

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LISA RAM

Plaintiff

and

THE TORONTO DOMINION BANK

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**MOVING PARTY'S FACTUM
- Leave to Amend Distribution Protocol -**

May 22, 2020

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PART I - INTRODUCTION

1. This motion relates to a fully settled class action against the Toronto Dominion Bank (“**TD**”) claiming that TD’s coin counting machines did not accurately count coins.

2. On April 15, 2019, this Court approved a protocol for distributing the settlement funds among class members (the “**Distribution Protocol**”). On this motion, Class Counsel are seeking leave to amend the distribution protocol. Class Counsel are also seeking to approve the disbursements they have incurred since this Court made its orders on April 15, 2019.

Affidavit of Sabrina Callaway sworn May 8, 2020 at paras 2, 15 (“**Callaway Affidavit**”), Motion Record (Leave to Amend Distribution Protocol) (“**Motion Record**”), Tab 2, pp. 20-21, 23.

3. The proposed amendments to the Distribution Protocol are fair, reasonable and in the best interests of the class. It is designed to allocate more of the settlement funds among settlement class members who filed an approved claim.

PART II - SUMMARY OF FACTS

4. In broad terms, the distribution permitted settlement class members to make a claim for their share of the net settlement funds totalling approximately \$329,209 based on the following parameters:

- (a) the net settlement funds were to be distributed *pro rata* based on the value of settlement class members' deposited coins;
- (b) the value of a settlement class member's deposited coins would be assigned a minimum value of \$25.00 for the purposes of calculating that class member's *pro rata* share;
- (c) a settlement class member's total recovery from the net settlement funds would be capped at 2% of the value of their deposited coins;
- (d) settlement class members were required to submit a proof of claim; and
- (e) excess amounts after completing this calculation, as well as any funds remaining of the net settlement funds, would be paid by *cy prè*s to the Law Foundation of Ontario.

Callaway Affidavit at para 3, Motion Record, Tab 2, p. 21.

5. When drafting the distribution protocol, Class Counsel considered a cap of 2% of the value of class members' deposited coins to be reasonable in order to avoid over-compensating people having large amounts of deposited coins.

Callaway Affidavit at paras 4, 8, Motion Record, Tab 2, pp. 21-22.

6. Class members were given notice of the distribution protocol and made claims, 185 of which were approved.

Callaway Affidavit at paras 5-6, Motion Record, Tab 2, p. 22.

7. Now that the number of approved claims is known to both Class Counsel and the Claims Administrator, Class Counsel are seeking to amend the distribution protocol to:

- (a) increase the cap on a class member's payout from 2% to 20% of the value of that class member's deposited coins;
- (b) establish a minimum payout of \$25 to each class member with a valid claim; and
- (c) change the recipient of the *cy prè*s funds from the Law Foundation of Ontario to Pro Bono Canada.

Callaway Affidavit at paras 8-9, 11, Motion Record, Tab 2, p. 22.

8. The increased cap and the minimum payout will ensure that class members with approved claims receive a larger *pro rata* share of the net settlement funds thereby reducing the value of the funds to be paid by *cy prè*s.

Callaway Affidavit at para 10, Motion Record, Tab 2, p. 22.

9. Class Counsel are proposing a change in the recipient of the *cy-prè*s funds to allocate the moneys to Pro Bono Canada. The *cy prè*s funds will be allocated across Canadian pro bono law clinics. This proposed change was prompted by the serious funding problems recently experienced by Pro Bono Ontario.

Callaway Affidavit at paras 11-13, Motion Record, Tab 2, pp. 22-23.

10. Class Counsel have incurred additional disbursements in the amount of \$3,197.25 for which they are now seeking Court approval. These additional disbursements relate primarily to photocopying costs and court filing fees associated with motions that were heard on April 15, 2019 and not captured in that Fee Approval Order.

Callaway Affidavit at paras 14-15, Motion Record, Tab 2, p. 23.

Exhibit “D” to the Callaway Affidavit, Motion Record, Tab 2D, pp. 71-72.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

11. Section 26 of the *Class Proceedings Act, 1992* governs the distribution of settlement funds. It permits the Court to direct the distribution of settlement monies by any means it considers appropriate. Subject to Court approval, Class Counsel are required to develop a distribution protocol that is fair, reasonable, and in the best interests of the class.

Class Proceedings Act, 1992, SO 1992, c 6, s. 26.

Zaniewicz v Zungui Haixi Corporation, 2013 ONSC 5490 at para 59, online: <<http://canlii.ca/t/g098k#par59>>.

Mancinelli v Royal Bank of Canada, 2018 ONSC 4192 at para 49, online: <<http://canlii.ca/t/hsw5m#par49>>.

12. The proposed amendments to the Distribution Protocol are intended to enhance access to justice by allocating a greater portion of the net settlement funds to the settlement class members. The proposed amendments to the Distribution Protocol offer a meaningful opportunity for settlement class members to receive direct compensation. Access to justice is further amplified through the proposed *cy-près* payment.

AIC Limited v Fisher, 2013 SCC 69 at paras 25 and 50, online: <<http://canlii.ca/t/g2bhl#par25>>.

13. *Cy prè*s awards can be approved pursuant to section 26. Courts will approve a *cy prè*s distribution where the settlement funds “cannot be economically distributed to individual class members” and the proposed organizations are “credible”.

Sorenson v Easyhome Ltd., 2013 ONSC 4017 at paras 24-26, online:
<<http://canlii.ca/t/fz5c3#par24>>.

14. The proposed *cy prè*s payment to Pro Bono Canada will benefit settlement class members and others who are similarly situated by funding pro bono legal clinics in order to reduce the high barriers to justice posed by legal fees.

Callaway Affidavit at para 13, Motion Record, Tab 2, p. 23.

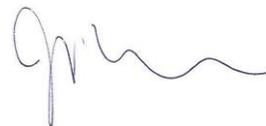
15. The defendant takes no position on this motion.

PART IV - ORDER REQUESTED

16. The plaintiff requests:

- (a) An Order granting leave to amend the Distribution Protocol in the form attached to the Notice of Motion as Schedule “A”; and
- (b) An Order approving payment of Class Counsel’s disbursements, including applicable taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2020.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *AIC Limited v Fischer*, [2013] 3 SCR 949, 2013 SCC 69
2. *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4192
3. *Sorenson v Easyhome Ltd.*, 2013 ONSC 4017
4. *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Class Proceedings Act, 1992, SO 1992, c 6

Judgment distribution

26 (1) The court may direct any means of distribution of amounts awarded under [section 24](#) or [25](#) that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

- (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
- (b) the defendant pay into court or some other appropriate depository the total amount of the defendant’s liability to the class until further order of the court; and
- (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

Idem

(4) The court may order that all or a part of an award under [section 24](#) that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

- (a) persons who are not class members; or
- (b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under [section 24](#) or [25](#) and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

Payment of awards

- (8) The court may order that an award made under [section 24](#) or [25](#) be paid,
 - (a) in a lump sum, forthwith or within a time set by the court; or
 - (b) in instalments, on such terms as the court considers appropriate. 1992, c. 6, s. 26 (8).

Costs of distribution

(9) The court may order that the costs of distribution of an award under [section 24](#) or [25](#), including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

Fees and disbursements

32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
- (b) direct a reference under the rules of court to determine the amount owing; or
- (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

LISA RAM
Plaintiff

-and-

THE TORONTO DOMINION BANK
Defendant

Court File No. C-680-16

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PROCEEDING COMMENCED AT KITCHENER

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