

Securities Law Bulletin

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Ontario Securities Act Amended to Prohibit Insiders from Recommending Trades

By: Geoff Clarke, Daniel Everall and Chris Matthews*

The Ontario government has recently amended the insider trading rules under the *Ontario Securities Act* (the “Act”)¹. The Act’s prohibitions have been expanded so as to restrict a company (an “issuer” under the Act) and those in a special relationship with a company from recommending or encouraging the sale or purchase of such company’s securities where such person making the recommendation possesses undisclosed material information.

Insider Trading – An Overview

Insider trading prohibitions under the Act encompass two general prohibitions. These prohibitions limit the ability of a company, in certain situations, and those in a “special relationship”² with a company, to:

- (i) buy or sell the securities of such company (i.e. the “true” insider trading prohibition), and
- (ii) share inside information, not in the ordinary course of business (i.e. the “tipping” prohibition).

It is the latter of these two restrictions that the amendment has broadened.

Recommending Was Not Tipping

Before the amendments came into force, the tipping prohibition restricted the sharing of material undisclosed information.³ However, this prohibition did not catch instances where a company or person in a special relationship with that company prompted another person to make a trade without informing them of any particular

material fact or material change. In other words, simply giving an indication that one should buy or sell a security did not itself constitute the sharing of material undisclosed information.

Amendment to the Ontario Securities Act Regarding Recommendations

The newly enacted s. 76(3.1) of the Act provides that no company, no person in a special relationship with a company, and no person that is considering or evaluating whether to engage in a transaction with the company shall recommend or encourage, other than in the necessary course of business, another person to purchase or sell securities of the company with the knowledge of a material fact or material change with respect to the company that has not been generally disclosed.

The amendments codify certain actions already taken by the Ontario Securities Commission (the “OSC”) through the use of its discretionary public interest power, and thereby may increase certainty for insiders. Recently, for example, in *Re Finkelstein et al.*,⁴ the OSC used its public interest power to find against certain investment advisers who recommended the shares of target companies; this despite those advisers technically being outside the tipping prohibitions. The OSC may therefore not need to rely on its public interest jurisdiction in future similar cases. Moreover, we note that the change brings Ontario legislation closer into line with the securities legislation in other Canadian provinces, many of which already prohibit such recommendations.⁵

¹ *Ontario Budget Measures Bill 173*, Schedule 26, s. 2 (1), which received royal assent on April 19, 2016 and was proclaimed into force effective July 1, 2016.

² The definition of “special relationship” under the Act includes, among others, those who (i) are an insider, affiliate, or associate of (A) the issuer, (B) a company considering certain transactions with the issuer or its securityholders; (ii) are engaging in business or advisory services with a company; (iii) learned of the material fact or material change with respect to the issuer while the person or company was previously in a special relationship; and (iv) learn about a material fact or change with respect to the issuer from another person or company that is in a special relationship with the issuer where that person knows or ought reasonably to have known that the other person or company is a person or company in such a relationship; see the Act, ss. 76(5).

³ See the Act, ss. 76(2) and (3).

⁴ OSC, March 24, 2015.

⁵ For e.g. *Securities Act* (British Columbia), s. 57.2(5) and *Securities Act* (Alberta), s. 147(5).

*Geoff Clarke is a partner in the Corporate Finance Group, Daniel Everall is an associate in the Corporate Finance Group and Chris Matthews is a partner in the Litigation Group. The authors would like to thank Jonathan Yantzi, a summer student at Aird & Berlis LLP for his assistance in preparing this bulletin.

If you have questions regarding this article,
please contact the author or any member of the
Aird & Berlis LLP Corporate Finance Group:

Lawyers:

Sherri Altshuler	416.865.3081	saltshuler@airdberlis.com
Aaron S. Bains	416.865.3084	abains@airdberlis.com
Christopher F. Berrigan	416.865.3065	cberrigan@airdberlis.com
Geoff Clarke	416.865.7711	gclarke@airdberlis.com
Melanie Cole	416.865.4638	mcole@airdberlis.com
Daniel Everall	416.865.4733	deverall@airdberlis.com
Thomas A. Fenton	416.865.4631	tfenton@airdberlis.com
Tony Gioia	416.865.3403	tgioia@airdberlis.com
Mat Goldstein	416.865.4637	mgoldstein@airdberlis.com
Jacqueline Goslett	416.865.4741	jgoslett@airdberlis.com
Rebecca Kacaba	416.865.7707	rkacaba@airdberlis.com
Richard M. Kimel	416.865.3961	rkimel@airdberlis.com
Martin E. Kovnats	416.865.3419	mkovnats@airdberlis.com
Matthew V. Liberatore	416.865.4639	mliberatore@airdberlis.com
Andrew Magnus	416.865.4744	amagnus@airdberlis.com
Jeffrey K. Merk	416.865.7768	jmerk@airdberlis.com
Anne E. Miatello	416.865.7717	amiatello@airdberlis.com
Margaret T. Nelligan	416.865.7710	mnelligan@airdberlis.com
Jonathan Tong	416.865.3413	jtong@airdberlis.com
Graham Topa	416.865.4739	gtopa@airdberlis.com
Jennifer A. Wainwright	416.865.4632	jwainwright@airdberlis.com
Susan Wolburgh Jenah	416.865.4707	sjenah@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

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