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Judge slams banks in conflict ruling

Denies BMO, TD attempt to take Siskinds off case

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An Ontario Superior Court judge has denied a request by BMO Nesbitt Burns Inc. and TD Securities Inc. to kick the law firm Siskinds off a securities class-action case because it acted for the TD and BMO retail banking arms in debt collections and bankruptcy matters.

Justice Joan Lax called the attempt to knock Siskinds off the case -- which alleges prospectus misrepresentation -- nothing more than a "tactical" manoeuvre and she took the banks to task for bringing it.

She said the banks' position "raises the spectre of imposing exaggerated and unnecessary client loyalty demands" and would have "serious and unwelcome consequences for access to justice and for the right of a litigant to counsel of his or her choice."

She noted no lawyer at Siskinds "has ever acted for the underwriters. Nor has any Siskinds lawyer advised either bank on matters relating to securities, due diligence, stock options or class actions."

"There is no realistic possibility that Siskinds received or could have received confidential information that is relevant to this action in the course of these retainers." Justice Lax said "it cannot be seriously maintained that Nesbitt and TD Securities are the alter egos of BMO and TD Bank."

"The underwriters and the banks are separate and sophisticated businesses and legal entities that are individually governed and autonomous. The banks had no reasonable expectations that their subsidiaries would be treated as clients," she said, adding, "there is no compelling reason to impose fiduciary obligations..."

The case deals with a class-action lawsuit brought by a shareholder against Gammon Gold and its underwriters, including Scotia Capital Inc., which was not part of the conflict motion. The suit alleges misrepresentation and further claims Gammon engaged in stock-option manipulation, charges the company denied in a press release last year.

The conflict ruling will likely be cheered by Bay Street and national law firms. Many large law firms have tripped up on conflict issues and been called to task by judges when

they have tried to act against former or current clients. That has led to a number of legal decisions that attempt to establish a "bright line test" covering the duty of loyalty and when it applies.

[Earl Cherniak](#), a lawyer at Lerner in Toronto, who argued on behalf of Siskinds against the banks' motion, said "the case will have significant interest in the legal community. This clarifies something that was really unclear ... the extent to which the conflict rules extend to near-clients or in this case subsidiaries of a parent. This is the first case on that point."

Mr. Cherniak said that banks tried to argue "we are just one big happy family; the client was us, the client group." However, he said, Justice Lax, disagreed.

Dimitri Lascaris, the Siskinds litigator behind the class-action suit, said "if the court were to adopt the very expansive interpretation of lawyer's duty of loyalty advanced in this motion, it would have created immense difficulties, especially for law firms that have national practices."

Ron Slaght, of Lenczner Slaght, who argued for the banks, declined to comment on the case because it's still before the court, as did BMO Nesbitt Burns.

A TD spokesman said "we disagree with, and are disappointed by, the court's decision. However, we will accept the decision and not seek leave to appeal. Overall, we believe the claim in the class action has no merit and we intend to vigorously defend our position."

Justice Lax found that "Siskinds does not have a disqualifying conflict of interest. It has breached no contractual retainer." She added if the retail banks wanted to bar Siskinds from suing their investment banking arms, it could have made that a requirement of their retainers.

She noted that after the conflict was raised and Siskinds refused to withdraw, the two banks advised the firm it would no longer receive any work from them -- a decision that sources say could cost the firm between \$500,000 and \$1-million a year.

Justice Lax said "this is a business decision that the banks were free to make. However it is telling that they did not remove their existing client files. If the banks had any real concern about Siskinds' loyalty to them or the impairment of their solicitor-client relationship, they would have terminated the retainers. Instead, they continue despite Siskinds' refusal to withdraw from its representation of the plaintiff in this action." She noted that TD Bank's conflict policy "specifically contemplates that a law firm may both represent and act against the bank in certain circumstances and there are a number of examples where this has occurred."

Carla Swansburg, president of the Ontario Chapter of the Association of Corporate Counsel, an organization for company lawyers, said "conflicts are a very significant issue to in-house counsel and are unfortunately very common."

Ms. Swansburg, who is a practising lawyer at RBC Financial Group, said the case highlights the need for inhouse lawyers to deal with it up front in their retainer agreements, "rather than being forced to deal with individual cases before the courts." She said "our firms know that a term of being on our list is to avoid acting for any party whose interests are, or may become, adverse to ours, and we clearly include our units and subsidiaries in this term. It sounds harsh, and in a transactional situation, for example, we are flexible about this, but we are clear from the beginning that in litigation matters, we require this commitment."

Justice Lax said removing Siskinds would "impair the integrity of the justice system." She noted that until recently there have been relatively few securities class actions and Siskinds is one of the small number of firms prosecuting them and investing the time and resources needed to launch them. "It has particular and specialized expertise in the investigation of stock-option practices of TSX-listed companies" and is the only law firm to commence such a proceeding in Canada. She said that the plaintiff's ability to secure counsel of choice "does not trump the requirement to avoid conflicts of interest. However, it explains why this motion was brought."

Mr. Lascaris said "as a firm we looked at it first and foremost as a matter of principle and felt the principle was important to defend."