation for the purposes of an action under s. 138:

Definitions

1 (1) In this Act,

"material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities

"misrepresentation" means,

(a) an untrue statement of material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made

"reporting issuer" means an issuer,

(f) that has issued voting securities on or after the 1st day of May, 1967 in respect of which a prospectus was filed and a receipt therefor obtained under a predecessor of this Act or in respect of which a securities exchange take-over bid circular was filed under a predecessor of this Act,

(g) that has filed a prospectus and for which the Director has issued a receipt under this Act,

(b.1) that has filed a securities exchange take-over bid circular under this Act before December 14, 1999,

(h) I any of whose securities have been at any time since the [1]5th day of September, 1979 listed and posted for trading on any exchange in Ontario recognized by the Commission, regardless of when such listing and posting for trading commenced) to which the Business Corporations Act applies and which, for the purposes of that Act, is offering its securities to the public,

(i) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with) a statutory amalgamation or arrangement, or

(ii) a statutory procedure under which one company takes title to the assets of the other company that in turn loses its existence by operation of law, or under which the existing companies merge into a new company,

(j) where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months, o) that is designated as a reporting issuer in an order made under subsection 1 (11);

[56] TD has not filed a statement of defence to any of these actions, pending a decision on carriage. The focus on this motion is the question of carriage in accordance with the factors in the Act. In the absence of a statement of defence, discovery of relevant records and investigation of witnesses by the competing actions, I will be cautious in avoiding speculative assumptions.

[57] Next, I turn to the background facts beginning with TD's October 2024 guilty plea.

The Guilty Plea by TD

[58] On October 10, 2024, TD's U.S. affiliates pleaded guilty on a criminal indictment filed by the U.S. Department of Justice to conspiracy to commit money laundering and failure to prevent money laundering. TD agreed that it was aware of the systemic deficiencies in the bank's AML measures, but placed a higher priority on profit. TD agreed that it had failed to monitor trillions of dollars in transactions for at least a ten-year period between 2014-2024.

[59] TD acknowledged that its failures to address insider risk meant that bank customers and five bank insiders laundered approximately $671 million through TD accounts in the U.S. TD agreed to having filed 564 materially incorrect CTRS, which omitted the identity of an individual conducting the transaction, involving more than $412 million in currency transactions and thus impeding law enforcement.

[60] Through its U.S. holding company, TD agreed to pay a criminal penalty of $3.09 billion US.

[61] The guilty plea was accompanied by consent orders with the Office of the Controller of the Currency (the "OCC") and the U.S. Treasury Financial Crimes Enforcement Network (FinCEN). Those orders prevented TD from expanding in the U.S. – including being prevented from opening new retail and commercial branches.

The Misrepresentation Allegations

[62] Each action relies on overlapping alleged misrepresentations by omission. The Nam action relies on misrepresentations related to AML violations, the impact on TD's growth and the AML investigations, but unlike the other two actions, does not allege accounting misrepresentations.

[63] The Parkin action relies on four categories of misrepresentation: ineffective AML controls, the criminal and regulatory investigations into the bank's AML controls, criminal investigations of TD's employees and customers, and accounting compliance with International Control Over Financial Reporting ("ICFR")/goodwill.

[64] The Gazarek action relies on the same four categories as the Parkin action, except it does not pursue a ground of misrepresentation related to accounting for goodwill. It frames the accounting misrepresentation as a failure to record a provision when a liability is probable and estimable.

The Alleged Corrective Disclosures

[65] Beginning on May 8, 2023 and through until TD's guilty plea on October 9, 2024, TD and members of the media published information about TD's AML problems. Each action relies on subsets of information taken from a global list of "corrections" of TD's alleged failures to disclose material information.

[66] The pleaded corrective disclosures, listed in chronological order, include:

a. May 8, 2023—Bloomberg and the Wall Street Journal publish articles disclosing that bank regulators had not approved TD's acquisition of First Horizon bank due to its AML measures [Parkin action only].

b. August 24, 2023—TD's Third Quarter Report to Shareholders/IFS disclosed that TD in the U.S. were being questioned by regulators about its AML compliance under the *Bank Secrecy Act* [all actions].

c. January 8, 2024—Capital Forum publishes an article asserting that TD executives were aware by November 2022 that several U.S. regulators found serious lapses in its AML controls which put he acquisition of First Horizon was in jeopardy. The article also disclosed that a TD employee, Oscar Nunez-Flores was charged in October 2023 with conspiracy to launder hundreds of millions of dollars in illegal drug funds [all actions].

d. January 9, 2024—The Globe and Mail covers the Capitol Forum article and cites analyst estimates as to the risk of large fines being run by TD as a result of the AML issues [Gazarek action only].

e. April 30, 2024—TD issues a press release informing the public that it was taking an initial provision of $450 million US in connection with discussions with one of its U.S. regulators, related to previously disclosed regulatory and law enforcement investigations of TD's U.S. Bank Secrecy Act/AML program. The press release stated that the bank's AML controls were insufficient to effectively monitor, detect, report and respond to suspicious activity indicating money laundering, and stated that the bank expected further monetary penalties which are "unknown and not reliably estimable at this time" [all actions].

f. May 2, 2024—National Bank releases an analyst report stating that due to the seriousness of the AML investigations, TD's business activities in the U.S. could be curtailed, with significant business impact and fines could be up to $2 billion US given the involvement of the U.S. Department of Justice [Parkin and Gazarek action].

g. May 2, 2024—FINTRAC announces an administrative monetary penalty against TD for $9.19 million CDN for its AML failings [Parkin and Nam actions].

h. May 2, 2024—Media reported that the U.S. Department of Justice investigation of the TD U.S. affiliates involved hundreds of millions of dollars of proceeds from illicit narcotic sales. The investigation arose from TD bank employee Da Ying Sze, who pleaded guilty to money laundering conspiracy charges in 2022 and agreed to having bribed bank employees. The plea agreement did not name the bank at the time of the Sze plea. On that day, the National Bank of Canada issued a report that disclosed the potential for limitation on the TD U.S. affiliates business activities, and that fines could total $2 billion USD given the seriousness of the investigation [all actions].

i. May 3, 2024—More media outlets pick up and report on the National Bank analyst report of May 2, 2024 [Gazarek and Parkin actions].

j. June 3, 2024—Bloomberg article published which reports on criminal proceedings against another TD U.S. bank employee alleging that he took bribes to assist others launder proceeds of crime and move the money to South America. The article speculates on the effect on TD's U.S. growth prospects [Nam action only].

k. August 21, 2024—TD press release advises the public that there are both civil and criminal investigations into the bank's AML controls and compliance with the BSA. TD discloses that it had taken a further provision of $2.6 billion US in its third quarter financial results for the anticipated total fines related to these investigations [Gazarek and Parkin actions].

l. October 9-10, 2024 Wall Street Journal publishes a story on the 9th of October after the close of markets regarding the plea, asset cap and fine as part of the AML settlement with prosecutors and regulators. TD issues a press release describing the plea agreement and its intentions on overhauling its AML systems [Gazarek and Parkin actions].

V. Analysis: Which Action Should Have Carriage?

(a) Competing Theories of the Case, Work Performed and Support for the Theory

[67] All three actions allege that TD misrepresented the state of its AML controls, the nature of regulatory investigations into its AML controls, money laundering activity by TD employees and customers, the risk to expansion plans in the U.S. including the acquisition of US bank, First Horizon Corp., and CEO and CFO certification misrepresentation. The actions are grounded in statutory and common law causes of action. The claims have more in common than not, as illustrated by the following comparison of the causes of action across the three claims:

	Gazarek action	**Parkin action**	**Nam action**
Causes of Action	Statutory Market Misrepresentation Negligent Misrepresentation Vicarious Liability Punitive Damages Fraudulent Concealment & Discoverability	Statutory Market Misrepresentation Negligent Misrepresentation Vicarious Liability Aggregate Damages	Statutory Market Misrepresentation Negligent Misrepresentation Vicarious Liability Punitive Damages Tort of Deceit

[68] While there are more similarities than differences in each case theory, the actions differ in terms of the class period and size, the number of defendants, and the choice of pleaded corrections. Each seeks recovery of billions of dollars in damages on behalf of the investors.

Class Period and Size of Class

[69] The Gazarek action begins in 2018 – which takes it outside the three-year statutory limitation period in the *SA*. To address this issue, the Gazarek action pleads fraudulent concealment. The Nam action ends its proposed class period on June 3, 2024 for reasons of cost-benefit to investors and efficiency. The Parkin action has filed a motion for leave under the *SA* as of September 6, 2024, which suspends the running of the limitation period as of that date.

[70] Each action critiques how the others chose to define their class period. Each action's rationale for their selected class period in brief, is:

a. **Gazarek action**: January 1, 2018-October 10, 2024. The rationale for this longer class period is that it will provide greater access to justice for a larger class. The three-year limitation period in the *Securities Act* and the two-year limitation period applicable to its common law claims can be overcome by its pleading that TD fraudulently concealed its AML failings from investors for years. The Gazarek action argues that it has a plausible action, for a longer period giving the greatest number of class members access to justice.

b. **Parkin action:** May 27, 2021-October 9, 2024. The Parkin action pleads a three-year period after the date of the first alleged misrepresentation, which it identifies in TD Bank's Q2 2021 Report to Shareholders, released on May 27, 2021.The Parkin action defines this class period as the only tenable class period given its research into what was known about money-laundering activity in 2021 and the failure by TD to mention this in the subsequent second quarter report. It claims $11 billion in aggregate damages.

c. **Nam action**: February 25, 2021-June 3, 2024. The Nam action pleads the shortest class period. It reasons that the misrepresentations were fully corrected by June 3, 2024 and nothing of significance is to be gained by extending the period as the other two actions propose. The Nam action submits that the longer periods proposed by Gazarek and by Parkin will be a "drag" on the action. It submits that having regard to the Parkin action, its failure to plead discoverability means that a large group of investors will have no common law claims outside the two-year limitation period. The Nam action relies on its pleading of discoverability and wilful concealment to respond to any common law limitation period defences that are raised by its choice of class period. Overall, Nam submits that its class period prioritizes efficiency and avoids strategic conflicts among investors.

[71] All three actions seek relief for significant groups of investors harmed because of TD's alleged misrepresentations and subsequent sets of corrections. As amended, the Gazarek action seeks relief on behalf of the largest group. However, this is a starting point, given the limitation period issue raised by the other actions. I consider the impact of the limitation period on the Gazarek class period under the "likelihood of success" factor.

[72] The Nam action submits that the phrase "efficient and cost-effective" modifies all of the criteria found in ss. 13.1(4)(a)-(d). This approach would favour the Nam action with a single class plaintiff, fewer individual defendants, a shorter class period, and an absence of accounting

misrepresentations. However, this submission would sever and elevate considerations of efficiency above the overriding aim expressed in s. 13.1(4). The court must determine "which proceeding would best advance the claims of the class members in an efficient and cost-effective manner." The leanest action would not necessarily advance the claims of the class members. A more compact action might be more efficient, but excessively abridging a claim in the name of efficiency may come at a cost to the class members.

[73] As Morgan, J. put it in *Dziedziejko v. Canopy Growth Corporation,* 2023 ONSC 6318, at para. 32: "streamlined actions encouraged by the factors to be taken account of under s. 13.1(4) are intended to foster access to justice, not to eliminate it for some claimants with credible claims in order to expedite it for a smaller and thus inevitably more manageable class of claimants."

Number of Defendants

[74] The Gazarek action has 21 defendants, comprised of TD, past and present CEOs and CFOs who certified that TD's disclosures did not contain any misrepresentations, officers with responsibility for AML controls and members of the TD Audit Committee whose mandate included overseeing the adequacy of TD's AML systems and internal controls. The chosen defendants relate to their responsibilities and likelihood of knowledge. The Gazarek action names the largest number of defendants. It is potentially the most unwieldy among the three actions.

[75] The Parkin action has 13 defendants, comprised of TD, and some directors and officers of the bank. It is the only action to include what the Parkin action describes as "four critical defendants": Mia Levine, Allen Love, Kevin Doherty, and Greg Braca. The Parkin action submits that these defendants are important due to their responsibilities and as sources of critical evidence about the events during the relevant class period.

[76] More particularly, each of the four named Parkin defendants had the following responsibilities:

a. Mia Levine-TD Bank's Bank Secrecy Act Officer and Head of TD's U.S. AML program during the relevant times. Ms. Levine's responsibilities included receiving reports that analyzed TD Bank's Currency Transaction Reports. For that reason, the Parkin action believes that Ms. Levine is "Individual-2" named in the plea agreement with the Department of Justice.

b. Allen Love-TD Bank's Head of Fraud Risk Management and Global Security and Investigations until June of 2023, which is part of the class period. Mr. Love had responsibility for oversight of the TD U.S. AML procedures and managing the "Unusual Transaction Reports" which are the reports of suspicious conduct by employees via the bank's internal reporting systems. For that reason, the Parkin action believes that Mr. Love is "Individual-3" in the plea agreement.

c. Kevin Doherty-TD Bank's Head of Financial Intelligence Unit and Associate Vice President, Global AML. Mr. Doherty led a team of AML professionals in the areas of adjudication, investigations, quality assurance, high risk program, sanctions operations, demarketing and reporting.

d. Greg Braca-Group Head, U.S. Retail for TD Bank during the class period. As Vice-Chair of TD's U.S. affiliates holding company, Mr. Braca reported directly to the CEO of the Bank, named defendant on all three actions, Mr. Masrani. The Parkin action submits that Mr. Braca would be aware of material information about the AML controls in TD's retail business, including the charges against Da Ying Sze on May 6, 2021 for laundering $474 million through TD's U.S. retail branches.

[77] The Nam action names the fewest defendants: TD and three officers. Nam submits this is another litigation choice which makes its action preferable because it is leaner and more efficient. This is true but could sacrifice access to information from key players, especially those involved in the plea agreement, in the name of efficiency. On an incomplete record, it cannot be said that Nam's smaller group of defendants offers the best outcome for the class in what is fairly anticipated to be strongly defended litigation. The Nam action has not explained the benefit of omitting the four U.S. AML officers apparently connected to the TD guilty plea or countered the Parkin action's submissions about their expected usefulness to the action.

[78] Each of the actions include statutory defendants under the *OSA*, TD as the corporate defendant, and various officers and directors. The Parkin action has provided a comprehensive description of the rationale for its choice of defendants, including the unique positions of the four officers above. Given the issues of AML controls and knowledge in play, these added four defendants can reasonably be expected to have relevant evidence. I find that the choice of defendants favours the Parkin action.

Choice of Corrective Disclosures and Misrepresentations: Granular Differences

[79] The Nam action distinguishes itself from the Parkin and Gazarek actions by reducing the number of corrections to five and selecting June 3, 2024 as the final date for the correction of misrepresentations.

[80] The Nam action submits that all the information that was published on August 21, 2024 and again on October 9 and 10, 2024 had already been made public by June 3, 2024. Thus, the Nam action reasons that any purchasers after June 3, 2024 had knowledge of the corrections and do not have a cause of action against TD. The Nam action submits that the failure of the Parkin and Gazarek actions to plead the June 3, 2024 corrective disclosure reveals a weakness in their case theories.

[81] The Parkin and Gazarek actions contrast their econometric opinions in support of their pleaded corrective disclosures to the Nam action which relies on a chartered business valuator without experience in securities misrepresentation cases. The Parkin and Gazarek actions rely on the importance of economic analysis of alleged corrective disclosures in the wake of misrepresentations as discussed in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation,* 2021 ONCA 104, at para 50, adopting Perell J.'s analysis in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of)* v. *SNC Lavalin Group Inc*., 2016 ONSC 5784.

[82] Determinations of whether an alleged public correction reveals a prior misrepresentation requires a "robust analysis of the evidence" on which the proponent argues supports a finding that

a trial court could find that the purported public correction could serve as a "time-post" for damages: see *Kauf v. Colt Resources Inc.*, 2019 ONSC 2179, 145 O.R. (3d) 100, at para. 121.

[83] The Parkin action is critical of Gazarek's pleading that the January 9, 2024 Globe and Mail article is a partial corrective disclosure and its choice to exclude the May 8, 2023 publication, relying on preliminary reports from its economist expert. The Gazarek action submits that Parkin's DRIP misrepresentation claims and goodwill claims are flawed.

[84] All three actions have a rationale for their litigation choices. The wisdom and flaws of some of the details cannot be readily distinguished at such an early stage, and in the absence of complete expert analysis. At its highest, I conclude that the Parkin and Gazarek actions have filed economic expert evidence to support their choices in accordance with the jurisprudence on how damages are to be assessed. However, these are not final reports and there have been no cross-examinations to test the assumptions within those reports. This aspect favours the Parkin and Gazarek actions.

Work Performed to Date

[85] The Parkin action began its preparation and research in January 2024. It has advanced the furthest since that date by researching publicly available materials, issuing its Notice of Action, a Statement of Claim, an amended Statement of Claim, serving its leave motion by September 6, 2024 to toll the *SA* limitation period, retaining and obtaining preliminary expert reports in the areas of securities action econometrics, AML, banking, accounting, corporate governance and disclosure.[1] The Parkin action has added an experienced representative class plaintiff, The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund.

[86] The Gazarek action has likewise researched publicly available records and materials, issued and amended its Statement of Claim, pleaded fraudulent concealment and discoverability with a view to defeating limitations periods issues, researched and signed an agreement with experienced securities class action counsel in the U.S., Cohen Milstein ("CM"). CM has in turn retained private investigators to seek out and interview witnesses, including former TD employees. Several senior lawyers with CM have applied for and received foreign legal consultant licences from the Law Society of Ontario to give legal advice on Ontario concerning U.S. laws.[2] The Gazarek action has also retained experts and obtained preliminary reports from American experts ranging from AML regulatory structures, OCC and bank regulation, accounting and goodwill, and corporate compliance and risk. In addition to Mr. Gazarek, the Canadian investor representative, the Gazarek action has added an American representative plaintiff, the Public School Teacher's Pension and Retirement Fund of Chicago.

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[1] The Parkin banking expert testified as an expert years ago on behalf of TD at a trial involving international correspondent banking. The trial judge found her to be an impartial, qualified expert witness. While Gazarek submits that this expert could be disqualified, the information filed to date does not persuade me at this stage that this is likely, given her role as a neutral expert witness, the differences in subject matter and timing, and her intended role as a banking expert in this litigation.

[2] The issue of the legality of the funding agreement between Canadian and American counsel to the Gazarek action is discussed in more detail below.

[87] The Nam action started its investigation at the beginning of May 2024 when it read the April 30, 2024 report that disclosed issues with TD's AML program and that it was taking an initial provision of $450 million connected to potential regulatory penalties. Like the other actions, the Nam action reviewed TD's public disclosure documents and news concerning money-laundering activity in U.S. TD banks, and the applicable laws and regulations concerning bank obligations for AML programs. The Nam action has engaged two experts: Mark G. Jones, an accounting expert to provide an opinion on the length of the class period and partial disclosures, and Ross S. Delston, a certified AML specialist.

[88] Overall, the Parkin and Gazarek actions have moved farther ahead than the Nam action in their preparations for leave and certification. This aspect favours them.

Support for the Competing Theories

[89] All of the actions have pleaded viable claims on their face. The expert reports, the pleaded misrepresentations and corrections, and the TD guilty plea with its references to what was known by senior TD management, are preliminary indicia of support for the case theories. While each takes issue with certain choices and diverge on questions such as whether to pursue the tort of deceit (Nam-yes; Parkin and Gazarek-no) and accounting misrepresentations (Gazarek and Parkin-yes; Nam-no), these are not core differences.

[90] The Nam action submits that adding accounting misrepresentations adds time and energy to the analysis without any additional benefit. Nam's choice to add the tort of deceit could potentially motivate individual defendants "dig in" to protect their personal reputations, thereby adding to the length of trial unnecessarily and with no corresponding value. These are all possibilities with elements of speculation. As all counsel acknowledged, the claims are broadly alike in their quest to obtain damages for investors who traded in "damaged shares" because of the misrepresentations.

[91] Overall, these are not really "competing theories" but "competing actions" with the same theory and slightly different approaches to seeking damages for the benefit of the class. I do not find that the critiques of the added tort of deceit by Nam, or the accounting claims by Gazarek and Parkin are significant enough to be determinative. Each action has pleaded some basis for each of their choice of claims. This aspect is neutral for all three actions.

(b) Relative Likelihood of Success on Certification and as a Class Proceeding

[92] These actions require leave to proceed under s.138.8 of the *OSA*, prior to any motion to certify the action. Thus, the relative likelihood of success of the actions must be considered in the context of leave and certification, while bearing in mind that this is not a full adjudication on the merits: *Longair,* at para. 16; *Blackford-Hall,* at paras. 4, 37; *Dziedziejko,* at para. 44; *Liang v. SSR Mining, Inc.*, 2024 ONSC 4432, at para. 3.

[93] The leave requirement means that the plaintiff must offer a "plausible analysis" of the legislation, and demonstrate a legal foundation for the claim, supported by credible evidence. The record must demonstrate a reasonable chance the action will succeed during this stage: *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation* 2024 ONCA 105 ("*DALI v. Barrick* 2024"), at paras. 26-32.

[94] While the leave step is not a "mini trial", the motion judge acts as a gatekeeper and considers all the evidence – including whether cross-examination has undermined the credibility or reliability of the plaintiff's critical evidence: *DALI v. Barrick* 2024, at para. 32.

[95] Understanding the role of the motion judge on leave, as well as certification, informs the carriage decision. At the carriage stage, I focus on whether there are identifiable weaknesses, complications, or impediments to leave and/or certification with the competing actions relative to one another: *Buis,* at para. 26; *Dziedziejko,* at para. 4.

[96] There are two areas of weakness which I address next. The first involves the Gazarek action's longer class period, stretching back to 2018. That action relies on pleading fraudulent concealment to defeat the three-year statutory limitation period in the *SA*.

The Gazarek Class Period, Limitation Period Issues and the Doctrine of Fraudulent Concealment

[97] The Gazarek action submits that it will benefit a larger class of wronged investors, with the longest class period pleaded. The statutory limitation period in s. 138.14 of the *SA* requires that an action be commenced no later than three years after the first release of a document containing the actionable misrepresentation. It is an "event-triggered" limitation period and is not subject to discoverability: *Kaynes v. BP, P.L.C.,* 2018 ONCA 337, at para. 15.

[98] By virtue of s. 138.14(2), the limitation period is suspended when a party files a notice of motion for leave under s. 138.8. Otherwise, statements made more than three years before an action is commenced fall outside the limitation period. Section. 138.14 of the *SA* aims to balance claims of current or previous shareholders against the interests of subsequent shareholders: *Kaynes,* at paras. 19-21.

[99] The Gazarek action proposes to address the statutory limitation period defence under the *SA* by pleading the equitable doctrine of fraudulent concealment. Fraudulent concealment has historically been applied where a defendant in a special relationship to a plaintiff takes advantage of that relationship and knowingly withholds information from the plaintiff that would give rise to a cause of action. The doctrine aims to prevent wrongdoers who hide their wrongs long enough to then benefit from a limitation period. The doctrine operates by suspending the limitation period until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud: *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, at p. 390; *M. (K.) v. M. (H.)*, 3 [1992] S.C.R. 6, at pp. 56-57; *Pioneer Corp v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 54; *Gilani v. BMO Investments Inc*., 2021 ONSC 3589.

[100] Prior to 2019, a special relationship between the parties was a precondition for the doctrine of fraudulent concealment. However, the Supreme Court of Canada restated the test in *Pioneer Corp.* The Supreme Court focussed on the unconscionability of the defendant's actions in the overall context of the relationship, eliminating any requirement that there be a "special relationship" as a precondition to applying the doctrine: *Pioneer Corp,* at para. 54; see also *Soetemans v. Design Concrete Systems Ltd*., 2022 ONSC 5595, at paras. 32-43.

[101] More recently, in the *Gilani* class action, Glustein, J. applied the doctrine of fraudulent concealment in the context of a trustee-beneficiary relationship and reasoned as follows:

> [282] In *Giroux Estate,* at para. 29, Moldaver J.A. (as he then was) held that "the doctrine of fraudulent concealment is not dependent upon the particular wording of the limitation provision".
>
> [283] The foundational question to determine whether fraudulent concealment arises is "whether it would be, for any reason, unconscionable for the defendant to rely on the advantage gained by having concealed the existence of a cause of action" [Emphasis in original.]: Pioneer, at para. 54.
>
> [284] In the present case, Gilani pleads that BMO Investments deliberately concealed the existence of its alleged misrepresentation—that it was paying trailing commissions for "services and advice" provided by brokers. In such circumstances, it is not plain and obvious that fraudulent concealment could not apply (even if discoverability did not apply to the limitation period under s. 138(b)(ii)).
>
> [285] Given the pleading, Gilani can claim that it would be unconscionable to permit a trustee—upon whom the most stringent fiduciary duties are placed—to rely on the advantage it gained by concealing the existence of the misrepresentations giving rise to the cause of action under s. 130 of the Securities Act.
>
> [286] Consequently, even if it is plain and obvious that discoverability does not apply to s. 138(b)(ii) (which I do not find), the pleading of fraudulent concealment permits Gilani to respond to any limitation period defence that might be raised.

[102] Gazarek pleads that there is a special relationship between a responsible issuer and investors due to the knowledge imbalance, and the unconscionability of the issuer withholding important information about its AML failures. In essence, the pleading defines secondary market misrepresentation claims made by a reporting issuer as "unconscionable" *per se*. The implications of this position would mean that the doctrine of fraudulent concealment would apply in any such cause of action. As Ms. Nayerahmadi put it in her submissions, this would effectively "obliterate" the three year limitation period in the *SA* for such claims. I agree with her that this is a novel attempt to extend fraudulent concealment to secondary market claims of misrepresentation under Part XXIII.I of the *SA*. It can reasonably be predicted to complicate and lengthen the issues on leave and certification, given its broad implications. This is not in the best interests of the class.

The Issue of the Gazarek-CM Agreement for Funding and Fee Sharing Between Canadian and U.S. counsel

[103] The Parkin action further submits that the Gazarek action proposes an unlawful fee-splitting arrangement between Canadian counsel, Sotos, and its agreement with its American counterparty, CM, contrary to the Rules of Professional Conduct. In support of that position, the Parkin action filed an expert report from Gavin Mackenzie.

[104] The Gazarek action responds that the expert report is not admissible because it is expert evidence on domestic law – that being the *Law Society Act,* R.S.O. 1990, c L.8 and the Rules of

Professional Conduct – and is therefore within the realm of knowledge of the court*: International Air Transport Association v Canada (Transportation Agency),* 2024 SCC 30, at para. 78.

[105] I disagree. Expert evidence about professional standards of conduct is admissible: *Teskey v. Canadian Newspapers Co.,* 1989 CanLII 4392, 68 O.R. (2d) 737 (C.A.), at paras. 44-46. I apply *Teskey* to the opinion tendered here and the test found in *White Burgess Langille Inman v. Abbot and Haliburton Co.* 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 19 -23. I conclude that the expert evidence meets the *White Burgess* criteria.

[106] The expert evidence concerns the standards of practice in Ontario of lawyer licensees, which is an area of expertise outside the regular knowledge of the court. There is no exclusionary rule. Mr. Mackenzie is a properly qualified expert to give evidence on the standards for lawyers licensed to practice in Ontario. To name but a few of his credentials, he is former Senior Counsel, Discipline and Treasurer of the Law Society of Ontario, and author of *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993).

[107] In terms of the cost-benefit analysis of receiving the expert evidence, the funding issue is important. If the arrangement between Canadian and U.S. counsel is vulnerable to challenge based on unlawful fee-splitting, this could seriously undermine the Gazarek action's leave and certification application. The opinion is not lengthy and the parties have had a fair opportunity to make submissions on it. I conclude that the benefits of admitting Mr. Mackenzie's opinion outweigh the risks.

[108] The opinion considers the application of r. 3.6-7 of the Rules of Professional Conduct, which prohibits Ontario lawyers from fee-splitting with non-lawyers. Rule 3.6-7 provides that: "[a] lawyer shall not directly or indirectly share, split, or divide their fees with any person who is not a lawyer or paralegal". The definition of "lawyer" in r. 1 is: "a person licensed by the Law Society to practice law as a barrister and solicitor in Ontario." Subject to certain exceptions that do not apply here, r. 3.6-7 does not allow fees to be divided between law firms based in Ontario and firms in American jurisdictions that are not licensed to practice in Ontario.

[109] The agreement between Sotos and CM envisions a 40:60 fee split, which would come from the total fees approved for Sotos. Under the terms of that agreement, Sotos will maintain control of the litigation, and any disputes will be resolved in Canada by an arbitrator. CM will not practice law in Canada and has obtained the necessary foreign legal consultant permits to give advice on U.S. law. CM has agreed to fund disbursements with a 100% premium on disbursements paid. The agreement between the firms also permits CM to approve Sotos' disbursements that are over $5,000.

[110] While the Parkin action acknowledges that U.S. firms can be paid for services rendered to Canadian class counsel, it is the nature of the Ontario rule and the terms of this arrangement that is problematic. In *Leslie v. Agnico-Eagle Mines,* 2016 ONSC 532, 90 C.P.C. (7th) 201, the court approved payment of $700,000 to an American firm commensurate with their time spent assisting class counsel. This was not a contingency fee arrangement.

[111] Class counsel routinely retain U.S. law firms. Their fees are generally treated as justifiable costs or disbursements: *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275, at para. 62.

[112] In Canadian provinces where the rules around fee-splitting are different from those in Ontario, courts have permitted contingency fees with U.S. counsel: *New Brunswick v. Rothmans Inc*, 2009 NBQB 198, 352 N.B.R. (2d) 226, at para. 71; *Plimmer v. Google Inc.*, 2013 BCSC 681, at para. 74. These differences were noted in *Plimmer*. Griffin, J. reviewed the Code of Professional Conduct for British Columbia which permits fee sharing among lawyers in B.C. with lawyers in other jurisdictions, subject to client consent and proportionality. In contrast, as Griffin, J. noted at para. 72:

> The rules governing Ontario lawyers are different than in British Columbia, in that lawyers from outside of Canada cannot share in fees generated by lawyers in Ontario. However. U.S. counsel are able to lend their assistance to Canadian class action litigation with their fees recoverable as a disbursement: see Wilson v. Servier Canada Inc. [2005] O.J. No. 1039. (S.C.J.)

[113] A fee-sharing arrangement was proposed in the failed certification of an automobile defect class action in *Poulin v. Ford Motor Company of Canada Limited*, 2006 CanLII 38880. In that case, the motion judge declined to certify the class proceeding. Among other findings, the motion judge raised a concern that U.S. counsel were effectively underwriting the action: *Poulin,* at para. 92. The Divisional Court upheld the decision on the broader questions of suitability of the plaintiff, lack of common issues, and that there a class proceeding was not the preferable procedure: *Poulin v. Ford Motor Company of Canada Limited*, 2008 CanLII 54299, 301 D.L.R. (4th) 610. In doing so, the Divisional Court echoed the concerns of the motion judge, including the U.S. firm's power of approval of disbursements over $2500.

[114] The cases the Gazarek action relied upon do not assist with the question of allowable fee-splitting with U.S. counsel. The decisions in *Shah v. LG Chem. Ltd*, 2021 ONSC 396 and *Mallette v. Bank of Montreal*, 2021 ONSC 2924 concerned interprovincial firms working jointly on Canadian class actions in Ontario. Canadian lawyers enjoy inter-provincial mobility which may permit them to practice in other provinces. This feature distinguishes the approved fee arrangements in *Shah* and in *Mallette* from the Gazarek action's proposal.

[115] In summary, there is admissible expert evidence that the proposed fee arrangements in the Gazarek action may be contrary to the Rules of Professional Conduct in Ontario. This is capable of being a live issue on certification to the detriment of the class, and thus reduces the preferability of the Gazarek action.

(c) Expertise and Experience of the Solicitors in Class Proceedings or the Substantive Areas of Law at Issue

[116] The solicitors for the Parkin action have acted as lead or co-lead counsel in over 16 securities class actions. They were counsel on two common issue securities trials: *AIC v. Fischer*, which is proceeding to a damages trial in April of 2025, and *Kerr v. Danier Leather Inc.* in 2004.

They are the only firm in Canada to have prosecuted the only two common issue securities trials in Ontario.

[117] The Gazarek action has likewise established that its team has extensive credentials in class action litigation, particularly in competition law matters. Counsel has bolstered its securities subject matter expertise with the agreement formed with CM, an established U.S. firm of 105 lawyers with over 50 years of representation in securities actions, complex litigation and class actions. However, this is subject to the comments above about the risks posed by the financial arrangements between the firms, and the critical role of Canadian counsel where a case is prosecuted in Canada: *Wilson and Shah v. LG Chem*, 2014 ONSC 1875, at para. 22.

[118] The solicitors for the Nam action collectively bring securities class action experience as co-counsel on several securities class actions. They have collectively settled securities class actions ranging from $6-11 million. The firm seeking carriage on behalf of the Nam action was granted carriage in the *Dziediejko* action, in which the motion judge Morgan J. described each competing firm as "experienced in investors' rights litigation and class actions."

[119] These are complex actions. Given what is at stake, actions of this nature predictably attract all manner of issues, motions and appeals. The experience of the legal team selected is relevant to efficiency: experienced counsel are well-placed to make strategic choices that move matters along and avoid unnecessary skirmishes that can entangle a class action in delay.

[120] I conclude that all three competing actions have legal teams who are competent to prosecute class actions. However, acknowledging the expertise of the group, the Parkin action team has more experience as lead counsel in prosecuting large-scale securities class actions, although it inexplicably failed to register its initial Notice of Action on time, and failed to include all relevant material in its carriage material in accordance with the court's timetable.

[121] The scope of this action will predictably attract corresponding resources in defence of the claims. The class will benefit from the trial experience in securities' class actions. Overall, this factor slightly favours the Parkin action.

(c) ***The Sufficiency of Funding, Resources and Applicable Third-Party Funding Agreements***

[122] Each action has slightly different proposals for its share of fees from any recovery. Each proposes a contingency agreement on fees.

[123] Even though fees must be approved, their importance to the class means that significant differences in funding proposals are relevant on carriage motions: *Mancinelli v Barrick Gold Corporation,* 2016 ONCA 571, 131 O.R. (3d) 497, at para 18.

[124] At the time of the oral argument, a range of contingency fee arrangements were sought as follows:

i. Parkin action: 30% contingency fee

ii. Gazarek action: 20% contingency fee to certification; 25% on amounts recovered after certification

iii. Nam action: 33% contingency fee

[125] In response to my request for further submissions on the comparative benefits of the different funding proposals in a single document with the same assumptions underlying each outcome for ease of comparison, each action filed new charts, raised issues with their rival's charts and in the case of Parkin and Nam, adjusted their proposed funding structures to compete with the Gazarek proposal.

[126] The revised contingency fee proposals are:

i. Parkin action: up to 25% on recovery amount up to $500 million; up to 15% on any amounts recovered above $500 million; up to 20 % on any recovery achieved prior to leave and certification, subject to a 15% cap over $500 million.

ii. Gazarek action: Up to 25% on first $500 million, up to 15% on any amount above $500 million; 20% contingency fee on recovery achieved prior to leave and certification; 25 % after leave and certification motions.

iii. Nam action: No information provided as to the percentage contingency fee being proposed. The Nam action blended the fees, disbursements and funders fees payable under several types of settlement scenarios. Those totals appear on their face to be competitive with comparable fees and disbursements payable by the Gazarek and Parkin actions.

[127] Each action has a different proposal for funding its disbursements.

[128] The Parkin action proposes to self-fund disbursements, compared to its two initial proposals: apply to the Class Proceedings Fund or use a third party funder with an accompanying premium to the funder on settlement. The Parkin action submits that its latest proposal to self-fund is in the best interests of the class because it will not add further costs to the class. The Parkin action submits that it has experience in self-funding class action litigation with good outcomes. It has self-funded the disbursements required in this action to date, including the costs of several detailed expert reports.

[129] The Gazarek action proposes a disbursement funding arrangement via its agreement with CM. It submits that this mitigates the risk and potential for conflict which can arise from a single firm self-funding disbursements, as the Parkin action now proposes to do. The Gazarek action criticizes the Parkin action for changing its funding proposals on an iterative basis throughout the lead up to the carriage motion, with this latest proposal representing the Parkin action "betting the firm" and raising serious risks of liquidity. The Gazarek action further submits that a self-funding option is not acknowledged in the retainer agreements signed by the representative plaintiffs in the Parkin action.

[130] This is a legitimate concern, given that at the time the carriage motion was argued, the Parkin action had not landed a funding option. The Parkin submissions did not spend much time

on the question of funding, and the materials focussed more on the open application to the Class Proceedings Fund and a third-party funding proposal which was more expensive than the comparative proposals from the Gazarek action and the Nam action. While the Parkin action cited its experience in self-funding prior actions, it would have been preferable to have the final funding decision put before the court at the time of argument to accommodate questions and submissions. However, I have taken that problem into account and granted extensions to counsel for brief reply in writing to the changed proposals. I also consider Parkin's experience with mega-fund cases, their assessment of the scale of disbursements that will be needed to bring this case to trial, and the absence of any suggestion or evidence that the firms involved have defaulted on payment of disbursements in class action litigation.

[131] The Nam action proposes to use a third-party funder for its disbursements, which will attract a premium payable from any settlement to the funder. This represents a higher cost of litigation financing than that proposed by the Parkin and Gazarek actions, however the Nam action has proposed to reduce its fee to make its total cost to the class equivalent to its initial proposal.

[132] An additional cost to the class arises from the purchase of "After the Fact Event" ("ATE") insurance as a protection against unfavourable costs orders. The Parkin action does not propose to charge those costs to the class. The Gazarek action would pass along this cost to the class. The Gazarek insurance expense is not material at higher levels of recovery, but below a threshold, this cost becomes more material.

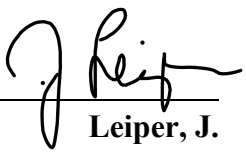
[133] Overall, the proposed funding arrangements have strengths and weaknesses that are unique to each proposal. All have taken steps to arrange funding. The materiality of the differences among the classes depends on the timing and the amount, if any, of a settlement. All are subject to court approval. The funding proposals, in my view, do not represent a significant difference among the three competing actions.

VI. Conclusion

[134] I conclude that the Parkin action will best achieve the interests of the class, in a cost-effective manner when measured against the statutory factors within the Act. To summarize the factors discussed above, the Parkin action has been either in first place or tied for first place in its proposal for the theory of its case, work done to date, choice of defendants, experience in securities "mega-fund" class actions, and it avoids the potential complicating factors of the Gazarek funding arrangement and limitation period issues. The Parkin action has a track record which supports its capacity to fund disbursements.

[135] The Gazarek and Nam actions are stayed. Carriage is ordered to the Parkin action.

[136] Counsel for Parkin and the TD defendants are to communicate with my office within 15 days of this decision to arrange a case conference with a view to setting a timetable for the leave/certification motions.



Leiper, J.

Released: February 21, 2025

CITATION: Parkin v. The Toronto-Dominion Bank, 2025 ONSC 1201
COURT FILE NOS.: CV-24-00720906-00CP; CV-24-00721491-00CP; and CV-24-00724998-00CP
DATE: 20250221

Court File No. CV-24-00720906-00CP
BETWEEN:

ANGELA PARKIN, OMER DZEHVEROVIC, AND THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND

Plaintiffs

– and –

THE TORONTO-DOMINION BANK, BHARAT B. MASRANI, LEOVIGILDO SALOM, GREG BRACA, KELVIN VI LUAN TRAN, RIAZ AHMED, ALAN N. MACGIBBON, MARY A. WINSTON, BRIAN M. LEVITT, MICHAEL BOWMAN, MIA LEVINE, KEVIN DOHERTY, AND ALLEN LOVE

Defendants

Court File No.: CV-24-00721491-00CP
BETWEEN:

GERALD A. GAZAREK AND PUBLIC SCHOOL TEACHERS' PENSION & RETIREMENT FUND OF CHICAGO

Plaintiffs

-and-

TORONTO-DOMINION BANK, RIAZ AHMED, AYMAN ANTOUN, AJAI BAMBAWALE, MICHAEL BOWMAN, ANDREW CLARKE, JEAN-RENÉ HALDE, BRIAN C. FERGUSON, MONICA KOWAL, BHARAT MASRANI, BRIAN M. LEVITT, ALAN N. MACGIBBON, KEITH G. MARTELL, HERBERT MAZARIEGOS, IRENE R. MILLER,

CLAUDE MONGEAU, S. JANE ROWE, LEO SALOM, KELVIN VI LUAN TRAN, NANCY G. TOWER AND MARY A. WINSTON

Defendants

Court File No.: CV-24-00724998-00CP
BETWEEN:

GENEVA NAM

Plaintiff

-and-

THE TORONTO-DOMINION BANK, BHARAT B. MASRANI, RIAZ AHMED AND KELVIN VILUAN TRAN

Defendants

REASONS FOR DECISION ON CARRIAGE MOTION

Leiper, J.

Released: February 21, 2025