

CHAPTER SIX

THE REGULATION OF INSIDER TRADING IN CANADA: A COMPARATIVE PERSPECTIVE.

6.1. INTRODUCTION.

A well developed regulatory framework is also in place in Canada. The Canadian system was regarded by one commentator as one of the most effective and adequate systems to be found in recent years.¹ It is actually characterized for its stringent but effective statutory prohibitions on insider trading.²

It is against this background that an incisive comparative analysis will be carried out in this Chapter, of the Canadian and the South African statutes to explore their similarities and differences. Any meaningful lessons that can be learnt and innovations that can be recommended for adoption in South Africa will be identified. Relevant Canadian cases and provisions will be analysed and contrasted with their South African counterparts. The discussion of the Canadian insider trading prohibition is predominantly focused on the Ontario Securities Act of 1990 as amended.³

6.2. OVERVIEW OF INSIDER TRADING LEGISLATION IN CANADA.

The statutory regulation of insider trading is still predominantly a provincial matter in Canada despite several attempts to enact a single uniform federal statute.⁴ The first

¹ See Osode P C “Regulatory theory, Private Interests and the Rationality of Insider Trading Regulation in the United States and Canada” (1998) 3 *Journal of South African Law* 427 437.

² See Osode P C “The Regulation of Insider Trading in Canada: A Critical Appraisal” (1999) 28 *Anglo-American Law Review* 166.

³ A critical examination of all the provincial insider trading legislation in Canada and cases is not possible due to constraints in relation to space.

⁴ See Welling B *Corporate Law in Canada: The Governing Principles* 2nd ed Butterworths Canada Ltd 1991 363.

statute on insider trading in Canada was the Ontario Securities Act of 1966 (OSA),⁵ which was passed pursuant to the adoption of the *Report of the Attorney General's Committee on Securities Legislation in Ontario* on 11 March 1965.⁶ Prior to this date, insider trading was not statutorily regulated in Canada. This Act was however only applicable to insider trading activity in the securities of “reporting issuers”.⁷ This led to various subsequent legislative reviews of the OSA and similar statutes in the other provinces in an attempt to have more stringent and adequate provisions against insider trading.

The insider trading prohibition was for instance also contained in the Canada Corporations Act of 1970 (CCA). This Act was aimed at preserving the integrity of federal companies by protecting their shareholders against insider trading.⁸ Moreover the CCA prohibited insiders or other persons who held positions of trust or otherwise from trading in securities of a company if they were privy to price-sensitive information relating to such securities which was not yet available to all its shareholders.

A subsequent review of the CCA resulted in the enactment of the Canada Business Corporations Act of 1975 (CBCA).⁹ This Act prohibited insider trading in a “distributing corporation”, which was defined as a corporation whose shares have been part of a distribution to the public, if their price remains outstanding and they are held by more than one person. Furthermore, the CBCA prohibited insiders from selling shares that they do not own or have a right to own, and from buying or selling a call option or put

⁵ *Statutes of Ontario* 1966 c 142. See sections 108-117 which contained the first insider trading prohibition in Canada.

⁶ This report is hereinafter referred to as the *Kimber Report*. See in particular paragraphs 1.06, 1.11 and 7.15 of the *Kimber Report*.

⁷ A reporting issuer is a corporation or a company whose securities are traded on a stock exchange or other market place.

⁸ *Multiple Access Ltd v McCutcheon and others* (1982) 138 DLR (3d) 18 (SCC).

⁹ Canada c 33. Also see generally Welling B *op cit* note 4 365 and Smith M “Insider Trading” <http://www.parl.gc.ca> 22 December 1999.

option in respect of a share of the distributing corporation in relation to which they are insiders.¹⁰

In an attempt to complement and revive the original insider trading provisions which were contemplated in the OSA, the Ontario Business Corporations Act of 1982 (OBCA.) was enacted.¹¹ Furthermore, it broadened the definition of insiders to include not only “senior officers”, but all the employees of any corporation or company. However, it dealt mainly with the liability of insiders of corporations or companies that do not offer securities to the public.¹²

This eventually led to yet another legislative review of the OBCA which resulted in the enactment of the Ontario Securities Act of 1990 as amended.¹³ This Act expanded the reporting obligations of all insiders¹⁴ of the reporting issuers in terms of section 107. This was meant to deter insiders from profiting unfairly from their prior knowledge of any unpublished confidential inside information relating to a company, such as an impending take-over or other acquisition.

Recently, in 2003 the Canadian Securities Administrators (CSA) and the federal government introduced a Uniform Securities Law Project (USL) and a Bill C-46 respectively in an attempt to improve the overall regulation of insider trading in all the provinces of Canada.¹⁵ Firstly, the USL Project seeks to provide a national framework

¹⁰ See sections 126(1) and 130 of the CBCA.

¹¹ S O 1982 c 4. Also see generally *Ontario Securities Legislation* CCH Canadian Limited 1977 46-47.

¹² See Welling B *op cit* note 4 364.

¹³ *Revised Statutes of Ontario* 1990 c S 5. This statute is hereinafter referred to as the 1990 OSA. Also see Macintosh J G and Christopher N C *Essentials of Canadian Law: Securities Law* Irwin Law Inc 2002 231.

¹⁴ See section 1(1) of the 1990 OSA.

¹⁵ For a detailed analysis see the Insider Trading Task Force Report (ITTF) on “Illegal Insider Trading in Canada: Recommendations on Prevention, Detection and Deterrence” (November 2003) http://www.regulationservices.com/en/pdf/1TTFFReport_20031112.pdf 35 26 May 2006.

for securities regulation by the harmonization of insider reporting obligations. Secondly, Bill C-46 proposes to establish new *Criminal Code* offences for illegal insider trading and for tipping.

Most recently, Bill C-13 was introduced in March 2004. This Bill will create the first specific *Criminal Code* offences in relation to insider trading and other related practices. It also proposes to make it an offence to threaten or retaliate against employees who reveal any insider trading or related activities (whistle blowing).

Unlike in Canada, the statutory regulation of insider trading in South Africa is centralized and specifically prohibited in terms of the Securities Services Act, 36 of 2004. The provincial regulation of insider trading approach which contributed immensely towards curbing insider trading and related practices in Canada will probably not be followed in South Africa. This may perhaps, contribute towards the lack of awareness and of effective combating of the insider trading activity in South Africa.¹⁶

6.2.1. The scope and meaning of “insider trading”.

It seems as if Canada has also followed the American approach by electing not to define the controversial concept of insider trading.¹⁷ Only a few terms such as “insider”, “reporting issuer”, “special relationship”, and “issuer” are comprehensively defined. Other fairly important terms like “tippees”, “inside information” and “illegal insider trading” are not defined. Insider trading is therefore generally regarded as a practice that involves the buying or selling of securities under circumstances where one of the parties is in possession of undisclosed material information about the securities or about the issuer, or where that information has been tipped off to one of the parties or where securities are being traded by the person who was tipped.¹⁸

¹⁶ See Chapters 2, 3 and 4.

¹⁷ See paragraph 5.2.1 in Chapter 5 of this dissertation.

¹⁸ See the ITTF Report *op cit* note 15 1. Also see Macintosh J G and Christopher N C *op cit* note 13 237.

It is interesting to note that South Africa seems to be following this American approach as well. More specifically, no definition of insider trading is proscribed in the current regulatory framework.¹⁹ However it remains to be seen whether the South African regulatory framework will be as effective as its Canadian counterpart.

6.2.2. The prohibition on “insider trading”.

The provisions of the 1990 OSA prohibits any person in a *special relationship*²⁰ with a reporting issuer and who has knowledge of an undisclosed *material fact* or *change*²¹ of relevant circumstances relating to securities to disclose it to others or to trade on the basis of such information to the detriment of others.

It is plausible to note that the insider trading prohibition in terms of section 76 applies to a much wider range of persons and companies than is covered by the definition of “insider” in section 1 of the 1990 OSA.²² Thus, the most important definition in section 76 is not that of an “insider” but rather that of a “special relationship person”. The term “special relationship” was specifically defined in terms of section 76(5) to mean:

- (a) insiders, affiliates²³ and associates²⁴ of a reporting issuer and others engaging in *various transactions*²⁵ with respect to such issuers;²⁶

¹⁹ See Chapter 4 of this dissertation.

²⁰ See section 76(5) of the 1990 OSA.

²¹ The terms were defined to constitute a change in business, operations or capital of an issuer or a fact that can reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. See section 1(1) of the 1990 OSA.

²² Macintosh J G and Christopher N C *op cit* note 13 238.

²³ This term is defined in section 1 paragraph 1.1(2) of the 1990 OSA.

²⁴ This term is defined in section 1(1) of the 1990 OSA

²⁵ Such transactions include firstly, the making of a takeover bid or secondly, entry into a business combination such as a reorganization, or a merger or thirdly, acquisition of a substantial portion of the issuer’s property.

²⁶ See section 76(5)(a)(i), (ii) and (iii).

- (b) persons or companies engaged in or proposing to engage in any business or professional activity with or on behalf of a person that is proposing to engage in similar transactions with the reporting issuer;²⁷
- (c) directors, officers or employees of the reporting issuer and others proposing to engage in similar transactions as contemplated in sections 76(5)(a)(ii) or (iii) and 76(5)(b);²⁸
- (d) a person or company that learned of the material fact or change with respect to the reporting issuer, while the person or company was a person or company described in subsections (a),(b) or (c) above;²⁹
- (e) a person or company that learns of a material fact or change with respect to the reporting issuer from any other person or company described in this section who knows or ought reasonably to have known that the other person or company is in such a relationship.³⁰

It is clear that this definition covers not only those persons who work within the reporting issuer, but also others who work within different companies proposing to enter into a major business transaction or arrangement such as a takeover of the issuer's shares. Moreover, other related practices such as tipping are covered as well. For instance, unlawful disclosure to another of unpublished material information relating to the reporting issuer's securities, whether by that issuer, a special relationship person or any other person in possession of such information, is prohibited in terms of section 76(2) and (3). In order to reduce the risk of illicit insider trading, all persons referred to in section 76 of the 1990 OSA are prohibited from speculating in the securities of any corporation or company.

²⁷ Section 76(5)(b).

²⁸ Section 76(5)(c).

²⁹ Section 76(5)(d).

³⁰ Section 76(5)(e).

6.2.3. Reliance on both civil and criminal sanctions.

Civil as well as criminal sanctions are used to curb both insider trading and tipping in Canada. The criminal sanction will be discussed first, then the civil remedy and lastly, a comparative analysis will be made with respect to similar sanctions in South Africa.

Any special relationship person who violates the provisions of section 76, whether through tipping or engaging in unlawful insider trading will be liable for a criminal offence.³¹ If convicted, such persons may be sentenced to pay a fine equal to the amount of the profit made or loss avoided but up to a maximum of \$1 million, or to imprisonment for two years or both.³² Such persons may further be ordered to pay an additional penal fine up to an amount that is three times the amount of the profit made or loss avoided.³³ Furthermore, with respect to tipping, it is not required that the tippees should have traded on the premise of the confidential inside information they received from special relationship persons, before any criminal liability can be imputed on them. Recently, Bill C-13 of 2004 proposed to introduce the first specific *Criminal Code* sanctions for insider trading and tipping of a maximum imprisonment term of up to ten years and five years respectively.

A civil remedy is available to all the persons who fall victims of unlawful insider trading and tipping in contravention of the provisions of section 76.³⁴ For instance, any special relationship person who trades while in possession of unpublished price-sensitive information is liable to compensate all the affected persons (plaintiffs) for any damages caused by such trading.³⁵ It is plausible to note that this civil remedy is available to four classes of plaintiffs:

³¹ See sections 122(1)(c) and 76(1), (2) and (3).

³² See section 122(1).

³³ See section 122(4) and *R v Harper* (2000) O J 3664 where the accused was convicted on two counts of insider trading in terms of section 122(1)(c).

³⁴ See section 134(1).

³⁵ See *Doman v British Columbia (Superintendent of Brokers)* (1998) BCJ 2378 (CA).

- firstly, those who are the innocent counterparties to unlawful insider trading with insiders;
- secondly, those who are the innocent counterparties to insider trading with tippees;
- thirdly, to mutual funds or the clients of portfolio managers or of registered dealers, against someone who *had access to* unpublished confidential information relating to the investment program of those funds, managers or dealers and who benefits *by trading* on the basis of such information;³⁶
- and lastly, reporting issuers whose insiders, affiliates, or associates have gained by trading with knowledge of undisclosed material information or have communicated such information to others.³⁷

The basis for liability in terms of section 134 differs, depending upon whether the plaintiff is an innocent party to the unlawful trade or is the reporting issuer to which the undisclosed information relates. Innocent counterparties to unlawful insider trading are entitled to recover from the defendant any damages they may have suffered as a result of such trading. On the other hand, in cases of actions brought by a reporting issuer, liability of insiders, associates or affiliates of such an issuer is measured by the extent of any gain they have realized as a result of insider trading.

It is interesting to note that in South Africa, provision is also made for criminal sanctions as well as civil remedies to curb insider trading and related practices.³⁸ However, unlike the position in Canada, the defendant's civil liability in terms of the current South African legislation is not contingent upon whether the affected person is an innocent counterparty or not. It is however submitted that such a distinction should be drawn and that South Africa would be well advised to follow the Canadian law in this respect.

³⁶ See section 134(3).

³⁷ Section 134(4). Also see generally Williamson J P *Securities Regulation in Canada* University of Toronto Press 1960 347-352.

³⁸ See paragraphs 4.3.4 and 4.4 in Chapter 4 of this dissertation.

6.2.4. The role and effectiveness of the Intermarket Surveillance Group (ISG).

The ISG was established to provide an intermarket insider trading framework for the sharing of information and the coordination of regulatory efforts among securities and commodities markets and market regulators in North America, Europe and Asia.³⁹ This framework is responsible for combating intermarket trading abuses and developing best practices.

It is important to note that Canada is a member of the ISG, and its equities and derivatives markets can therefore trade with similar markets around the world. Moreover, it is agreed that the technological surveillance department of the ISG enables Canadian markets to effectively detect any patterns of illegal insider trading in Canadian equities and derivatives on markets globally. The ISG further implemented a database that assists member market regulators to share relevant information and to investigate intermarket insider trading. However it is not clear whether Canada had successfully utilized this database to curb insider trading.

Contrary to this international initiative to combat insider trading and the participation of Canada therein, no similar development seems to have taken place in South Africa. South Africa should seek to become involved in international initiatives such as the ISG and co-operate and where possible to exchange information with other jurisdictions so that insider trading can be regulated more effectively.⁴⁰

6.2.5. The role and effectiveness of Insider Trading Task Force (ITTF).

The ITTF was established in September 2002 by Canada's securities regulatory authorities with the objective of evaluating how best to curb illegal insider trading in Canadian capital markets. This followed concerns by some securities regulators that there was a public perception that unlawful insider trading was prevalent and increasing

³⁹ See the ITTF report *supra* note 15 33.

⁴⁰ Also see generally Manne H G *Insider Trading and the Stock Market* The Free Press 1966 160-169.

in Canadian markets, at a time when few successful enforcement actions against such trading in the courts, were recorded. The regulatory authorities that expressed concerns were the Ontario, British Columbia and Alberta Commissions, *Commission des valeurs mobilières du Québec*, Investment Dealers Association of Canada, *Bourse de Montreal Inc* and the Market Regulation Services Inc.

Therefore, the role of the ITTF is to examine unlawful insider trading in Canadian securities markets in order to determine more effective means of curbing it. It is empowered to devise suitable methods of increasing the capacity of regulators to detect insider trading when it occurs in offshore and nominee accounts, by coordinating the regulation of equities and their derivatives. For instance, 15 of about 289 insider trading cases investigated in Canada between 2001 and 2002 involved offshore accounts.⁴¹ The ITTF is also empowered to promulgate best *practices* or *principles* for dealers, issuers and service providers to limit the leakage of inside information. Furthermore, the ITTF is responsible for increasing any deterrence efforts by ensuring that the provisions of insider trading statutes are adequate, and that there is better coordination among regulatory authorities as well as improved enforcement mechanisms.

For purposes of adequacy and effectiveness, the ITTF focuses on three main policy goals which are:

- (i) deterrence;
- (ii) detection; and
- (iii) prevention.

It is submitted that the ITTF has contributed immensely towards the effectiveness of the Canadian insider trading regulatory framework.⁴²

⁴¹ For a comprehensive and analytical discussion see “Insider trading – What’s the problem?” http://www.cbc.ca/news/background/crime/insider_trading.htm 21 December 2006.

⁴² See the ITTF report *supra* note 15 1.

Unlike the position in Canada, it seems as if the legislature in South Africa ignored the role and importance of establishing a similar task force to combat insider trading. It is unfortunate that the legislature rigidly imposed the so-called wide investigatory and enforcement powers on the Financial Services Board (FSB) only.⁴³ Other regulatory bodies such as the Bond Exchange of South Africa (BESA) should perhaps have been incorporated to compliment the efforts of the FSB in enforcing the insider trading prohibition.

6.2.6. Establishment of competent courts to prosecute insider trading cases.

In Canada, both the High and Supreme Courts are empowered to prosecute insider trading cases. It should be noted that this important role of the courts is acknowledged in the various provincial securities statutes as well as other securities statutes such as the Canada Business Corporations Act of 1985.⁴⁴

However, in terms of the various provincial statutes, the compliance orders that the courts may impose, differ from one province to the other. For instance, the disgorgement orders, civil penalties, monetary fines and imprisonment terms imposed by the courts in Alberta may be different from those imposed by the courts in Ontario. Moreover, in *quasi*-criminal proceedings, competent courts in various provinces may impose fines ranging from \$1 million to \$5 million, or for payment of a multiple of the profits made and imprisonment sentences for periods that range between three and five years.⁴⁵

Although it appears that the sanctions that may be imposed by courts are not uniform, it is submitted that these courts still play a substantial role in the curbing of illegal insider trading and related practices in Canada.⁴⁶ Moreover, the number of reported successful insider trading cases that were recorded to date in both criminal and civil proceedings is,

⁴³ See paragraph 4.6.1 in Chapter 4 of this dissertation.

⁴⁴ C C-44 RSC 1985.

⁴⁵ See ITTF report *op cit* note 15 41.

⁴⁶ *Ibid.*

unlike the situation in South Africa, clear testimony of the effectiveness of the courts.⁴⁷ In spite of some of the FSB investigations which have been instituted through the Directorate for Market Abuse (DMA) in South Africa, many cases are still pending in the courts. This directly points to the fact that the role of the courts in curbing insider trading in South Africa has not been as effective as it is in other developed countries such as Canada.

With respect to civil cases, clear guidelines are provided in terms of the 1990 OSA by which the courts may determine the compensatory damages for prejudiced persons.⁴⁸ It is submitted further that the courts have a discretion where necessary, to supplement the guidelines in section 134(6) with additional, adequate and appropriate measures as the circumstances of each case may dictate. This has enabled the courts to successfully sanction many settlements in civil cases.

6.2.7. The adequacy of available defences and exemptions.

A number of defences as well as exemptions are available for insiders or any other person alleged to have contravened insider trading provisions in Canada. For instance in terms of the 1990 OSA, any person accused of contravening section 76 may avoid liability if he is able to rely on the proscribed defences or exemptions. These are the following:

- With respect to tipping, any person who as a *tippee* knowingly trades on the basis of material confidential information before it is “generally disclosed”⁴⁹ may escape liability if he proves that he did not know or ought not reasonably to

⁴⁷ See *Green v Charterhouse Group Can. Ltd* (1976) 12 OR (2d) 280 (CA); *Lewis v Fingold* (1999) 22 OSCB 2811; *In the Matter of MCJC Holdings Inc and Michael Cowpland* (2002) 25 OSCB 1133. See also the cases quoted in notes 8, 33, and 35.

⁴⁸ See section 134(6).

⁴⁹ This term is not defined in terms of the 1990 OSA but it is clear that mere issuing of a press release without actual and timeous disclosure of material facts to the public is insufficient. Also see *Green v Charterhouse Group Can Ltd supra* note 47 302-303.

have known, that the tipper was a person or a company in a special relationship with the reporting issuer.⁵⁰

- Another defence in terms of section 76(4) is only available to a person who traded on the basis of the undisclosed confidential information which he reasonably believed that it had already been publicly disclosed.
- Moreover, in terms of section 76(4) any accused person may avoid liability for insider trading if he proves that he has traded on the premise of undisclosed price-sensitive information which was known or ought reasonably to have been known to the plaintiff as the affected person.
- The courts have also recognized a “reasonable mistake of fact” defence in some instances where the accused person mistakenly traded on price-sensitive before it had been generally disclosed.⁵¹
- Furthermore, for purposes of the containment of inside information, the Chinese Wall defence is available to corporations or companies that implemented this defence to prevent abuse of inside information between their different departments.⁵²
- In addition to these defences, liability for violating sections 76 and 134 of the 1990 OSA can still be avoided in terms of the exemptions provided for in terms of section 175 of the Ontario Securities Act Regulation, for instance, where accused persons who participated in, or who advised on a particular trading

⁵⁰ See section 76(4). Also see *Re Harold P Connor* (1976) OSC Bulletin 149 174 for a discussion of the circumstances suggested by the Ontario Securities Commission to determine whether the confidential information is generally disclosed.

⁵¹ See *Lewis v Fingold* *supra* note 47 where the accused was acquitted after he successfully raised the defence of mistake. Also see generally *Rider B A K Insider Trading* Jordan and Sons Limited 1983 283-301.

⁵² See OSC Policy 33-601. Also see *Transpacific Sales Ltd (Trustee for) v Sprott Securities Ltd* (2001) OJ 597 (Sup Ct).

decision did not have actual knowledge of the undisclosed price-sensitive information or where the purchase or sale of the securities occurred pursuant to a pre-existing agreement, plan or commitment. These exemptions are also available to a person who or a company which, was acting as an agent for a third party pursuant to a specific order.

- In contrast to these developments in Canada, the defences in the South African legislation do not cover these situations. Perhaps, the South African legislature should adopt similar exemptions to ensure that accused persons who have acted in good faith are not restricted to a few and inadequate defences.⁵³ It is crucial that the South African legislature enact adequate defences or exemptions for insider trading and related practices to avoid prejudice to persons who are incorrectly prosecuted.

6.2.8. The enforcement and effectiveness of insider trading legislation.

Various enforcement organs such as the Ontario Securities Commission (OSC), Integrated Market Enforcement Teams (IMETS), Self Regulatory Organisations (SRO), Intelligent Market Monitoring System (IMM), Canadian Investor Relations Institute (CIRI), Canadian Securities Administrators (CSA) and the Canadian Institute of Chartered Accountants (CICA) have each played a significant role in the effective implementation and enforcement of the insider trading legislation in Canada. The enforcement of insider trading laws in Canada is clearly a shared responsibility involving the federal government, provincial governments and many other securities regulators.

The OSC was established in 1966 as an administrative agency empowered to oversee securities trading and to provide public scrutiny of the investment market place, in order

⁵³ See paragraph 4.5 in Chapter 4 of this dissertation.

to combat illicit practices such as insider trading.⁵⁴ It has several powers which include amongst other things, powers to cease trade orders, issue compliance orders, and impose punitive and administrative penalties in civil cases.⁵⁵ For instance, it may impose administrative penalties ranging from \$100,000 to \$1 million on individuals and \$500,000 to \$1 million on corporations or companies (juristic persons).

The OSC Policy 33-601 was introduced in 1998, to give guidelines relating to employee education, containment of inside information, compliance and restriction of transactions. Firstly, employee education involves education about insider trading and the prohibition thereof, ethical standards and consequences for violating the insider trading provisions. Secondly, containment (protection) of inside information involves limiting unauthorized transmission thereof by restricting access to inside information, keeping information in sensitive areas secure and ensuring that electronic transmission of such information takes place under adequate supervision and control. Thirdly, restriction of transactions involves the use of grey lists, restricted lists and information barriers. Lastly, compliance includes the monitoring and reviewing of trading in the OSC registrants' accounts, monitoring and restricting trade in securities about which the registrant or its employees may possess inside information, requiring all employees to maintain accounts with the employer registrant only, and conducting a periodic review of the adequacy of policies and procedures.⁵⁶

The OSC also requires reporting issuers to report insiders in relation to them within ten days.⁵⁷ In May 1999, the OSC released *A Guide to Insider Reporting*⁵⁸ in an attempt to

⁵⁴ See Welling B *op cit* note 4 363. Also see Mann M D and Lustgarten L A "Internationalization of Insider Trading Enforcement - A Guide to Regulation and Co-operation" in Hopt K J and Wymeersch E (eds) *European Insider Dealing – Law and Practice* Butterworths 1991 368.

⁵⁵ See Ziegel J S (ed) *Studies in Canadian Company Law Volume 2: Corporation and Securities Law in the Seventies* Butterworths 1973 444-449. Also see *International Claim Brokers v Kinsey* (1966) 57 DLR (2d) 357; 55 WWR 672 (BCCA).

⁵⁶ See ITTF report *supra* note 15 15-16. Also see "A Guide to What Constitutes Inside Information" <http://www.uilo.ubc.ca> 22 April 2006.

⁵⁷ See section 107(1) and OSC Rule 55-501(1996) 19 OSCB 821.

ensure compliance with the insider trading prohibition. Moreover, a System for Electronic Disclosure by Insiders (SEDI) was adopted in 2001 to simplify the reporting and filing process of all insiders of the reporting issuer.⁵⁹ It is further submitted that section 135 of the 1990 OSA provides a method by which the OSC, security holders of a reporting issuer or security holders of a mutual fund may, in terms of section 134(3) or (4), institute an action in the name of the issuer or the mutual fund against those who traded unlawfully.

Apart from the OSC, the federal government as part of its efforts to strengthen enforcement of the provisions against illegal insider trading and related practices, created the IMETS in Toronto, Montreal, Vancouver and Calgary to investigate capital markets fraud and insider trading cases. An effective process within the IMETS structure to address unlawful insider trading incorporates the activities of securities commissions such as the OSC, SRO, Department of Justice and police officers who are highly qualified financial investigators.⁶⁰

The IMETS and the proposed *Criminal Code* offences in relation to insider trading and tipping, represent additional enforcement machinery included in the federal government's coordinated and integrated regulatory approach towards curbing insider trading in Canada. With respect to enforcement of criminal sanctions, it is expected that the IMETS are going to develop and enhance case assessment criteria, integrated procedures for speedy addressing and fast tracking of insider trading cases.⁶¹

Another important enforcement organ is the SRO. For purposes of this dissertation, member organizations of the SRO include the Market Regulation Services Inc, *Bourse de*

⁵⁸ See <http://www.osc.gov.on.ca> 22 April 2006 and also see generally Bewsey J and others *The Law of Investor Protection* 2nd ed Sweet and Maxwell Limited 2003 287-295.

⁵⁹ See National Instrument 55-102 (2001) 24 OSCB 4414 and <http://www.sedi.ca> 15 January 2007.

⁶⁰ For a comprehensive discussion see "Federal Strategy to Deter Serious Capital Market Fraud" (June 2003) <http://www.justice.ca/en/new/nr/2003doc30928.html> 18 November 2006.

⁶¹ See ITTF report *op cit* note 15 44 and also see generally Ashe M *Insider Dealing* The Round Hall Press 1992 38-44.

Montreal Inc (an exchange that specializes in options), CIRI, CICA and IMM. These organizations have to date successfully worked with other Canadian securities regulatory authorities in combating insider trading and related practices.⁶²

It should be noted that the courts have also contributed immensely towards curbing insider trading in Canada. This is evidenced by numerous reported cases such as the *Russell J Bennett, William R Bennett and Harbanse S Doman* case which involved approximately \$2, 3 million in losses avoided, pursuant to a sale of Doman Industries Limited shares in 1988, the *Glen Harper* case which involved approximately \$3, 6 million in losses avoided from selling shares of Golden Rule Resources Limited in 1997 and the *MCJC Holdings Inc* case involving the sale of \$20, 4 million in Corel Corporation shares also in 1997. These cases suggest that there is at least some degree of enforcement of the insider trading legislation by the Canadian courts,⁶³ which is in contrast with the South African scenario as has previously been pointed out.

6.3. CONCLUDING REMARKS.

Although it appears that the Canadian insider trading regulatory framework is not always uniform,⁶⁴ it is generally agreed that the Canadian system is comparable to international best practice. Therefore, despite the fact that the insider trading legislation varies from province to province and that enforcement is not the responsibility of a single regulatory organ, many insider trading cases have to date been successfully prosecuted in Canadian courts.

It is against this background that this researcher submits that in order to have adequate insider trading legislation, the South African legislature should draw some meaningful lessons from similar legislation in Canada. The South African legislature would be well

⁶² See ITTF report *op cit* note 15 23-29.

⁶³ See paragraph 6.2.6 of this Chapter.

⁶⁴ There is different legislation in force both federally and provincially. These laws are constantly amended or being reviewed.

advised to adopt the Canadian approach of involving more specialized bodies and securities regulatory authorities by statute to enforce the insider trading prohibition.