

**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 Joint Liquidators of Stanford International Bank Limited**

Plaintiffs

- and -

**THE TORONTO-DOMINION BANK**

Defendant

**REPLY FACTUM OF THE TORONTO-DOMINION BANK  
(motion for an order temporarily staying the action pending the outcome of the appeal  
of the *Livent* decision to the Supreme Court of Canada, returnable October 6, 2016)**

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**REPLY FACTUM OF THE TORONTO-DOMINION BANK**

***Introduction***

1. The Joint Liquidators' (the "JLs") written argument on this motion conspicuously ignores that, without the Ontario Court of Appeal's ruling in *Livent Inc. (Receiver of) v. Deloitte & Touche*<sup>1</sup> and the theory of damages on which it is based (the "deepening insolvency" theory), their action as constituted is defective. In April 2016, they conceded that they cannot claim the \$5.5 billion in losses they seek in the absence of a class action on behalf of the creditors of Stanford International Bank ("SIB").<sup>2</sup> To cure this defect, they elected to rely on *Livent* and the deepening insolvency theory for the proposition that those same losses could properly be sought through the vehicle of an action in SIB's name alone.

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<sup>1</sup> 2016 ONCA 11 ("*Livent*"), Book of Authorities of The Toronto-Dominion Bank ("TD Bank BOA"), Tab 6.

<sup>2</sup> Affidavit of Katherine Stubits sworn June 16, 2016 ("*Stubits Affidavit*"), para. 3, Motion Record of The Toronto-Dominion Bank ("TD Bank MR"), p. 9.

2. The JLs now vociferously argue that their reconstituted claim is not based on *Livent* and the deepening insolvency theory, but never identify what it is based on. If not *Livent* and the deepening insolvency theory, what is the basis for the claim?

3. The JLs' avoidance of this reality is central to their position on this motion. Once the indispensibility of *Livent* to their claim is reinserted into the picture, their arguments for opposing this motion ring hollow.

*It is true, but irrelevant to this motion, that Livent is distinguishable on liability*

4. The JLs argue at length, correctly, and paradoxically, that *Livent* is distinguishable in that it is an auditors' liability case. They recall that The Toronto-Dominion Bank ("TD Bank") made it clear that this was its position when arguing its March 11, 2016 motion, at which time the JLs signalled that they would nevertheless be relying on *Livent*. The JLs claim that TD Bank's argument in this regard is inconsistent with its present rationale for seeking a temporary stay on the basis that *Livent* may materially affect the scope of this action.

5. In making this argument, the JLs confuse the distinct concepts of *liability* and *damages*.

6. If the *Livent* formula for determining the losses of an insolvent corporation (i.e. the deepening insolvency theory) is repudiated by the Supreme Court of Canada, the JLs' claim for the *damages* they seek is doomed. As a result of their election to proceed only with their claims on behalf of SIB, the JLs would be precluded from seeking losses in SIB's name, and they have closed the door on any prospect of seeking those losses on behalf of SIB's creditors. The Appellant's factum in *Livent* squarely targets the correctness of the deepening insolvency

theory as a central issue on appeal, and points out that it has never before been recognized by a Canadian court.<sup>3</sup> In this sense, the *Livent* appeal raises a very serious issue with respect to the JLs' claim, and indeed may be determinative of this action, thereby warranting the temporary stay sought.

7. However, if the *Livent* formula for determining the losses of an insolvent corporation survives on appeal, the question of TD Bank's *liability* for those losses will remain an open question, even under the *Livent* rubric. This is because, as the JLs correctly point out, *Livent* is distinguishable in that it addresses the duty of care owed by an auditor to its clients, rather than the duty owed by a bank to its customers. This is among the reasons that TD Bank took the position, on its March 11, 2016 motion, that the legally correct way for the JLs to proceed is by seeking to constitute a class action on behalf SIB's creditors. Knowing that this is, and would be, TD Bank's position with respect to liability, the JLs nevertheless elected to rely on *Livent*.

8. The fact that *Livent* is distinguishable on liability will be an issue for the JLs to reckon with at trial if the scope of their massive claim for damages on behalf of SIB survives appellate scrutiny. It is not a reason to ignore, as the JLs do, that their claim for those damages is entirely dependent on the correctness of the deepening insolvency theory applied in *Livent*, and that a temporary stay is therefore warranted pending a determination of that central issue.

***The nexus between Livent and the present action is direct and explicit***

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<sup>3</sup> Factum of the Appellant, Deloitte LLP, S.C.C. File No. 36875, paras. 111-119, Second Supplementary Motion Record of The Toronto-Dominion Bank, Tab A.

9. The JLs raise numerous arguments in support of the proposition that there is “no very direct nexus” between their action and *Livent*, and that the test for a temporary stay in *AstraZeneca Canada Inc. v. Mylan Pharmaceuticals*<sup>4</sup> has therefore not been met. These arguments are all irrelevant attempts to sidestep the JLs’ explicit election to rely on *Livent*, and the deepening insolvency theory on which *Livent* is based. That election was made openly before this Court in March 2016 in the wake of a concession that this action is otherwise not properly constituted.<sup>5</sup>

10. Incredibly, the JLs go so far as to deny that the basis for their claim has changed as a result of *Livent*, pointing to the fact that there has always been a claim on behalf of SIB itself. Once again, they confuse the distinct issues of i) to which claimant a duty is owed (liability), and ii) the loss sustained by that claimant (damages). The JLs cannot escape that the legal basis for their claim changed entirely when they took the position that they could seek damages exclusively on behalf of SIB and abandon their claims on behalf of its customers.

11. A temporary stay should be granted if this action is to proceed in a manner that is proportionate and well-founded at law. If it turns out that the JLs cannot seek all of the damages they claim on behalf of SIB, but instead are entitled to none of them or some greatly reduced portion of them, they will have wasted a great deal of time and money in the interim forcing the parties through a discovery process that is fit only for a multi-billion-dollar action.

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<sup>4</sup> 2011 FCA 31, TD Bank BOA, Tab 2.

<sup>5</sup> Stubits Affidavit, para. 3, TD Bank MR, p. 9.

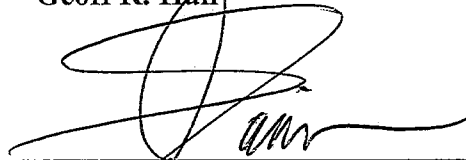
***TD Bank is moving for a stay of both actions***

12. The JLs incorrectly argue that TD Bank is not moving for a stay of the *Dynasty* action, which has been case managed with the JLs' action since 2014.<sup>6</sup> The parties appeared before Justice Barbara Conway in chambers on September 6, 2016, at which time the *Dynasty* action was discussed at length and TD Bank made clear its position that the stay sought would apply to both actions. The JLs have had ample notice of TD Bank's position in this regard.


**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of October, 2016.



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<sup>6</sup> Reply Affidavit of Katherine Stubits sworn September 15, 2016, para. 4, and Exhibit C, Reply Motion Record of The Toronto-Dominion Bank, Tab C.

**SCHEDULE A**  
**LIST OF AUTHORITIES**

1. *AstraZeneca Canada Inc. v. Mylan Pharmaceuticals ULC*, 2011 FCA 312
2. *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11



**SCHEDULE B**  
**RELEVANT STATUTES**

None.

MARCUS WIDE OF GRANT THORNTON  
(BRITISH VIRGIN ISLANDS) LIMITED et al.  
Plaintiffs

THE TORONTO-  
DOMINION BANK  
Defendant

- and -

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

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Proceeding commenced at Toronto

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