Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 TD Waterhouse Canada Inc.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, C.S.5, AS AMENDED

AND

IN THE MATTER OF
TD-WATERHOUSE CANADA INC.

SETTLEMENT HEARING

Hearing: Friday, September 30, 2005

Ontario Securities Commission Panel:

Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
Carol Perry	-	Commissioner
Suresh Thakrar	-	Commissioner

Counsel:

Matthew Britton	-	For the Staff of the Ontario Securities Commission
David Hausman	-	For TD-Waterhouse

The following text has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on excerpts from the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the chair of the panel (Paul M. Moore) for the purpose of providing a public record of the decision.

DECISION AND REASONS

Vice Chair Moore:

[1] This is a hearing under s. 127 and s. 127.1 of the *Securities Act, R.S.O. 1990, c.S. 5*, as amended (the Act), to consider whether the Commission should approve as being in the public interest a Settlement Agreement between staff of the Commission and T-D Waterhouse Canada Inc. concerning allegations of conduct contrary to the public interest made by staff against T-D Waterhouse.

[2] Agreed facts and sanctions are set out in the Settlement Agreement.

Issues

[3] T-D Waterhouse acknowledges that it failed to comply with

(i) its suitability obligation to its clients, contrary to section 1.5 of Ontario Securities Commission Rule 31 – 505 (Conditions of Registration) and

(ii) its obligations to deal with its clients fairly, by failing to disclose to its clients a commission paid to T-D Waterhouse, contrary to section 2.1(2) of Rule 31 - 505.

Facts

[4] The impugned conduct of the respondent arose from an RRSP loan scheme carried out by a third party, unaffiliated with T-D Waterhouse. The third party, Richard Ochnik, was not registered under the Act in any capacity.

[5] Ochnik incorporated a numbered company to develop a property as a retirement complex.

[6] He arranged for various individuals, facing financial difficulty, to invest in the numbered company.

[7] These individuals were advised that if they collapsed their locked in RRSPs, or pensions, and bought shares in the numbered company, they would receive a non-repayable loan for between 40 percent and 60 percent of their locked in funds.

[8] The potential investors were referred to a particular registered representative at T-D Waterhouse.

[9] Ochnik met with the registered representative. He told her that he had various individuals who intended to invest in the numbered company.

[10] He told her that he needed T-D Waterhouse to establish accounts for these individuals, and arranged for the transfer of shares in the numbered company to these individuals.

[11] With the approval of T-D Waterhouse management and the T-D Waterhouse compliance department, the registered representative agreed to facilitate the transactions for a commission of seven percent of the funds deposited into the clients' accounts with T-D Waterhouse.

[12] In the course of opening the client accounts, the registered representative sent new client application forms to the clients.

[13] When the clients returned the new client application forms to the registered representative, she reviewed and signed them.

[14] The financial information contained in the new client account forms reveals that the clients were of modest means and leads to the conclusion that collapsing their locked in pensions and RRSPs to invest in a long term, high risk investment like the numbered company was, in fact, unsuitable for the clients.

[15] The registered representative at the start referred the proposed transaction to her branch manager.

[16] After reviewing the proposal, T-D Waterhouse head office approved the transaction. The registered representative kept head office advised of the transaction as it proceeded.

[17] At T-D Waterhouse's request, Ochnik provided an appraisal of the retirement home property, valuation of the shares to be acquired, legal opinions, a sample subscription agreement, and other documents, to T-D Waterhouse head office and its compliance department, all of which were reviewed by T-D Waterhouse.

[18] Neither T-D Waterhouse, nor the registered representative, were aware that there were to be loans associated with the investments in the company's shares or that the investment was designed as a method to enable investors to withdraw assets from their locked in RRSPs.

[19] T-D Waterhouse's compliance department, however, was aware that the Ontario Securities Commission had issued an RRSP loan scheme alert.

[20] At T-D Waterhouse's request, the registered representative specifically asked Ochnik whether there were loans associated with the investment and was advised that no loans were involved.

[21] No one at T-D Waterhouse, however, had any direct conversations with the bulk of the investors. The issue of loans associated with the investments was never discussed with most of them.

[22] The agreed facts provide that had T-D Waterhouse been aware of the loans, it would not have proceeded with the transaction.

[23] Between June 7, 2002, and December 31, 2002, 43 clients of T-D Waterhouse collapsed their locked in RRSPs and pensions, and deposited approximately $1.5 million into their accounts at T-D Waterhouse.

[24] These funds were then transferred to the numbered company and the shares in the numbered company were then deposited into the client accounts.

[25] T-D Waterhouse received approximately $105,000 in commissions.

[26] T-D Waterhouse failed to disclose to its clients the seven percent commission paid to it.

Decision

[27] We approve the Settlement Agreement as being in the public interest.

Reasons

[28] The suitability requirement imposed by securities law on registrants dealing with clients carries with it, inherently, a due diligence inquiry obligation by the registrant. A registrant under a suitability obligation must make reasonable inquiries into facts

(i) relating to the investor and

(ii) the proposed investment,

sufficient to form reasonably the opinion that the investment is suitable for the investor. This requires that the registrant have, or that he or she acquire a basic understanding of the proposed investment and the circumstances of the investor.

[29] Reliance on information provided by persons other than the investor may be reasonable, depending on the facts.

[30] But where information is provided by an apparently unregistered person – in this case, Richard Ochnik – whose activities may well have amounted to conduct in furtherance of trading (and therefore, trading), and who may well have been carrying on the business of trading (in view of the number of clients involved), red flags should have gone up. Although there were some discussions with a few investors over whether there were loans involved in the transaction, the bulk of the investors were not asked and the few that were, incorrectly, left the representative and T-D Waterhouse with the view that no loans were involved.

[31] The agreed facts state that, and I quote:

> No one at T-D Waterhouse had any direct conversations with the bulk of the investors, and so, the issue of loans associated with the investments, was never discussed with most of them.
>
> Had T-D Waterhouse been aware of the loans, it would not have proceeded with the transaction.

[32] It appears, therefore, that part of the failure of T-D Waterhouse to fulfill the suitability requirement is attributable to its failure to exercise due diligence, by making sufficient inquiries of the investors, or others, about the nature of the transaction, and other relevant factors. This was, obviously, necessary, in view of the information disclosed in the new client account forms.

[33] T-D Waterhouse acknowledges that its conduct was contrary to Ontario securities law and contrary to the public interest.

Sanctions

[34] In the Settlement Agreement T-D Waterhouse agreed to the following:

(i) To make restitution to its clients in the amount of monies that were deposited into the client accounts at T-D Waterhouse and used to purchase shares of the private company, plus interest calculated by a formula to be agreed upon by staff and T-D Waterhouse.

(ii) To provide proof in writing to staff that restitution to its clients has been made.

(iii) To make a settlement payment of $250,000 to the Commission for allocation to, and for the benefit of, third parties, under section 3.4 (2) of the Act. (In passing, I wish to note that this amount is equivalent to approximately two and-a-half times the amount of commissions received by T-D Waterhouse in the transaction.)

(iv) To provide a letter of comfort from its auditors to staff to confirm that T-D Waterhouse has instituted new practices and procedures relating to preventing the facilitation of potential RRSP loan schemes. (This is

directly responsive to T-D Waterhouse's partial failure to meet its suitability obligations to its clients. I think this sanction is very appropriate.)

(v) Pursuant to clause 6 of subsection 127.1 of the Act, T-D Waterhouse will be reprimanded.

(vi) Pursuant to section 127.1 of the Act, to pay the sum of $125,000 in respect of the costs of the investigation and hearing in this matter.

[35] We believe that the sanctions are appropriate and that the Settlement Agreement is in the public interest.

[36] T-D Waterhouse is hereby reprimanded.

Approved by the chair of the hearing on October 7th, 2005.

"Paul M. Moore"
Chair