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Silence Has a Cost: Defending Cross-Border Securities Leave Motions

Decisions on securities leave motions seldom come with illustrations. Sometimes, however, a picture is worth a thousand words. In *Parkin v The Toronto-Dominion Bank*, the Court reproduced a surveillance still from the US Department of Justice showing a man (later convicted of laundering hundreds of millions of dollars) conducting an obviously suspicious US$372,000 cash transaction at the counter of a Manhattan branch.

These and other facts led Justice Leiper to grant leave under the secondary market misrepresentation provisions of the Ontario *Securities Act* and to certify a global class of TD shareholders. The shareholders allege TD misrepresented its anti-money laundering (AML) controls and related investigations . Given the prior guilty pleas behind the case, the result may not be surprising but the Court's decision reveals many of the challenges in defending complex securities cases.

Background

In October 2024, TD Bank, N.A. (TDNA) and its US holding company pleaded guilty to conspiracy charges, which included conspiring to fail to maintain an adequate AML program and conspiring to launder monetary instruments. With parallel regulatory orders, the resolution cost US$3.08 billion and imposed an asset cap on TD's US business. The subsidiaries admitted they failed to monitor trillions of dollars of transactions and held the AML budget flat under a "flat cost paradigm." One laundering network, led by Da Ying Sze, moved roughly US$474 million through TDNA branches before Sze was indicted in May 2021.

Meanwhile, TD announced a US$13.4 billion acquisition of First Horizon in February 2022. In December 2022, TD's CEO told analysts he was confident the deal would close on schedule and was not aware of regulators taking a closer look at anything. The deal was terminated in May 2023, and news reports soon tied its failure to AML concerns.

TD disclosed the regulatory and law enforcement inquiries in August 2023, then took provisions of US$450 million in April

2024 and a further US$2.6 billion in August 2024.

Two investors and a union pension fund started a proposed class action, alleging misrepresentations in four categories:

- TD's descriptions of its AML controls
- Non-disclosure of the investigations, including in statements about First Horizon
- Non-disclosure of criminal proceedings against TDNA customers and employees
- TD's accounting disclosures and officer certifications

The plaintiffs pleaded eight partial corrections and a $30 billion decline in market capitalization.

The Motions

The Court heard the leave and certification motions over eight days in 2026. Leave under section 138.8 of the *Securities Act* requires good faith and a reasonable possibility of success at trial. In *Lundin Mining Corp v Markowich*, the Supreme Court described this test as a meaningful screen, not a mini-trial.

TD characterized the claim as hindsight-driven. It argued that:

- It had disclosed an evolving, confidential investigation in a timely way.
- Its AML statements were aspirational.
- Under *Paniccia v MDC Partners Inc*, an investigation does not by itself trigger disclosure.
- US rules required it to keep confidential supervisory information confidential.

A dozen experts filed reports on AML practice, US enforcement, accounting, and financial economics, and three individual officers sought dismissal.

The Decision

Justice Leiper granted leave against TD and most of the individual defendants on all four categories of allegedly false statements.

The Court found the plaintiffs had a reasonable possibility of proving TD's statement that its AML program was "designed" to ensure legal compliance was false, given agreed facts with the US Department of Justice about systemic under-resourcing and lack of oversight. The Court also held that a trial judge could reasonably find TD's generic risk warnings ineffective to protect investors.

On the alleged investigation misrepresentations, the Court rejected TD's reliance on *Paniccia*. The Court held that the plaintiffs could reasonably show that TD itself was "the source of the 'buried' negative information," because TD knew of its AML failings and the risk of significant penalties years before any subpoena (a legal order to produce documents or testify). Moreover, TD's choice to make disclosure before any plea agreements also undercut its position that it could wait for the outcome.

Finally, the Court held that the plaintiffs had a reasonable possibility of establishing a duty to disclose criminal proceedings against TDNA customers and employees, even though TDNA was not a party to them.

Certification largely followed. The Court certified:

- The secondary market claim
- A parallel negligent misrepresentation claim
- Vicarious liability
- An aggregate damages question over TD's objection that section 138.5 prescribes a per-share formula

TD was largely unsuccessful in narrowing the secondary market claims but defeated the certification of a novel primary market claim, which relied on section 130 of the *Securities Act* and a US prospectus for TD's dividend reinvestment plan, filed on EDGAR (the US Securities and Exchange Commission's public filing system), that allegedly incorporated the same misrepresentations. If successful, this could have expanded the plaintiffs' class definition to include primary purchasers of TD's securities under that US prospectus.

Instead, the Court held that the claim would plainly and obviously fail. For the purposes of section 130, a "prospectus" is one that complies with Ontario securities law and is filed with and receipted by the Ontario Securities Commission. A foreign US prospectus is neither, nor is it "governed by Ontario law." It therefore could not ground a primary market claim under section 130.

Implications

The facts to which TD already pleaded guilty in the US made this a difficult case for TD to defend; however, the case has important implications for defending such cases.

Silence on Leave Has a Cost

A defendant has no burden to prove anythingat the leave stage and need not produce documents before discovery. There are

good reasons to say little: affiants can be cross-examined, and production may not be in the defendant's interests.

That doesn't mean the alternative is without cost. Judges account for the information asymmetry before discovery. In *Parkin*, the Court did so through expert evidence about the documents the defendant must hold and through inferences drawn in the absence of contrary evidence.

Winning evidentiary objections may not matter if the gap is filled by inference, and a critique of the plaintiffs' experts will carry little weight unless it can wholly undermine their theory. Defendants should decide whether to tender evidence issue by issue, considering:

- What will the court infer if the defendant says nothing?
- Is there evidence that can genuinely displace that inference?

Sometimes silence will still be the right choice, but it should not be the default.

Disclosure During Investigations is Complex

TD did disclose the investigations and, later, certain provisions. The plaintiffs' case is, essentially, that TD disclosed too little, too late. *Paniccia* remains good authority that an inquiry or subpoena does not by itself require disclosure but *Parkin* suggests that where the issuer already knows the facts driving the investigation, the question shifts to the probability and magnitude of the consequences rather than the investigation's formal status.

Where the investigation is confidential or where restrictions may limit what can be disclosed, this has to be assessed carefully: each voluntary step, such as an early disclosure or a provision, may later be cited as proof that more could have been said sooner.

Section 130 Stops at Ontario's Prospectus Regime

A Canadian issuer can distribute TSX-listed securities in the US under US registration documents, through dividend reinvestment plans and otherwise, without an Ontario prospectus. *Parkin* holds that misrepresentations in a foreign prospectus cannot ground a statutory primary market claim in Ontario, even if the securities are issued and traded in Ontario.

The decision also confirms that:

- A pure question of statutory interpretation can be decided at certification.

- Novelty alone does not save a claim that is plainly doomed.
- Because the reasoning turns on filing and receipt under Ontario law, an offering made under an Ontario-receipted prospectus may be analyzed differently.
- The secondary market regime's global reach remains intact as the certified class covers TD shareholders wherever they reside.