



- (b) “**Certification Notice**” is the notice of certification to Class Members;
- (c) “**Class**” and “**Class Members**” means all persons, wherever they reside, who hold or held at any time during the Class Period, one or more units of the Canadian Equity Fund or a Portfolio Fund, except for Excluded Persons;
- (d) “**Class Period**” means the period from January 1, 2010 to the date on which the certification order in this proceeding is issued;
- (e) “**CPA**” means the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
- (f) “**DOT**” means the Amended, Consolidated and Restated Declarations of Trust, dated as of November 22, 2018 (TD Mutual Funds) made by TDAM, as amended and supplemented from time to time;
- (g) “**Excluded Persons**” means the Defendant and its past and present subsidiaries, affiliates, and parent corporations, and their:
  - (i) officers, directors, legal representatives, predecessors, successors and assigns; and
  - (ii) employees having responsibility for managing the investment risk and performance reporting of the Funds, and the past and present members of the independent review committees of the Funds;
- (h) “**Funds**” means collectively the Canadian Equity Fund and the Portfolio Funds;
- (i) “**Litigation Plan**” means the plaintiff’s plan for the proceeding as contemplated by section 4(1)(e) of the *CPA*;
- (j) “**Opt-Out Deadline**” means ninety (90) days after the first publication of the Certification Notice made under the notice program described in paragraph 12 of the Litigation Plan;
- (k) “**Portfolio Fund**” means any mutual fund trust constituted by a TD Trust Instrument, including all series of units of that trust, that holds or held one or more units of the Canadian Equity Fund at any time during the Class Period;
- (l) “**SEDAR**” means the System for Electronic Document Analysis and Retrieval established in Canada;
- (m) “**TD Trust Instruments**” means, collectively, all declarations of trust or similar trust instruments that govern or have governed the Funds;
- (n) “**TDAM**” means the defendant TD Asset Management Inc.

2. This action is certified as a class proceeding under the *CPA*.
3. Dean Turpin is hereby appointed as the representative plaintiff for the Class.
4. The proceeding is certified on the basis that the issues to be adjudicated, as listed in **Schedule A** to this order, are common to the Class.
5. The Litigation Plan attached as **Schedule B** to this order is approved as a workable method for advancing the proceeding on behalf of the Class at this stage.
6. Any other judicial proceeding in Canada relating to this class proceeding shall be stayed.
7. The Certification Notice is approved substantially in the form attached hereto as **Schedule C** to this Order.
8. The Certification Notice shall be disseminated in accordance with the notice program described in paragraph 12 of the Litigation Plan and shall be filed by TDAM as a news release on SEDAR.
9. Costs associated with the Certification Notice and its dissemination shall be paid by the Plaintiff in accordance with paragraph 14 of the Litigation Plan.
10. A Class Member may opt out of the class proceeding only in accordance with the directions set out in the Notice, by no later than the Opt-Out Deadline. No person may opt out of this proceeding after the Opt-Out Deadline and a person who opts out in accordance with the directions set out in the Certification Notice by the Opt-Out Deadline shall not be a Class Member on or after the date such person opts out of the proceeding.
11. Class Members may not opt out after the expiry of the Opt-Out Deadline set out in paragraph 10 above.
12. This Order is binding on each Class Member including those persons who are minors or mentally incapable and the requirements of Rule 20-2 of the *Supreme Court Civil Rules* are dispensed with.

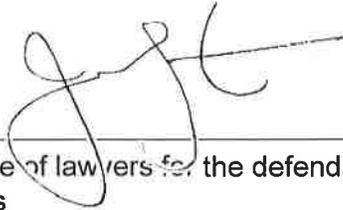
THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

John Archibald  
per 

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Signature of lawyers for the plaintiff  
Paul Bates and John Archibald

BY THE COURT



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Signature of lawyers for the defendant  
Jill Yates

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REGISTRAR

## SCHEDULE A

### PROPOSED COMMON ISSUES

#### **Defined Terms**

For the purposes of the proposed common issues below, the following definitions apply:

- (a) "**BCSA**" means the *Securities Act*, R.S.B.C. 1996, c. 418, as amended;
- (b) "**Benchmark**" means the benchmark index of the Canadian Equity Fund, which is the S&P/TSX Composite Total Return Index
- (c) "**Canadian Equity Fund**" means TD Canadian Equity Fund, the mutual fund trust constituted by the DOT, including all series of units of that trust;
- (d) "**Class**" and "**Class Members**" means all persons, wherever they reside, who hold or held at any time during the Class Period, one or more units of the Canadian Equity Fund or a Portfolio Fund, except for Excluded Persons;
- (e) "**Class Period**" means the period from January 1, 2010 to the date on which the certification order in this proceeding is issued;
- (f) "**Closet Indexing Strategy**" means an investment strategy designed to closely track or replicate, not exceed, the performance of the Benchmark;
- (g) "**Defendant**" means the defendant TD Asset Management Inc. in its capacities as trustee and manager of the Funds;
- (h) "**DOT**" means the Amended, Consolidated and Restated Declarations of Trust, dated as of November 22, 2018 (TD Mutual Funds), as amended and supplemented from time to time;
- (i) "**Excess Management Fees**" means any unreasonable portion of the management fees that have been paid to the Defendant during the Class Period:
  - (i) out of the assets of the Canadian Equity Fund; or
  - (ii) out of the assets of a Portfolio Fund in respect of the Portfolio Fund's holdings of the Canadian Equity Fund;
- (j) "**Excess Trading Costs**" means any unreasonable amount of trading costs charged by the Canadian Equity Fund;
- (k) "**Excluded Persons**" means the Defendant and its past and present subsidiaries, affiliates, and parent corporations, and their:
  - (i) officers, directors, legal representatives, predecessors, successors and assigns; and

- (ii) employees having responsibility for managing the investment risk and performance reporting of the Funds, and the past and present members of the independent review committees of the Funds;
- (l) **"Fund Facts Document"** means a fund facts document as referred to in NI 81-101 and Form 81-101F3;
- (m) **"Funds"** means the Canadian Equity Fund and the Portfolio Funds;
- (n) **"Management Report"** means an interim or annual management report of fund performance as referred to in *National Instrument 81-106 - Investment Fund Continuous Disclosure*, as amended;
- (o) **"Other Canadian Securities Legislation"** means the *Securities Act*, R.S.A. 2000, c. S-4; the *Securities Act*, C.C.S.M. c. S.50; the *Securities Act*, S.N.B. 2004, c. S-5.5; the *Securities Act*, R.S.N.L. 1990, c. S-13; the *Securities Act*, S.N.W.T. 2008, c. 10; the *Securities Act*, R.S.N.S. 1989, c. 418; the *Securities Act*, S. Nu. 2008, c. 12; *Securities Act*, R.S.O. 1990, c. S.5, as amended; the *Securities Act*, R.S.P.E.I. 1988, c. S-3.1; the *Securities Act*, R.S.Q., c. V-1.1; the *Securities Act*, 1988, S.S. 1988-89, c. S-42.2; and the *Securities Act*, S.Y. 2007, c. 16, all as amended;
- (p) **"Portfolio Fund"** means any mutual fund trust constituted by a TD Trust Instrument, including all series of units of that trust, that holds or held one or more units of the Canadian Equity Fund at any time during the Class Period;
- (q) **"Public Disclosure Documents"** means the Fund Facts Documents, the Management Reports, and the Simplified Prospectuses of (i) the Canadian Equity Fund; and (ii) the Portfolio Funds;
- (r) **"Simplified Prospectus"** means a simplified prospectus as referred to in *National Instrument 81-101 - Mutual Fund Prospectus Disclosure*, as amended.
- (s) **"Standard and Duty of Care"** means in respect of any person or company performing duties on behalf of one of the Funds, the obligation to:
  - (i) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Fund; and
  - (ii) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances;
- (t) **"TD Trust Instruments"** means, collectively, all declarations of trust or similar trust instruments that govern or have governed the Funds.

### ***The Closet Indexing Strategy***

1. In managing the Canadian Equity Fund, did the Defendant use the Closet Indexing Strategy?

### ***Legal Obligations of the Trustee and Manager***

2. Did the Defendant, as trustee and manager of the Funds, breach the Standard and Duty of Care? If so, when and how?

### ***Prospectus Misrepresentation***

3. Did any of the Public Disclosure Documents contain a misrepresentation within the meaning of the *BCSA* (and, as applicable, the Other Canadian Securities Legislation)?

### ***Unjust Enrichment***

4. If the answer to (1) is yes, was the Defendant enriched by using the Closet Indexing Strategy?
5. If the answer to (4) is yes, did some or all of the Class Members suffer a corresponding deprivation?
6. If the answers to (4 and 5) are yes, was there a juristic reason for the enrichment of the Defendant?

### ***Remedies***

7. If the Defendant is found liable for breach of trust, prospectus misrepresentation, or unjust enrichment, can remedies be determined on a class-wide basis? If so, how?
8. If the answer to (1) is yes, does the Court have the power to grant any remedy in respect of Excess Management Fees and Excess Trading Costs? If so, what remedy, if any, should be granted?

### ***Interest***

9. If the Defendant is found liable, should the Defendant be ordered to pay an equitable rate of interest or pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*? If so, on what basis and in what amount?

### ***Administration and Distribution***

10. If the Defendant is found liable, should the Defendant pay some or all of the costs of administering and distributing the recovery? If so, in what amount?

**SCHEDULE B**  
**LITIGATION PLAN**

Court File No. VLC-S-S-194222  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**DEAN TURPIN**

PLAINTIFF

AND:

**TD ASSET MANAGEMENT INC.**

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**PLAINTIFF'S LITIGATION PLAN**

**A. DEFINED TERMS**

1. Capitalized terms that are not defined in this litigation plan ("**Plan**") have the meanings attributed to them in the Second Amended Notice of Civil Claim dated July 31, 2020 ("**NOCC**").

**B. REPORTING AND COMMUNICATION**

2. Investigation Counsel P.C. ("**ICPC**") and Paul Bates, Barrister (together, "**Class Counsel**") have posted information about the nature and status of this action on the ICPC website, [www.investigationcounsel.com](http://www.investigationcounsel.com) ("**Website**"). That information will be updated regularly. Copies of important publicly available court documents, court decisions, notices, documentation and other information relating to the action are or will be accessible on the Website.

3. The Website also contains a communication feature that permits Class Members to submit inquiries to Class Counsel, which are sent directly to a designated member of the Class Counsel team who will promptly respond.

**C. DOCUMENT MANAGEMENT**

4. Class Counsel will use data management systems to organize, code and manage the documents produced by the Defendant and all relevant documents in the Plaintiff's possession. The agreement of the Defendant's counsel will be sought to facilitate the electronic exchange of documents. Once the volume of documents to be produced in this action is determined, Class Counsel may retain the services of a third party document management firm for assistance.

**D. LITIGATION SCHEDULE**

5. The Plaintiff has brought an application seeking certification of the action as a class proceeding pursuant to the *CPA* ("**Certification Application**").
6. The Plaintiff will ask the Court to set a litigation schedule for the remaining steps in the action.
7. From time to time, the parties may ask that the litigation schedule be amended.

**E. EXPERTISE AND MEDIATION**

8. The Plaintiff has retained Class Counsel as his counsel in this action. Class Counsel have the experience, resources and expertise to prosecute this action on behalf of the Class.
9. Expert witnesses may be retained as the action proceeds.

10. The Plaintiff will participate in a mediation if the Defendant is prepared to do so. If the parties reach a proposed settlement of the action and the Court approves the settlement, this Plan will require amendment.

**F. NOTICE OF CERTIFICATION AND OPT OUT PROCEDURE**

11. If this action is certified as a class proceeding, the Plaintiff proposes that a notice of certification ("**Certification Notice**") be circulated to advise Class Members, among other things, that:

- (a) the Court certified the action as a class proceeding;
- (b) a person may only opt out of the class proceeding by sending a written opt out election to the recipient designated by the Court, before a date and time fixed by the Court;
- (c) a person may not opt out of the class proceeding after the date fixed by the Court; and
- (d) if the common issues are resolved in favour of the Class, the Class Members may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.

12. The Certification Notice, in a form approved by the Court, will be distributed and published in the following manner:

- (a) posted by Class Counsel on the Website, in English and French;
- (b) provided by Class Counsel to any person who requests it or who has previously contacted Class Counsel for the purposes of receiving notice of developments in the action;
- (c) disseminated as a press release in Canada across a newswire service (in English and French);
- (d) published once in the national edition of *The National Post (Financial Post)*, in English; and
- (e) published once in *La Presse*, in French.

13. The Plaintiff proposes that Class Counsel will receive the opt-out notices and report to the Court the names and addresses of the persons who opt out by the date fixed by the Court.
14. The Plaintiff will pay the costs of disseminating the Certification Notice in the first instance, reserving his right to seek recovery of these costs from the Defendant by order of the judge presiding at the common issues trial.

**G. REFINEMENT OF COMMON ISSUES**

15. Following the completion of discovery, the parties may seek an amendment of the order certifying this action to deal with any necessary refinements to the common issues.

**H. TRIAL ON THE COMMON ISSUES**

16. The Plaintiff or the Defendant may apply for summary trial under Rule 9-7. The parties have reserved all rights regarding the suitability of a summary trial to dispose of one or more of the common issues.
17. If the Plaintiff or Defendant does not seek a summary trial of one or more of the common issues, or if the court determines that the action is not suitable for a summary trial, the parties will proceed to a *viva voce* trial. The parties will address issues of trial management in advance of the trial to ensure the orderly and efficient determination of any remaining common issues.
18. The parties will seek to have a trial on the merits proceed within a reasonable period of time following the completion of discoveries and of resolving any requests made therein.

**I. CLAIMS PROCESS, INDIVIDUAL ISSUES AND DISTRIBUTION**

19. All issues relating to the appropriate claims process, individual issues and distribution of judgment obtained on one or more common issue, if judgment is obtained on any common issues, will be addressed in a subsequent litigation plan.

**J. APPLICATIONS FOR DIRECTIONS**

20. The parties may apply at any time to the Court for directions.

**K. CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION**

21. After the trial of the common issues or summary judgment, the Plaintiff will ask the Court to approve an agreement respecting fees and disbursements between him and Class Counsel.

22. Matters in relation to fees and disbursements will be resolved by a future order of the court.

**L. FURTHER ORDERS CONCERNING THIS PLAN**

23. This Plan may be amended from time to time by directions given at case conferences or by further order of the Court.

**M. EFFECT OF THIS PLAN**

24. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the Court whether or not they make a claim under the Claims Process.

## SCHEDULE C – CERTIFICATION NOTICE

### CLOSET INDEXING CLASS ACTION

*Turpin v. TD Asset Management Inc.*

### NOTICE OF CERTIFICATION THIS NOTICE IS IMPORTANT TO YOU.

#### This notice is directed to:

All persons, wherever they reside, who hold or held at any time from January 1, 2010 to July 31, 2020, one or more units of the TD Canadian Equity Fund or a Portfolio Fund (the “**Class Members**” or the “**Class**”).

A “**Portfolio Fund**” refers to a TD mutual fund which holds or held the TD Canadian Equity Fund at any time from January 1, 2010 to July 31, 2020. The following is a list of the Portfolio Funds:

- TD Advantage Balanced Growth (previously TD Advantage Balanced Portfolio)
- TD Advantage Balanced Income (previously TD Advantage Conservative Portfolio)
- TD Advantage Aggressive Growth (previously TD Advantage Equity Portfolio)
- TD Advantage Growth Portfolio
- TD Advantage Balanced Portfolio (previously TD Advantage Moderate Portfolio)
- TD Managed Aggressive Growth Portfolio
- TD Managed Balanced Growth Portfolio
- TD Managed Income & Moderate Growth Portfolio
- TD Managed Income Portfolio
- TD Managed Maximum Equity Growth Portfolio
- TD Canadian Equity Pool
- TD Comfort Aggressive Growth Portfolio
- TD Comfort Balanced Growth Portfolio
- TD Comfort Balanced Income Portfolio
- TD Comfort Balanced Portfolio

- TD Comfort Conservative Income Portfolio
- TD Comfort Growth Portfolio

#### THE CERTIFICATION ORDER

On July 31, 2020, the Supreme Court of British Columbia (the “**Court**”) certified the action *Turpin v. TD Asset Management Inc.*, Court File No. VLC-S-S-19422 (the “**Class Action**”) as a class proceeding and appointed Dean Turpin as representative plaintiff (the “**Representative Plaintiff**”) for the Class. The defendant in the Class Action is TD Asset Management Inc. (“**TDAM**”), which is the trustee and manager of the TD Canadian Equity Fund and the Portfolio Funds.

The Representative Plaintiff alleges that throughout the Class Period the defendant did not actively manage the TD Canadian Equity Fund, instead employing a passive investment strategy, the Closet Indexing Strategy, the purpose of which was to closely track or replicate, and not exceed, the Canadian Equity Fund’s benchmark, the S&P/TSX Composite Index.

The Representative Plaintiff pleads claims including breach of trust, prospectus misrepresentation, and unjust enrichment. He seeks compensation on behalf of all persons who hold or have held units of the TD Canadian Equity Fund or a Portfolio Fund from January 1, 2010 to July 31, 2020. He also seeks disallowance of expenses and disgorgement of fees allegedly received by TDAM.

TDAM denies the allegations made by the Representative Plaintiff. In its response, TDAM

pleads that it managed the TD Canadian Equity Fund in a diligent and prudent manner, in line with the objectives set out in the offering documents. TDAM also pleads that, as manager of the TD Canadian Equity Fund, TDAM makes investment decisions based on quantitative and qualitative research and has never engaged in 'closet indexing'.

The certification order means that the Class Action may proceed to trial on certain issues on a common basis. Certification is a preliminary procedural matter. The merits of the claims in the Class Action, and the allegations of fact on which the claims are based, have not yet been considered by the Court.

#### **DO NOTHING IF YOU WANT TO PARTICIPATE IN THE CLASS ACTION**

Class Members who **want to participate** in the Class Action are **automatically included** and need not do anything at this time.

#### **YOU MUST OPT OUT IF YOU DO NOT WANT TO PARTICIPATE IN THE CLASS ACTION**

Class Members who do not want to participate in the Class Action must opt out. If you want to exclude yourself from the Class Action, you must send written notice to Class Counsel expressing your desire to opt out of the TD Closet Indexing Class Action. Your written notice must include your name, address, telephone number, and signature. If you are submitting an opt-out request on behalf of a corporation or other entity, you must state your position with and authority to bind the corporation or entity.

Your opt-out request must be sent by email, fax or mail to:

Investigation Counsel P.C.  
Re: Closet Indexing Class Action  
350 Bay Street, Suite 300  
Toronto ON M5H 2S6  
Email: [tdclosetindexing@investigationcounsel.com](mailto:tdclosetindexing@investigationcounsel.com)

Fax: 416-637-3445

**In order for your opt out request to be valid, it must be postmarked or received no later than ● , 2020 and it must contain all of the required information.**

Each Class Member who does not opt out of the Class Action will be bound by the terms of any judgment or settlement, whether favourable or not, and will not be allowed to prosecute an independent action against TDAM for any of the factual matters raised in the Class Action. If the Class Action is successful, you may be entitled to share in the amount of any award or settlement recovered. A Class Member who opts out will not be entitled to participate in the Class Action and will not be entitled to share in the amount of any award or settlement.

A minor or a mentally incapable Class Member cannot be opted out of the Class without permission of the Court. The Children's Lawyer or the Public Guardian and Trustee, as applicable, must receive notice of such an opt-out request.

#### **NO DIRECT COST TO YOU**

The Representative Plaintiff has entered into a contingency fee retainer agreement with law firm Investigation Counsel P.C. which provides that counsel will be paid only if the Class Action is successful or costs are recovered from the defendant. If the action is successful, either through judgment on the common issues or by way of an approved settlement, the legal fees will be set by the Court, and the Court may order that these fees be paid out of the settlement proceeds or by the defendant.

If the class action is not successful, you will NOT be responsible for any legal costs of the Class Action and will NOT have any other financial obligations because of the Class Action.

## **ADDITIONAL INFORMATION**

For further information, Class Members can contact Class Counsel as follows:

Investigation Counsel P.C.

Attn: John Archibald

350 Bay Street, Suite 300

Toronto ON M5H 2S6

(416) 637-3152

[tdclosetindexing@investigationcounsel.com](mailto:tdclosetindexing@investigationcounsel.com)

**Publication of this notice has been authorized by  
the Supreme Court of British Columbia.**