

**CITATION:** TD Bank v. 2026227 Ontario Inc., 2012 ONSC 1046  
**COURT FILE NO.:** CV-11-9336-00CL  
**DATE:** 20120213

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:** The Toronto-Dominion Bank, Applicant

**AND:**

2026227 Ontario Inc., Respondent

**BEFORE:** D. M. Brown J.

**COUNSEL:** F. Sulley, for BDO Canada, the Interpleaded Fund Advisor

J. Berman, Q.C., for 2026227 Ontario Inc.

G. Bowden, for The Toronto-Dominion Bank

M. Huneault, for Carriere Industrial Supply Limited, claimant

H. Desbrisay, for the DiBrina Group, claimants

**HEARD:** February 13, 2012

**REASONS FOR DECISION**

[1] 2026227 Ontario Inc. provided payroll processing services to its clients. It ceased operations about one year ago. Pursuant to the order of Low J. made June 28, 2011 the TD Bank paid into court the sum of \$2,398,786.75 which were funds held in 202's Payroll Account with the Bank.

[2] By order made November 14, 2011, I appointed BDO Canada Limited ("BDO") to act as the Interpleaded Fund Advisor, and I authorized a process by which clients of 202 could make claims against the Interpleaded Fund. That process set a Claims Bar Date of January 31, 2012.

[3] BDO has filed two reports with the Court dated December 16, 2011 and February 9, 2012. Briefly put, BDO reports that approximately 420 clients may have claims against the Fund, of which it has been able to trace about \$1.3 million of the Fund to 175 specific clients. The remaining \$1 million in the Fund cannot be traced to specific clients and is co-mingled. In its report BDO proposes distributing the traceable part of the Fund to specific clients and the

remaining balance of the Fund to the other clients on a *pro rata* basis. It also proposes to distribute its professional and legal fees across both funds.

[4] I gather that at present about 40 clients are disputing BDO's treatment of its claims, and BDO is working with those clients in an effort to resolve those disputes. I also understand that BDO received a few claims following the Claims Bar Date.

[5] From the discussion with counsel at today's hearing it is apparent that I need to give further directions about the next steps in this matter. Here they are:

- (i) I will hold a three (3) hour hearing in this matter on April 4, 2012;
- (ii) The main focus of that hearing will be to determine whether the Court should approve the distribution of the Fund proposed by BDO or some alternative distribution;
- (iii) No later than Friday, February 17, 2012, BDO must serve on all claimants copies of (i) its December 16, 2011 Report, (ii) its February 9, 2012 Report, and (iii) these Reasons. Where BDO knows a claimant's email address, service may be effected by email. Where BDO does not know a claimant's email address, service shall be done by regular mail and service will be deemed made five (5) business days following the mailing of the materials;
- (iv) No later than Friday, March 9, 2012, BDO must serve on all claimants, and file with the Court, a further Report which (i) reports on its further activities, (ii) identifies allowed and disallowed claims, (iii) identifies the details of the proposed distributions to traceable and non-traceable clients, and (iv) identifies how it proposes to allocate its professional and legal fees to each group. In sum, BDO must place before the Court a detailed proposal for the distribution of monies to specific clients. Service may be made by a combination of email and regular mail as specified above;
- (v) Any claimant who wishes to make submissions on BDO's proposal must file and serve a Notice of Appearance in this proceeding no later than March 9, 2012;
- (vi) If any claimant wishes to support or oppose the distribution proposed by BDO, it must serve on BDC and all parties who have filed a Notice of Appearance and file with the Court a responding motion record and/or factum containing legal argument no later than Monday, March 26, 2012. I wish to emphasize that if any claimant wishes to propose an alternative method for distributing the Fund, it must place before the Court the necessary evidence and/or legal argument to support such an alternative distribution; and,
- (vii) If any claimant wishes to respond to a submission made by another claimant, it shall serve and file a brief responding factum no later than Monday, April 2, 2012.

[6] During today's hearing I expressed some concern about the costs incurred to date in this matter. I appreciate that BDO had to perform a detailed tracing exercise. At the same time, I intend this process to secure fair results for all claimants at a reasonable cost. It therefore is my expectation that on April 4 I will have before me all materials necessary to determine the appropriate distribution of the Fund.

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(original signed by)

D. M. Brown J.

**Date:** February 13, 2012