

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**BETWEEN:**

**THE TORONTO-DOMINION BANK**

**Applicant**

**and**

**2026227 ONTARIO INC. ("202")**

**Respondent**

**THIRD REPORT OF THE INTERPLEADED FUND ADVISOR  
DATED August 31, 2012**

**1. INTRODUCTION**

- 1.1. BDO Canada Limited ("BDO") was appointed as Interpleaded Fund Advisor ("Fund Advisor") by Order of the Honourable Mr. Justice Brown, dated the 14<sup>th</sup> day of November, 2011 ("Appointment Order"). A copy of the Appointment Order is attached to the First Report of the Fund Advisor, dated December 16, 2011, as Exhibit "1". Further, under date of February 9, 2012, the Fund Advisor issued a Supplement to its First Report. Then, under date of March 8, 2012, the Fund Advisor issued a Second Report, and, finally, under date of March 30, 2012, the Fund Advisor issued a Supplement to its Second Report.
- 1.2. The purpose of this, the Third Report of the Fund Advisor, is to inform the Court of the activities of the Fund Advisor following the date of the Supplement dated March 30, 2012, and:
  - 1) to seek the Court's approval of its activities to date;

- 2) to advise the Court of the intention of the Canada Revenue Agency (“CRA”) to distribute the sum of \$445,038.69 to claimants, provided the Court authorizes it to do so;
- 3) to seek the Court’s approval of its professional fees and costs incurred to date, and expected to be incurred related to the distribution of the aforesaid funds by CRA, and of the professional fees and costs incurred to date and estimated to completion, by Torkin Manes LLP, the Fund Advisor’s legal counsel; and
- 4) to seek direction from the Court with respect to the Fund Advisor’s future role and responsibilities in relation to any monies that may be ordered to be paid by the Toronto Dominion Bank (“TD”) pursuant to a proposed Application by certain representative claimants against the TD.

## **2. THE FUND ADVISOR’S ACTIVITIES AFTER MARCH 30, 2012**

- 2.1 Immediately after having filed its Supplement to the Second Report, the Fund Advisor assisted counsel in preparation for the attendance at Court on April 4, 2012 for the hearing of the Tracing Arguments related to the tracing exercise which the Fund Advisor had been instructed to undertake, as reported on in the First Report and in the Second Report.
- 2.2 While the Court reserved its decision as to the tracing exercise, the Court approved the fees and disbursements of the Fund Advisor and its counsel, to March 31, 2012, and ordered the Accountant of the Superior Court of Justice to make payment of the funds previously paid into Court, directly to BDO, for eventual distribution to claimants. A copy of the Order of The Honourable Mr. Justice Brown, dated April 4, 2012 is attached hereto as Exhibit “1”.
- 2.3 Counsel to the Fund Advisor then forwarded a copy of the Order of April 4, 2012 to the Office of the Accountant of the Superior Court, and requested that the funds previously paid into Court, being the sum of \$2,397,786.75, plus any interest earned thereon, be paid to BDO, in accordance with the order of the Court.

- 2.4** During the balance of the months of April and May, the Fund Advisor attended to various enquiries from claimants as to the status of the legal proceedings, and was party to a number of discussions with CRA and its counsel, the Department of Justice, to consider the issues related to a proposed refund by CRA of the overpayments it had received from 202 in January 2011.
- 2.5** Following the release of the Reasons for Decision of The Honourable Mr. Justice Brown, dated May 28, 2012, the Fund Advisor immediately posted the decisions and reasons on its website (<http://www.bdo.ca/extranets/timepluscanada/>) and advised the claimants by e-mail of the link as well as the 30-day appeal period and timelines for distribution. A copy of the Reasons for Decision is attached hereto as Exhibit "2", and a copy of the e-mail which was sent is attached hereto as Exhibit "3".
- 2.6** By cheque dated June 5, 2012, the Fund Advisor received the amount of \$2,443,669.47 from the Office of the Accountant of the Superior Court.
- 2.7** Following the expiry of the Appeal Period, the Fund Advisor on July 3, 2012 forwarded cheques totaling \$2,112,773.63 to 416 claimants with claims totaling \$5,098,381.52 representing a dividend of 41.440%. The dividend sheet detailing these payments is attached hereto as Exhibit "4".
- 2.8** We attach as Exhibit "5" the Fund Advisor's Statement of Receipts and Disbursements detailing the funds received from Court, and monies paid out. From the funds received, BDO paid its approved fees and costs totaling \$187,998.71, to March 31, 2012, and the approved fees and costs of its counsel, Torkin Manes LLP, of \$42,882.56, to March 31, 2012, both plus HST, and additionally retained a sum of \$70,000.00 to fund the costs to complete the distribution to claimants. Thus, the remaining funds available for distribution to claimants were calculated to total \$2,112,773.63, and were then distributed, as reported above.

### **3. CRA OVERPAYMENT OF JANUARY 6, 2011**

- 3.1** This issue was fully discussed in Section 2 of the Supplement dated March 30, 2012 to the Second Report of the Fund Advisor, and we refer the reader to paragraphs 2.1 to 2.9 of that Supplement, which, for ease of reference, is reproduced and attached hereto, as Exhibit "6".
- 3.2** Since the end of March, 2012 there have been a number of discussions between CRA, the Department of Justice and its counsel, the Fund Advisor and its counsel, to consider alternatives and issues related to the calculation and method of repayment of the net overpayments referred to in Exhibit "6" to this the Third Report. The overpayments of which the Fund Advisor had become aware as a result of its work with claimants, and also the records of 202, total \$1,693,879.24, as detailed in Exhibit "1" to the Supplement dated March 30, 2012 to the Second Report. Further, the Fund Advisor's work has identified approximately \$440,000.00 of net overpayments, (net of the affected claimants' claims against 202 for the under-remittance of payroll taxes and deductions), again based on information obtained from the claimants, and from the records of 202. CRA has advised that, due to privacy concerns, it is unable to provide the Fund Advisor with any details of how CRA arrived at its calculations of its net overpayment figure of \$445,038.69. As a consequence, the Fund Advisor has been unable to completely reconcile its figure with that of CRA; however the amount identified by the Fund Advisor is less than and close to the amount what CRA proposes to now distribute, as noted in the ensuing paragraph.
- 3.3** As advised by CRA in its letter of July 19, 2012, attached hereto as Exhibit "7" CRA has calculated an amount of \$445,038.69 as being the net overpayments in the various tax remittance accounts of customers of 202. While the Fund Advisor is not able to confirm the accuracy of CRA's calculations, the Fund Advisor is satisfied that the customers of 202 have been given ample opportunity to submit their claims to the Fund Advisor. These claims have been adjudicated by the Court and, as reported herein, a dividend of 41.440% of these claims has meanwhile been paid. Accordingly, the Fund Advisor is satisfied that whatever amount of overpayment becomes available from CRA, should be distributed in its entirety to the existing claimants with claims totaling \$5,113,744.64. The Fund

Advisor notes that this total proven and accepted claims figure was increased by \$15,363.12 to adjust for a credit that the Fund Advisor had previously offset against the claim of Grant Aggregate (Western) Inc. ("GAW") which had originated in a related company and which now forms part of the funds CRA proposes to now distribute. Accordingly, in the proposed CRA distribution, there is an additional distribution to GAW representing its 41.440% dividend entitlement on its additional claim of \$15,363.12.

- 3.4 CRA proposes to distribute the sum of \$445,038.69 to the claimants by way of credit to their individual tax remittance accounts, and the Fund Advisor has advised CRA that it is prepared to provide CRA with a calculation which would allow CRA to make the suggested distribution. Accordingly, the Fund Advisor attaches hereto a Second Dividend Sheet setting out the proposed distribution of the amount of \$445,038.69 to each of the claimants. The Second Dividend Sheet is attached hereto as Exhibit "8". The dividend to each claimant would be 8.578%, and when added to the first dividend of 41.440%, the resultant net recovery to claimants, to date, then totals 50.018%.

#### 4. TD LITIGATION

- 4.1. The claimants Carriere Industrial Supply Limited and Dibrina Sure Benefits Consulting Inc. (together, the "Proposed Representative TD Claimants"), the two largest of the 416 claimants, have proposed an Application (the "Proposed TD Application") whereby it is their stated intention to pursue funds which are alleged by the Proposed Representative TD Claimants to have been improperly applied to reduce unsecured debt owing by 202 to TD, where such funds ought to have been included in the interpleaded funds and distributed to the benefit of the claimants.
- 4.2. On August 27, 2012, the Proposed Representative TD Claimants served a motion, returnable on the September 10, 2012, seeking leave to represent all 416 proven claimants in advancing the Proposed TD Application against TD;
- 4.3. It is the Fund Advisor's understanding that should leave be granted and any monies become payable by TD pursuant to the Proposed TD Application, the

Proposed Representative TD Claimants wishes that such funds be distributed by the Fund Advisor and in a manner consistent with the how the interpleaded funds were distributed. Accordingly, the Fund Advisor seeks direction from this Honourable Court with respect to its future role and responsibilities in the event that there are any monies to be distributed as a result of the Proposed TD Application.

## **5. PROFESSIONAL FEES AND COSTS**

- 5.1** By Order of the Honourable Mr. Justice Brown dated April 4, 2012 (attached hereto as Exhibit "1") the professional fees and costs of the Fund Advisor and its counsel up to March 31, 2012 have been approved. These costs have been paid, as set out herein and reflected on the attached Statement of Receipts and Disbursements (Exhibit "5").
- 5.2** Additionally, for the period from April 1, 2012 to June 30, 2012, the Fund Advisor has incurred time charges and disbursement of \$25,729.64 and has estimated the additional costs to complete of \$10,574.14, plus HST, for a total of fees, disbursements and HST to finalize its current mandate and assist with the funds now to be distributed by CRA, of \$41,023.95. The Affidavit of Matthew Lem together with the related invoice and detail of time charges to June 30, 2012, are attached hereto as Exhibit "9".
- 5.3** Additionally, legal counsel to the Fund Advisor has incurred time charges and disbursements of \$27,989.95 inclusive of HST, for the period from April 1, 2012 to August 31, 2012 as set out in the Affidavit of Barry A. Cohen, Q.C., attached hereto as Exhibit "10".
- 5.4** The Fund Advisor believes that the fees and disbursements set out in Exhibits "9" and "10" 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. Further, as advised herein, the Fund Advisor has reserved sufficient funds, with the authorization of the Court, so as to enable these costs to be paid.

5.5 The Fund Advisor requests the Court's approval of these charges, and of the activities of the Fund Advisor as set out in this Third Report. Further, the Fund Advisor requests the Court's authorization to CRA to make available the sum of \$445,038.69 for distribution to the claimants herein, as set out in this report.

All of which is respectfully submitted.

**BDO CANADA LIMITED**  
Interpleaded Fund Advisor  
Per:



**Matthew E. Lem, CIRP**  
Senior Vice-President