
Stephen HERNE *

The problem of insider trading has been dealt with in various ways by Australia, Canada, the United Kingdom, and the United States. This article compares the statutory regulation and case law regarding insider trading in these countries, as well as formulating a framework for analysis of the existing law.

1. Introduction

Insider trading usually involves the sale or purchase of company shares or securities by persons connected with a company (insiders), who have price-sensitive information not generally known by the public or by the persons with whom the insiders deal. It is an activity many jurisdictions have sought to proscribe [1].

For a variety of reasons, definitions of inside information in Australia, Canada and the United Kingdom (U.K.) have undergone considerable change during a short period of time. In Australia, case law has refined earlier ideas. The U.K. reconsidered the policy basis for legislation concerning inside information. This has narrowed the field of prohibition. In Canada, changes have been initiated mainly in Ontario and Quebec.

This article will consider the scope of the statutory definitions of inside information in these three jurisdictions and the relevant United States (U.S.) case law. Section 2 will set out the relevant statutory references to inside information in Australia, Canada, the U.K., and the U.S. Section 3 will explore the relevant definitions of inside information. Consideration of different definitions of insider trading can aid statutory interpretation as well as serve to illustrate different perceptions of the “evil” that this type of legislation is designed to attack.

* Principal Legal Officer, Executive and Policy Unit, Northern Territory Department of Law. Darwin, Australia, LL.M., University of Sydney, 1979; B. Juris, LL.B., University of Western Australia.

2. Statutory Scheme in Australia, Canada, the U.K. and the U.S.

2.1. Common Law Background

In Commonwealth jurisdictions such as Australia, Canada, and the U.K., Percival v. Wright [2] stands for the proposition that insider trading by a director does not automatically breach any duties owed to the shareholders [3].

In Percival, a shareholder sold his shares to the chairman and two other directors. At the time of sale, the directors were negotiating the sale of the company at a price which represented more per share than the price they paid to the shareholder [4]. The directors had not informed the shareholder of the negotiations; the shareholder then sought to have the sale set aside based upon the non-disclosure [5]. The action failed because it was held that the directors owed no fiduciary duty to the individual shareholders [6].

2.2. Statutory Scheme in the U.K.

Insider trading was prohibited by Part V of the 1980 Companies Act (1980 Act) [7]. The current law on insider trading has been consolidated in the Company Securities (Insider Dealing) Act 1985 (1985 Act) [8]. The 1985 Act provides that:

[A]n individual who is, or at any time in the preceding six months has been, knowingly connected with a company shall not deal on a recognized stock exchange in securities of that company if he has information which:

(c) he knows is unpublished price sensitive information in relation to those securities [9].

The concept of unpublished price-sensitive information is information which:

(a) relates to specific matters relating or of concern (directly or indirectly) to that company, that is to say, is not of a general nature relating or of concern to that company; and

(b) is not generally known to those persons who are accustomed or would be likely to deal in those securities but which would if it were generally known to them be likely materially to affect the price of those securities [10].

The 1985 Act makes it an offense for individuals to deal with the securities of a company with whom they are associated, or any other company on a recognized stock exchange [11] if those individuals are connected with a company, or were so connected within the preceding six months [12], are contemplating or were contemplating making a takeover for such company [13], or were direct or indirect tippees. Defenses to insider trading include acting without a profit motive [14], acting in good faith as a trustee in bankruptcy [15], and “jobbers” acting in good faith [16]. The Act also prohibits the use of information obtained in an official capacity [17]. These prohibitions extend to off-market dealings [18]. The 1985 Act, however, does
not provide any civil remedy for victims of insider trading, and breach of the 1985 Act does not of itself render a transaction void [19]. The common law position on the validity of a contract where a breach of a fiduciary duty has occurred is not clear [20].

2.3. Canada

Six of the Canadian Provinces have Securities Acts which were largely uniform [21], since they were based on the 1966 Ontario Securities Act [22]. The acts require an insider to disclose beneficial shareholdings and any changes thereon by making a report to the relevant Securities Commission, which then publishes such changes [23]. In addition, there are civil and criminal penalties for insider trading [24]. The Canada Business Corporations Act 1975 [25] outlawed insider trading with regard to federal corporations [26].

In Ontario, several changes to the law of insider trading were made by the Securities Act of 1978 (1978 Act) [27]. The 1978 Act provides that:

Every person or company ... who sells the securities of a reporting issuer with knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed ... is liable to compensate the purchaser of the securities for damages as a result of the trade.[28].

The Quebec 1982 Securities Act [29] "is probably the most innovative" [30] of the Canadian Acts dealing with securities law. To some extent, the Act brings Quebec law into harmony with the legislation of other provinces. However, the recently created Securities Commission – Commission des valeurs mobilières du Québec – has new and extensive powers. Also new to Quebec is the provision of civil remedies for defrauded investors, including insider trading victims [31]. Two defenses to the use of privileged information are allowed: the insider believed the "information was generally known or known to the other party; [or] he availed himself of a plan for the acquisition of securities established before he learned the information" [32]. The Act provides that "insiders" [33] must file reports of any change in securities held [34]. Civil liability [35] extends to tippees [36]. The term "privileged information" is defined as "any information concerning a material fact not yet known to the public that could affect the value or the market price of securities of any issuer" [37].

2.4. Australia

Significant differences in the companies legislation of Australia's various States prompted moves in the 1950's toward a uniform law [38]. The Companies Act 1961 [39] was based on a uniform bill. The uniform act was partially
aimed at the control of insider trading:

An officer of a corporation shall not make improper use of information acquired by virtue of his position as such an officer to gain directly or indirectly an advantage for himself or for any other person or to cause detriment to the corporation [40].

In 1975, New South Wales, Queensland, Victoria, and Western Australia introduced uniform Securities Industry Acts [41]. Insider trading was made an offense [42]. Civil liability was allowed in order to compensate the victims of insider trading [43]. These provisions now appear in the Securities Industry Code operative throughout all Australian jurisdictions except the Northern Territory [44].

A person who is, or at any time in the preceding six months has been, connected with a body corporate shall not deal in any securities of that body corporate if by reason of his so being, or having been connected with that body corporate he is in possession of information that is not generally available but, if it were, would be likely materially to affect the price of those securities [45].

A similar liability is extended to situations where the insider deals with the securities of "any body corporate" while in possession of inside information acquired because of the insider's connection with his or her own company and which "relates to any transaction (actual or expected) involving both those bodies corporate or involving one of them and the securities of the other" [46]. Liability is also extended to tippees [47].

2.5. The U.S.

The effective regulation of insider trading in the U.S. began with the passage of the Securities Exchange Act of 1934 (1934 Act) [48]. The 1934 Act requires directors, officers, and principal shareholders of companies whose securities are traded on an organized exchange to report their transactions, which are then published by the Securities and Exchange Commission (SEC) [49]. Profits made within six months are automatically disgorged back to the company [50]. The key provision is Section 10b of the 1934 Act which provides that "it shall be unlawful for any person ... to use or employ in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary" [51].

Rule 10b-5 makes it unlawful when trading in securities:

(a) To employ any device, scheme or artifice to defraud;
(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. [52]
The broad terms of this rule have been interpreted by the courts as outlawing the practice of insider trading [53]. *Kardon v. National Gypsum Co.* [54] held that a seller of shares had a private right of action under Rule 10b-5 without having to show that the defendants profited by their actions [55]. *Speed v. Transamerica Corporation* [56] applied the rule to a majority stockholder's offer to minority stockholder, and *In re Cady, Roberts & Co.* [57], held the rule applicable to stock exchange dealings. In those dealings, a trader of shares has an affirmative duty to disclose material information to the other party if not doing so would give the outsider a false idea of the relevant circumstances of the transaction [58]. In *Affiliated Ute Citizens v. United States* [59], where there was a failure to disclose, it was held that positive proof of reliance by the outsider need not be shown; all that was necessary was that a reasonable investor considered the undisclosed facts to be important [60].

3. Definitions of Inside Information

The focus of all statutory definitions of insider information is on the type of information which the insider possesses when dealing with the outsider. All of these definitions include some combination of the following elements: specificity, confidentiality, unavailability or being generally unknown, and materiality [61].

3.1. What Constitutes Information?

In an Australian case, *Commissioner for Corporate Affairs v. Green* [62], a prosecution was launched under Section 124(2) of the uniform Companies Act [63]. Green was a director of two companies, Endeavor Oil and Gwello [64]. It was alleged that at an Endeavor company meeting, Green acquired knowledge that Endeavor was to make a call on its shares [65]. Green, with this knowledge, caused Gwello, a company of which he was a major shareholder, to sell over half of its Endeavor shares [66]. Consequently, when the prices fell after the announcement of Endeavor's call, Gwello had avoided a loss [67]. The court discussed what kind of information was required to find illegal insider trading:

-In many cases a hint may suggest information or may enable an inference to be drawn as to information. Information about impending stock movements or share movements may often be veiled. Discussion concerning such a movement may often take the form of 'mooting' but not deciding a matter [68].

Knowledge of how those present are likely to vote, assuming the matter was not discussed, together with knowledge of how the absent member is likely to vote, may well be inside information. Outside information may supplement the inside information to make it more meaningful [69].
In the United States case, SEC v. Geon Industries, Inc. [70], the directors of Geon were negotiating a possible merger with Burmah. In February, 1974 it became apparent that the conditions of the merger would not be met and Burmah ended negotiations in July, 1974 [71]. Neuwirth, who was chairman and controlled 28 percent of Geon's stock, allegedly tipped two shareholders in mid-October, 1973 as to the state of negotiations [72]. The court stated that the transaction was sufficiently uncertain that the company need not include it in its disclosure report to the SEC [73]. Despite the uncertainty of the merger, the court held that knowledge of the merger plans was material inside information [74]. Thus, the information was not the deal itself, but the probability of the deal [75].

In Green v. Charterhouse Group Canada Ltd. [76], a Canadian case, directors of Imbrex purchased shares from a stockholder in accordance with a right of first refusal agreement. At the time of the purchase, unknown to the shareholder, Imbrex was involved in takeover negotiations [77].

The court described the negotiations as "too inconclusive for either company to have made any announcement of their intentions in regard thereto" [78]. Thus, the mere existence of takeover negotiations did not constitute inside information. However, on appeal, the court concluded that the negotiations had reached the stage where they could be classed as inside information [79].

While negotiations which may affect the price of relevant shares are ongoing, questions of degree are involved in deciding whether negotiations amount to inside information. Geon and Green emphasize that minds may differ on the same facts. The Canadian courts have been careful to distinguish the insider's superior knowledge of company affairs or financial affairs generally from an actual piece of information which is used by the insider [80].

This view is similar to the approach that has been followed in the U.S. In SEC v. Texas Gulf Sulphur [81], the court stated that the insider is not "obligated to confer upon the outside investors the benefit of his superior financial or other expert analysis by disclosing his educated guesses or predictions" [82]. These analyses should be distinguished from the "basic facts" upon which the predictions may be based, facts which the "reasonable investor" [83] might consider relevant and, therefore, must be disclosed.

3.2. Specific Information

The requirement that information be specific no longer exists in Australia [84]. It is still part of the law of Canada, except those provinces following the Ontario model, and the U.K [85].

In Green v. Charterhouse Group, a prosecution under Section 113 of the Ontario Securities Act failed for inability to show that the insiders had made use of "specific confidential information" [86]. At first instance, the court
adopted a strict interpretation of "specific" [87]. The court concluded that the
takeover discussions could not amount to specific information because "the
facts alleged ... were preliminary and uncertain" [88]. The Court of Appeal
disagreed because the bidder had indicated a specific price it was prepared to
offer to Imbrex; this was considered sufficiently specific [89].

3.3. Confidential Information

Some Canadian jurisdictions still require inside information to be "con-
fidential" [90]. The term is relatively imprecise. Normally inside information
will be confidential in the sense that it is given in confidence, such as a
takeover proposal [91], or classified as not being intended for public disclosure
at a particular time, such as projected profits and losses [92]. "Confidential"
has been replaced in other jurisdictions by the phrase "not generally known"
[93].

One commentator has suggested that "confidential" might require the
company to do something to designate a piece of information as confidential
[94]. Yet, it is precisely those persons who must make such a designation who
are most likely to misuse the information. This approach suggests that
information by its intrinsic nature cannot be clearly intended to be confiden-
tial. There are many questions that will have to be determined by litigation.
Does confidential mean the manner in which the information is acquired, or
the manner in which it is dealt with by the company? If it is the former, the
situations in which information would be confidential would be limited. It
would seem to be narrower than the idea of information acquired for the
business of a company. Information can be confidential even if it has not been
acquired for corporate purposes [95].

Once information is "public," it is no longer "confidential" [96]. In Kinwat
Holdings Pty. Ltd. v. Platform Pty. Ltd. [97], an Australian case, Platform and
Watkins were both limited companies with four common directors. Platform
made a takeover offer for Watkins [98]. Watkins sought to enjoin the takeover
on the basis that at the time four of Platform's directors possessed inside
information regarding certain assets of Watkins which were substantially
undervalued on its books of accounts [99].

At the time of hearing, this information was contained in an affidavit in
support of the injunction, revealed in a letter to the Stock Exchange and
published in the city newspaper [100]. This was sufficient to make the
information "generally available," and the court considered the possibility
that a news story on its own may constitute sufficient availability [101]. Thus,
market reports, projected sales, or analyses of the effect of changes in
government policies, although all based upon publicly available information,
may still be confidential information depending upon the particular cir-
cumstances of a case.
3.4. Information Not Generally Available or Generally Known

The definitions of information which is not generally available or known vary among these jurisdictions. In Australia, information must be “not generally available” [102]. In the U.K. and Canada, except where the Ontario or Quebec model is followed, the information must be “not generally known” [103]. The current Ontario Securities Act requires the information to be “not generally disclosed” [104]. In Quebec, the Act refers to information that is “not yet known” [105] to the outsider. In the U.S., judges have spoken of information being unknown or unavailable [106].

In Ackroyds (London) v. Islington Plastics [107], the plaintiff alleged that the defendant breached its contract because the defendant had used confidential information for its own profit, instead of for the plaintiff’s benefit [108]. The defendant argued that knowledge of the process was no longer confidential [109]. The court disagreed:

[The mere publication of an article by manufacturing it and placing it upon the market ... is not necessarily sufficient to make such information available to the public. The question in each case is: Is such information available to the public? It is not, in my view, if work would have to be done upon it to make it available [110].

According to the court, if the public cannot understand the information in the form that it is presented to them — here in a manufactured article — then it is not generally available. While this rule is imported from the law of confidences and refers to the general public, as opposed to the investing public, it has an exact parallel in the U.S. regulation on insider trading. In SEC v. Texas Gulf Sulphur [111], the court said that “where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting on it immediately upon dissemination” [112].

Using this definition, insiders must disclose information and wait until it has been both disseminated to and digested by the public. The insider must wait a reasonable period during which the investing public can evaluate the information. For example, in Reynolds v. Texas Gulf Sulphur [113] the court held that, under the circumstances, twenty days was a reasonable period.

Under the concept of “similar emphasis,” the insider must not stress certain facts while disregarding others [114]. Even where all facts have been disclosed, the more important facts must be highlighted under the “buried facts doctrine” [115]. In addition, information should be disclosed in a manner that is intelligible to the unsophisticated investor [116]. Where previous statements made by the insider become inaccurate or misleading in the light of new information to which the insider has access, this must be disclosed to the outsider [117]. The insider must wait until the information has appeared in a medium likely to achieve the widest distribution [118]. Thus, there is a continuing duty on the part of the insider to disclose; however, this obligation
is not taken to an unreasonable extreme. Courts have held that there is no violation of the duty to disclose when the information is available to a reasonably diligent searcher [119].

The rules of the American Stock Exchange which define and describe inside information [120] attempt to clarify the circumstances when an insider in possession of inside information may trade. These regulations discourage insider trading until “the public has had an opportunity to evaluate [the material information] thoroughly” [121].

The idea of information being “generally available” has an inherent vagueness. Courts have attempted to remedy this vagueness by requiring that, in the absence of clear language, mere public announcement of the information does not necessarily amount to public availability; there must be digestion of this information by the investing public [122].

3.5. Material Information

The term “material” is evaluated differently in the Commonwealth countries than by the U.S. In the U.S. the standard for materiality is that an outsider’s decision would have been different if the outsider had possessed the inside information, regardless of its affect upon price [123]. Materially, as used in the Commonwealth definitions, means that the information must affect price in a discernible manner.

3.5.1. Commonwealth: Information which Affects Price

In Australia and the U.K., information must be likely to affect the price and must materially affect the price of the securities in which the insider deals [124]. Likely indicates a degree of probability, something more than a possibility [125]. One writer sees this as placing an “[e]mphasis on reasonable and objective contemplation of possible effects on security prices, rather than ... concentration on what might happen if there were public disclosure of the information” [126].

One problem in trying to establish that information is likely to affect the price is determining upon whom the information acts. If the reasonable investor is used as a guide, the factors such a person would consider relevant must be considered, including the fact which not all investors in a market are reasonable people. Information that might cause one investor to buy shares might be meaningless to a more sophisticated investor. The results of one drill core would not, in a rational world, affect the value of a security. However, experience tells us otherwise [127].

The Ontario Securities Act defines a material fact as a fact that significantly affects or which “would reasonably be expected to have a significant effect on the market price or value of such securities” [128]. The definition of information which “would reasonably be expected to” affect the price [129] is similar.
to the use of the word "likely" in the Australian and British definitions.

The Ontario Court of Appeals has adopted a test which focuses on the effect of the information on the reasonable shareholder rather than on the price of stock itself (the "substantial likelihood" test). In Sparling v. Royal Trustco Ltd. [130], a takeover bid was sent to all directors of Royal Trustco. The directors were required [131] to send a circular to all Canadian shareholders [132]. A declaration was sought alleging that the circular did not contain all other material facts known to the directors or officers of the target corporation [133].

In deciding whether a valid cause of action existed, the court adopted the test from the U.S. case of TSC Industries, Inc. v. Northway Inc. [134], that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote ..." [135].

The use of the terms "value" or "price" in a definition may also affect a court's determination of whether the information affects the price. In the Canadian provinces, the statutory definitions refer to information "that, if generally known, might reasonably be expected to affect materially the value of such securities" [136]. The intrinsic value of something may not be fully reflected in its price. One could argue that the value of something could increase without its price changing materially. On the other hand, value can be viewed merely as a synonym for price.

3.5.2. The U.S.: Effect of the Information on the Investor

Most discussion of inside information in the U.S. has centered around the concept of materiality [137]. Only material information must be disclosed [138]. The concept of materiality focuses on the mind of the outsider and not the price of the security per se [139]. Price sensitive information, however, can be material information [140]. The test to determine whether information is material "is whether a reasonable man would attach importance (to a matter) in determining his choice of action in the transaction in question" [141]. The reasonable person has also been called the "average prudent investor" [142] and the "reasonable investor" [143]. It has been said that such phrases "are interchangeable and intended to have the same meaning" [144], yet the idea of a "prudent" or "reasonable" investor suggests a degree of conservatism, while a "reasonable, if speculative" investor implies a more prominent element of risk [145].

The subjective aspect of the test also poses several questions. For example, how much market knowledge should a reasonable person have? How much should a reasonable person know about company history and policy? These are essentially issues of fact.

In Freedman v. Barrow [146], shareholders were sent proxy materials seeking approval for an executive compensation program. It was claimed that the accounting treatment of a stock option plan with appreciation rights failed
to disclose how it differed from that of a straight stock option plan [147]. The court applied the *Northway* test, decided that the omission was not material, and concluded that an explanation would have been too detailed and intricate for shareholders [148].

What effect must the information have on an investor before it is considered material? Is it sufficient that an investor "might" consider it relevant, or is it necessary that an investor "would" consider it so? The "might" test would require a lower degree of probability of effect on the investor's decisional process [149]. The "would" test requires a higher degree of probability [150]. This debate has been resolved in favor of the latter approach [151].

These concepts are difficult to comprehend in terms other than those of degree. Examples of information that have been considered material include: greatly improved earnings and an intention to liquidate [152]; failure to disclose changes in accounting methods which inflated earnings [153]; and negotiations for the sale of a corporation's major product [154].

4. Conclusion

Two separate theories for the regulation of insider trading have been recognized - fiduciary duty [155] and unequal bargaining power [156]. Under the first theory, the insider acquires information belonging to the company. It would be a breach of the relationship between the insider and the company to allow the insider to profit from the use of this information. This theory is similar to the doctrine of corporate opportunity [157], which treats the information as belonging to the company and focuses on the relationship between the insider and the company. This is not a true proprietary concept [158] but, rather, a trust or fiduciary concept, which the word confidential suggests. Under the second theory, the emphasis is on the fact that the insider knows something the outsider does not [159].

To some extent there is a tension between these two views. The present U.K. and Australian formulations emphasize the fiduciary approach by requiring information to be held "by virtue of being connected with the company" [160] or "by reason of the insider" [161] being so connected. The present statutory formulations in Canada [162] appear to adopt the unequal bargaining power theory since they do not spell out how the information is to be acquired.

In the U.S., inside information may be defined as material non-public information available only for a corporate purpose [163]. Non-public has its counterpart in Commonwealth regulation in the phrases "not generally disclosed" [164] or "not generally known" [165]. However, U.S. regulations and proposals go further and prescribe certain methods by which an insider can
make information public. One permissible procedure is the careful and concise disclosure by means of a press release or public announcement. Alternatively, one can file with the SEC and then wait for the information to be digested by the public [166]. In the Commonwealth jurisdictions, the question of whether information is sufficiently available, known or disclosed to prevent it being considered inside information is determined on a case-by-case basis. U.S. case law, however, can illuminate areas not yet considered in the Commonwealth jurisdictions [167].

Information must be material in the sense that it must “affect a reasonable investor’s judgment” [168]. This has no direct counterpart in the Commonwealth, except for Quebec, which has adopted the Northway test as a standard of materiality [169]. In most other situations, this separate materiality concept would not appear to matter since “price-affective” information must be “mind-affective” [170]. The reverse is not necessarily true. Requiring such an element in the Commonwealth would complicate matters by requiring that two standards, “price-affective” and “mind-affective”, be satisfied in each case.

In the U.S., information must relate to the company or its business [171]. In the U.K., this has an express counterpart in requiring the information to be of direct or indirect concern [172] to the company. Otherwise, it is subsumed under the rubric of confidential information [173] or “material fact or change with respect to” [174] the company in Canada. In Australia, part of this is covered by the requirement that information must be acquired by reason of the insider’s being “connected with” [175] the corporate body. In the U.S., information need not be acquired by reason of the insider’s association with the company. To some extent, however, a similar effect may be achieved by the requirement that it be intended for corporate purposes only [176].

Requiring express disclosure of inside information before the insider can trade will bring more clarity to the definition of inside information. The adoption of the public disclosure requirement in the Commonwealth countries would clarify the existing definitions and provide a clear test. Thus, if the insider has not met disclosure requirements, then the insider cannot trade without breaching the relevant statutory prohibition.
Notes


[2] [1902] 2 Ch. 421.
[3] Id. at 422.
[4] Id.
[5] Id. at 423.
[6] Id. at 426.


[10] Id. at § 10 (emphasis added).

[11] Id. at § 1(3).

[12] Id. at § 1(1).

[13] Id. at § 1(5).

[14] Id. at § 3(1)(a).

[15] Id. at § 3(1)(b).

[16] Id. at § 3(1)(c). A jobber is defined as “an individual, partnership or company dealing in securities on a recognized stock exchange and recognized by the Council of the Stock Exchange as carrying on the business of a jobber.” Id.

[17] Id. at § 2.

[18] Id. at §§ 4–5.

[19] Id. at § 8.

[20] See, e.g., In re Wimbledon Olympia Ltd. [1910] 1 Ch. 630 (recission of a contract is not available merely for a breach of disclosure requirements of the Companies (Consolidation) Act, 1908 8 Edw. 7, ch. 69); Edler v. Auerback, [1950] 1 K.B. 359, (the contract remains intact absent fraudulent misrepresentation). But see Nat'l Companies & Securities Comm'n v. Monarch Petroleum N.L., 1984 Vict. R. 733 (Australia) (court rescinded all contracts for sale of shares in Monarch made as a result of a forged letter stating that Monarch had acquired an interest in a valuable oil discovery).


[26] Id. at § 125(5).
[28] Id. at § 131(1). The Act allows the following defenses to changes of insider trading:
   (a) the person or company ... had reasonable grounds to believe that the material fact or material change had been generally disclosed; [or]
   (b) the material fact or material change was known or ought reasonably to have been known to the purchaser; [or]
   (c) the person or company in the special relationship with the reporting issuer proves that he or it did not make use of knowledge of the material fact or material change in selling the securities or in communicating knowledge of the material fact or material change, as the case may be.
[30] La Rochelle & Simmonds, Bill 85, Quebec's New Securities Act, 29 McGill L.J. 89, 91 (1983). The authors also state:
   Its drafting owes most to the Ontario Act [of 1978], but it has also been much influenced by the federal Proposals for a Securities Market Law for Canada, more than any other provincial Act to date. It also appears to have been influenced by present and proposed securities law in the United States (footnote excluded).
[32] Id. at § 187.
[33] Id. at § 89. Section 89 provides that:
   The insiders of a reporting issuer that are subject to the disclosure requirements established in this chapter are:
   (1) the issuer itself, its subsidiaries, its senior executives and the senior executives of its subsidiaries;
   (2) any person who exercises control over more than 10% of voting rights attached to the outstanding securities of a reporting issuer, other than securities that were the object of a firm underwriting and are in the course of distribution;
   (3) the senior executives of a person contemplated in paragraph 2.
[34] Id. at §§ 89–103.
[36] Id. at §§ 187–188.
[37] Id. at § 5.

https://scholarship.law.upenn.edu/jil/vol8/iss1/1

[43] See, e.g., id. at § 114(c).


[46] Id. at § 128(2).

[47] Id. at § 128(3). Section 128(3) provides that a person, not otherwise prohibited, shall not deal in securities if:

(a) he has obtained the information, directly or indirectly, from another person and is aware, or ought reasonably to be aware, of facts or circumstances by virtue of which that other person is then himself precluded by subsection (1) or (2) from dealing in those securities; and

(b) when the information was so obtained, he was associated with that other person or had with him an arrangement for the communication of information of a kind to which those subsections apply with a view to dealing in securities by himself and that other person or either of them.


[55] Id. at 514.


[58] Id. at 912.


[60] Id. at 153–54.

[61] In the U.S., the insider must disclose non-public material information regarding the company's business. Arber v. Essex Wire Corp., 490 F.2d 414 (6th Cir.), cert. denied, 419 U.S. 830 (1974). In addition, insider trading laws usually require the insider to be associated with the corporation in some way. In Australia, information must be acquired "by reason of the insider being connected with" the company. Securities Industry Act 1980, Austl. Acts P., No. 66, § 128(1).
The British Companies Act refers to information the insider "holds by virtue of being connected with the company." Company Securities (Insider Dealing) Act, 1985, ch. 8, § 1(1)(a) (U.K.).

[65] Id.
[66] Id. at 511
[67] Id.
[68] Id. at 511
[69] Id.
[70] 531 F.2d 39 (2d Cir. 1976).
[71] Id. at 45.
[72] Id. at 42–46.
[73] Id. at 48.
[74] Id. at 47.
[75] Id. at 47; see also T.S.C. Indus. v. Northway Inc., 426 U.S. 438, 445–50 (1976) (under U.S. law, information must be material in that it must affect the hearer's mind); Compare Northway with Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322, 333–39 (1979) (the obligations of the mandatory requirements are obviously different from the antifraud obligation, and require greater certainty).

[77] 68 D.L.R.3d at 610.
[78] 35 D.L.R.3d at 226.
[79] 68 D.L.R.3d at 618.
[80] See, e.g., Charterhouse, 35 D.L.R.3d at 224 (quoting Loss, Securities Regulation (2d ed. 1961)). The Court stated:

... one must differentiate between a knowledge or expertise developed through experience or financial sophistication about the company or the market of its shares from facts or information which are available to all parties involved and a knowledge of specific events or the probability of future events gained through the directors' access to the corporate business or activities which are not available to the other parties with whom the director is dealing or to the public generally. The latter case is inside information. The former only points out the special ability of the director which he is entitled to use to his own benefit and need not pass on the advantage thereof.

[81] 401 F.2d at 833.
[82] Id. at 848.
[83] Id. at 849.
[84] See supra note 41.
[86] 35 D.L.R.3d at 228.
[87] Id. at 224–27.
[88] Id. at 228.
[89] 68 D.L.R.3d at 618.
[91] See, e.g., Charterhouse Group, 68 D.L.R.3d at 592.
[92] See Geon Industries, 531 F.2d at 44.
[94] Afterman, supra note 90, at 117.
[95] Charterhouse Group, 68 D.L.R.3d at 621.
[96] 35 D.L.R.3d at 228 ("When the information lost its confidentiality by publication, it mattered not then whether the plaintiff knew of it or not because at that point, it ceased to be the subject of § 113.").
[98] Id. at 370–71.
[99] Id. at 371.
[100] Id. at 372.
[101] Id. at 376; see also Johnson v. Wiggs, 443 F.2d 803, 806 (5th Cir. 1971) (easily understood information is in the public domain because it "was previously reported to be in the area newspapers and on a local television station which gave financial news").
[108] Id. at 98.
[109] Id. at 99.
[110] Id. at 104.
[111] 401 F.2d at 833 (2d Cir. 1968).
[112] Id. at 854.
[119] U.S. courts have interpreted the concept of materiality in the same manner under various federal securities laws: See Mills, 396 U.S. at 375 (Rules 10b-5 and 14a-9); Gilbert v. Nixon, 429 F. 2d 348, 355 (10th Cir. 1970) (Section 12(2) and Rule 10b-5).
[121] Id. at § 402(f).
[122] See supra note 113 and accompanying text.
[125] Webster's Deluxe Unabridged Dictionary 1048 (1979) ("probable" is one meaning of "likely").
[127] See Reynolds, 401 F.2d at 553.
[129] Id.
[133] Id.
[135] Id. at 448–49.
[139] However, at a minimum, the information must concern the company or its securities. This idea is expressed in the oftentimes phrase that there must be “market information.” Chiarella v. United States, 445 U.S. 222, 233 (1980). It must also affect the value of the securities traded. Affiliated Ute Citizens, 406 U.S. at 128.
[141] Fashion Park, 340 F.2d 457 at 462; see generally Restatement (Second) of Torts § 538(2)(a) (1977).
[142] In re Charles A. Howard, 1 S.E.C. 6, 8 (1934).
[143] Northway, 426 U.S. at 449.
[144] Hewitt, supra note 137, at 894.
[145] “Reasonable” is defined as: “having sound judgment, sensible, moderate, not expecting too much,” 8 The Oxford English Dictionary 215 (1961), while “speculate” means to “make investment, engage in commercial operation, that involves risk of loss.” 10 id. at 558. In Texas Gulf Sulphur, the court rejected the standard of “prudent or conservative investors” as too narrow. 401 F.2d at 849.
[147] Id. at 1139.
[148] Id. at 1140.
[150] Id.
[154] See Rogen Ilikon Corp., 361 F.2d 260 (1st Cir. 1966), reh’g denied, 554 F.2d 1965 (5th Cir. 1977).
[155] See, e.g., Kohler v. Kohler Co., 319 F.2d 634 (7th Cir. 1963); Charterhouse Group, 68 D.L.R.3d 617; Es-me Pty. Ltd. v. Parker, 1972 W. Austl. R. 52, 55. See generally, Brudney, supra note 75, at 326 (the obligation to disclose inside information “undoubtedly has [its] roots in fiduciary considerations” while the “market context in which transactions in securities” occur “invites” a similar duty); Loss, The Fiduciary Concept as Applied to Trading by Corporate “Insiders” in the U.S., 33 Mod. L.R. 34 (1970).
[156] See Kimber Report, ¶ 2.02, quoted in Charterhouse Group., 35 D.L.R.3d at 218:

The ideal securities market should be a free and open market with the prices thereon based upon the fullest possible knowledge of all relevant facts among traders. Any
factor which tends to destroy or put in question this concept lessens the confidence of the investing public in the market place and is, therefore, a matter of public concern.

This is referred to as the "informational advantage" in Brudney, supra note 75, at 339, who argues that "the function of the antifraud rules is to place all exchange transactions on a parity of information with all others - to deny informational advantages to any person dealing in the securities market over any other person with whom he deals." See, e.g., Texas Gulf Sulphur Co., 401 F.2d at 851–52.

[157] This doctrine treats the right to exploit a corporate opportunity belonging solely to the company and not the insiders or other officers. See Canadian Aero Service Ltd. v. O'Malley, 40 D.L.R.3d 371 (1974); Hansen, Corporation Law. 10 Ottawa L.R. 617, 662–70 (1978); Slaughter, The Corporate Opportunity Doctrine, 18 Southwestern L.J. 96 (1964).


[162] See Kimber Report, supra note 156, at ¶ 2.02; See also Charterhouse Group, 68 D.L.R.3d at 621 ("The probabilities doubtless are that the insider acquired his information through participation in the company’s affairs, but that is not a sine qua non to the operation of the section.").


[164] See supra note 21 and accompanying text.

[165] See supra note 21 and accompanying text.


[167] See the discussion of “non-public” information in Fridgitemp Corp. v. Financial Dynamics Fund, 524 F.2d 275, 281–82 (2d Cir. 1975); Wiggs, 443 F.2d at 806.


[172] See supra note 90.

[173] See supra note 90.

[174] See supra note 90.

[175] See supra note 90.

[176] See supra note 90.