

**CITATION:** Aggarwal v. TD Asset Management Inc., 2024 ONSC 5603  
**COURT FILE NO.:** CV-22-00691344-00CP  
**DATE:** 20241008

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Manojkumar Aggarwal

**AND:**

TD Asset Management Inc.

**BEFORE:** J.T. Akbarali J.

**COUNSEL:** *Paul Guy and Serge Kalloghlian*, for the plaintiff

*Shane C. D'Souza and Agatha Wong*, for the defendant

**HEARD:** October 4, 2024

**Proceeding under the *Class Proceedings Act, 1992***

**ENDORSEMENT**

**Overview**

[1] The plaintiff moves with the defendant's consent for an order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") for the purposes of settlement. The plaintiff also seeks orders approving the notice plan, the long-form and short-form notices, and the opt-out process.

**Brief Background**

[2] This action relates to the payment of trailing commissions to discount brokers from mutual funds for which the defendant, TD Asset Management Inc., acted as trustee and manager. The proposed class consists of TD Mutual Fund unitholders who held their units through a full-service broker. The claim alleges that the defendant's payment of trailing commissions to discount brokers improperly dissipated TD Mutual Fund assets, which diminished the value of the TD Mutual Fund units held by the putative class members.

[3] The parties have engaged in lengthy negotiations and have reached a settlement, subject to court approval. As the first step, they seek to certify the action on consent and approve a notice program and notices, and an opt-out process, to advance this action to the stage of a settlement approval hearing.

## Certification

[4] Pursuant to s. 5(1) of the *CPA*, the court shall certify a class proceeding if: (a) the pleadings or the notice of application disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims or defences of the class members 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 would fairly and adequately represent the interests of the class, has produced a workable plan for the proceeding, and does not have an interest in conflict with the interests of other class members.

[5] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met, although compliance with the certification criteria is not as strictly required: *Waheed v. Pfizer Canada Inc.*, 2011 ONSC 5057, at para. 36; *Nutech Brands Inc. v. Air Canada*, [2008 CanLII 11643, at para. 9. The representative plaintiff must provide a certain minimum evidentiary basis for certification order: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 24.

*Section 5(1)(a): The pleadings disclose a cause of action.*

[6] Certification will not be denied under s. 5(1)(a) unless it is plain and obvious that the pleadings disclose no cause of action: *Hollick*, at para. 25.

[7] For the purposes of the settlement approval, the defendant does not dispute, and I accept, that the pleadings disclose a cause of action in breach of fiduciary duty for which facts are sufficiently pleaded.

*Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff.*

[8] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action. The class must be bounded, and not of unlimited membership, or unnecessarily broad, and have some rational relationship with the common issues: *Hollick*, at para. 17, *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45.

[9] For purposes of settlement, the plaintiff seeks to certify the following class:

All persons, wherever they may reside or be domiciled, who held or hold, at any time on or prior to September 11, 2024, units of a TD Mutual Fund other than through a Discount Broker, except for the Excluded Persons.

“Excluded Persons” means: (a) the Defendant; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the Defendant; the past and present members of the independent review committee of each TD Mutual Fund; or (b) any

Person who would otherwise be a Class Member but who validly excluded themselves from the Action.

[10] I am satisfied that the class is defined by reference to objective criteria, is bounded and bears a rational relationship with the common issue which I discuss below.

*Section 5(1)(c): The claims raise common issues.*

[11] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46.

[12] The plaintiff must prove that there is some basis in fact that the asserted common issues actually exist, and they are common to the entire class: *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128, at paras. 26-33.

[13] The plaintiff proposes to certify the following common issues:

1. Did TD Asset Management Inc., as the trustee of the TD Mutual Funds, owe a fiduciary duty to the Class?
2. If so, did TD Asset Management Inc., as the trustee of the TD Mutual Funds, breach its fiduciary duty to the Class?

[14] I am satisfied that these questions are common to all class members, and the resolution of these questions at a common issues trial would advance the action for all class members, avoiding the need for each class member to prove the issues in individual trials. Given the trust relationship at issue in this case, this is not a situation where each class member must individually prove an *ad hoc* fiduciary duty.

[15] Moreover, I am satisfied that the plaintiff has adduced evidence providing some basis in fact that the proposed common issues exist. The record indicates that: (i) trailing commissions were paid from the assets of the TD Mutual Funds to discount brokers; (ii) the purpose of the payments was to compensate discount brokers for advice and service; but (iii) discount brokers do not provide advice.

*Section 5(1)(d): Preferable Procedure*

[16] This branch of the test requires that the court be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. This inquiry is directed at two questions: first, whether the class proceeding would be a fair, efficient, and manageable way to advance the claim, and second, whether the class proceeding would be preferable to other procedures for resolving the common issues. Section 5(1.1) of the *CPA* adds two further criteria

for the court to consider: superiority and predominance. In *Banman v. Ontario*, 2023 ONSC 6187, Perell J. found that the preferable procedure analysis involves determining:

- a. Whether the design of the class action is manageable as a class action;
- b. Whether there are reasonable alternatives;
- c. Whether the common issues predominate over the individual issues;
- d. Whether the proposed class action is superior, i.e. better, to the alternatives.

[17] Preferable procedure is addressed through the lens of the three goals of class proceedings, that is, access to justice, behaviour modification, and judicial economy: *Hollick*, at para. 27; *Banman*, at para. 313.

[18] In the context of the settlement, courts have recognized that a class proceeding is a fair, efficient, and manageable method for advancing the class members claims and is preferable to other procedures. As Perell J. held in *Waheed*, at para. 27, where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis to conclude that a class proceeding is the preferable procedure because certification would serve the primary purposes of the CPA: access to justice, behaviour modification, and judicial economy.

[19] I am satisfied that, in the context of the settlement, a class proceeding is the preferable procedure to resolve the common issues. The action is manageable as a class proceeding. Given the settlement, a class proceeding is superior to all other reasonable available means to address the defendant's conduct. Moreover, in view of the settlement, there are no individual issues to address, and the proposed common issues predominate.

[20] I conclude that a class proceeding is the preferable procedure in this case.

*Section 5(1)(e): There is an adequate representative plaintiff.*

[21] The evidence before me indicates that the proposed representative plaintiff, Mr. Aggarwal, understands his duties as a representative plaintiff and is capable of fulfilling them. He has played an active role in the action and will continue to do so. He has no known conflict of interest with other class members. He has proposed a reasonable notice program, using both direct and indirect notice, and has proposed a workable plan to move towards the approval of the settlement agreement.

### **Notice**

[22] The plaintiff proposes a notice plan that is substantially the same as the plan I ordered in *Westwood v. TD Asset Management Inc.*, CV-18-595380-00CP, dated December 14, 2021. I am satisfied that it will adequately advise class members of the certification of the action, the opt-out process, and their right to object to, or comment on, the proposed settlement, class counsel fees, and honorarium.

[23] I am also satisfied with the form of the notices, and the opt-out form and process.

**Conclusion**

[24] This action is certified for the purposes of settlement. The notice plan, long-form notice, short-form notice, and opt-out process and form are approved.

[25] The order shall go in the form of the draft I have signed.

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J.T. Akbarali J.

**Date:** October 8, 2024