

APPENDIX  
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**CITATION:** Carriere Industrial Supply Limited v. The Toronto Dominion Bank, 2012 ONSC 5091  
**COURT FILE NO.:** CV-11-9336-CL  
**DATE:** 20120910

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE: CARRIERE INDUSTRIAL SUPPLY LIMITED AND DIBRINA SURE  
BENEFITS CONSULTING INC., Applicants**

**AND:**

**THE TORONTO DOMINION BANK, 2026227 ONTARIO LIMITED,  
2140074 ONTARIO INC., JAMES GARLAND AND JOHN DAVIS,  
Respondents**

**BEFORE: CUMMING J.**

**COUNSEL: J. Anthony Caldwell, for the Applicants, Carriere and Dibrina**

**Hugh Desbrisay, for the Applicant, Carriere**

**Fay Sulley, for Interpleaded Fund Advisor, BDO Canada Limited**

**Jules Berman, Q.C., for the Respondents, 2026227 Ontario Limited, 2140074  
Ontario Limited, James Garland and John Davis**

**Sonia Singh and Shahana Kar, for Canada Revenue Agency**

**G. Bowden, for the Respondent, The Toronto Dominion Bank**

**HEARD: SEPTEMBER 10, 2012**

**ENDORSEMENT**

**The Motions**

[1] There are two motions before the Court. First, there is a motion under Rule 10.01 of the *Rules of Civil Procedure* by the Applicants, Carriere Industrial Supply Limited and Dibrina Sure Benefits Consulting Inc. (the "Applicants") for an order that they represent 416 persons, inclusive of the Applicants (the "Class") who were customers of the Respondents 20206227 Ontario Limited ("Time Plus") and 2140074 Ontario Inc. ("Time Plus Newmarket").

[2] Second, there is a motion by BDO Canada Limited as set forth below.

## Background

[3] Time Plus provided employee payroll processing services to the Applicants and other companies over several years. This included processing the contributions required to be made on behalf of the said employees to the Canada Revenue Agency ("CRA"). Time Plus would withdraw or "pull" funds from the bank accounts of the Applicants and other employers for the purpose of paying the salaries of their employees along with the required remittances to the CRA on behalf of those employees. The monies so pulled by Time Plus were deposited into an account (the "payroll account") at the Respondent The Toronto-Dominion Bank (T-D Bank), and then paid out to the individual employees' accounts, and to a "tax account" at the T-D Bank in respect of the CRA remittances. The Applicants claim that the T-D Bank accounts constituted trust accounts and the funds moving into and through those accounts were trust funds.

[4] It is alleged, that on January 20 and 21, 2011, T-D Bank unlawfully misapplied \$1,327,616 of the trust funds by applying those monies to reduce Time Plus's unsecured indebtedness to T-D Bank. It is further alleged that T-D Bank improperly allowed the transfer of \$1,000,000 in trust funds to Time Plus Newmarket.

[5] The payroll account and the tax account were closed by T-D Bank on February 9, 2011 with a balance of \$2,518,210.79 in the payroll account as of that date. After certain adjustments, T-D Bank interpleaded the sum of \$2,397,786.75 (the "Interpleaded Fund"), representing the residual balance in the payroll account.

[6] By Order dated November 14, 2011, BDO Canada Limited was appointed as the Interpleaded Fund Manager ("IFM"). The IFM then identified 416 claimants, inclusive of the Applicants, in respect of the Interpleaded Fund and the amount of their respective claims as totalling \$5,098,381.52.

[7] The IFM then brought a motion before Mr. Justice Brown of this Court who gave Reasons for Decision on May 28, 2012: *TD Bank v. 2026227 Inc.*, 2012 ONSC 2992. He determined that the payroll account and the tax account were "mixed, co-mingled trust accounts for the benefit of customers from whose accounts funds were pulled for payment to employees and remittance to CRA", that the Interpleaded Fund represented what remained of the mixed trust account and that the Interpleaded Fund was to be distributed to the claimants on a *pari passu ex post facto pro rata* basis. The IFM has now distributed the monies, net of costs, of the Interpleaded Fund.

[8] It has now also been determined that some \$445,039.69 (the "CRA funds") in the possession of CRA are properly to be allocated to the credit of the 416 claimants. Accordingly, the IFM in the second motion before the court seeks an order, *inter alia*, authorizing the IFM to have the CRA funds distributed in accordance with the protocol outlined in the May 28, 2012 decision of Mr. Justice Brown. This motion and the proposed order are not opposed by any party.

[9] The Respondent T-D Bank opposes the granting of the requested representation order. Its counsel argues that the 416 members of the Class do not all have common issues because the alleged breaches of trust against T-D Bank involve two distinctive transactions, *i.e.*, the transfer of the \$1,327,616 from the payroll account in partial satisfaction of the indebtedness of Time Plus to T-D Bank and the transfer of \$1,000,000 to Time Plus Newmarket.

[10] T-D Bank does not dispute that \$2,327,616 is the total amount at issue. The allegations of the Applicants as to breach of trust remain to be proven. But, if successful in respect of one or both alleged breach of trust situations, the class is agreeable as to the distribution of the fruits of success. Thus, from the standpoint of the class members there is a commonality of interest and common issues to be determined. In my view, there is no merit to T-D Bank's opposition to the requested representation order. T-D Bank will either be liable for the \$2,327,616 claimed or some lesser part thereof or will be found to have a complete defence.


[11] In my view, it is necessary and desirable to grant the requested representation order. It provides access to justice for the 416 members of the Class and significant efficiency in the use of resources to determine the claims in issue.

**Disposition**

[12] Orders will issue in respect of both motions in accordance with these reasons.

[13] Costs of \$1,500, inclusive of applicable taxes, are awarded as a counsel fee to the Applicants for today's success in respect of responding to T-D Bank's opposition to the motion for the representation order. These costs are payable forthwith by T-D Bank, ie. within 30 days.

[14] The Applicants also seek costs for the preparation of the materials in respect of the motion for the representation order. These materials would have been necessary irrespective of whether T-D Bank opposed or did not oppose. I fix those costs of the Applicants at \$9000., inclusive of applicable taxes and disbursements. Such costs shall follow the cause, subject to the discretion of the trial judge.

 J  
CUMMING J.

Date: September 10, 2012