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OF SECRETARIES, ANALYSTS AND PRINTERS: SOME REFLECTIONS ON INSIDER TRADING

Stanley M. Beck*

In *Dirks v. SEC*,¹ the U.S. Supreme Court continued the process it began some three years earlier in *Chiarella v. United States*² of limiting the reach of Rule 10b-5³ to traditional insiders — directors, senior officers and their tippees. In so doing, it has placed itself in sharp opposition to a continuing campaign by the Securities and Exchange Commission (hereafter “SEC”) to extend the civil and criminal sanctions of the Rule to all those who trade in the securities markets with knowledge of a material fact that they know, or ought reasonably to know, has not been made public.⁴

It is remarkable to those schooled in the Anglo-Canadian legal tradition that the entire jurisprudence of insider trading in the

¹ Professor, Osgoode Hall Law School, York University. I am grateful to Philip Anisman and Mark Connelly for helpful comments and suggestions and for saving me from error in my interpretation of the Canadian Business Corporations Act (hereafter “CBCA”) provisions.


¹ 17 C.F.R., s. 240. 10b-5 (1980). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(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 are 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.

⁴ The SEC has placed before the U.S. Congress the Insider Trading Sanctions Act (HR 559) which gives power to the Commission to seek treble damages from any person convicted of insider trading. Criminal penalties are increased from $10,000 to $100,000. The Bill was passed by the House of Representatives on September 19, 1983.
United States springs out of judicial and administrative interpretation of a legislative rule that in its own terms does not deal with insider trading and, arguably, was never intended to do so. One advantage of such a judicially created offence is the ongoing debate it engenders between regulators, practitioners, academics and judges as to the proper scope of insider trading regulation. It is that debate, which has been intensified by the decisions in Chiarella and Dirks, that is of most interest in the context of Canadian securities law for under the Ontario Securities Act (hereafter "OSA"), civil and criminal liability for insider trading has been extended beyond traditional insiders to include a wide class of those deemed to be in a "special relationship" with a reporting issuer. And the definitions for civil liability in the CBCA are even broader than those in the OSA. Little, if any, public discussion accompanied these extensions and it will be the purpose of this article to ask, in the context of Dirks and Chiarella, whether the OSA and the CBCA have moved too far, or whether there is yet room for further inclusion.

The initial judicial decisions with respect to insider trading liability under Rule 10b-5 were in the context of face-to-face transactions and were confined to traditional insiders — directors, officers and majority shareholders. Thus it could be argued that normal fiduciary duty theory was being applied to a securities trading context. It was a decision of the SEC itself, in Cady, Roberts & Co., that extended insider liability to impersonal

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6 It may be that only an academic would see it as an advantage; those who work in the world of securities, whether as registrants or legal advisers, may have another view of the matter. A very serious disadvantage, of course, is the law's uncertainty. The SEC's Enforcement Director, John Fedders, has recently announced that he now supports a definition of the prohibited conduct. The SEC has officially opposed a definition on the ground that it would be unduly limiting: 15 B.N.A. Secs. Reg. and Law Report 2261 (1983).

7 R.S.O. 1980, c. 466.

8 Ibid., ss. 75, 118(c), 131.

9 S.C. 1974-75, c. 33, s. 125(1), as amended.


11 40 SEC 907 (1961). In Cady, Roberts, a director of the Curtis-Wright Corporation, who
stock exchange transactions. Although the judgment spoke of the special obligation that traditionally has been required of corporate insiders, and on the facts is within that tradition, it did note that such insiders "do not exhaust the classes of persons upon whom there is such an obligation". The Commission stated that the obligation rests on two principal elements:

... first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose ... second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.\(^\text{12}\)

Judicial affirmation of the *Cady, Roberts* doctrine came with the decision of the U.S. Court of Appeals for the Second Circuit in *SEC v. Texas Gulf Sulphur* (hereafter "TGS").\(^\text{13}\) Although once again the officers and employees involved were within the traditional category of fiduciaries, the court echoed the "equal access" theory of *Cady, Roberts*:

... the Rule [10b-5] is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information. ...\(^\text{14}\)

A step forward taken in *TGS* was the imposition of liability on a non-trading tipper, following on the liability visited on a trading tippee in *Cady*.\(^\text{15}\) The "disclose or abstain" holding of *Cady* and *TGS* was subsequently extended from corporate insiders and their tippees to those who, because of a special relationship with the corporation, were privy to material, confidential information. Included in this category were lawyers and accountants,\(^\text{16}\) broker-dealers and underwriters,\(^\text{17}\) and those who acquired information in the course of negotiations with the company.\(^\text{18}\)

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\(^\text{12}\) Ibid., at p. 912.


\(^\text{14}\) Ibid., at p. 848.


\(^\text{17}\) *Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith Inc.*, 495 F. 2d 228 (2d Cir., 1974). *Shapiro* was also important for the fact that it was a private suit for damages and the court had to decide who had standing to sue. For the Second Circuit's later resolution of
The above, in very brief compass, was the state of the law with respect to insider trading when the U.S. Supreme Court considered the matter for the first time in *Chiarella*. The uniqueness of *Chiarella* was that the Second Circuit imposed liability on an individual who had received his information from a source outside the corporation. In short, the equal access theory of *Cady* and *TGS* was being tested in a framework that did not contain the usual picture of fiduciaries and their participants. The essential facts of the case were that a printer, Vincent Chiarella, while employed by a financial printing firm in New York, worked on documents with respect to five proposed takeover bids. The names of the offerors and the target companies were coded to preserve confidentiality. Chiarella deciphered the name of the offeree company in each case by piecing together information in the documents and purchased their shares. When the bids were announced, he sold the shares at a substantial profit. Chiarella was convicted of wilful misuse of material, non-public information and on appeal the Second Circuit affirmed.

Chief Judge Kaufman, for the majority, noted that Chiarella was not an insider but held that the reach of Rule 10b-5 extended beyond insiders to include “market insiders” who were defined inclusively as “Anyone — corporate insider or not — who regularly receives non-public information”. Judge Kaufman based his holding on the court’s pronouncement in *TGS* to the effect that the Rule is based on the “justifiable expectation ... that all investors ... have relatively equal access to material information”. In terms of harm to the market-place, he empha-

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18 *Crane Co. v. Westinghouse Air Brake Co.*, 419 F. 2d 787 (2d Cir., 1969).
19 The analysis of Rule 10b-5 is almost endless in the American legal literature as commentators have attempted to follow the weaving pathways of the federal courts in interpreting and applying such terms as “fraud” and “in connection with” to a wide variety of securities transactions. With respect to insider trading, a helpful guide is found in Langevoort, “Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement”, 70 Cal. L. Rev. 1 (1982).
21 588 F. 2d 1358 (2d Cir., 1975).
22 Ibid.
23 Ibid., at p. 1365 (emphasis in original). A major difficulty in Judge Kaufman’s formulation is to determine those who “regularly” receive confidential information.
24 Ibid. Chiarella argued that he was not within the “disclose or abstain” rule of *TGS* as he did not owe a fiduciary duty to the offeree shareholders.
sized that "the most unscrupulous officer or director" would not have a greater opportunity to reap profits than did Chiarella by virtue of his market information.\textsuperscript{25}

The U.S. Supreme Court reversed\textsuperscript{26} and rejected the Second Circuit's test of "regular access to market information". Mr. Justice Powell, for the majority, held that for there to be actionable fraud under Rule 10b-5 there "must be a duty to disclose arising from a relationship of trust and confidence between parties to a transaction".\textsuperscript{27} Absent a fiduciary duty, there was no obligation to disclose prior to trading\textsuperscript{28} Chiarella was a "complete stranger" to the sellers and the court was unwilling to recognize "a general duty between all participants in market transactions to forego actions based on material non-public information".\textsuperscript{29} An important question left open in the case was whether Chiarella's breach of duty to his employer and his employer's customers by using confidential information could be the basis of criminal liability under the Rule.\textsuperscript{30}

Within a relatively short period, the Supreme Court considered

\begin{footnotes}
\textsuperscript{25} Ibid. "Market information", as opposed to "corporate information" refers to information that affects the price of a company's securities without reference to the company's assets or earning power, e.g., a proposed takeover bid. See Fleischer, Mundheim and Murphy, "An Initial Inquiry into the Responsibility to Disclose Market Information", 121 U. Pa.L.Rev. 798 (1973).

\textsuperscript{26} Supra, footnote 20.

\textsuperscript{27} Supra, footnote 20 at p. 230.

\textsuperscript{28} The court noted with approval that liability had been extended to tippees on the basis of their "role as participant after the fact in the insider's breach of fiduciary duty", supra, footnote 20, at p. 230, note 12. The court also agreed with the holding in Cady, Roberts & Co., 40 SEC 907 (1961), that an insider owed a duty to purchasers who were not previously shareholders even though there was no pre-existing duty, on the basis that the purchase transaction brought them into such a relationship. See, supra, footnote 20 at p. 227, note 8.

\textsuperscript{29} Supra, footnote 20, at p. 232.

\textsuperscript{30} The question was left open because the majority felt that the matter had not been properly put to the jury at the trial. The question was squarely faced by the Second Circuit in the subsequent case of \textit{U.S. v. Newman}, 664 F. 2d 12 (2nd Cir., 1981), cert. denied 52 U.S.L.W. 3240 (1983). The court held that the misappropriation of non-public information by an employee was "fraud" for the purposes of criminal prosecution under Rule 10b-5. It was not necessary that the fraud actually be perpetrated on purchasers or sellers of securities. In a subsequent civil action by a seller of the target company's shares, the Second Circuit, following \textit{Chiarella} and \textit{Dirks}, held that the defendant had no duty to disclose his knowledge of the impending tender offer since he was not an insider of the target and had no special relationship to the purchaser: \textit{Moss v. Morgan Stanley, Inc.}, 719 F 2d 5 (2d Cir., 1983); a petition for \textit{certiorari} has been filed, U.S. Sup. Ct. No. 83-950, 12/8/83.
\end{footnotes}
it necessary to express its views again on the reach of Rule 10b-5 to catch insider trading. The facts in Dirks v. SEC\textsuperscript{31} were very different and a good deal more controversial than those in Chiarella. Dirks was an officer of a registered broker-dealer that dealt primarily with institutional investors. Dirks' own specialty was the insurance industry. In March, 1973, he received a telephone call from Ronald Secrist, who had recently been fired from his job as an officer of one of the subsidiaries of Equity Funding Corporation of America (hereafter "Equity Funding"), an insurance holding company. Secrist informed Dirks that he had information with respect to major fraud at Equity Funding. Dirks then conducted his own investigation, including the questioning of some employees and senior officers and an industry-comparative analysis of the group's operating results, and confirmed to his satisfaction the truth of Secrist's allegations.

During his two-week investigation, and particularly after he had substantiated Secrist's information, Dirks informed a number of his institutional clients of his findings. They sold some $15.5 million in Equity Funding stock prior to a halt in trading imposed by the New York Stock Exchange on March 27th.\textsuperscript{32} The SEC's Enforcement Division brought disciplinary proceedings against Dirks and five of his institutional clients who sold Equity Funding stock. An administrative law judge found that Dirks had violated Rule 10b-5 by communicating inside information and suspended him for 60 days.\textsuperscript{33} Dirks appealed and the SEC held that as he had received information from insiders which he knew was material and non-public and had communicated that information to clients, he had wilfully aided and abetted a violation of the Rule.\textsuperscript{34} However, it reduced the sanction to a censure.

At first blush, the case seems an unremarkable one of a tippee

\textsuperscript{31} Supra, footnote 1.

\textsuperscript{32} The SEC subsequently suspended trading in Equity Funding and an investigation showed fraud on a massive scale and the company went into receivership. A Los Angeles federal grand jury subsequently returned a 105-count indictment against 22 persons, including many of Equity Funding's officers and directors. All defendants were found guilty on one or more counts. See Dirks, supra, footnote 1 at p. 3259, note 4.

\textsuperscript{33} The four institutions were found guilty of trading on inside information and were censured. They did not appeal.

\textsuperscript{34} Professor Loss, in noting that Dirks, in passing on information that he had received as tippee, was held to have violated the Rule as an aider and abettor of his tippees' illegal sales, asks the question whether the aiding and abetting doesn't run the other way — from tippee (Dirks, the secondary violator) to tipper (Secrist, the primary violator in his fiduciary capacity); Loss, supra, footnote 5 at p. 843, note 67.
making use of the information passed to him by an insider.\textsuperscript{35} On further appeal, the D.C. Circuit Court of Appeals upheld the SEC.\textsuperscript{36} Judge Wright, after noting that two different theories, the “information” theory (as exhibited in the Second Circuit’s decision in \textit{Chiarella}) and the “fiduciary” theory, underlay the insider trading opinions, recognized that the Supreme Court in \textit{Chiarella} had opted for the narrower fiduciary theory. And Dirks argued that neither he nor his informants had any duty to keep their information confidential with respect to the fraud. Absent such a duty they were free, within the holding of \textit{Chiarella}, to trade without disclosing. Judge Wright disagreed and held that Rule 10b-5 may require fiduciaries to disclose material information they have acquired as fiduciaries before trading or tipping, even if it would \textit{not} be a breach of their fiduciary duty to disclose the information.\textsuperscript{37}

Judge Wright also held Dirks liable to censure on a completely separate ground. As a registrant, he held that Dirks was subject to “myriad duties” not imposed on insiders or members of the public. Although a “high standard of ethical behaviour” had traditionally been imposed upon brokers in their dealings with customers, it was also applicable “in their dealings with the SEC and the public at large”.\textsuperscript{38} By acting as he did, Dirks ensured that his clients would be protected and the loss would be borne by smaller, less sophisticated investors. Judge Wright concluded that “Dirks violated his duties to the SEC by failing to report promptly what he knew.”\textsuperscript{39}

Once again, the Supreme Court reversed and reiterated its narrower, fiduciary theory of liability. Justice Powell, for the majority, emphasized the court’s holding in \textit{Chiarella} that there is no duty to disclose where there is no fiduciary relationship.\textsuperscript{40} And he held that both the SEC’s and the D.C. Circuit Court of

\textsuperscript{35} As the D.C. Circuit Court of Appeals noted, it was the custom of the industry that Dirks’ clients would compensate him by directing brokerage business, and hence commissions, to his firm. See \textit{Dirks v. SEC}, 681 F. 2d 824 (D.C. C.A. 1982), at p. 831.

\textsuperscript{36} \textit{Ibid.}

\textsuperscript{37} Judge Wright held that Dirks’ conduct fell within the holding as to tippees in \textit{Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith Inc.}, 495 F. 2d 228 (2d Cir., 1974).

\textsuperscript{38} \textit{Dirks, supra}, footnote 35 at p. 841.

\textsuperscript{39} \textit{Supra}, footnote 35 at p. 842.

\textsuperscript{40} Included in the fiduciary category were those in a special confidential relationship (underwriter, accountant, lawyer, etc.). See \textit{Dirks, supra}, footnote 1 at p. 3261, note 14.
Appeal's analysis of the matter was inconsistent with Chiarella notwithstanding that Dirks had received his information from an insider. When then will liability attach to a tippee who trades, or becomes a tipper? As the tippee's liability is derivative from the insider's duty, there must be a breach by the insider of his fiduciary duty not to disclose. And whether there is a breach by the insider will depend on the purpose of the disclosure — whether it was for the insider's direct or indirect personal advantage, such as a pecuniary gain or a reputational benefit. As for Dirks, he was not in a special, confidential relationship with Equity Funding and there was no expectation that he would keep the information secret. As for Secrist, he received no monetary or personal benefit for his disclosure, nor did he intend to make a valuable, personal gift to Dirks. His purpose was to expose the fraud. Accordingly, there was no breach of duty by the fiduciary/tipper and thus no derivative breach by the tippee.

There is a good deal that can be said about the decisions in Chiarella and Dirks from the particular angle of the interpretation and development of Rule 10b-5, but it would be of limited interest or utility to Canadian securities practitioners and, in any event, is a task better left to more knowledgeable American commentators. What is relevant is the debate over the "equal access" (or "information") theory as against the "fiduciary" theory that runs through the cases, for the insider trading provisions of the OSA and the CBCA contain elements of both. As noted above, little debate accompanied the broadening of the scope of liability in both statutes and as our corporate and

41 There can be no doubt that Secrist, even though a former officer of Equity Funding, was still subject to a duty not to disclose confidential information. See Canadian Aero Service Ltd. v. O'Malley (1973), 40 D.L.R. (3d) 371, [1974] S.C.R. 592.

42 See Dirks, supra, footnote 1 at p. 3265.

43 Quite the contrary; it was Secrist's hope and expectation that Dirks would expose the fraud. See, supra, footnote 1 at p. 3268.

44 See the article by Langevoort, supra, footnote 19, for a critique of Chiarella. See also Anderson, "Fraud, Fiduciaries, and Insider Trading", 10 Hof. L. Rev. 341 (1981-82). The Supreme Court decision in Dirks is too recent for published comment, but is certain to spawn a spate of notes and articles. For a broader discussion of securities fraud in the United States, see Loss, supra, footnote 5, Chapter 9 ("Fraud and Manipulation") and Chapter 9A ("Corporate Insiders").

45 The definitions in the CBCA, S.C. 1974-75, c. 33 and in the 1978 amendments, 1978-79, c. 9, s. 38(1), were influenced by the writings of Professor Philip Anisman. See Anisman, Takeover Bid Legislation in Canada: A Comparative Analysis (CCH, 1974), pp. 108-41; Anisman, "Insider Trading under the Canada Business Corporations Act"
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securities laws are in a process of almost constant amendment, it is well to consider the underlying justification for the legislation.

The fiduciary theory is obviously based on traditional notions of the fidelity that an agent owes to his principal. If an agent, whether in his capacity as director, trustee, partner, guardian or broker breaches his trust, he is liable to account. The agent has unjustly enriched himself (possibly, but not necessarily, at the expense of the principal) and he must give up his unbargained-for gain. If others knowingly participate in the breach, they hold their gain on a constructive trust and must also account. With respect to corporate fiduciaries, it is not much of a stretch of equitable theory to hold that the duty is owed to the shareholders as well as to the corporate principal. Indeed, both the OSA and CBCA provide liability to those with whom the insider traded and to the corporate principal.

Equity extended its tenets to a broad range of persons whom it considered to occupy positions analagous to a fiduciary office. The U.S. Supreme Court in Dirks characterized such persons as "outsiders [who] may become fiduciaries ... [because] they have entered into a special confidential relationship ... and are given access to corporate information solely for corporate purposes". Similarly, both the OSA and the CBCA include in their category of defined insiders those who are employed or retained by a corporation and thereby acquire confidential information (although it should be noted that the entire group of those so defined in both statutes is broader than the U.S. Supreme Court's "special confidential relationship" formulation). The problematic

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47 OSA, s. 131(1), (4); CBCA, s. 125(5)(a), (b).


49 Dirks v. SEC, supra, footnote 1 at p. 3261, note 14. The SEC's General Counsel has referred to footnote 14 of the Dirks decision as giving the Commission "a valuable new tool" through the court's "theory of the constructive insider": B.N.A., Securities Regulation and Law Report, Vol. 15, no. 38, p. 1821. The creation of constructive insiders is precisely the purpose of ss. 75(3) and 131(7) of the OSA and s. 125(1)(e) of the CBCA.

50 OSA, ss. 73(3), 131(7); CBCA, s. 125(1)(e).
area in insider trading is at the margin where traditional equitable doctrine does not readily supply the answer. Absent a breach by a fiduciary, by a knowing or reckless participant or by one in a special, confidential relationship, what ought to be the response of the law to those who trade with knowledge of material, nonpublic information? That was the real issue raised in Chiarella, although not satisfactorily answered by the Supreme Court as the majority felt constrained by the "fraud" terminology of Rule 10b-5. It was also the issue raised in Dirks, although one might have thought that the application of traditional fiduciary doctrine would have supplied the answer.\(^{51}\)

The scope of the rule that one opts for in insider trading depends upon the rationale chosen to justify its prohibition. The most thorough and, to my mind, persuasive analysis of the issues is Professor Victor Brudney's.\(^{52}\) Insider trading prohibitions\(^{53}\) are primarily designed to protect the investing public from those who possess an informational advantage. The focus is on the unfairness created in the market-place rather than on the abuse of position by a fiduciary. To be sure, the felt unfairness of insider trading is that a position has been abused for personal gain, but the overriding purpose of the legislation is to protect through prohibiting rather than to punish.\(^{54}\) A secondary purpose is that of efficiency, to ensure a full, free flow of information into the market so that price will reflect value and resources will be optimally allocated. But as Brudney points out, other securities law provisions relating to prospectus filings, proxies and information circulars, periodic financial reporting and continuous disclosure of material changes more directly serve that function.\(^{55}\)

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51 This point will be discussed further, infra.


53 Professor Brudney deals with Rule 10b-5, the "antifraud provisions", which I characterize for purposes of analogy to Canadian legislation as the "insider trading prohibitions".

54 This viewpoint is stated more strongly in this article than it is in Brudney's article.

55 It is doubtful that insider trading prohibitions have any real effect on allocative efficiency. There is very little evidence in the cases that announcements were delayed so that
A third purpose, effected in conjunction with the disclosure provisions, is regulatory. The greater the disclosure requirements and the more stringent the rules against self-dealing, the less temptation there will be to act, and to cause the corporation to act, in ways that will facilitate personal gain.

In terms of insiders and all those in a confidential relationship, Brudney’s analysis led him to the conclusion that the disclose or abstain rule is based not only on notions of fidelity and efficiency, but also on considerations of equity.\(^5\) His much-quoted insight was to the effect that the informational advantage that an insider possesses cannot lawfully be acquired (without the corporation’s consent) by those with whom he deals. The unfairness inheres not in having more information, but in having information to which an outsider is barred access. This Brudney referred to as an "unerodable informational advantage". And the same considerations would bar trading if what was possessed was market information\(^5\)\(^7\) rather than corporate information, regardless of whether the information was obtained by insiders in their capacity as such. Those who are not insiders but who receive their information from an insider — tippees — are placed in the same position with respect to trading as their informers. A tippee cannot trade without disclosing as he knows that the information is confidential and that his informant is barred from using it for his own advantage. And an insider cannot benefit\(^5\) through selective disclosure — tipping — rather than through trading.

But who, apart from insiders and those in a special confidential relationship and tippees, should be subject to the disclose or abstain rule? If the right to trade is not to be denied to all who possess an informational advantage, where is the line to be drawn and on the basis of what principle? The answer is again based on the inability of third parties to overcome lawfully the superior knowledge of those with whom they trade. From the perspective of a buyer or seller of securities it makes no difference whether the person with whom they trade, and who possesses confidential information that is not reflected in the price, is an insider or an

\(^5\) Brudney, supra, footnote 52 at p. 346.
\(^6\) See supra, footnote 25.
\(^7\) Brudney likens tipping to selling the information for something of value, whether cash, reciprocal information, status or prestige; Brudney, op. cit., footnote 52 at p. 348.
outsider. They have traded in a market where the other party possessed information that was not legally available to them. That is the "inherent unfairness" of *Cady, Roberts* and the rationale for "limiting the trading privileges available to such an exclusive possessor of information". Moreover, the rule of disclose or abstain is argued to have a functional base as well as being grounded in notions of inherent unfairness. If trading markets are perceived to regularly contain those who trade with inside information, many will refrain from dealing in those markets altogether, or will demand a risk premium for so dealing, both of which effects will raise the cost of capital.

The theory of equal access is not an egalitarian one. The argument is not for equality of information in the market-place, although the on-going drive for continuous disclosure is toward that elusive goal and is to be fostered. The Supreme Court in *Dirks* expressed concern about the important role of the analyst but appeared to confuse equality of information with access to confidential information. Analysts are to be encouraged in their work of exploring, appraising and projecting. The faster their insights are translated into market activity, the more efficient that market will be. If they have more pieces of information and are able to construct a more accurate picture, they and their customers are entitled to profit thereby. The benefits that accrue to the market-place from the activity of financial analysts are argued to outweigh the costs of allowing them to capitalize on their informational advantages. What analysts may not do is trade on or transmit information which they know to be confidential and non-public. The line at times may be a fine one, but those who are market professionals should not have too much difficulty in recognizing the boundary.

The need to encourage the pursuit of discovery values is the justification for allowing a takeover bidder to purchase securities when he knows that within a short time he will make a public bid at a price above the current market. An impending takeover bid is the classic example of market information, and as Professor Loss has noted "there is no reason in either principle or in case

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59 Ibid., at p. 355.
60 Ibid.
61 Ibid., at p. 356.
62 *Dirks*, *supra*, footnote 1 at p. 3263.
63 See Brudney, *supra*, footnote 52 at p. 341.
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law ... to distinguish between information that is intrinsic to the company and market information that will not affect the company's assets or earning power". If the "efficient capital market hypothesis" is correct, as it has been argued to be, the price of a security will reflect its value in the sense that it will reflect all available information. As information becomes known, even if only through the trading activities of insiders, the price will move towards the correct one. Underpriced or overpriced securities will fairly quickly be identified and corrections will be made. Why then would a takeover bidder pay a premium, often a substantial premium, over the value of a security?

The answer is that the offeror's research has disclosed something in the offeree company that makes it think it can use the offeree's assets to earn a greater return. This may be through management changes, different production processes, more efficient use of assets, including disposals, benefits from a merged operation, financial restructuring, tax savings and synergy gains. Both individual shareholders and the general economy gain from such activity. The informational advantage that an offeror has is the knowledge that he is willing to pay more for the security than the current price. That informational advantage is not one that has to be shared with the public. And it would be counter-productive to require it to be as it would discourage entrepreneurs from seeking unexploited values by denying them the rewards of and recompense for the costs of research and discovery.

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66 This is the rationale for the mandatory continuous disclosure requirement of s. 74 of the OSA.


68 Ibid. (In citing Easterbrook and Fischel, I do not want to be taken to be agreeing with their principal thesis with respect to the harmful effects of defence tactics.) The demands of disclosure and considerations of fairness call for limits on an offeror's ability to silently acquire control. Thus limits of 5% in the United States (s. 13(d) of the 1934 Act), 10% under the CBCA (s. 122(3)), and 20% under the OSA (s. 103) are set at which disclosure or accelerated disclosure is required. The level for insider reporting
While a prospective offeror may purchase with impunity,69 its directors and officers may not. Thus under both the OSA70 and CBCA71 directors and senior officers of a company that becomes an insider of another company are deemed to have been an insider of that other company for the previous six months.72 There is no incongruity in allowing the principal to trade while denying that right to its agents. The agent acquires the information for the benefit and use of his principal and, apart from the strictures of fiduciary doctrine, there is no economic justification for allowing such insiders to profit from their informational advantage at the expense of public investors. The same arguments apply to "warehousing" which is proscribed in the CBCA,73 but escapes restraint under the OSA.74 Warehousing is

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69 An offeror may not purchase without disclosing under the CBCA if it receives confidential information from officers of the offeree corporation during pre-bid negotiations as it would then be an insider by reason of s. 125(1)(f). That is not the case under the OSA. As Anisman notes, the majority of takeover bids are negotiated: Anisman, "Insider Trading Under the Canada Business Corporations Act", supra, footnote 45 at p. 268, note 679.

70 S. 1(8).

71 S. 121(3)(a). Under the CBCA the same rule applies where two companies enter into a "business combination" which is an acquisition of all or substantially all of the property of one by the other, or an amalgamation involving both of them; see CBCA, s. 121(4).

72 The directors and senior officers of the second company are similarly deemed to be insiders of the first company for the previous six months; see OSA, s. 1(9); CBCA, s. 121(3)(b). In both cases, the period is six months or such shorter period that one has been a director or senior officer.

73 Warehousing would result in civil liability under s. 125(5) by reason of the combined effect of s. 125(1)(f) and s. 125(3)(a). An insider includes a person who receives "specific confidential information" (which I interpret to include market information) from a "person described ... in subsection (3)." Subsection (3)(a) deems directors and senior officers of the offeror (those who would furnish the information to the institutional investor) to have been insiders of the offeree for the previous six months. The amendment of s. 125(1) in 1978 was based on Anisman's critique of the legislation; see Anisman, "Insider Trading Under The Canada Business Corporations Act", supra, footnote 45 at pp. 207-34.

74 Under the OSA, s. 75(1)(b), informing with respect to a material fact is prohibited by those in a special relationship. Under s. 75(3)(a), insiders are in a special relationship and under s. 1(8) directors and officers of the offeror are deemed to be insiders of the offeree for the previous six months. Thus there would be criminal (s. 118) and civil liability (s. 131) for informing an institutional investor of an intention to make a bid. The intention to make a bid would be "material fact" within s. 1(1)22. There is a gap, however, in that the tippee, the institutional investor, is not caught under s. 75 or s. 131;
the giving of advance notice to institutional investors of an intention to make a bid for a particular security on the understanding that the investor will purchase and hold the security. The offeror is thus assured of a number of large blocks being tendered to it when the bid is announced and the institutions are assured of a profit. Although the arguments that are made to justify pre-bid trading by the offeror might seem to justify warehousing, the opportunity for further tipping, aided by the offeror’s inability to police his tippees, and the increased number of investors who would be induced to sell by the market activity and likely rising price, argue for its prohibition. These considerations presumably led the SEC to ban warehousing by the passage of Rule 14e-3 in 1980.75

The arguments set out above for extending the disclose or abstain rule beyond the traditional categories of insiders to “outsiders” who possess material non-public information are not widely accepted. The major securities law codification projects in the United States and Canada both skirted around the issue. The American Law Institute’s Federal Securities Code does not extend liability beyond corporate insiders, those given access to inside information, and their tippees.76 For other cases, the Code resorts to an ad hoc fairness test by inviting the courts to rely on the Code’s anti-fraud prohibition77 (similar to Rule 10b-5) “to the extent that a sufficiently egregious or shocking or offensive case of trading while silent cannot be rationalized on an ‘insider’ analysis”.78 The Proposals for a Securities Market Law for Canada do not discuss the issue directly79 except to note that the

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there is no equivalent of the CBCA’s s. 125(1)(f). Thus investors who are tipped may purchase without disclosing and without fear of liability. Clearly, an amendment to the OSA is required to deal with tippee liability. See, Anisman, “Insider Trading Under the Canada Business Corporations Act”, supra, footnote 45 at pp. 269-70.

76 Fed. Sec. Code, s. 1603(a), (b) (1980). The Code does not prohibit tipping but rather treats it as a matter for civil liability. The inclusion of “indirect”, or remote tippees in s. 1603(b)(4) makes the coverage very broad and would catch most of those whom one would consider to be outsiders.
77 Ibid., s. 1602(a)(1).
78 Ibid., Comment (3)(d) to s. 1603(a), (b); Loss, supra, footnote 5 at p. 852. Comment (3)(d) notes that s. 1603 “reflects no universally applicable theory of ‘market egalitarianism’”, and that “this area must be left to further judicial development”. The Comment also notes that although it would be convenient to have a new category of “quasi-insider” to cover the outsider who is not a tippee, the matter “does not lend itself to definition”. The Code’s solution is a broad category of defined insiders and a general anti-fraud provision similar to Rule 10b-5 (s. 1602).
79 Anisman et al., 2 Proposals for a Securities Market Law for Canada (1979), pp. 218-23 (hereafter “the Proposals”).
definition of insider that it employs is broader than the OSA and is based directly on the CBCA with the important addition of a residual category that includes those whose relationship to a company gives them access to confidential information. While the precision and breadth of the definitions in s. 12.0281 of the Proposals are admirable, it is a matter of regret that neither they nor the Code deal directly with the "inherent unfairness" theory advanced by Brudney.

What result would the application of the inherent unfairness theory lead to in Chiarella and Dirks? Chiarella is the more difficult case as the printer was an outsider who had no direct connection with the offeror-principal. His employment, however, gave him regular access to inside information. He was thus in a position to acquire and use, in breach of his duty to his employer, confidential information. That information was not available to and could not legally be acquired by those in the market-place with whom Chiarella dealt as long as the offeror wished to keep it confidential. Accordingly, he possessed an "unerodable informational advantage" and should have been held liable.

Dirks is an easier case, both because Dirks was a market professional, a registrant, and because he was a classic tippee. His information came from someone he knew to be an insider and he used that information, after confirmation, to his advantage and to the detriment of those who purchased from his tippees. Although market-place purchasers could be said to have been able to acquire lawfully the non-public information in the sense that a company may not assert a claim of confidentiality with respect to its own fraud, the reality was that they (as opposed to a market professional) had no way of acquiring the information to which the tippers and the tippees were privy. Accordingly, liability should have been imposed on Secrist, Dirks and the institutional sellers. Dirks also should have been held liable on the alternative ground given by Judge Wright in the D.C. Circuit Court of Appeals. Dirks was a registrant and as such is held to a high standard of ethics in dealing with the market-place. On that ground alone he ought to have been held liable as his conduct

80 Ibid., p. 219. This category, along with the inclusion of indirect tippees in s. 12.02(1)(vi), casts the net very wide and would catch most cases of trading with material non-public information.

81 1 Proposals, s. 12.02, pp. 75-6.
ensured that investors purchased securities at prices far above those that would have obtained if he had seen that his information was promptly disseminated.

What would be the result in *Dirks* and *Chiarella* under the provisions of the OSA and CBCA? Chiarella would not be an insider under the OSA as he was not in a special relationship with a reporting issuer under s. 75(3).\(^{82}\) His employer engaged in business activities (s. 75(3)(c)) with the offeror but it is the offeree who is the reporting issuer whose shares were purchased. Even if the employer was in a special relationship with the offeree, and its associates therefore included by s. 75(3)(d), the definition of associate in s. 1(1)2 does not include an employee (although it does include a partner).

The case with respect to Chiarella under the CBCA is similar to that under the OSA. Under s. 125(1)(e)\(^{83}\) insider includes a person employed or retained by the corporation, but Chiarella was employed by the printing company, not by the offeree. For civil liability under s. 125(5) the insider must engage in "a transaction in a security of the corporation" of which he is an insider. Nor did Chiarella become an insider of the offeree by virtue of

\(^{82}\) OSA, s. 75(3):

(3) For the purposes of this section, a person or company is in a special relationship with a reporting issuer where,

(a) the person or company is an insider or an affiliate of the reporting issuer;
(b) the person is a director, officer or employee of the reporting issuer or of a company that is an insider or an affiliate of the reporting issuer;
(c) the person or company has engaged, is engaging in or proposes to engage in any business or professional activities with or on behalf of the reporting issuer and thereby has acquired knowledge of the material fact or material change; or
(d) the person or company is an associate of the reporting issuer or of any person or company referred to in clause (a), (b) or (c).

\(^{83}\) CBCA, s. 125(1):

(1) In this section "insider" means, with respect to a corporation,

(a) the corporation;
(b) an affiliate of the corporation;
(c) a director or an officer of the corporation;
(d) a person who beneficially owns more than ten per cent of the shares of the corporation or who exercises control or direction over more than ten per cent of the votes attached to the shares of the corporation;
(e) a person employed or retained by the corporation; and
(f) a person who receives specific confidential information from a person described in this subsection or in subsection (3), including a person described in this paragraph, and who has knowledge that the person giving the information is a person described in this subsection or in subsection (3), including a person described in this paragraph.
the tippee provision of s. 125(1)(f). Under subsec. 125(3), the directors and officers of the offeror and offeree are deemed to have been insiders of each other for the previous six months. But Chiarella was not a person who received specific confidential information from a person described in subsec. (3) because the person he received the information from, albeit indirectly, was the offeror corporation that retained the printing company. The information did not come from, and was not received from, a director or officer of the offeror who became a deemed insider of the offeree.

Dirks presents a more interesting case, particularly under the OSA. Dirks was a tipper and s. 75(1)(b) makes it an offence to tip and s. 131(1) imposes civil liability on a tipper, if in a special relationship, when his tippee trades. But was Dirks in a special relationship with Equity Funding? The only possibility would be to argue that Dirks “engaged in . . . any business or professional activities with or on behalf of the reporting issuer” within s. 75(3)(c). The case could be made that Dirks, as a securities analyst, was engaging in a professional activity with Equity Funding when he investigated its affairs. That could be said to be the case every time an analyst deals with a listed company, even though the company has not retained him. It might also be argued that the activity is “on behalf of” the reporting issuer as it is to an issuer’s advantage to be open to analysts, even if the ultimate report is not always to its liking. The case is far from clear (some contractual relationship may be required) but it is certainly arguable.84

The case with respect to Dirks is not clear under the CBCA. He was neither “employed or retained” by Equity Funding.85 But under s. 125(1)(f) a tippee who receives his information from “a director or an officer” of the corporation is a deemed insider. Secrist was an officer of an affiliate of Equity Funding, but he had been fired. While he may still carry his obligation of confiden-

84 Secrist would be liable as a tipper under s. 75(1)(b) if he could be held to still carry his obligation of confidentiality after he left Equity Funding’s employ; see Canadian Aero Service Ltd. v. O’Malley (1973), 40 D.L.R. (3d) 371, [1974] S.C.R. 592. It might be difficult to contend that there was an obligation of confidentiality with respect to knowledge of a corporate fraud. Certainly, there could be no complaint about general disclosure. The wrong is in selective disclosure of material information that Secrist knew, and intended, would be used for trading purposes.

85 S. 125(1)(e).
tiality at common law, it may be difficult to contend that Dirks received his information from "an officer" when Secrist was no longer employed by Equity Funding when he tipped. On the other hand, should a court be receptive to the argument that an insider is relieved of his statutory liability the moment he leaves the company's employment? The obligation of confidentiality remains with him and that is an interpretation of s. 125 that would fulfil the deterrent policy of the provision. The overriding consideration should be Secrist's status at the time he became privy to the information and he was clearly an insider at that time. Thus, Dirks would be a deemed insider by virtue of having received his information from someone he knew to have acquired the information at the time that person was an insider and who was in a continuing fiduciary relationship with Equity Funding.

The Ontario Securities Commission has made it clear in Danuke that it will discipline a registrant who uses or communicates material, non-public information even though such registrant is not in a "special relationship" under the OSA. In echoes of Judge Wright's holding in Dirks, the Commission held that the actions of a registrant who uses inside information are "contrary to the public interest and fall below the standard of conduct that may reasonably be expected". Suspensions were imposed on all those involved.

It is likely that the OSC would take a different view of the matter than did the U.S. Court of Appeals for the Second Circuit in Walton v. Morgan Stanley & Co. The defendant registrant was retained by a client to find a suitable takeover target and selected Olinkraft Corporation. Olinkraft co-operated and gave Morgan confidential internal earnings projections "for the purposes of the bid". The bid did not take place and when

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85a See Canadian Aero Service Ltd. v. O'Malley, supra, footnote 84.
87 It is not clear from the judgment whether the panel appreciated that Danuke and her companions were not, in fact, within the terms of s. 75. The conclusion of the judgment appears to state, erroneously, that they were within s. 75. The sense of the judgment does not, however, depend upon a showing of a breach of s. 75.
87a In Moss, supra, footnote 30, the Second Circuit noted that Judge Wright's remarks in Dirks were in the context of a SEC enforcement action and declined to hold that registrants have special fiduciary duties of disclosure to the market-place.
88 623 F.2d 796 (2d Cir., 1980).
another company bid $51, Morgan's arbitrage department purchased some 143,000 shares because it was confident a competing bid would be made at a higher price. Morgan then disclosed the financial information to Johns-Manville "to induce it to make a substantially higher offer" and Johns-Manville ultimately made a successful bid at $65. In a derivative action by an Olinkraft shareholder, the Second Circuit held that Morgan owed no duty to observe confidentiality. The reasoning of the majority was that Morgan and Olinkraft were acting at arm's length; Morgan was responsible to its clients and Olinkraft to its shareholders and the receipt of confidential information did not change those relationships. Olinkraft may have placed its confidence in Morgan not to disclose the information, but "Morgan owed no duty to observe that confidence". 89

Judge Oakes dissented on the ground that the obligations of a fiduciary attached to Morgan once it was given information on the understanding and expectation that it would remain confidential and was accepted on that basis. 90 It could not thereafter disclose the information without Olinkraft's permission. In similar circumstances, one would expect the OSC to hold, as in Danuke, that such conduct "falls below the standard . . . that may reasonably be expected of registrants". Morgan's conduct would also be a breach of the OSA if it occurred in Ontario. Morgan engaged in business activities with Olinkraft (the reporting issuer) within s. 75(3)(c) and therefore was in a special relationship with it. If the financial information was a material fact, there would be a breach of s. 75(1)(b) and civil liability under s. 131(1). This seems like the proper result as it does not matter, from the perspective of the market-place, how or for what purpose a tippee acquires material, non-public information which he knows to be such.

Subsequent to the decisions in Chiarella and Dirks, the SEC has brought four cases, each of which is now pending in the courts. I propose to look at each of the cases in the context of the provisions of the OSA and the CBCA, and in the context of the equal access theory set out above.

1. A person in a football stadium overheard confidential information being discussed by two people sitting in front of him

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89 Ibid., at p. 799.
90 Ibid., at p. 801.
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and traded on it.\textsuperscript{91} The eavesdropper apparently knew that one of the individuals was president of the company and he understood that what he heard was both material and confidential. In those circumstances, there would be liability under the CBCA but not under the OSA. Under s. 125(1)(f) of the CBCA, the eavesdropper would have received specific confidential information from someone he knew to be an officer of the corporation.\textsuperscript{91a} For liability under s. 125(5), he would have made use of the information by trading on the basis of it and, as it concerned the liquidation of the company, it was information that if generally known "might reasonably be expected to affect materially the value of the security".

There would be no liability under the OSA as there is no provision similar to s. 125(1)(f) of the CBCA which covers tippees. The equal access theory, as expounded by Brudney, would, it is suggested, impose liability. The eavesdropper is in much the same position as the printer in \textit{Chiarella}. It is true that he was not in a position that gave him regular access to confidential information as was the printer, nor did he breach any duty by using the information, as did Chiarella to his employer. But if he knows, or ought reasonably to know, that the information is confidential and further knows that the person he is listening to is a director or officer of the company, then he possesses an informational advantage that those with whom he trades cannot lawfully acquire. There is an inherent unfairness in trading in those circumstances and liability should follow. The case is certainly one that tests the equal access theory — it would not fall within the Second Circuit's holding in \textit{Chiarella}, but it is hard to see why the line should be drawn to exclude someone who, to his knowledge, possesses and uses material, confidential information.

2. A financial printer purchased, but never sold, shares based on information with respect to a takeover bid that he obtained during his work. The SEC seeks disgorgement of the paper profits. This is the same case as \textit{Chiarella} but is being brought by the SEC to get an answer to the question left open in that case as


\textsuperscript{91a} The sense and purpose of s. 125(1) do not require that a tippee be given or offered the information to be taken to have received it. It is only necessary to show that he came into possession of it.
to whether a breach of duty to one's employer will supply the necessary "fraud" for 10b-5 liability for insider trading.92 As noted above, there would be no liability under the OSA or CBCA, but there would be liability under the equal access theory.

3. A word processor operator in a law firm allegedly came into possession of inside information with respect to takeover bids. He both traded and tipped.93 The case is similar to the one above, with the breach of duty to the employer being the essential link to Rule 10b-5. There would be no liability under the OSA. The law firm is in a special relationship with the client under s. 75(3)(c), as are its associates under s. 75(3)(d). Associate is defined94 to include partners but does not include employees and the secretary is therefore free of liability. In any event, the "reporting issuer" would be the offeree, not the offeror who retained the law firm.

Liability under the CBCA would depend upon from whom the secretary could be said to have "received" the information under s. 125(1)(f). The argument is the same as that set out above with respect to a CBCA analysis of Chiarella. Under s. 125(3) it is the directors and officers of the offeror who are deemed to be insiders of the offeree for the previous six months (and vice versa). The offeror does not become an insider of the offeree until its holdings reach 10%. While it is the offeror who retains the law firm, the information will invariably be supplied to one of its members, most often orally, by the offeror's directors or senior officers. Given the tippee chain set up by s. 125(1)(f), the secretary would have received the information from a deemed insider and would be liable. In that respect, the case is different from a printer receiving a takeover bid circular which is the circular of the offeror. If the information with respect to the client did not concern a takeover bid and the client's shares were the relevant ones for trading and tipping, there would be liability

94 OSA, s. 1(12).
under the CBCA by reason of the tippee inclusion in s. 125(1)(f). There would be no liability under the OSA as employees are not included in the definition of those in a special relationship and there is no tippee liability. There would be liability under the argued-for equal access theory as the secretary would know where the information originated and that it was material and non-public.

4. A group of unrelated people in brokerage firms traded in securities of companies that were involved in takeover bids. The only common link was that a law firm was involved in all the bids but the SEC has not been able to identify a tipper or establish that the law firm was the source of the information. The SEC does not believe that it is necessary for it to establish the identity of the tipper. If the information came from someone in a special confidential relationship and the tippees knew that, or that is a reasonable inference from the evidence, there would likely be liability under Rule 10b-5.

Under the OSA there would be no liability as there is no tippee liability even if it can be shown that the tip came from one in a special relationship as defined. If the tipper was identified as a partner in the law firm there would be liability on him under s. 75(1)(b), but not if the tipper were an employee.

There is tippee liability under s. 125(1)(f) of the CBCA, but the tip would have to come from a partner who received his information from a director or officer of the offeror. The initial tip must come from an insider and a chain of infinite tippee links is then established. If the tip came from an employee, then the case is like the one argued above; it depends upon from whom the employee received the information. While there is tippee liability under the CBCA, it is not clear that there is tipper liability. Section 125(5) imposes civil liability (insider trading is not an offence under the CBCA) on an insider who "makes use of ... for his own benefit or advantage". While the benefit or advantage to a tipper may not always be immediately apparent, it should not be too difficult in most cases to establish a personal reason for the tip that will satisfy the statutory test. There clearly would be liability on the tipper and tippees under the equal access theory.


An analysis of Chiarella and Dirks and subsequent SEC actions in the context of the OSA and CBCA provisions suggests the need for major amendments to the OSA and some tightening in the CBCA. Indeed, amendments should be considered to make liability consistent with the equal access theory proposed by Professor Brudney. At the least this would require the inclusion of an employee of anyone engaged in a business or professional activity with a reporting issuer under s. 75(1)(c) of the OSA. It is not sensible to include employees of a reporting issuer under s. 75(3)(b) and to exclude employees under s. 75(3)(c). This one change would cover many of the situations of "exploiting the employer's special relationship with its clients" that recently have been brought to light.

As to tippers and tippees, there should be a clear statement of tippee liability in the OSA and the subject of tipping should be dealt with in a separate provision in the CBCA. Both statutes should also refer to former as well as present directors, officers and employees. If the matter is still confidential, a former fiduciary should continue to be held to a statutory duty of refraining from trading or tipping. None of the above changes would necessarily catch the eavesdropping football fan and consideration should be given to whether or not it is desirable to make the statute stretch to cover that and similar cases. Given the definitional difficulties of including "outsiders", perhaps the best solution is that found in s. 12.02 of the Proposals. Section 12.02 includes a net for "any other person" whose relationship to the issuer gives him access to confidential information and the tippee clause includes all secondary tippees. Registrants should be included as defined insiders in both statutes as they should be subject to civil and criminal liability for insider trading apart from

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96a This article is not intended as a detailed review of insider trading legislation and, accordingly, has not dealt with such important questions as the interpretation of key terms such as "specific", "confidential", "material" and "make use of". The leading cases in Ontario are Green v. Charterhouse Group Canada Ltd. (1976), 68 D.L.R. (3d) 592, 12 O.R. (2d) 280 (C.A.) and Re Connor, [1976] OSC Bull. 149. See also F. H. Buckley, "How to Do Things with Inside Information", 2 C.B.L.J. 343 (1977-78); J. C. Baillie and V. P. Albini, "The National Sea Decision — Exploring the Parameters of Administrative Discretion", 2 C.B. L.J. 454 (1977-78); Anisman, "Insider Trading Under the Canada Business Corporations Act", supra, footnote 45 at pp. 217-34. The most contentious issue is in the interpretation of "make use of". The Proposals argue that its interpretation "may not unreasonably be said to have led to an incorrect result in every case in which it has been considered": see 2 Proposals, p. 221. Accordingly, s. 12.02 of the Proposals does not include the defence and the prohibition is based solely on the knowledge of a material confidential fact. There is much to be said for deleting the defence from the OSA.
any disciplinary action that may be taken by the OSC or Toronto Stock Exchange.

Finally, a word against what has been argued for above; or at least a word against an enforcement policy in pursuit of equal access. What evidence there is suggests that insider trading is pervasive, and yet the number of cases that have been brought in this country and in the United States is minuscule. Where there is a conviction the penalties, if any, are trivial. What this tells us is that insider trading offences are very difficult to detect and any serious enforcement programme would require such a disproportionate part of the OSC's scarce resources as, in effect, to be a misallocation of those resources. There are more serious enforcement problems that require attention. Moreover, neither the judiciary nor the trading public appear to view insider trading as a serious offence, if one can judge from attitudes and penalties. Perhaps when the very foundation of an industry is information, those who have and use more or better information, even if it is confidential, are not regarded as serious wrongdoers.

All of this is not to say that insider trading ought not to be an offence or that the law in this area, as has been argued, should not be as rational and as equitable as is possible. The case for equal access appears to me to be a strong one. In terms of enforcement, however, the concentration should be on serious abuses by traditional insiders. They are the front line fiduciaries, the sources of insider information, and the ones who stand to gain the most from its improper appropriation. Greater attention should be paid to an analysis of their required reports, particularly at a time of significant corporate events, and enforcement should be on a scale considerably greater than that exhibited in the OSC's recent pronouncements in *Noranda Mines Inc.* and in *Joseph Burnett.* Concentration on directors and senior officers would be a rational use of resources and a policy that is most likely to pay enforcement and deterrence dividends.

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97 Dooley, *supra*, footnote 5 at pp. 5-7. SEC officials have been quoted to the effect that insider trading is rampant: see *New York Times* (March 7, 1980).
98 Dooley, *supra*, footnote 5 at pp. 10-15. The first criminal conviction for insider trading under the OSA was recorded on October 4, 1983. The President of Falconbridge Copper pleaded guilty to purchasing the Company's shares prior to the issuance of a press release which announced significant drill hole results. He was fined $250: see *The Globe and Mail* (Toronto, October 5, 1983), at p. 81. See also Herman, “Equity Funding, Insider Information, and The Regulators”, 21 U.C.L.A. Law Rev. 1 (1973-74), at pp. 21-8. Professor Herman's article is a particularly thought-provoking one that puts the Equity Funding case in a different perspective.