

Court File No.: CV-11-9336-00-CL
and Court File No.: CV-12-9838-00-CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE TORONTO-DOMINION BANK

Applicant

and

2026227 ONTARIO INC.

Respondent

**FOURTH REPORT OF THE INTERPLEADED FUND ADVISOR
DATED JUNE 27, 2017**

INTRODUCTION

1. BDO Canada Limited (“BDO”) was appointed as Interpleaded Fund Advisor (“Fund Advisor”) by Order of the Honourable Mr. Justice Brown, dated 14 November, 2011 (“Appointment Order”). A copy of the Appointment Order is attached as **Appendix I**.

BACKGROUND

2. 2026227 Ontario Inc. operated as Time Plus Canada (“TPC”), a payroll processing service which administered customers` payrolls. TPC pulled funds directly from customers` bank accounts, depositing such funds into its own bank account called a Payroll Account. TPC then transferred the customers` employees` net pay directly to the individual employee bank accounts. Additionally, TPC then transferred the withholding taxes related to such payrolls to its own separate bank account, the Tax Account, as a temporary depository until such time as remittances had to be made to the appropriate tax authorities.

3. Depending on the size of the payroll of a particular employer, payroll deductions had to be remitted by TPC on a weekly, semi-monthly or monthly basis. The computer system employed by TPC kept track of the different dates when remittances were due, and triggered the funding requests as remittances fell due.
4. For reasons which never became entirely clear, the funds available in the Tax Account were insufficient to fully pay the customers' tax obligations, but for an extended period of time the extent of the shortfall was not known, as all remittances were paid on time. However, occasionally overdrafts occurred in the Tax Account, but these were then covered by subsequent transfers into the Tax account from other customers' withholding taxes.
5. Then, on or about 6 January 2011, a clerical employee of TPC by mistake transferred an amount of \$2,349,544.96 to the Canada Revenue Agency ("CRA") from the Tax Account. This amount represented the gross pay (not the taxes withheld) pulled from 35 separate customers' accounts for various pay periods in December 2010, for which periods the resultant tax remittances had come due. The correct amount that should have been transferred to CRA for those particular customers was \$655,665.72. As a result, the overpayment to CRA was \$1,693,879.24.
6. The effect of this overpayment was to trigger immediate overdrafts in the Tax Account, which continued to increase until by the end of the day on 12 January 2011 the overdraft totaled \$920,410.07, and the banker of TPC, the Toronto-Dominion Bank ("TD"), questioned the reasons for the overdrafts.
7. Again, even this overdraft was again temporarily covered through subsequent pulls for other customers' tax remittances awaiting distribution to the tax authorities, but through further remittances to the tax authorities the overdrafts continued to grow in size, reaching \$2,367,900.41 by the end of the day on 19 January 2011.
8. TPC continued to operate its business while TD became increasingly concerned about the overdrafts. In an attempt to stabilize the account, TD then loaned an amount of \$1,040,284.43 to TPC on an unsecured basis, and deposited that amount into the tax account on 31 January 2011, so as to eliminate the overdraft as at that date.

9. When TPC was unable to adequately address the concerns of TD as to the overdrafts in what were clearly trust accounts, TD at midnight on 9 February 2011 closed both the Tax Account and the Payroll Account and thereby closed down the operations of TPC.
10. Subsequently, on 4 March 2011, TD obtained a Court Order authorizing it to pay a net amount of \$2,514,230.55 into Court. Subsequently, three customers of TPC compelled TD to refund to them amounts they claimed had been drawn from their bank accounts by TPC without their permission. As a result, TD paid these three customers \$115,443.80, and obtained a further Court Order to vary the previous Order so as to reduce the payment into Court, to \$2,397,786.75. This amount was then paid into Court by TD, on 15 September 2011.

ACTIVITIES OF THE FUND ADVISOR IN 2011 and 2012

11. Pursuant to its appointment, the Fund Advisor on 5 June 2012 received an amount of \$2,443,669.47 from the Office of the Accountant of the Superior Court, being the amount paid into Court by TD, plus some accumulated interest thereon.
12. By that time, the Fund Advisor had conducted a Court authorized Claims Determination Process, as set out in the Appointment Order, whereby it had canvassed all customers of TPC and obtained claims of their unremitted payroll deductions, based on the customers' interactions with CRA during the months since the cessation of business of TPC. As a result of this process, the Fund Adviser identified 416 claimants with claims totaling \$5,098,381.52. As authorized by Reasons For Decision of the Honourable Mr. Justice Brown, released 28 May 2016, which Reasons are attached as **Appendix II**, the Fund Advisor on 3 July 2012 remitted to the claimants a total of \$2,112,773.63, as per the list of claimants attached as **Appendix III**. The payment represented a 41.440% dividend.
13. The Fund Advisor reported to the Court in its Third Report, dated 31 August 2016, and clarified in para. 3.3 thereof that there had been one final adjustment to the claims, whereby the claim of one claimant was increased by \$15,363.12. Accordingly, total claims increased to \$5,113,744.64. A copy of the Third Report is attached as **Appendix IV**.
14. In support of the Third Report, the Fund Advisor submitted to the Court its Statement of Receipts and Disbursements (referred to in para. 2.8 of the report), indicating the receipt of the Interpleaded Funds from the Court, the payment of the dividend to claimants, as

reported in para. 12 above, the payment of approved fees, and the retention of the remaining cash balance for fees to come. The Statement of Receipts and Disbursements is attached as **Appendix V**.

15. As also noted in the Third Report, CRA had advised the Fund Advisor that it had calculated an amount of \$445,038.69 as being the net overpayment in the various tax remittance accounts of customers of TPC (referred to in para.3.3 of the Third Report). CRA`s letter, advising of this overpayment, is attached as **Appendix VI**.
16. As further noted in the Third Report, the Fund Advisor prepared a second Dividend Sheet setting out the proposed allocation of \$445,038.69 to the Claimants totaling \$5,113,744.64. The matter is set out in para. 3.4 of the Third Report, and the dividend sheet is attached to this Fourth report, as **Appendix VII**. This dividend, which was to be “paid” by CRA by way of credits to all 416 claimants` tax remittance accounts, represents 8.578% of the claims, bringing the total recovery of claimants, to that point in time, to 50.018%. The Fund Advisor prepared a summary of Receipt of Funds and Dividend Paid, dated 1 November 2012, to summarize the receipts and disbursements, and confirm the dividend of 50.018%, paid to that date. The summary is attached as **Appendix VIII**.
17. Also, the Third Report advised the Court of litigation proposed to be brought against TD by two major claimants , being Carriere Industrial Supply Limited (“Carriere”) and Dibrina Sure Benefits Consulting Inc. (“Dibrina”) , both acting on behalf of all 416 claimants. The allegations were that TD improperly applied TPC trust funds of \$1,327,616 to reduce TPC`s debt to TD, and improperly allowed the transfer of \$1,000,000 from TPC to a related company (referred to in sec. 4 of the Third Report). The Fund Advisor was asked by the claimants to stand by to distribute to all claimants any monies that may be recovered from TD from such litigation.
18. By Order of the Honourable Mr. Justice Cumming dated 10 September 2012, the Court approved the Fund Advisor`s Third Report and the Activities set out therein, approved all fees and costs up to the completion of the distributions referred to therein, and directed that any funds flowing from the litigation against TD be paid to the Fund Advisor, subject to any cost orders, and be distributed to the claimants. A copy of the Order is attached as **Appendix IX**.
19. By his Endorsement dated 10 September 2012, Cumming J. summarized the issues before the Court, approved a representation order allowing Carriere and Dibrina (the “Plaintiffs”)

to represent the 416 claimants in litigation against TD, and summarized the allegations, as set out in para. 17 above. The Endorsement is attached as **Appendix X**.

PURPOSE OF THIS FOURTH REPORT OF THE FUND ADVISOR

20. The purpose of this, the Fourth Report of the Fund Advisor, is to inform the Court of the results of the litigation against TD, the activities of the Fund Advisor following 10 September 2012, and to seek:
- the Court's approval of its activities to date;
 - the Court's approval of its professional fees and costs incurred from 10 September 2012 to date, and expected to be incurred to completion, including the professional fees and costs incurred to date and estimated to completion, of Torkin Manes LLP, the Fund Advisor's legal counsel, all pertaining to the distribution of the funds now available for a third distribution to the claimants, net of any cost order which may be made pertaining to the litigation costs incurred by the Plaintiffs on behalf of the claimants; and
 - its discharge as Interpleaded Fund Advisor in this matter.

RESULTS OF THE LITIGATION

21. The litigation was conducted pursuant to COURT FILE NO.: CV-12-9838-00CL. The trial was heard on 13 January and 17, 18, and 19 March 2014. By Reasons For Judgment released 7 November 2014, The Honourable Mr. Justice Wilton-Siegel among other things dismissed the Plaintiffs' claims against TD in the amount of \$1,327,616 for knowing receipt of trust funds, but granted judgment against TD in favour of the Plaintiffs, in the amount of \$1,000,000, for knowing assistance in a breach of trust. The Reasons for Judgment are attached as **Appendix XI**.
22. Both the Plaintiffs and TD appealed the Order. The matter was heard by the Court of Appeal for Ontario, on 9 November 2015. The Court upheld the decision of Wilton-Siegel J. The decision of the Court of Appeal is attached as **Appendix XII**.

23. On or about 5 February 2016, TD paid the sum of \$1,037,397.26 to the Fund Advisor. The email confirmation of Frank Dinino of TD, addressed to Uwe Manski of BDO, is attached as Appendix XIII.

ACTIVITIES OF THE FUND ADVISOR AFTER 10 SEPTEMBER 2012

24. As noted in para. 10 of this Fourth Report, TD in 2011 refunded a sum of \$115,443.80 to three customers of TPC who claimed that funds had been drawn from their bank accounts by TPC without the customers' permission. The Fund Advisor had in 2012 reviewed this matter and determined that the sum of \$115,443.80 had been drawn by TPC with proper authority, notwithstanding the customers' claims to the contrary. Further, of that sum, amounts totaling \$73,349.74 had immediately been remitted by TPC to the employees of the three customers. Accordingly, these customers had in fact suffered losses of only \$42,094.06, being the withholding taxes not remitted to CRA by TPC.
25. As the Fund Advisor had not been authorized by Court to pursue the three customers to seek a refund of the amount of \$73,349.74 paid by TPC to the customers' employees, the Fund Advisor in about October and November 2012 provided relevant supporting documentation and information to Counsel for the Plaintiffs, so as to provide him with what he needed to pursue repayment of this amount. Accordingly, in October 2012 and February 2013 the sum of \$73,349.74 was recovered, in full.
26. Further, at the request of Counsel for the Plaintiffs, the Fund Advisor provided factual information to Counsel related to the Fund Advisor's investigations of the financial affairs of TPC, including particularly the banking transactions in the TPC trust accounts, being the Payroll Account, and the Tax Account. Uwe Manski of BDO also provided evidence at the trial held in March 2014.
27. Then, in early 2016, the Fund Advisor had communications with TD which resulted in the receipt of the amount of \$1,037,397.26 paid by TD pursuant to the judgment referred to in para. 23 of this Fourth Report.
28. Meanwhile, on 17 March 2014 the Plaintiffs had obtained a judgment against a number of defendants including a related company of TPC, named 2140074 Ontario Inc., operating as

Time Plus Newmarket (“TPN”). They then sought to place TPN into receivership, and by Order of the Court dated 25 November 2014, BDO was appointed a receiver of TPN. TPN was effectively a franchisee of TPC. The ownership of TPC and TPN was similar, and on the cessation of business of TPC in early 2011, TPN had sold its business to a non-related purchaser for about \$300,000. The only remaining asset of TPN at the date of receivership was a portion of the sale price of the assets of TPN, which portion was finally determined by the Receiver to be \$79,953.00, which BDO was able to collect. Net of professional fees and costs, as approved by the Court, an amount of \$66,806.09 became available for distribution. Based on agreement between the parties, and as approved by the Court, this amount was split 50/50 between TD and the Plaintiffs, with the Plaintiffs’ share allocated to BDO as the Fund Advisor in the TPC insolvency. The applicable Court Order of the Honourable Mr. Wilton-Siegel, dated 6 April 2016, is attached as **Appendix XIV**. As directed by the Order, a sum of \$33,403.04 was paid to the Fund Advisor on or about 22 April 2016.

29. The Fund Advisor has prepared a final Statement of Receipts and Disbursements, including its professional fees and costs, and those of its Counsel, as set out in the following paragraphs 31. - 33., and is able to complete that Statement once the litigation costs of the Plaintiffs, to be payable from the funds held by the Fund Advisor, are determined by the Court. The remaining funds would then be distributed to the 416 claimants. The Statement of Receipts and Disbursements, as at 15 June 2017, is attached as **Appendix XV**.

PROFESSIONAL FEES AND COSTS

30. By Order of the Honourable Mr. Justice Cumming dated 10 September 2012, attached hereto as **Appendix IX**, the professional fees and costs of the Fund Advisor and its counsel up to then have been approved. These costs have been paid, as set out herein and reflected on the summary of Receipt of Funds and Dividend Paid, prepared November 1, 2012, attached as **Appendix VIII**.
31. Since then, for the period from September 2012 to 15 June 2017, the Fund Advisor has incurred time charges and disbursements of \$22,391.92 and has estimated additional costs to complete of \$10,000.00, all plus HST, for a total of fees, disbursements and HST to finalize this mandate and distribute available funds, of \$36,602.87. The Affidavit of

Uwe Manski together with the related invoice and detail of time charges to 15 June 2017, plus the estimate for costs to complete, is attached hereto as **Appendix XVI**.

32. Additionally, legal counsel to the Fund Advisor has incurred time charges and disbursements of \$3,191.90 plus HST, for the period to 26 June 2017, and has estimated additional costs to complete of \$3,000.00 plus HST, for an overall total of fees, disbursements and HST of \$6,996.85, all as set out in the Affidavit of Fay Sulley, attached hereto as **Appendix XVII**.
33. The Fund Advisor believes that the fees and disbursements set out in Appendices XVI and XVII are fair and reasonable, and confirms that the hourly rates on which its time charges are based are consistent with the hourly rates charged by BDO in other insolvency-related engagements.

FUND ADVISOR`S REQUESTS

34. The Fund Advisor requests the Court:
 - to approve its activities since September 2012, as set out in this Fourth Report of the Fund Advisor;
 - to approve its professional fees and costs, including those of its counsel, Torkin Manes LLP, all as set out in paras. 31. and 32., above;
 - to determine the litigation costs of the Plaintiffs to the extent they are to be paid from the funds in the possession of the Fund Advisor;
 - to authorize a pro-rata distribution of the remaining sums, net of professional fees and costs, and of the litigation costs referred to above, to the 416 claimants represented by the Plaintiffs, all as per the listing of final claims totaling \$5,113,744.64 (as per **Appendix VII** to this Fourth Report of the Fund Advisor);
 - to authorize the Fund Advisor to return to Court for further directions in the event that distributions of more than \$5,000 in total cannot be distributed to claimants who may not be locatable because they have moved and left no forwarding address, or have gone out of business in the almost five years since the last contact with them by the Fund Advisor; and

- to discharge the Fund Advisor on the issuance by it of a certificate that it has completed its mandate herein.

All of which is respectfully submitted.

BDO CANADA LIMITED

Interpleaded Fund Advisor
of 2026227 Ontario Limited, operating as Time Plus Canada
Per:



Eugene P. Migus, CPA, CA, CIRP, LIT
Senior Vice-President