

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

MARCUS WIDE of Grant Thornton (British Virgin Islands) Limited and HUGH  
DICKSON, of Grant Thornton Specialist Services (Cayman) Ltd., acting together herein in their  
capacities as the Joint Liquidators of Stanford International Bank Limited

Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

**FACTUM OF THE PLAINTIFFS  
(Motion returnable October 6, 2016)**

September 26, 2016

**BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto ON M5X 1A4

**Lincoln Caylor (#37030L)**  
Email: caylorl@bennettjones.com

**Maureen M. Ward (#44065Q)**  
Email: wardm@bennettjones.com

**Nathan J. Shaheen (#60280U)**  
Email: shaheenn@bennettjones.com

Telephone: (416) 863-1200  
Facsimile: (416) 863-1716

Lawyers for the plaintiffs

TO: **MCCARTHY TÉTRAULT LLP**  
Barristers and Solicitors  
TD Bank Tower  
66 Wellington Street West  
Suite 5300  
Toronto ON M5K 1E6

**Geoff R. Hall (#34701O)**  
**Junior Sirivar (#47939H)**  
**Vladimira Ivanov (#68119J)**

Telephone: (416) 362-1812  
Facsimile: (416) 868-0673

Lawyers for the defendant

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

MARCUS WIDE of Grant Thornton (British Virgin Islands) Limited and HUGH DICKSON, of Grant Thornton Specialist Services (Cayman) Ltd., acting together herein in their capacities as the Joint Liquidators of Stanford International Bank Limited

Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

**FACTUM OF THE PLAINTIFFS  
(Motion returnable October 6, 2016)**

**PART I - OVERVIEW**

1. TD Bank is seeking a stay of an uncertain duration of between one and two years<sup>1</sup> pending the Supreme Court of Canada's decision in the upcoming hearing of *Livent Inc (Receiver Of) v. Deloitte & Touche*.<sup>2</sup> TD Bank's documentary production currently scheduled for April 2017 would not occur until potentially sometime in 2019. There is no precedent for a stay of such duration, particularly given that, unlike in the cases relied on by TD Bank, there is no determination on the merits pending in the Joint Liquidators' action (only the discovery process). TD Bank cannot meet its heavy burden of establishing that the requested stay would be in the interests of justice.

---

<sup>1</sup> See paragraphs 34 to 40 below. TD Bank's case law refers to cases where the Supreme Court has taken 18 months to render a decision. The *Livent* appeal will be heard in February 2017 at the earliest, more than five months from now.

<sup>2</sup> 2016 ONCA 11, TD Bank's Book of Authorities, Tab 6.

2. A stay pending the resolution of another action will be in the interests of justice only where there is a "very direct nexus between the issues" in the two actions. There is no such very direct nexus between the Joint Liquidators' action and *Livent*. The nature and identities of the parties in the two actions are completely distinct and given the number of auditor-specific issues at play in *Livent*, the Supreme Court may not even decide any issue relevant to the Joint Liquidators' action.

3. In fact, TD Bank itself argued the following when previously attempting to stay the Joint Liquidators' action:

5. *Livent* turns on the duties that an **auditor** owes to its client. Those duties are not the same as, and cannot be analogized to, the duties owed by a **bank** to its customer. Moreover, the measure of damages is not the same.

[...]

42. *Livent's* factual setting is crucial. Its entire analysis is premised upon an auditor's duty to its client. The analysis is not transferrable to the relationship between a bank and its customer because the duties owed by a bank to its customer are completely different from the duties owed by an auditor to its client.<sup>3</sup> [underlining added, other emphasis original]

4. TD Bank now ignores its prior submissions regarding *Livent* and advances the opposite position. It does so despite not even pleading in defence the purported damages issue it now argues may cause the Joint Liquidators' action to "evaporate entirely".<sup>4</sup> On this motion, TD Bank now purports to believe the *Livent* appeal is highly relevant to its defence of a USD \$5.5 billion action (and probably others) but is not even seeking leave to intervene in that appeal as it is entitled to do.

5. TD Bank has also failed to establish the prejudice required to meet its heavy burden or at all. It argues only that it may be required to unnecessarily use "time and resources" if required to

<sup>3</sup> TD Bank's factum on TD Bank's First Stay Motion returnable March 11, 2016, Exhibit N of the Affidavit of Marcus A. Wide sworn September 22, 2016 (the *Wide Affidavit*), ¶5 and 42, Joint Liquidators' Amended Responding Motion Record (the *Joint Liquidators' Responding Record*), Tab 1N, p 249 and 264.

<sup>4</sup> TD Bank's factum on TD Bank's Second Stay Motion returnable October 6, 2016, ¶32. TD Bank's latest amended statement of defence was delivered after the Court of Appeal's decision in *Livent* and while leave to appeal to the Supreme Court of Canada was being sought.

proceed with the pending documentary productions in the Joint Liquidators' action. However, the court has expressly confirmed: "For a stay to be granted, the injustice to the moving party must amount to more than an inconvenience or expense."<sup>5</sup>

6. In addition, the Supreme Court's decision in *Livent* will have no bearing on the related Dynasty Action. As such, the Dynasty Action – including the upcoming productions – will inevitably proceed regardless of *Livent*. In executing the Discovery Agreement in September 2016, and consistent with this court's prior order, TD Bank expressly agreed that those productions will be the same as the productions in the Joint Liquidators' action. TD Bank is not moving to stay the Dynasty Action<sup>6</sup> and there is otherwise no basis to delay the progress of that action. As a result, there is no prejudice to TD Bank and no practical benefit to staying the Joint Liquidators' action.

7. From its commencement in 2011, the legal basis of the Joint Liquidators' action has never changed – as a result of *Livent* or at all. The Joint Liquidators' main claim has always been directly on behalf of SIB and seeking SIB's damages. Like now, they originally pleaded that ... "if TD Bank had performed its duties to SIB as required, the discovery of the CD Scheme at an earlier date would have reduced or eliminated the losses, liabilities and damages incurred after that date."

8. The Joint Liquidators continue to pursue the direct SIB claim on the same legal basis originally (and always) pleaded. The Joint Liquidators' April 2016 decision not to pursue their expressly alternative claim on behalf of SIB's creditors is irrelevant.<sup>7</sup> TD Bank's submission that the Joint Liquidators developed their current legal theory only at that time is incorrect and also irrelevant.

<sup>5</sup> *Navionics Inc v Nautical Data International Inc*, [2006] OJ No 5397 (SCJ), ¶30, Joint Liquidators' Book of Authorities, Tab 1.

<sup>6</sup> TD Bank's notice of motion does not address the Dynasty Action at all. TD Bank first argued the Dynasty Action should be stayed in its factum.

<sup>7</sup> The only amendments to the Joint Liquidators' statement of claim in April 2016 were the removal of allegations concerning the Joint Liquidators' expressly alternative claim on behalf of SIB's creditors. No amendments were made to any allegations concerning the Joint Liquidators' main claim directly on behalf of SIB.

9. There is no basis to delay the action at all, let alone for potentially almost two years. The Joint Liquidators should be permitted to advance their action in the normal course without further delay and the resulting prejudice that would occur. TD Bank's motion should be dismissed.

## PART II - FACTS

### A. THE JOINT LIQUIDATORS' LEGAL THEORY PREDATES LIVENT

10. In May 2011, Marcus A. Wide and Hugh Dickson (the **Joint Liquidators**) were appointed as liquidators of the Antiguan estate of Stanford International Bank Limited (**SIB**).<sup>8</sup>

11. In August 2011, prior to any decision being rendered in *Livent*, the Joint Liquidators commenced the within action against Toronto-Dominion Bank (**TD Bank**).<sup>9</sup> From the outset, the Joint Liquidators' action contained two distinct claims: a main claim directly on behalf of SIB and an alternative claim on behalf of SIB's creditors.

12. In their original statement of claim, the Joint Liquidators pleaded the following in respect of their main claim directly on behalf of SIB and their expressly alternative claim on behalf of SIB's customers:

75. TD Bank breached its duties to SIB through the acts and omissions described herein which it failed to meet the standard of care required of a reasonable banker.

[...]

77. TD Bank's acts and omissions described herein are the proximate cause of the harm suffered by SIB...The plaintiffs plead that if TD Bank had performed its duties to SIB as required, the discovery of the CD Scheme at an earlier date would have reduced or eliminated the losses, liabilities and damages incurred after that date.

78. In the alternative to the claims made on behalf of SIB, the plaintiffs plead that as Joint Liquidators with the powers and capacities of a trustee in bankruptcy and

<sup>8</sup> The Wide Affidavit, ¶1, Joint Liquidators' Responding Record, Tab 1, p 1.

<sup>9</sup> The Wide Affidavit, ¶3, Joint Liquidators' Responding Record, Tab 1, p 2.

charged to recover funds for SIB's customers, the ultimate victims of Stanford's CD Scheme, they may appropriately advance the claims SIB's customers may have against TD Bank.<sup>10</sup> [underlining added]

13. In April 2014, the Joint Liquidators delivered an amended statement of claim. The amendments pleaded further facts in support of the Joint Liquidators' main claim directly on behalf of SIB and alternative claim on behalf of SIB's creditors. Importantly, however, the amendments did not alter the legal theory of damages or otherwise being advanced by the Joint Liquidators or plead any additional causes of action.<sup>11</sup>

14. There can be no real debate that the Joint Liquidators previously advanced two distinct claims. As Justice Conway confirmed in dismissing TD Bank's prior motion for summary judgment on the basis of a limitations argument in November 2015: "The Joint Liquidators assert two claims – one on behalf of SIB as TD's customer and one on behalf of SIB's customers (as non-customers of TD)."<sup>12</sup>

## **B. TD BANK'S FIRST STAY MOTION**

15. In March 2016, TD Bank brought a motion "for an order staying the action and directing the Plaintiffs to reconstitute as a class proceeding in accordance with the *Class Proceedings Act, 1992*" (TD Bank's First Stay Motion).<sup>13</sup>

16. On TD Bank's First Stay Motion, its position was that the Joint Liquidators' action is readily distinguishable from *Livent*. Its position was argued in detail in its factum, which stated, among other things:

<sup>10</sup> Exhibit B of the Wide Affidavit, ¶75 and 77-78, Joint Liquidators' Responding Record, Tab 1B, p 48-49.

<sup>11</sup> Exhibit C of the Wide Affidavit, Joint Liquidators' Responding Record, Tab 1C, p 53.

<sup>12</sup> *Wide v Toronto-Dominion Bank*, [2015] OJ No 5806 (SCJ Comm List), ¶22, Joint Liquidators' Book of Authorities, Tab 2.

<sup>13</sup> Exhibit K of the Wide Affidavit, Joint Liquidators' Responding Record, Tab 1K, p 227.

5. ... *Livent* turns on the duties that an **auditor** owes to its client. Those duties are not the same as, and cannot be analogized to, the duties owed by a **bank** to its customer. Moreover, the measure of damages is not the same.

[...]

41. *Livent* held that the trustee in bankruptcy of an insolvent corporation may sue the corporation's **auditor** for negligence in failing to detect a fraud by the corporation's principals, and may recover the corporation's losses even if the corporation is insolvent such that the effect of the damages award is to benefit the corporation's creditors.

42. *Livent's* factual setting is crucial. Its entire analysis is premised upon an auditor's duty to its client. The analysis is not transferrable to the relationship between a bank and its customer because the duties owed by a bank to its customer are completely different from the duties owed by an auditor to its client.<sup>14</sup> [underlining added, other emphasis original]

17. TD Bank's submissions in TD Bank's First Stay Motion regarding *Livent* are the opposite of its submissions on this motion (**TD Bank's Second Stay Motion**). TD Bank has not attempted to explain the basis for its changed position and there is no viable explanation for that change.

18. In response to TD Bank's First Stay Motion, the Joint Liquidators brought a cross-motion seeking limited early productions from TD Bank consisting of contracts between SIB and TD Bank. The Joint Liquidators' reason for their cross-motion was expressly stated in their factum:

If the Early Productions reveal that there are only limited contractual limitations of liability in place between SIB and TD Bank, the Joint Liquidators would likely pursue neither their representative claim nor any class proceeding. Instead, the Joint Liquidators would pursue only their direct claim on behalf of SIB and the Dynasty Action in the form as currently constituted would also proceed.

19. TD Bank made the early production of contracts between SIB and TD Bank that were sought by the Joint Liquidators. Having received those contracts, and consistent with their stated

<sup>14</sup> Exhibit N of the Wide Affidavit, ¶5 and 41-42, Joint Liquidators' Responding Record, Tab 1N, p 249 and 264.



position prior to the motion, the Joint Liquidators agreed not to pursue their expressly alternative claim on behalf of SIB's creditors.<sup>15</sup>

20. As a result, in April 2016, the Joint Liquidators further amended their statement of claim. The amendments exclusively removed the allegations relating to the Joint Liquidators' alternative claim on behalf of SIB's customers.<sup>16</sup> The amendments did not in any way change the Joint Liquidators' main claim directly on behalf of SIB, which remains entirely consistent with their original pleading: "...if TD Bank had performed even its basic duties to SIB as required, the discovery of the SIB Looting at an earlier date would have avoided the increased liabilities of SIB and otherwise reduced or eliminated the losses and damages incurred by SIB after that date."<sup>17</sup>

21. On May 9, 2016, having received the Joint Liquidators' amended statement of claim in April 2016 (which exclusively removed the alternative claim), TD Bank delivered an amended statement of defence.<sup>18</sup> This amended statement of defence was delivered after the Court of Appeal's decision in *Livent* and at the very time that leave to appeal to the Supreme Court was being sought.<sup>19</sup>

22. In its amended statement of defence, TD Bank does not plead any allegations regarding the "theory of damages on which the JLs are now relying"<sup>20</sup> or any damages issue at all. It fails to do so even while now arguing the result of the damages issue potentially alive on the *Livent* appeal could make the Joint Liquidators' action "evaporate entirely".<sup>21</sup>

<sup>15</sup> Exhibit Q of the Wide Affidavit, Joint Liquidators' Responding Record, Tab 1Q, p 326. The Joint Liquidators have never conceded that the expressly alternative claim on behalf of SIB's creditors was "not properly brought".

<sup>16</sup> Wide Affidavit, ¶22, Joint Liquidators' Responding Record, Tab 1, p 6.

<sup>17</sup> Exhibit R of the Wide Affidavit, ¶327, Joint Liquidators' Responding Record, Tab 1R, p 429.

<sup>18</sup> Wide Affidavit, ¶23, Joint Liquidators' Responding Motion Record, Tab 1, p 6.

<sup>19</sup> The Court of Appeal's decision in *Livent* was rendered on January 8, 2016. Deloitte & Touche's legal argument in support of its application for leave to appeal to the Supreme Court was delivered on February 26, 2016. The Supreme Court granted leave to appeal on June 9, 2016.

<sup>20</sup> TD Bank's factum on TD Bank's Second Stay Motion returnable October 6, 2016, ¶11.

<sup>21</sup> TD Bank's factum on TD Bank's Second Stay Motion returnable October 6, 2016, ¶32.

23. TD Bank has also not sought leave to intervene in the Supreme Court's hearing of the *Livent* appeal despite purporting to believe that the Supreme Court's decision could impact a USD \$5.5 billion action against it (and presumably other actions against it also).<sup>22</sup>

### C. THE DYNASTY ACTION IS PROCEEDING IN ANY EVENT

24. The Joint Liquidators have taken an assignment of any proceeds recovered from the related action bearing Court File No. CV-09-8373-00CL that is being pursued by five SIB creditors against TD Bank in Ontario (the **Dynasty Action**).<sup>23</sup>

25. Although the legal basis of the Dynasty Action is distinct from the Joint Liquidators' action, the factual allegations advanced in the two actions are the same. As a result:

- (a) On December 1, 2015, Justice Conway rendered an endorsement stating: "All steps relating to production of documents will cover both the Joint Liquidators' action and the Dynasty Action."<sup>24</sup>
- (b) On January 13, 2016, TD Bank's counsel wrote to the Joint Liquidators' counsel and stated: "TD Bank agrees with the Joint Liquidators' and the Dynasty plaintiffs' position that its productions in both of their actions should be the same."<sup>25</sup>
- (c) On September 15, 2016, after TD Bank's Second Stay Motion had been brought, the Joint Liquidators and TD Bank finalized a discovery agreement (the **Discovery Agreement**). The Discovery Agreement provides the following:

---

<sup>22</sup> Section 55 of the Rules of the Supreme Court of Canada, SOR/2002-156 provide: "Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge." The Federal Court of Appeal considered this to be relevant to analyzing the interests of justice in *AstraZeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 312, ¶25 TD Bank's Book of Authorities, Tab 2.

<sup>23</sup> Wide Affidavit, ¶32, Joint Liquidators' Responding Record, Tab 1, p 10.

<sup>24</sup> Exhibit H of the Wide Affidavit, Footnote 1 to the "Timetable for Joint Liquidators and Dynasty Actions", Joint Liquidators' Responding Record, Tab 1H, p 208.

<sup>25</sup> Exhibit M of the Wide Affidavit, p 6, Joint Liquidators' Responding Record, Tab 1M, p 243.

10.1.1 The documents to be produced by the plaintiffs in the Dynasty Action include all of the documents that will be produced by the plaintiffs in the Action. The plaintiffs' productions will therefore constitute productions of both the plaintiffs in the Action and the Dynasty Action;

10.1.2 The documents to be produced by TD Bank are the same in the Action and the Dynasty Action, and that productions by TD Bank in the Action will therefore constitute TD Bank's productions in the Dynasty Action; and

10.1.3 The plaintiffs in the Dynasty Action will have a small number of additional documents to produce, primarily in respect of damages. Any such documents will be produced to TD Bank in a supplementary affidavit of documents.<sup>26</sup>

26. TD Bank is not moving for a stay of the Dynasty Action on the basis of *Livent* or otherwise.<sup>27</sup>

#### **D. THE UPCOMING DOCUMENT REVIEW PROCESS IS NOT OVERLY ONEROUS**

27. TD Bank takes the position that it would be "a waste of the parties' and the Court's time and resources to proceed with the merits of a claim" in light of the *Livent* appeal and submits:

This is particularly true given that the action is proceeding to documentary discovery on the merits imminently. The parties are in the midst of negotiating the details of a documentary discovery process which contemplates a search and review of records selected from over 18,000 *boxes* of documents and two electronic databases controlled by SIB's estate, and no less than half a million records collected by TD Bank.<sup>28</sup> [emphasis original by TD Bank]

28. However, under the Discovery Agreement, the Joint Liquidators agreed to give TD Bank specific guidance regarding the documents sought rather than require TD Bank to identify all documents potentially relevant to the pleading as would normally be required.<sup>29</sup>

29. The Discovery Agreement also provides a detailed process to select and review documents that is not nearly as onerous as TD Bank's submission suggests. Among other things:

<sup>26</sup> Exhibit W of the Wide Affidavit, section 10.1, Joint Liquidators' Responding Record, Tab 1W, p 514.

<sup>27</sup> TD Bank's notice of motion does not address the Dynasty Action at all. TD Bank first argued the Dynasty Action should be stayed in its factum.

<sup>28</sup> TD Bank's notice of motion for TD Bank's Second Stay Motion returnable October 6, 2016, ¶13, TD Bank's Motion Record, Tab 1, p 4.

<sup>29</sup> For instance: Exhibit W of the Wide Affidavit, section 9, Joint Liquidators' Responding Record, Tab 1W, p 504-514.

- (a) Section 8.2.4 of the Discovery Agreement addresses the approximately 18,000 boxes of documents held in Houston, Texas. As indicated in the Discovery Agreement, the Joint Liquidators previously undertook a process aimed at identifying relevant documents and extracted such documents from the boxes. The extracted records are now contained in just two boxes located in Toronto. The Discovery Agreement provides that those records are to be reviewed by the Joint Liquidators and relevant, non-privileged documents produced to TD Bank in electronic form. TD Bank does not need to take any steps in respect of the two boxes of documents.<sup>30</sup>
- (b) Section 8.2.1 of the Discovery Agreement confirms that the Joint Liquidators control two electronic databases of documents and have agreed with TD Bank on search terms to run in those databases.<sup>31</sup> In accordance with the Discovery Agreement, the Joint Liquidators are actively reviewing the documents contained in the two databases in preparation to soon make production to TD Bank. TD Bank does not need to take any steps in respect of the documents contained in the Joint Liquidators' databases.

As stated in the January 13<sup>th</sup> letter of TD Bank's counsel, TD Bank preserved approximately 500,000 documents soon after SIB's collapse in February 2009 but then "determined that about 25,000 of the 500,000 records contained in these accounts are potentially relevant to Stanford".<sup>32</sup> Under the Discovery Agreement, TD Bank has agreed to run certain additional search terms in the 500,000

---

<sup>30</sup> Exhibit W of the Wide Affidavit, section 8.2.4, Joint Liquidators' Responding Record, Tab 1W, p 502-503.

<sup>31</sup> Exhibit W of the Wide Affidavit, section 8.2.1 Joint Liquidators' Responding Record, Tab 1W, p 502.

<sup>32</sup> Exhibit M of the Wide Affidavit, p 3, Joint Liquidators' Responding Record, Tab 1M, p 240.

documents to potentially identify further documents to be reviewed. However, as demonstrated by TD Bank's previous review, only some limited number of those documents are expected to be identified as potentially relevant and reviewed. In any event, the number of documents TD Bank may be required to review to complete its documentary productions is, in the Joint Liquidators' view, relatively limited and reasonable given the nature and scope of the Joint Liquidators' action and the Dynasty Action. This is particularly true in light of sections 8.2.2 and 9.2.5 of the Discovery Agreement, which are discussed in the next subparagraph.

- (c) At sections 8.2.2 and 9.2.5 of the Discovery Agreement, the Joint Liquidators and TD Bank have agreed that if a party runs a search term that returns a number of "hits" the party deems to be disproportionate, then "[t]he parties will meet and confer in order to agree to a method for narrowing the hits to be reviewed. In the event that the Parties are unable to agree on such a method, or dispute the proportionality of the number of hits returned by any search term, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute."<sup>33</sup> As such, the parties have already agreed to a process for ensuring the number of documents required to be reviewed is not excessive or disproportionate.

30. In addition, contrary to the position of TD Bank, the evidentiary basis of the Joint Liquidators' damages claim is documents held by the Joint Liquidators and it is the Joint Liquidators (not TD Bank) who will need to review such documents in order to undertake documentary productions relevant to damages.<sup>34</sup>

<sup>33</sup> Exhibit W of the Wide Affidavit, sections 8.2.2 and 9.2.5, Joint Liquidators' Responding Record, Tab 1W, p 502 and 505.

<sup>34</sup> Wide Affidavit, ¶31, Joint Liquidators' Responding Record, Tab 1, p 10.

### PART III - LAW AND ARGUMENT

31. The issue to be determined on this motion is whether the Joint Liquidators' action should be stayed pending the Supreme Court of Canada's decision in *Livent*.

32. The answer is "no". TD Bank cannot meet its heavy burden of establishing that a stay is in the interests of justice. As detailed below:

- (a) TD Bank is requesting "a long wait". The *Livent* appeal hearing is tentatively scheduled for February 2017 and could be later. TD Bank's own case law confirms the time frame for the stay being considered on this motion could be up to two years<sup>35</sup> and TD Bank's documentary production would not occur until several months after any stay is lifted – potentially not until sometime in 2019. There is no precedent for a stay of such duration, particularly when there is no determination on the merits pending in the Joint Liquidators' action (only the discovery process).
- (b) There is no "very direct nexus" between the Joint Liquidators' action and *Livent*. The nature and identity of the parties in the two actions are entirely distinct. As TD Bank has previously acknowledged, the legal and factual bases of the two actions are readily distinguishable. In fact, TD Bank has not even pleaded any allegations relevant to the damages issue it now argues may be addressed on the *Livent* appeal and are allegedly determinative of the Joint Liquidators' action.
- (c) As the moving party, TD Bank has not established any prejudice it will suffer if the requested stay is not granted. TD Bank points only to potential inconvenience and

---

<sup>35</sup> *AstraZeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 312, ¶17, TD Bank's Book of Authorities, Tab 2. In analyzing the length of the stay and the interests of justice, the Federal Court of Appeal noted cases where it has taken the Supreme Court 18 months to issue a decision after hearing an appeal. The *Livent* appeal will be heard in February 2017 at the earliest, more than five months from now.

expense if the Joint Liquidators' action proceeds in normal course, neither of which are valid grounds for a stay. In any event, TD Bank is not moving to stay the related Dynasty Action and has not even argued that the Dynasty Action will be impacted by *Livent*. Documentary productions are therefore inevitable in the Dynasty Action. As this court ordered and TD Bank has expressly agreed in the Discovery Agreement, productions in the Joint Liquidators' action and the Dynasty Action will be the same. As such, there will be no prejudice to TD Bank and no practical benefit to staying the Joint Liquidators' action.

- (d) The Joint Liquidators will be prejudiced by a stay of their action. Since 2014, TD Bank has brought a number of motions and is now proposing that documentary productions potentially not be exchanged until sometime in 2019. Such significant delay would prejudice the Joint Liquidators, including by giving rise to a real risk that the Joint Liquidators' ability to advance the evidence required to prove their case may be diminished.

33. The onus is on TD Bank to establish extraordinary circumstances justifying the requested stay. It cannot meet its burden in the circumstances of this case. TD Bank's Second Stay Motion should be dismissed.

**A. TD BANK IS SEEKING A LONG AND UNPRECEDENTED STAY**

34. The court must be "reluctant to grant a stay if the result of the stay is to deny the plaintiff access to the courts or substantially delay or impair the plaintiff's right to have his or her case heard."<sup>36</sup> Here, TD Bank is seeking a stay of an uncertain duration pending the Supreme Court of Canada's decision in the upcoming hearing of *Livent*. There is no basis or precedent for such a stay.

35. TD Bank relies on the Federal Court of Appeal's decision in *AstraZeneca Canada Inc v Mylan Pharmaceuticals ULC* as the leading case regarding stays of proceedings.<sup>37</sup> In that case, the Federal Court of Appeal considered whether the *AstraZeneca* case should be stayed pending a decision of the Supreme Court of Canada in another case, *Teva Canada Limited v Pfizer Canada Inc*.

36. The facts of the *AstraZeneca* case are relevant to TD Bank's requested stay:

- (a) The Federal Court of Appeal heard the issue of whether a stay should be granted in November 2011.

**Note:** TD Bank's Second Stay Motion is scheduled to be heard in October 2016.

- (b) The Supreme Court was scheduled to hear the appeal in the *Teva* case in February 2012.

**Note:** The *Livent* appeal is tentatively scheduled for February 2017 and could be later.

- (c) The Federal Court of Appeal noted that, at that time, the Supreme Court took 7.7 months on average to release decisions.

---

<sup>36</sup> *Navionics Inc v Nautical Data International Inc*, [2006] OJ No 5397 (SCJ), ¶31, Joint Liquidators' Book of Authorities, Tab 1.

<sup>37</sup> *AstraZeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 312, TD Bank's Book of Authorities, Tab 2.



**Note:** In 2015, the Supreme Court took approximately 6 months to release decisions and 2016 statistics are not yet available.

- (d) The Federal Court of Appeal also noted that there are instances where the Supreme Court takes 18 months after a hearing to issue a decision.<sup>38</sup>

**Note:** There are multiple cases where the Supreme Court's decisions have taken 18 months to be released.<sup>39</sup> As recently as June 2016, the Supreme Court rendered a decision after 17 months.<sup>40</sup>

37. In these circumstances, the Federal Court of Appeal characterized the stay request as one seeking "a long wait"<sup>41</sup> and declined to stay the *AstraZeneca* case.

38. TD Bank's Second Stay Motion also seeks "a long wait". While there is no telling when the Supreme Court's *Livent* decision may be rendered, it is reasonable to expect the timeframe will be at the higher end of the spectrum given that *Livent* is a complex commercial case with a number of non-time sensitive issues that the Supreme Court is being asked to consider.

39. In any event, the Supreme Court's hearing of the *Livent* appeal will not occur for another five months at the earliest. Based on TD Bank's own case law, the Supreme Court could then take up to 18 months to render a decision. As such, the length of the stay at issue on this motion is potentially almost two years.

40. In addition, TD Bank has indicated it cannot make its documentary productions until six months after any dismissal of TD Bank's Second Stay Motion.<sup>42</sup> If a stay is imposed, TD Bank will presumably require at least six months in order to make its documentary productions after the stay

<sup>38</sup> *AstraZeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 312, ¶17, TD Bank's Book of Authorities, Tab 2.

<sup>39</sup> *R v Advance Cutting & Coring Ltd*, 2001 SCC 70 (18 months); *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23 (18 months); *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 (18 months); *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 (19 months).

<sup>40</sup> *Canada (National Revenue) v Thompson*, 2016 SCC 21.

<sup>41</sup> *AstraZeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 312, ¶19, TD Bank's Book of Authorities, Tab 2.

<sup>42</sup> Exhibit V of the Wide Affidavit, Joint Liquidators' Responding Record, Tab 1V, p 496.

is lifted. Accordingly, TD Bank is seeking to potentially not make its documentary productions until sometime in 2019.

41. TD Bank cites no precedent for a stay of such duration and there is no such precedent. For instance, while TD Bank relies on *Korea Data Systems (USA), Inc v Aamzing Technologies Inc*, in that case (which is also factually distinguishable), the court held that the maximum duration of the implemented stay would be 120 days.<sup>43</sup> In that many days, the Supreme Court will not even have heard the *Livent* appeal let alone rendered a decision.

42. In another case relied on by TD Bank, *Ainsworth Lumber Co v Canada (Attorney General)* (which is also entirely distinguishable on its facts, as discussed below), the court imposed a stay where the other court's hearing had been completed months earlier and its decision was under reserve.<sup>44</sup> Again, this is nothing like the situation present in the Joint Liquidators' action.

#### **B. THERE IS NO VERY DIRECT NEXUS BETWEEN THIS CASE AND LIVENT**

43. Section 106 of the *Courts of Justice Act* provides that a court may stay any proceeding on such terms as are considered just.<sup>45</sup> Where a party requests that the court stay an action before it, the test to be applied is whether the interests of justice support the proceeding be stayed.<sup>46</sup>

44. The discretion to stay a proceeding must be exercised sparingly and only in the clearest of cases.<sup>47</sup> There is "a heavy onus on the party seeking a stay to establish that the stay is justified."<sup>48</sup>

45. The Federal Court of Appeal's decision in *AstraZeneca* is cited by TD Bank as the leading case regarding the test to be applied when a party seeks a stay pending the release of a decision in

<sup>43</sup> *Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, 2012 ONCA 657, ¶26, TD Bank's Book of Authorities, Tab 5.

<sup>44</sup> *Ainsworth Lumber Co v Canada (Attorney General)*, 2001 BCCA 105, ¶3, TD Bank's Book of Authorities, Tab 1.

<sup>45</sup> RSO 1990, c C 43, Schedule B.

<sup>46</sup> *Astrazeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 31, ¶14, TD Bank's Book of Authorities, Tab 2; *Korea Data Systems (USA) Inc v Aamazing Technologies Inc*, 2012 ONCA 756, ¶16-19, TD Bank's Book of Authorities, Tab 5.

<sup>47</sup> *Aldo Group Inc v Moneris Solutions Corp*, 2013 ONCA 725, ¶30, Joint Liquidators' Book of Authorities, Tab 3.

<sup>48</sup> *Navionics Inc v Nautical Data International Inc*, [2006] OJ No 5397 (SCJ), ¶29, Joint Liquidators' Book of Authorities, Tab 1.

another action. Having noted the long wait sought by the moving party, the Federal Court of Appeal held: "Only a very direct nexus between the issues in the *Teva* appeal and this appeal might warrant an exercise of discretion in favour of that wait."<sup>49</sup>

46. The Federal Court of Appeal then determined that no such very direct nexus existed. Notably, in that case:

- (a) the parties in the *AstraZeneca* appeal and the *Teva* appeal were different;
- (b) the factual bases of the *AstraZeneca* appeal and the *Teva* appeal were different<sup>50</sup>;
- (c) although a legal issue relevant to both the *AstraZeneca* appeal and the *Teva* appeal could potentially be resolved by the Supreme Court, "the Supreme Court may never decide that issue"<sup>51</sup>; and
- (d) it was open to the parties to seek to intervene in the *Teva* appeal and make submissions on issues that could conceivably affect them later. In this regard, the Federal Court of Appeal noted there is precedent for such successful intervention.<sup>52</sup>

47. The foregoing considerations also apply in response to TD Bank's Second Stay Motion. There is no very direct nexus between the Joint Liquidators' action and *Livent*:

- (a) TD Bank has at no time pleaded any allegations relevant to the damages issue that it now argues may potentially be addressed on the *Livent* appeal and is therefore not even defending the Joint Liquidators' action on the basis of such issues. This is the case notwithstanding that TD Bank delivered its most recent amended statement of

<sup>49</sup> *Astrazeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 31, ¶19, TD Bank's Book of Authorities, Tab 2.

<sup>50</sup> *Astrazeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 31, ¶21, TD Bank's Book of Authorities, Tab 2.

<sup>51</sup> *Astrazeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 31, ¶22, TD Bank's Book of Authorities, Tab 2.

<sup>52</sup> *Astrazeneca Canada Inc v Mylan Pharmaceuticals ULC*, 2011 FCA 31, ¶25, TD Bank's Book of Authorities, Tab 2.

defence after the Court of Appeal's decision in *Livent* and at the very time that leave to appeal to the Supreme Court was being sought.

- (b) The nature and identity of the parties in the Joint Liquidators' action are different from the nature and identity of the parties in *Livent*. TD Bank has previously made detailed submissions distinguishing its position as a defendant bank from the position of the defendant auditor in *Livent*.
- (c) Further to the previous point, as TD Bank acknowledges in its factum on this very motion, the appellant in the pending *Livent* appeal regarding auditors takes issue with the premise that "creditors ... to whom no duty is directly owed [can] take over the enterprise through the office of a receiver and assert their claim in the corporation's name."<sup>53</sup> As evident from *Livent*, the assertion that no duty is owed by auditors in that case is based on the Supreme Court of Canada's seminal decision regarding auditors in *Hercules Managements Ltd v Ernst & Young*. However, in response to a motion to strike by TD Bank, this court previously held that TD Bank may owe a duty directly to SIB's customers and TD Bank's appeal was quashed by the Court of Appeal.<sup>54</sup> Therefore, there is potentially a duty owed by TD Bank to SIB's customers that further distinguishes this case from *Livent* and any concern of the Supreme Court in *Livent* about potentially circumventing *Hercules* is irrelevant in this case.
- (d) Although TD Bank's position on this motion focuses on whether a corporation can sue to recover damages consisting of amounts owed to its creditors, as the Court of

<sup>53</sup> TD Bank's factum on TD Bank's Second Stay Motion returnable October 6, 2016, ¶16.

<sup>54</sup> *Dynasty Furniture Manufacturing Ltd v The Toronto-Dominion Bank*, 2014 ONSC 4933 (SCJ Comm List), appeal quashed, 2015 ONCA 137, Joint Liquidators' Book of Authorities, Tab 4.

Appeal acknowledged in *Livent* citing the Supreme Court's decision in *Hercules*, there is "a long-recognized principle of corporate law that a corporation is a legal entity separate and apart from its shareholders and stakeholders, and the corporation alone has the right to sue for wrongs done to it."<sup>55</sup> This is not a "novel and controversial" principle as TD Bank submits but a well-established principle of Canadian law established by the Supreme Court. It is highly unlikely the Supreme Court will reverse itself in *Livent*.

- (e) The facts giving rise to the Joint Liquidators' action are different from the facts giving rise to *Livent*. TD Bank has previously made detailed submissions distinguishing the facts of the two cases.
- (f) TD Bank has previously submitted that the legal issues in the Joint Liquidators' action are readily distinguishable from those in *Livent*, including in respect of the very damages issue it now argues connects the Joint Liquidators' action to the pending *Livent* appeal.
- (g) Unlike some more narrow appeals, there are a number of potential issues alive on the *Livent* appeal and, as a result, the Supreme Court may never decide the damages issue that TD Bank now submits is relevant to the Joint Liquidators' action. In that case, a stay of the Joint Liquidators' action would constitute an unjustified delay with no benefit to either party (unless delay is TD Bank's goal).
- (h) Since 2011, the Joint Liquidators have been pursuing a main claim directly on behalf of SIB. The legal basis for that claim has never changed, including as a result

---

<sup>55</sup> *Livent Inc (Receiver of) v Deloitte & Touche*, 2016 ONCA 11, ¶57, TD Bank's Book of Authorities, Tab 6.

of the Court of Appeal's decision in *Livent*. TD Bank's submissions to the contrary are simply incorrect.

- (i) The particular damages "formula" in *Livent* arose from the parties' expert reports filed at trial. The question of how damages are properly calculated in the Joint Liquidators' action will similarly be a question of expert evidence, particularly given the factual distinctions between the cases (that TD Bank has acknowledged), and cannot be determined by any other case.
- (j) In any event, even if TD Bank was correct that a new damages "formula" could arise from the Supreme Court's decision in *Livent* that is applicable to the Joint Liquidators' action, the source documents relevant to damages will not change. Staying the action will therefore not result in a different damages document collection process, which will be undertaken by the Joint Liquidators (and not TD Bank) in any event.
- (k) It is open to TD Bank to seek to intervene in the *Livent* appeal but it has not done so. This is the case even though TD Bank now purports to believe that the *Livent* appeal could directly impact a USD \$5.5 billion action against it (and presumably further actions against banks).

48. TD Bank's Second Stay Motion is also brought notwithstanding that there is no determination on the merits pending in the Joint Liquidators' action. The next step in the Joint Liquidators' action is the documentary and oral discovery process. TD Bank relies only on cases where a stay was sought to delay a determination on the merits pending the result of another case.

Here, therefore, there will be no "waste of the court's...time and resources."<sup>56</sup> TD Bank relies on no case where the discovery process was stayed pending a determination in another action.

49. The cases relied on by TD Bank are also otherwise distinguishable. For instance, in the British Columbia Court of Appeal's aforementioned decision in *Ainsworth Lumber*, a change to a tax rule gave rise to two actions each between the same plaintiff and the federal government – one before the Supreme Court of British Columbia and, on appeal from a tax reassessment, before the Tax Court of Canada. The stay sought was short, as noted above.

50. In staying the former action, the British Columbia Court of Appeal noted: "...in essence the two actions of the respondent are against the Government of Canada. As noted above, there is substantial overlap, if not a nearly total congruence between the result sought in the two proceedings."<sup>57</sup> Clearly the Joint Liquidators' action faces no such overlap with *Livent* and there is not the very direct nexus or "total congruence" required to stay the action.

### **C. THERE IS NO PREJUDICE TO TD BANK – THE DYNASTY ACTION PRODUCTION WILL OCCUR IN ANY EVENT**

51. As the moving party, TD Bank has not established any prejudice it will suffer if the requested stay is not granted. In *Navionics Inc v Nautical Data International Inc*, the court held: "For a stay to be granted, the injustice to the moving party must amount to more than an inconvenience or expense."<sup>58</sup>

52. TD Bank exclusively argues that it may unnecessarily spend "time and resources" if required to proceed in the normal course with documentary productions in the Joint Liquidators'

<sup>56</sup> TD Bank's factum on TD Bank's Second Stay Motion returnable October 6, 2016, ¶6.

<sup>57</sup> *Ainsworth Lumber Co v Canada (Attorney General)*, 2001 BCCA 105, ¶11, TD Bank's Book of Authorities, Tab 1.

<sup>58</sup> *Navionics Inc v Nautical Data International Inc*, [2006] OJ No 5397 (SCJ), ¶30, Joint Liquidators' Book of Authorities, Tab 1.

action.<sup>59</sup> This is not a valid basis for a stay. There is no determination on the merits pending in the action or any other event that could allow TD Bank to establish any prejudice.

53. In any event, TD Bank is not moving to stay the related Dynasty Action and there is no basis on which to impose such a stay.<sup>60</sup> Instead, the Dynasty Action further confirms that there is no basis to stay the Joint Liquidators' action.

54. The Supreme Court's decision in *Livent* will have no bearing on the Dynasty Action. Although the factual matrix giving rise to the Joint Liquidators' action and the Dynasty Action are the same, the legal bases are distinct. TD Bank does not even argue that *Livent* could impact the Dynasty Action.

55. TD Bank's position taken for the first time in its factum on this motion is that productions in the Joint Liquidators' action and the Dynasty Action ought to be different is without merit. The factual matrix giving rise to both actions is the same. For this reason, the Discovery Agreement – executed by TD Bank on September 15, 2016 – expressly provides that documentary productions in the Joint Liquidators' action and the Dynasty Action will be the same. This agreement is entirely consistent with Justice Conway's December 2015 endorsement regarding productions.

56. Accordingly, TD Bank will inevitably be required to produce documents in the Dynasty Action. There is no basis to delay those productions.<sup>61</sup> In these circumstances, as a result of the Dynasty Action, there will be no prejudice to TD Bank and no practical benefit as a result of staying the Joint Liquidators' action.

---

<sup>59</sup> TD Bank's factum on TD Bank's Second Stay Motion returnable October 6, 2016, ¶6.

<sup>60</sup> TD Bank's notice of motion does not address the Dynasty Action at all. TD Bank first argued the Dynasty Action should be stayed in its factum.

<sup>61</sup> To date, the Joint Liquidators' action and the Dynasty Action have been case managed in tandem. However, there is nothing requiring the actions to proceed in tandem. All that is currently required is for the same case management judge to be assigned to both the Joint Liquidators' action and the Dynasty Action.



57. In addition, it is the Joint Liquidators – not TD Bank – who are required to undertake the more substantial documentary collection process, including in respect of documents relevant to damages. Under the Discovery Agreement, TD Bank need not expend time or resources in respect of damages document at this stage. The Joint Liquidators will collect such damages documents and those documents will remain relevant to any damages calculation even if TD Bank is correct that the Supreme Court may modify an applicable damages "formula".

58. Conversely, the Joint Liquidators will be prejudiced by the requested stay. Plaintiffs such as the Joint Liquidators have a right to have their cases heard.<sup>62</sup> A stay of the Joint Liquidators' action – particularly of the length sought by TD Bank – impedes that right and constitutes prima facie prejudice to the Joint Liquidators. The unchallenged evidence also confirms that:

- (a) Since the action was reactivated in early 2014, TD Bank brought two unsuccessful motions, both of which sought to end the Joint Liquidators' action. The Joint Liquidators now face TD Bank's Second Stay Motion, which has already given rise to further unnecessary delay and seeks further delay.
- (b) The Joint Liquidators' action relates to events dating back to at least 1991. Evidence relevant to the action is less likely to be available with the passage of time, which may be significant as noted above. Documents held by third parties could be lost, memories could fade, and relevant witnesses' ability to testify may otherwise diminish.<sup>63</sup>

---

<sup>62</sup> *Navionics Inc v Nautical Data International Inc*, [2006] OJ No 5397 (SCJ), ¶31, Joint Liquidators' Book of Authorities, Tab 1.

<sup>63</sup> Wide Affidavit, ¶36, Joint Liquidators' Responding Record, Tab 1, p 12.

59. There will be no prejudice to TD Bank. Conversely, the further delay sought by TD Bank is completely unwarranted and prejudicial to the Joint Liquidators, all of which are further reasons that the interests of justice require TD Bank's Second Stay Motion to be dismissed.

#### PART IV - CONCLUSION

60. The interests of justice require TD Bank's Second Stay Motion to be dismissed. TD Bank cannot meet its "heavy burden" of establishing that it is entitled to the exceptional remedy sought. There is no very direct nexus between the Joint Liquidators' action and *Livent*, and TD Bank has not established any prejudice it will incur, particularly in light of the inevitable documentary productions in the Dynasty Action. There is no pending court hearing that could waste court resources and no practical benefit to be gained by staying the Joint Liquidators' action. To the contrary, only the Joint Liquidators will be prejudiced by any such stay. TD Bank's Second Stay Motion should be dismissed.

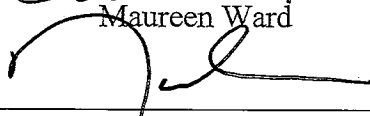
#### PART V - ORDER REQUESTED

61. The Joint Liquidators request an order dismissing TD Bank's motion with costs payable to the Joint Liquidators.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of September, 2016.

  
 Per: Lincoln Caylor

  
 Maureen Ward

  
 Nathan Shaheen

September 26, 2016

**BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto ON M5X 1A4

**Lincoln Caylor (#37030L)**  
Email: caylorl@bennettjones.com

**Maureen M. Ward (#44065Q)**  
Email: wardm@bennettjones.com

**Nathan J. Shaheen (#60280U)**  
Email: shaheenn@bennettjones.com

Telephone: (416) 863-1200  
Facsimile: (416) 863-1716

Lawyers for the plaintiffs

**TAB A**

## **SCHEDULE A**

### **LIST OF AUTHORITIES**

1. *Navionics Inc v Nautical Data International Inc*, [2006] OJ No 5397 (SCJ)
2. *Wide v Toronto-Dominion Bank*, [2015] OJ No 5806 (SCJ Comm List)
3. *Aldo Group Inc v Moneris Solutions Corp*, 2013 ONCA 725
4. *Dynasty Furniture Manufacturing Ltd v The Toronto-Dominion Bank*, 2014 ONSC 4933 (SCJ Comm List), appeal quashed, 2015 ONCA 137

**TAB B**

**SCHEDULE B****TEXT OF STATUTES, REGULATIONS & BY - LAWS****Courts of Justice Act, RSO 1990, c. C.43.****Stay of Proceedings**

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

**Rules of the Supreme Court of Canada, SOR/2002-156****Motion for Intervention**

55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

MARCUS WIDE of Grant Thornton (British Virgin Islands) Limited -and-  
and others  
Plaintiffs

THE TORONTO-DOMINION BANK

Defendant

Court File No. CV-12-9780-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE PLAINTIFFS**  
(Motion returnable October 6, 2016)

**BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto ON M5X 1A4

**Lincoln Caylor (#37030E)**  
Email: caylorl@bennettjones.com

**Maureen M. Ward (#44065Q)**  
Email: wardm@bennettjones.com

**Nathan J. Shaheen. (#60280U)**  
Email: shaheenn@bennettjones.com

Telephone: (416) 863-1200  
Facsimile: (416) 863-1716

Lawyers for the plaintiffs