

2005 BCSECCOM 705

November 14, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 123 - Relief from self dealing restrictions in ss. 121 and 122 of the Act - A mutual fund(s) wants relief from s. 121(2)(a) of the Act so that it can make or hold an investment in a person who is a substantial security holder of the mutual fund, its mutual fund manager or its mutual fund distributor or an associate of any of them - Securities Act s. 130 - Relief from certain self-dealing restrictions in Part 15 of the Act - A mutual fund wants relief from the principal trading prohibitions in s. 128 of the Act to enable persons having access to information concerning the investment program of the fund to purchase or sell securities comprising the portfolio of the mutual fund - The portfolio of the mutual fund is fixed; the portfolio is passively managed; the mutual fund will purchase the securities at a predetermined time and at no more than the ask price of the securities on the exchange where the securities are listed; independent directors of the mutual fund will approve all principal purchases

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 121(2)(a), 123, 128, and 130

In the Matter of
the Securities Legislation of
Ontario, British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador,
Nova Scotia and New Brunswick
(the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of
TD Split Inc. and TD Securities Inc.
(the Filers)

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for decisions under

2005 BCSECCOM 705

the securities legislation (the Legislation) of the Jurisdictions that the following requirements contained in the applicable Legislation shall not apply to TD Split Inc. (the Issuer) and/or TD Securities Inc. (TD Securities), as applicable, in connection with the offerings (the Offerings) of class B capital shares (the Capital Shares) and class B preferred shares (the Preferred Shares) of the Issuer:

- (a) The prohibitions contained in the Legislation prohibiting trading in portfolio shares by persons or companies having information concerning the trading programs of mutual funds (the Principal Trading Prohibitions) shall not apply to TD Securities in connection with the Principal Sales and Principal Purchases (both as hereinafter defined); and
- (b) The restrictions contained in the Legislation prohibiting the Issuer from making investments in the common shares (the TD Bank Shares) of The Toronto - Dominion Bank (TD Bank), which bank is a substantial security holder of TD Securities, a distribution company of the Issuer (the Investment Restrictions) shall not apply to the Issuer in connection with the Offerings.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filer:

TD Securities

1. TD Securities is a direct, wholly-owned subsidiary of TD Bank and is registered under the Legislation as a dealer in the categories of “broker” and “investment dealer” and is a member of the Investment Dealers Association of Canada and a participant in the Toronto Stock Exchange (the TSX).

2005 BCSECCOM 705

2. TD Securities is the promoter of the Issuer and has established a credit facility in favour of the Issuer in order to facilitate the acquisition of the TD Bank Shares by the Issuer.
3. Pursuant to an agency agreement to be made between the Issuer and a syndicate of dealers to be led by TD Securities (the Agents), the Issuer will appoint the syndicate of dealers, as its agents, to offer the Capital Shares and Preferred Shares of the Issuer on a best efforts basis and the final prospectus qualifying the Offerings (the Final Prospectus) will contain a certificate signed by the Agents in accordance with the Legislation.
4. Pursuant to an administration agreement (the Administration Agreement) to be entered into between TD Securities and the Issuer, the Issuer will retain TD Securities to administer the ongoing operations of the Issuer and will pay TD Securities a monthly fee of 1/12 of 0.20% of the market value of the TD Bank Shares held by the Issuer.
5. TD Securities' economic interest in the Issuer and in the material transactions involving the Issuer are disclosed in the amended and restated preliminary prospectus of the Issuer dated October 6, 2005 (the Preliminary Prospectus) and will be disclosed in the Final Prospectus under the heading "Interest of Management and Others in Material Transactions".
6. Any Principal Sales or Principal Purchases will be effected by members of TD Securities that do not have knowledge of a material fact or material change with respect to the TD Bank that has not been generally disclosed.

The Issuer

7. The Issuer was incorporated on July 31, 2000 under the *Business Corporations Act* (Ontario) and is a reporting issuer under the Legislation. The Issuer is authorized to issue an unlimited number of Capital Shares, an unlimited number of Preferred Shares, an unlimited number of class A capital shares (the Class A Capital Shares), class C and class D capital shares, issuable in series, an unlimited number of class A preferred shares (the Class A Preferred Shares), class C and class D preferred shares, issuable in series, and an unlimited number of class E voting shares (the Class E Shares), having the attributes set forth under the headings "Description of Share Capital" and "Details of the Offerings" in the Preliminary Prospectus.
8. The Issuer is a passive investment company whose principal undertaking will be to invest the net proceeds of the Offerings in a portfolio (the Portfolio) of TD Bank Shares in order to generate fixed cumulative preferential

2005 BCSECCOM 705

distributions for the holders of the Preferred Shares and to enable the holders of Capital Shares to participate in any capital appreciation in the TD Bank Shares and benefit from any increase in the dividends paid on the TD Bank Shares after payment of administrative and operating expenses of the Issuer. It will be the policy of the Board of Directors of the Issuer to pay quarterly dividends on the Capital Shares in an amount equal to the amount by which the dividends received by the Issuer on the TD Bank Shares exceed the dividends paid on the Preferred Shares and all administrative and operating expenses of the Issuer.

9. The Issuer was previously granted relief from the Principal Trading Prohibitions and the Investment Restrictions in connection with its initial public offering of the Class A Capital Shares and Class A Preferred Shares.
10. The Issuer is considered to be a mutual fund, as defined in the Legislation, except in the Province of Québec. Since the Issuer does not operate as a conventional mutual fund, it has made application for relief from certain requirements of National Instrument 81-102 Mutual Funds.
11. It will be the policy of the Issuer to hold the TD Bank Shares and to not engage in any trading of the TD Bank Shares, except:
 - (i) to fund retractions or redemptions of Capital Shares and Preferred Shares;
 - (ii) following receipt of stock dividends on the TD Bank Shares;
 - (iii) in the event of a take-over bid for any of the TD Bank Shares;
 - (iv) if necessary, to fund any shortfall in distributions on the Preferred Shares;
 - (v) to meet obligations of the Issuer in respect of liabilities including extraordinary liabilities; or
 - (vi) certain other limited circumstances as described in the Preliminary Prospectus.
12. The Class E Shares are currently the only voting shares in the capital of the Issuer. There are currently and will be at the time of filing the Final Prospectus, 100 Class E Shares issued and outstanding. All of the issued and outstanding Class E Shares are held by a trust established for the holders of the Preferred Shares and Capital Shares from time to time.

2005 BCSECCOM 705

13. The Issuer has a Board of Directors which currently consists of five directors, three of whom are employees of TD Securities and two of whom are independent of TD Securities. Also, the offices of President/Chief Executive Officer and Chief Financial Officer/Secretary of the Issuer are held by employees of TD Securities.
14. The Final Prospectus will disclose the acquisition cost of the TD Bank Shares and selected information with respect to the dividend and trading history of the TD Bank Shares has been disclosed in the Preliminary Prospectus and will be disclosed in the Final Prospectus.
15. The TD Bank Shares are listed and traded on the TSX.
16. The Issuer is not, and will not upon the completion of the Offerings be, an insider of TD Bank within the meaning of the Legislation.

The Offerings

17. There are currently 2,014,005 Class A Capital Shares and 2,014,005 Class A Preferred Shares of the Issuer issued and outstanding. The Class A Capital Shares and Class A Preferred Shares are scheduled to be redeemed by the Issuer on November 15, 2005 (the Class A Redemption Date) in accordance with their terms. A holder of Class A Capital Shares may choose to continue his or her investment in the Issuer by electing to receive Capital Shares of the Issuer as part of the Offerings in satisfaction of the redemption price payable for their Class A Capital Shares on the Class A Redemption Date.
18. The net proceeds of the Offerings (after deducting the Agents' fees, expenses of issue and carrying costs related to the acquisition of the TD Bank Shares) will be used by the Issuer to fund the purchase of TD Bank Shares and to fund the redemption of the Class A Preferred Shares and Class A Capital Shares, to the extent necessary.
19. The Capital Shares and the Preferred Shares will be listed for trading on the TSX. An application requesting conditional listing approval has been made by the Issuer to the TSX.
20. The Capital Shares and Preferred Shares may be surrendered for retraction at any time in the manner described in the Preliminary Prospectus.

2005 BCSECCOM 705

21. Any Capital Shares and Preferred Shares outstanding on November 15, 2010 (the Redemption Date) will be redeemed by the Issuer on such date and Capital Shares and Preferred Shares will be redeemable at the option of the Issuer on any Annual Retraction Payment Date (as described in the Preliminary Prospectus).

The Principal Trades

22. Pursuant to a securities purchase agreement (the Securities Purchase Agreement) to be entered into between the Issuer and TD Securities, TD Securities will purchase, as agent for the benefit of the Issuer, TD Bank Shares in the market on commercial terms or from non-related parties with whom TD Securities and the Issuer deal at arm's length. Subject to receipt of all necessary regulatory approvals, TD Securities may, as principal, sell TD Bank Shares to the Issuer (the Principal Sales).
23. The Preliminary Prospectus discloses and the Final Prospectus will disclose that any Principal Sales will be made in accordance with the rules of the applicable stock exchange and the price paid by TD Securities (inclusive of all transaction costs, if any) will not be greater than the price which would have been paid (inclusive of all transaction costs, if any) if the acquisition had been made through the facilities of the principal stock exchange on which the TD Bank Shares are listed and posted for trading at the time of the purchase from TD Securities. TD Securities may realize a gain or a loss in respect of TD Bank Shares that it sells as principal to the Issuer in these circumstances. Any carrying costs and other expenses incurred by TD Securities on behalf of the Issuer from the time of purchase of the TD Bank Shares will be for the account of the Issuer.
24. TD Securities will not receive any commissions from the Issuer in connection with the Principal Sales and all Principal Sales will be approved by the independent directors of the Issuer. In carrying out the Principal Sales, TD Securities will deal fairly, honestly and in good faith with the Issuer.
25. For the reasons set forth in Paragraphs 21 and 22 above, and the fact that no commissions are payable to TD Securities in connection with the Principal Sales, in the case of the Principal Sales, the interests of the Issuer and the shareholders of the Issuer may be enhanced by insulating the Issuer from price increases in respect of the TD Bank Shares.
26. In connection with the services to be provided by TD Securities to the Issuer pursuant to the Administration Agreement, TD Securities may sell TD Bank Shares to pay a portion of the dividends payable on the Preferred Shares, to

2005 BCSECCOM 705

fund retractions of Capital Shares and Preferred Shares prior to the Redemption Date and in connection with the liquidation of the assets of the Issuer prior to the Redemption Date. These sales will be made by TD Securities as agent on behalf of the Issuer, but in certain circumstances, such as where a small number of Capital Shares and Preferred Shares have been surrendered for retraction, TD Securities may purchase TD Bank Shares as principal (the Principal Purchases) subject to receipt of all regulatory approvals.

27. The Administration Agreement will provide that TD Securities must take reasonable steps, such as soliciting bids from other market participants or such other steps as TD Securities, in its discretion, considers appropriate after taking into account prevailing market conditions and other relevant factors, to enable the Issuer to obtain the best price reasonably available for the TD Bank Shares so long as the price obtained (net of all transaction costs, if any) by the Issuer from TD Securities is at least as advantageous to the Issuer as the price which is available (net of all transaction costs, if any) through the facilities of the applicable stock exchange at the time of the trade.
28. In connection with any Principal Purchases, TD Securities will comply with the rules, procedures and policies of the applicable stock exchange of which it is a member and in accordance with orders obtained from all applicable securities regulatory authorities. The Preliminary Prospectus discloses and the Final Prospectus will disclose that TD Securities may realize a gain or loss on the resale of such securities. TD Securities will not receive any commissions from the Issuer in connection with Principal Purchases.
29. TD Securities will not receive any commissions from the Issuer in connection with Principal Purchases and all Principal Purchases will be approved by the independent directors of the Issuer. In carrying out the Principal Purchases, TD Securities will deal fairly, honestly and in good faith with the Issuer.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the authority to make the decision has been met.

The decision of the Decision Makers is that:

- (i) the Principal Trading Prohibitions shall not apply to TD Securities in connection with the Principal Sales and Principal Purchases; and

2005 BCSECCOM 705

- (ii) the Investment Restrictions shall not apply to the Issuer in connection with the investments in TD Bank Shares for the purposes of the Offerings.

Paul M. Moore
Vice Chair

Carol S. Perry
Commissioner

Ontario Securities Commission