

**CITATION:** Lyons v. TD Bank, 2020 ONSC 7255  
**COURT FILE NO.:** CV-20-64678900CP  
**DATE:** 202011125

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** KEVIN LYONS, Plaintiff

– AND –

THE TORONTO-DOMINION BANK and TD HOME AND AUTO  
INSURANCE COMPANY, Defendants

**BEFORE:** E.M. Morgan J.

**COUNSEL:** *Jordan Goldblatt, Gord McGuire, Alex Fidler-Wener, Sivan Tumarkin and James Fireman*, for the Plaintiff

*Jeff Galway and Laura Dougan*, for the Defendant, TD Bank

**HEARD:** November 24, 2020

**TIMING OF RULE 21 AND CERTIFICATION MOTIONS**

[1] This class action is brought by an insured under a policy issued by the Defendant, TD Home and Auto Insurance Co. (“TD Insurance”), claiming that he, and the putative class of insureds, were wrongfully deprived of certain trip cancellation benefits under a travel insurance policy underwritten by TD Insurance.

[2] The Defendant, The Toronto-Dominion Bank (“TD Bank”), is the parent company of TD Insurance. TD Bank issued a credit card to the Plaintiff, in conjunction with which he was also issued trip cancellation insurance. The Plaintiff had purchased a fully paid trip to Italy using his TD Bank credit card. He claims that he was denied payment of compensation when, in March 2020, he cancelled his trip upon the Government of Canada issuing a travel advisory against all non-essential travel to Northern Italy due to COVID-19.

[3] Counsel for the TD Bank seeks to bring a motion under Rule 21 of the *Rules of Civil Procedure* striking out the claim as having no cause of action. Counsel for TD Insurance does not seek to bring a Rule 21 motion on behalf of their client, but will defend the claim on its merits. Counsel for the Plaintiff seeks to have the claim certified under the *Class Proceedings Act, 1992* (“CPA”).

[4] The question addressed at this case conference is that of sequence. Specifically, should the Rule 21 motion be heard prior to the certification motion, or should the TD Bank's argument that the claim lacks a cause of action against it be brought together with its response to the certification motion since in any case this issue arises as a factor in certification under section 5(1)(a) of the *CPA*? Either procedure is possible under the *CPA* and the *Rules*, and there is case law going both ways on this question.

[5] A similar issue came before me in a class action case conference pertaining to Tim Horton's franchisees and their claim against their franchisor and a number of other related defendants. In *1523428 Ontario Inc. v. The TDL Group Corp.*, 2018 ONSC 1180, at para 4, I indicated that it was apparent that "the Defendant's motion will, if successful, dispose of a substantial part, but not all, of the Plaintiff's claim..." On that basis, I determined that the most efficient course would be for the Rule 21 motion to be heard prior to the certification motion. In that way, the certification motion could be confined more narrowly and manageably without the cause of action issues against the non-franchisor defendants complicating the matter.

[6] By contrast, in *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 314, Strathy J. (as he then was) determined that the most efficient course would be for the Rule 21 issues to be argued as part of the certification hearing. He reasoned, at para 15, that there were a number of considerations to be taken into account in arriving at this decision, and that foremost among these was "whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined".

[7] Section 12 of the *CPA* gives the court in its case management function considerable latitude to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". In view of this discretion, neither approach can be said to be the right one or the wrong one; the challenge in a given case is to determine which approach best fosters judicial economy and access to justice for the parties.

[8] In the present case, unlike in *TDL Group*, the question posed in the proposed Rule 21 motion is not likely to narrow the issues sufficiently to make a separate motion worthwhile. Of course, if TD Bank is successful in its argument that there is no viable cause of action against it, the issues that remain would be only those against TD Insurance, and so in a formal sense the action would be a narrower one. However, the substantive claim raised by the Plaintiff and the class – deprivation of trip cancellation benefits – would be exactly the same. That was not the case in *TDL Group*, where striking the claim against some of the defendants eliminated entire claims of loss.

[9] While TD Bank raises a question as to the cause of action against it, the claims against TD Insurance equally encompass all of the Plaintiff's claims of loss. The factual background surrounding the Plaintiff's claim, the reasons for the denial of benefits, the contractual obligations owed to the insureds, etc. will all remain a part of the action even if TD Bank is successful in having the claim against it dismissed.

[10] The efficiencies gained in the *TDL Group* case by having the Rule 21 motion heard first are not available, or at least at this stage are not apparent, in the present case. Here, it seems to me to be more efficient, and more in keeping with the access to justice rationale of class actions, to have the cause of action question *vis-à-vis* TD Bank argued at the same time as the overall certification motion.

[11] I will exercise my discretion under section 12 of the *CPA* to hear the TD Bank's Rule 21 motion at the same time as I hear the Plaintiff's certification motion.

[12] Counsel should be in touch with my assistant to schedule the certification motion at a time convenient to all.

A handwritten signature in blue ink, appearing to read 'Morgan J.', is centered on a light blue rectangular background.

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Morgan J.

**Date:** November 25, 2020