LEGAL PROTECTION OF INVESTORS FROM THE CORPORATE MALFEASANCE OF INSIDER DEALINGS: A SOUTH AFRICAN-CANADIAN COMPARATIVE REVIEW

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Ensuring market discipline, integrity, and transparency with the overall aim of protecting the investing public is critical to the wellness of a capital market and a financial system. However, one corporate ill besetting the securities markets in all jurisdictions is insider trading. Apart from being unethical, insider trading disrupts market dynamics. In South Africa, over the years, successive Acts have been enacted, amended, and repealed to ensure discipline and protect the integrity of the nation's securities market. In 2012, the Financial Markets Act of 2012 (FMA) was enacted to improve, among others, the enforcement of insider trading regulation in South Africa. However, the regulation of insider trading and its enforcement in terms of the FMA have been insufficient. This article therefore seeks to benchmark the South African position against Canadian model with the objective of drawing lessons for South Africa. The choice of Canada was informed by the fact that Canada has a well-developed anti-insider trading regulatory framework and presents a case study of international best practices in the regulation of insider trading. Therefore, the conclusion in this article is that with creative and appropriate reforms of the FMA, using the Canadian model, the investing public will be adequately protected against insider trading, and investors' confidence and the financial markets' integrity and efficiency will be better enhanced.

Keywords: insider trading; regulation; South Africa; Financial Markets Act (FMA); Canada; Ontario Securities Act (OSA).

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Introduction

The securities market represents a very important component of the financial system in every free-market economy. As they are mainly created to generate long-term investment capital, they play a very important role in every country.[1] They also enhance industrial growth and aid socio-economic transformation by encouraging free enterprise, promoting good governance, creativity, and advancement.[2] Therefore, ensuring market discipline, integrity and transparency with the overall

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[1] Anthony Otaru Abuja, *Efficient dispute resolution, key to strong capital market, says CJN*, The Guardian, 24 February 2016 (Dec. 21, 2021), available at http://www.ngrguardiannews.com/2016/02/efficient-dispute-resolution-key-to-strong-capital-market-says-cjn/.

[2] *Id.*

protection of the investing public is critical to the wellness of a capital market and the financial system. However, one of the corporate ills besetting the securities markets in all jurisdictions is insider dealing.[3] Apart from being unethical, insider dealing disrupts market dynamics.

Over the years in South Africa, successive Acts have been enacted, amended, and repealed to ensure discipline and protect the integrity of the nation's securities markets. In 2012, the Financial Markets Act of 2012 (FMA) was enacted to improve, among others, the enforcement of insider trading regulation in South Africa.[4]

In the 1990s, the securities markets in South Africa experienced high levels of market-abuse practices such as insider trading.[5] Insider trading was first prohibited in South Africa in terms of section 233 of the Companies Act of 1973 (CA 61 of 1973),[6] which was enacted based on several recommendations made by the Van Wyk de Vries Commission of Inquiry into the Companies Act in its Main Report.[7] Section 233 made it a crime to deal in the shares of a company while an insider had price-sensitive information which had not been made public yet. However, section 233 was ineffective in regulating insider trading. This was made more obvious by the fact that there was no concluded and successful prosecution under this section.[8] Then, section 440F in the Companies Amendment Act 78 of 1989 was enacted. It contained a general anti-fraud provision and prohibited trading by insiders and those who got their information from insiders about the securities of a company before the information was made public.[9] Later, this was replaced by the Second Companies Amendment Act 69 of 1990. The last two Acts "raised more questions than they were able to answer."[10]

The above and other flaws resulted in the enactment of the Insider Trading Act (ITA) in 1998, based on the recommendation of the King Task Group in Insider Trading Legislation.[11] However, this Act also failed to provide a permanent solution to insider dealings in South Africa. In the Act, the definitions of "insider" and "inside information"

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3 Insider dealing is also known as insider trading. The terms are used interchangeably in this article.

4 Howard Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, 35(2) Obiter 254, 271 (2014).

5 Howard Chitimira, *The Regulation of Insider Trading in South Africa: A Roadmap for Effective, Competitive and Adequate Regulatory Statutory Framework*, unpublished LLM thesis, University of Fort Hare (2008), at 29 (on file with University of Fort Hare's Library System).

6 Companies Act 61 of 1973 (S. Afr.).

7 Chitimira, *supra* note 5, at 20–21.

8 Stephanie Luiz, *Insider Trading: A Transplant to Cure a Chronic Illness?*, 2(1) S.A. Merc. L.J. 59, 59 (1990).

9 Stephanie Luiz, *Prohibition Against Trading on Inside Information – The Saga Continues*, 2(3) S.A. Merc. L.J. 328, 328 (1990).

10 Chitimira, *supra* note 5, at 20–21.

11 Hereinafter known as the "King Task Group." Richard Jooste, *A Critique of the Insider Trading Provisions of the 2004 Securities Services Act*, 123(3) S.A. L.J. 437, 438 (2006).

were "cumbersome and counter-intuitive."[12] Finally, it was heavily criticized by academics because very little was achieved in enforcing its provisions in court.[13]

In 2005, the ITA was repealed by the Securities Services Act (SSA). Unfortunately, the SSA also had many flaws like the ITA in the sense that there were a lot of uncertainties. The definitions of "insider" and "inside information" were also clumsy as they were in the ITA. Thus, the Act was fundamentally flawed and incoherent.[14] The Act failed and only provided for the imposition of fines and other penalties by the Registrar (or Deputy Registrar) of Securities Services in section 95 and by a court during enforcement proceedings, and for the establishment of an "enforcement committee" in section 97. Apart from these, there were hardly any other enforcement measures provided for such as "disgorgement of profits" or whistleblowing.[15]

Therefore, against the backdrop of the above, it seems that the regulation of insider trading and its enforcement in terms of the FMA are insufficient and there is a compelling need for a robust legal framework that would guarantee a fair and economically safe securities market built on sound policy and practical consideration. Although lawyers, academics, and economists have done much work on insider dealings, this question has not been answered satisfactorily.[16]

This article therefore seeks to interrogate whether the FMA offers adequate protection to the investing public in South Africa and then highlight the weaknesses in the FMA Specifically, the South African position will be benchmarked against the

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[12] These were interconnected definitions, but they were circular. To know if information qualified as "inside information," one had to know the definition of an "insider," and vice versa. "Inside information" was defined as "information obtained or learned as an insider." An "insider" was "a person who has inside information." The provisions of the Act that imposed civil and criminal liability operated based on the meaning of "inside information." Thus, the Act was essentially not coherent at all.

[13] *Id. See* also Stephanie Luiz & Kathleen van der Linde, *The Financial Markets Act 19 of 2012: Some Comments on the Regulation of Market Abuse*, 35(4) S.A. Merc. L.J. 458 (2013); Patrick Osode, *The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?*, 44(2) J. Afr. L. 239 (2002); and Howard Chitimira, *A Historical Overview of the Regulation of Market Abuse in South Africa*, 17(3) Potchefstroom Electron. L.J. 936 (2014).

[14] *Id.*

[15] Disgorgement of profits practically entails enforcing restitution of all profits made in relation to the impugned transactions the investors allegedly injured. How it works and how effective it differs from jurisdiction to jurisdiction. *See* Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66(1) Va. L. Rev. 1, 14 (1980). Whistleblowing occurs where workers report wrongdoings at the workplace. It is usually in the public interest. Thus, whistle blowers are legally protected. They cannot be treated unfairly or lose their jobs. Whistleblowing for employees, Gov.uk, 2 July 2015 (Dec. 21, 2021), available at https://www.gov.uk/whistleblowing/what-is-a-whistleblower.

[16] Kwasi Opoku, *What Is Really Wrong With Insider Trading?*, unpublished LLM thesis, University of Cape Town (2014), at 7 (on file with the University of Cape Town's Library System). It seems that the offender must know that he is contravening the insider trading provisions of the FMA before he can be liable in terms of the FMA. This is a problem because like the SSA, the FMA does not mention any presumptions that can be used to improve the prosecutions of insider dealings-related cases in South Africa. Moreover, the FMA duplicates several of the flaws in the SSA.

Canadian model with the objective of drawing lessons for South Africa to improve on the current level of legal protection offered to investors in the country.

Furthermore, the authors will argue that with the creative and appropriate reforms of the FMA, drawing inspiration from the Canadian model, the investing public will be adequately protected against insider trading and investors' confidence and the financial markets' integrity and efficiency will be better enhanced. The choice of Canada was informed by the fact that Canada has a well-developed anti-insider trading regulatory framework and presents a case study of international best practices in the regulation of insider trading. Its framework is rigid, but effective. Moreover, Canada has better detection and enforcement mechanisms. Furthermore, it has a better criminal justice system which can ensure the successful prosecution of offenders. However, the authors will specifically focus on the Ontario Securities Act (OSA)[17] and the Canada Business Corporations Act (CBCA).[18]

The next section explores the regulation of insider trading in South Africa.

1. Legal Frameworks of Insider Trading in South Africa

The core objective of this section is to highlight the legal framework for the regulation of insider trading in the South African securities markets with the intention of drawing attention to its inherent flaws. Before embarking on this analysis however, it is important to discuss the meaning and nature of insider trading; articulate the arguments for and against its regulation; and briefly give a chronological narrative of insider trading regulation in South Africa.

1.1. Definition of Terms

The use of the terms "insider dealing" and "insider trading" could be misleading.[19] They are used to refer to the buying and selling of a company's securities by persons associated to it (insiders), who possess "price-sensitive" information that is not public, and which they obtained as a result of such association.[20] Dealing or trading by insiders on its own is not wrong; in most jurisdictions, insiders can trade in securities

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17 Ontario Securities Act of 1990.

18 Canada Business Corporations Act of 1985. This is because insider trading is regulated on a provincial basis in Canada and analysing the legislation of all the provinces will make the scope of this research too wide. Thus, it is a suitable choice. The South African Parliament can get good ideas from this framework and improve the anti-insider trading regulatory framework we have in South Africa. Another reason is that the writer can speak and understand its two official languages: French and English. Thus, there are no language barriers.

19 Farouk H.I. Cassim et al., *The Law of Business Structures* 928 (2012).

20 *Id.* The previous approach to this practice was to govern the conduct of directors and prescribed officers. Now, the approach is to regulate all trading on "inside information," not only by "insiders," but also by persons who have received inside information from "insiders." These people are known as "secondary insiders" or "tippees." They include those who wrongfully gained the information. Thus, it is generally more accurate to speak of "trading on inside information," rather than of "insider trading."

of companies with whom they are associated as long it is not done on the basis of non-public material information for their personal benefit.[21]

To understand the nature of insider trading, one must first comprehend the value of information in the capital markets. Capital markets rely on information to determine the value of shares traded there. According to the efficient capital market hypothesis, a company's share price correctly shows all available information about a company's financial future.[22] Thus, market participants can be confident that share prices correctly reflect a company's prospects, and this will safeguard the efficient apportionment of capital resources in that market. An insider dealer's aim is to deal in shares when he has non-publicized "price-sensitive" information which has not affected the share price yet. Insider dealing is therefore a "white-collar" crime. This kind of crime involves a person committing illegal acts by non-physical means and by concealment, to obtain money or property, or to avoid loss thereof, or to obtain any business or personal advantage.[23]

1.2. Why Should Insider Trading Be Regulated and What Are the Arguments Against its Regulation?

It is important to note from the outset that the securities market aids the stimulation of investment and economic growth in an economy. It provides a conducive environment where sellers who make secondary offers of securities to the public can meet with willing buyers and trade. Thus, the regulation of insider trading is seen as a function of the financial markets.[24]

Nonetheless, the literature on the debate as to whether insider trading should be regulated is huge. Two opposing schools will be mentioned here. The supporters of the regulation of insider trading argue that it improves market efficiency, and it speeds up the correct pricing of securities. Thus, it improves the economy's distribution of capital investment. It also minimizes the volatility of securities' prices.[25]

The opinion that there is nothing wrong with insider trading was first expressed by Manne.[26] He was an American lawyer and economist and might be the most quoted critic of the regulation of insider dealings. He argued that insider dealing is beneficial

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21 Margaret Smith, *Insider Trading*, Library of Parliament, 22 December 1999 (Dec. 21, 2021), available at https://publications.gc.ca/site/eng/9.561274/publication.html.

22 Derek Botha, *Control of Insider Trading in SA: A Comparative Analysis*, 3(1) S.A. Merc. L.J. 1, 64 (1991).

23 *Id.*

24 Cassim et al. 2012, at 931. This is why governments and financial markets around the world allocate substantial resources towards regulating insider trading. The main aim of regulating insider trading is to achieve market efficiency and competitiveness.

25 *Id.* Moreover, they argue that insider trading is an efficient and justifiable method of compensating managers for unveiling the information in the first place. Thus, it benefits the firm and society at large because it creates an incentive to be ingenious.

26 *See* Henry G. Manne, *Insider Trading and the Stock Market* (1966).

in the economic sense and should not be regulated. His arguments were based on two crucial issues.[27] First, he submitted that share prices efficiently show all information about a company through insider dealing, thus, increasing the informational efficiency of the market. Second, insider dealing stimulates entrepreneurial activities in large companies which have bureaucratic structures. This creates opportunities for active capitalist economics.[28]

Even if Manne's arguments have merit, the point in regulating insider dealings is to boost investors' confidence in the capital markets. Not every instance of insider dealing can be prevented; it can only be regulated to ensure the integrity of capital markets. Regulators are not capable of controlling people's will and choices. Insider trading is therefore usually detected where an instance of insider dealing has substantial, noticeable consequences such as a sudden fall in the price of a company's securities triggering an investigation, or where a whistle blower or other mechanisms expose insider dealings.[29] Insider dealing is nonetheless regulated in most countries where free market enterprise holds sway so that investors can be confident enough to invest their assets in the securities markets.[30]

Another argument in favor of regulating insider dealings is that the insiders hold a position of trust, and thus, they should not be allowed to abuse that position to benefit themselves to the detriment of shareholders who are the beneficiaries of that trust.[31] Moreover, the argument that the use of such information for personal gain is a normal benefit of being associated with the company has been rejected because of "commercial morality." Furthermore, it has been argued that the core issue in insider trading is the breach of a fiduciary duty owed by the insider to his company based on their fiduciary relationship. This view underlies the misappropriation theory.[32]

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27 Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53(7) Va. L. Rev. 1425 (1967).

28 *Id*.

29 For instance, say we have a very small company. The inside information is such that it will not have much impact on the price of the company's securities. Also, there is nothing so unusual about the trading. The profit made from trading on the information is R5000. In this instance, the Johannesburg Stock Exchange (JSE) and the Financial Sector Conduct Authority (FSCA) might not kick its mechanisms into motion and start an expensive trial or administrative proceedings against the offender. They may not even detect it in the first place. Yet, an insider trading offence may have been committed. Thus, it is usually where trading on such information has a big impact on the price of securities or a big loss is avoided or a big profit is made that the JSE might smell a stinking fish and investigate. This is probably the same situation in other jurisdictions across the world, because the investigation and prosecution of these cases are expensive.

30 Other arguments in favour of insider trading include notions of morality, fairness, and market integrity. *See* Cassim et al. 2012, at 928.

31 *Id*. at 929.

32 *Id*. The misuse of inside information by "tippees," can be placed within this theory as well. They misappropriate inside information to their benefit. However, the misappropriation theory provides for criminal liability of the offender, and deems the wrong done to the company. It renders the offender

According to the misappropriation theory, insider dealing amounts to the theft of valuable corporate property from the rightful owner – the company.[33] Thus, insider dealings should be regulated. Whatever gain made by the insiders without the rightful owner's permission belongs to the company.[34] Moreover, insider trading could harm the company. It can incentivize the managers to manipulate the prices of the company's securities.[35] It could also incentivize managers to minimize their losses when the company is down.[36]

Furthermore, fairness requires equal opportunities. The natural unfairness of insider trading is the reason why it should be regulated. The insider who has inside information has an unfair advantage over the other person who is not privy to the same information. This advantage cannot be attributed to any merit or industry that justifies it.[37]

Additionally, insider dealing reduces the confidence of investors in a financial market in the sense that it seriously corrodes the integrity of the markets.[38] This is because the investing public would be at a disadvantage, thus, potential investors are driven away by this practice.[39] The most crucial function of financial markets is to act as a pathway for channeling capital into the economy for development. Obviously, investors must have confidence in the markets for this function to be fulfilled. Insider dealings therefore hurt the integrity of the market, and this is harmful to the economy. The benefit of increased informational efficiency of the market as

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liable to the company. The authors also mention that the theory is deficient in the sense that it indirectly protects persons trading in shares, by enforcing the insider's wrong to the company. Also, they argue that for insider trading to constitute a wrong to the person with whom the insider trades, this must be as a result of a duty to disclose the inside information to them.

33 Opoku, *supra* note 16, at 4.

34 *Id*. However, a company is a separate legal entity from its shareholders in terms of *Salomon v. Salomon*, [1896] U.K.H.L. 1 (Eng.). The common law position on misuse of inside information is based on *Percival v. Wright*, [1902] 2 Ch. 401 (Eng.), which held that directors have no general duty to disclose price-sensitive information to individual shareholders, but only to the company itself. This decision has been criticized as being "calamitous."

35 Opoku, *supra* note 16, at 18. For example, they could time the release of information or withhold it. Managers could also be diverted from performing their duties to the company.

36 *Id*. Besides, a company depends on its reputation to raise capital. However, insider trading reduces a company's reputation of integrity. Thus, the incentive to avoid "flops" by the company is reduced.

37 *Id*.

38 Cassim et al. 2012, at 930.

39 Opoku, *supra* note 16, at 3. Investors would be hesitant to invest in a market where insiders can trade on inside information to make undue profits or avoid personal losses at their expense, with no legislative regulation. For instance, corporate insiders may perform activities that could lower the long-term value of the company and harm shareholders' investments. They may make investment and production decisions that may increase the volatility of a company's securities' prices and destabilise the firm's ability to take advantage of price swings. This clearly discourages corporate investment and reduces market efficiency.

a result of insider dealing[40] is outweighed by harm caused to the economy at a more fundamental level.[41]

The above reasons have made the call to criminalize all dealings or trading on inside information plausible.[42] The confidentiality of undisclosed inside information identifies "price-sensitive" information that may not be used.[43]

In the next section, the historical and chronological developments of the regulation of insider trading in South Africa are examined.

2. The Regulation of Insider Trading in South Africa

2.1. Companies Act of 1973 (CA 61 of 73)

The first attempt to regulate insider dealings in South Africa was in terms of section 233 of CA 61 of 73.[44] Prior to this, certain information about directors' shareholding had to be recorded by the company. The move towards regulating insider dealings was based on the report of the Van Wyk de Vries Commission of Inquiry into CA 61 of 73. This Commission reported that insider trading is a corporate "white collar" crime, and all its forms should be condemned.[45] It found that directors, officers, employees, and other persons engaged in insider dealings. Moreover, it was practiced in relation to other interests and unlisted securities of a company, apart from listed securities.[46]

Importantly, section 233 criminalized insider dealings and provided that if any director, past director, officer or person knows any information that may materially affect the price of securities, and he deals directly or indirectly in those securities for his benefit, he commits an offence.[47] Section 441 of this Act provided that an offender could face a maximum of R8000 or two years' imprisonment, or both.[48]

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40 An argument Manne advances as mentioned above.

41 Cassim et al. 2012, at 930.

42 It looks like this was taken up in section 78(3)(a) of the FMA. It says: "Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such person is an insider, commits an offence." Thus, the offender does not have to be an insider or necessarily have inside information.

43 Cassim et al. 2012, at 931.

44 Companies Act 61 of 1973. This position differs from Ontario, Canada. The first attempt to regulate insider trading in Canada was in the OSA of 1966. *See* Howard Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, 5(4) Mediterr. J. Soc. Sci. 144 (2014).

45 Jan Van Wyk de Vries et al., *Commission of Enquiry into the Companies Act: Supplementary Report and Draft Bill* (1972), para. 44.57.

46 *Id*.

47 Botha 1991, at 5.

48 *Id.*

One of key criticisms levelled against section 233 is that it only provided for insider trading committed by primary insiders such as directors, employees, and former directors. Secondary insider-tippers and "tippees" were excluded. Thus, insiders who encouraged or discouraged other people from dealing in certain securities based on the inside information they had could not be held liable under section 233.[49] The person who received a tip or who was encouraged to or discouraged from dealing in such securities based on such information could not be held liable.[50] Other people not directly or indirectly involved in management or not employees, were not prevented from trading in securities based on inside information they could possibly have. Examples are the financial advisors or attorneys that advise the company.[51]

The CA 61 of 73 was amended in 1989, and a new chapter regulating securities was inserted.[52] This chapter contained a prohibition of insider trading in relatively wide terms.[53] Section 440B created the Securities Regulation Panel (SRP) which supervised dealings in securities, received and dealt with representations. It seemed that the legislature wanted the SRP to play the main role in monitoring and investigating insider dealing activities. The penalties were also substantially increased. In terms of section 441, they went up from R8000 to R500 000 and from two to ten years imprisonment, or both. However, the effectiveness of such was questionable as yet again, no clear definitions of "insider" and "inside information" were given.

Section 440F of the Act which defined insider trading offences had its roots in American law. However, the American statute could not help in interpreting this provision because of its imprecise language. One of the grounds on which the Act was criticized was its "questionable draftsmanship and conceptual deficiencies."[54] This section never commenced however; it was soon replaced by a new section 440F in terms of the Second Amendment Act 69 of 1990, due to fears that the previous provisions were insufficient.[55]

In 1990, the CA 61 of 73 was further amended to correct the flaws of section 440F. It aimed to shed more light on the scope of the regulation of insider dealings. The added provisions to the Act were better drafted than the previous provisions, yet, they attracted criticism, though they attempted to provide a statutory definition of insider trading.[56]

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49 Chitimira, *supra* note 5, at 29.

50 *Id.* This criticism was probably taken up by Parliament in terms of section 78(5). It says: "An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence."

51 Chitimira, *supra* note 5, at 29.

52 *See* chapter XVA.

53 Botha 1991, at 32.

54 *Id.* at 16.

55 *Id.* at 32.

56 *Id.* at 16.

Section 440F was revised extensively. It applied to all dealings in securities. The definition of "securities" included company shares, stock debentures convertible into shares, rights or interests in a company, among others. One criticism that was levelled against this section was that it only applied to companies. Other entities including government and semi-government ones were clearly excluded, like it was in section 233 discussed above. One notable improvement on previous provisions nevertheless was that it covered insider dealings by "tippees." Thus, a party who knew information had been obtained in one of the prohibited ways and traded based on that, would have been guilty of insider dealing in terms of this provision.[57]

In addition, the 1990 Act did not provide for a case where the insider was acting in the best interests of the company. Apparently, all forms of insider dealings were illegal. Thus, despite the enactment of this Act, the regulation of insider dealings in South Africa remained problematic.[58]

2.2. Insider Trading Act 1998 (ITA)

"The King Task Group into Insider Trading Legislation" was appointed by the Reserve Bank's Policy Board for Financial Services and Regulation on the request of the Ministry of Finance.[59] The mandate of the King Task Group was to investigate the problem of insider trading in South Africa's securities markets. It recommended that a separate Act be enacted to help regulate insider trading. In addition, it recommended that insider trading regulation should apply to all securities and listed financial instruments.[60] Thus, the ITA was enacted after Parliament adopted the final report of the King Task Group. Moreover, the Report recommended that liability for insider trading should be extended to secondary insiders. Tougher penalties were also recommended. It also recommended a fine of R2 million or imprisonment for a period not exceeding 10 years or both. Again, it recommended that the proposed Act should provide for civil liability. Finally, it proposed that the Financial Sector Conduct Authority (FSCA)[61] be entrusted with the duty of administering the Act. However, this Act did not conclusively deal with the menace of insider trading.[62]

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57 Botha 1991, at 34–35.

58 *Id*. at 37. This is shown by the fact that there was not a single conviction. The first case where prosecution was attempted was the case involving Carol Botha of Waterkloof Agricultural Holdings in Pretoria and Charles Owen Wiggill (CW), the managing director of Nissan Manufacturing, a wholly owned subsidiary of Automakers. It was alleged that Carol made a profit of R947 634 by dealing in 700 000 shares of Automakers on the basis of unpublished price-sensitive information that she obtained from Charles. However, it took five years for them to be prosecuted because of the inadequate insider trading prohibition in the Act.

59 Hereinafter known as the "King Task Group." *See* Webber Wentzel, *South Africa: Insider Trading Act*, Mondaq, 14 April 2000 (Dec. 21, 2021), available at http://www.mondaq.com/southafrica/x/8564/securitization+structured+finance/Insider+Trading+Act.

60 King Task Group into Insider Trading Legislation, Final Report by the King Task Group into Insider Trading Legislation (1997), para. 3.3.1. Hereinafter known as the "King Task Report."

61 The FSCA was formerly known as the Financial Services Board.

62 *Id*.

2.3. Securities Services Act of 2005 (SSA)

The SSA commenced in February 2005. It repealed the ITA and the Stock Exchange Control Act (SECA)[63] and consolidated them into one Act. It also amended the repealed laws to improve some of their provisions. The main aim of the Securities Services Act (SSA) was to increase confidence in South Africa's securities markets, thereby, ensuring a stable financial sector and enhancing the international competitiveness of securities' services in South Africa. However, it has been submitted that the SSA unfortunately failed to address some of the issues identified in the ITA.[64] Also, it unwittingly introduced more uncertainties into the law on insider trading.[65] Moreover, it significantly tightened insider trading regulation in South Africa, in its aim to enhance confidence in South Africa's financial markets.[66]

The SSA defined an "insider" as a person who possesses inside information. A person is then defined to include a trust and a partnership.[67] Thus, the scope of insider trading prohibition was extended to cover juristic persons, including companies incorporated outside South Africa. This position was better than the ITA which simply defined an "insider" as an "individual who has inside information."[68]

The SSA retained the insider trading offences which were in the ITA.[69] In relation to the offence of dealing for one's own account, it is unclear whether this prohibition applied to unlawful transactions relating to other money-market instruments and derivatives. This uncertainty still exists in the FMA.[70]

In terms of the ITA, an accused had the right to raise any other defense apart from the ones set out in the SSA. The SSA however, left out this right to the accused. Cassim argues that this was bad because there may be cases where one could justifiably rely on a defense not provided for in the SSA.[71] Moreover, the ITA's insider dealing prohibition applied mainly to listed securities. This was a flaw that was carried over to the SSA.[72]

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63 Stock Exchange Control Act 1 of 1985 (S. Afr.).

64 Chitimira, *supra* note 5, at 21.

65 *Id*.

66 Rehana Cassim, *Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?*, 19(1) S.A. Merc. L.J. 44, 44 (2007).

67 Sec. 1 of the SSA.

68 Cassim 2007, at 44. A "person" in terms of section 2 of the Interpretation Act 33 of 1957, is defined as including the following. Any divisional council, municipal council, village management board, or like authority. Any company incorporated under any law. Anybody of persons corporate or incorporate.

69 *See* the offences listed in section 4.2 above.

70 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264.

71 *Id*. at 64.

72 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 148. This is also the position in Canada.

2.4. Financial Markets Act of 2012 (FMA)

The SSA was repealed by the FMA to improve the regulation of insider trading, among others. However, insider trading regulation in South Africa has been "scant and inconsistent" till date. This is despite the fact that the FMA was enacted as a separate legislation to consolidate all previous insider trading provisions of the SSA.[73]

Under the FMA, anyone who knows he has, and reveals improperly "non-public price sensitive information", will incur civil or criminal liability.[74] Criminal or civil liability could also be incurred by anyone who encourages or discourages another person from dealing in, or deals directly or indirectly for his benefit or another's in securities to which the aforementioned information relates, or where the price of such securities could be affected by such dealing. The SSA prohibited these same practices.[75] However, the FMA does not provide for any new crimes relating to insider trading.

Then, the question at this juncture is: What is insider trading in terms of the FMA?

The definitions of "inside information" and "insider" must first be given. Section 77 defines "inside information" as specific information which an insider learns, and if made public, would have a material effect on the price or value of any listed securities. On the other hand, an "insider" is defined as a person who has inside information because he is a director or shareholder or employee of the issuer of securities. Also, if you have access to inside information by reason of your employment or office or profession, you are an insider. Moreover, if you know the source of certain information as a director or shareholder or employee of the issuer of securities, you are an insider. Thus, there are two types of insiders: there are the primary insiders who get the information directly from a primary source – the company, and they include directors, shareholders, and employees; there are also the secondary insiders who get their information from a primary insider.[76]

Apart from individuals, the definition of "person" in the FMA covers partnerships and trusts, as well as corporate and other legal entities. Thus, insider trading can also be committed by an individual, partnership, trust, company, or other legal entity who misuses inside information.[77] Chitimira however submits that the use of the pronouns, "he" or "she" in some provisions of the FMA might cause uncertainty by implying that those provisions only apply to individuals. The use of such pronouns could imply that the definition of "person" is restricted to natural persons. This flaw was in the SSA and still remains in the FMA.[78]

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73 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 271.

74 *Id*. at 254.

75 *See* sec. 73 of the SSA.

76 Piet Delport, *Securities Law*, unpublished LLB lecture (April 2015). *See* also Nothemba Lugaju, *The Effectiveness of the Insider Trading Regulation in South Africa*, unpublished LLM thesis, University of Pretoria (2018), at 10 (on file at O.R. Tambo Law Library, University of Pretoria).

77 *Id*. at 259. *See* Jooste 2006, at 438.

78 *Id*.

Section 78 of the FMA lists five different scenarios where a person would be guilty of insider trading as follows:

i. If they are an insider and they know they have inside information and deal directly or indirectly or through an agent for their benefit in listed securities to which the information relates;

ii. If they are an insider and they know that they have inside information and deal directly or indirectly or through an agent for another person's benefit in the listed securities to which the information relates;

iii. If they deal for an insider directly or indirectly or through an agent in the securities to which the information relates or which is likely to be affected by it and they know the other person is an insider;

iv. If they are an insider and they know they have inside information and disclose it to another person; and

v. If they are an insider and they know that they have inside information and they encourage or cause another to or discourage or stop another from dealing in the information to which the information relates or which are likely to be affected by it.

Section 78(5) of the FMA offers no defense to the disclosure offence, such as the so-called "closed circles defense" as it is referred to in the United Kingdom.[79] Nevertheless, the person accused of insider dealing is meant to have known that he had inside information in order to be held liable based on this provision. A possible defense the accused could raise therefore is that they did not know of the price-sensitive character of the information at the time they encouraged or discouraged anyone to deal.[80]

Despite the existence of the above provisions, insider trading regulation has been ineffective till date in South Africa.[81] This may be aggravated by the fact that one would only be guilty of insider trading if they knew that they violated directly or indirectly, the insider trading provisions of the FMA.[82] Thus, they need to know of the insider trading offence before they can be liable for it. Moreover, like the SSA, the FMA does not provide any presumptions that may enhance prosecution and secure convictions in insider trading cases.[83] Certain difficulties were encountered in previous insider trading provisions because of factors such as double jeopardy, over-criminalization in

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[79] Cassim 2007, at 65. The "closed circle" defence can be raised by a person who had a reasonable basis for believing that the information they had was already disclosed broadly enough so that no party to the impugned transaction will be prejudiced because they did not have the same information. *See* Keith Wotherspoon, *Insider Dealing – The New Law: Part V of the Criminal Justice Act 1993*, 57(3) Mod. L. Rev. 419, 430 (1994).

[80] Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264–65.

[81] *Id*. at 257.

[82] *Id*. The requirement of knowledge is flexibly enforced in Canada, when you consider various insider trading defences and exemptions that are available. *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 148.

[83] *Id*. This position differs from that in section 440F of CA 61/73 which had two rebuttable presumptions to assist the prosecution in securing a conviction. See the discussion of this provision above.

different Acts, and repetition of same provisions. Thus, mere consolidation of insider trading provisions into the SSA, and then, the FMA, does not on its own improve insider trading regulation in South Africa. The FMA duplicated several of the flaws in the SSA. Thus, whether the FMA enhances the regulation of insider trading and protection of investors remains to be seen.[84]

The Financial Sector Conduct Authority (FSCA)[85] has the discretion to make market-abuse rules (which include insider trading rules) after consulting with the Directorate of Market Abuse (DMA).[86] Apart from this, the FSCA is not expressly empowered in the FMA to make its own rules regarding the enforcement of criminal and administrative sanctions for insider trading offences. This flaw was borrowed from the SSA and reintroduced in the FMA. No alternative ways of empowering the FSCA to make its own rules relating to the enforcement of criminal and administrative sanctions for insider trading offences were provided.[87]

The FMA also includes provisions related to foreign "regulated markets." "Regulated market" refers to any market – domestic or foreign – which is regulated in terms of the laws of the country where it exists as a financial market. Thus, any person who commits an insider trading offence in a foreign financial market may be prosecuted in South Africa. This is not limited to where there is a territorial link between the commission of the offence and South Africa. Although this extra-territorial application looks like a good step to regulate cross-border insider trading activities, it has not been used much. A probable reason is the lack of resources. Chitimira however argues that insider trading prohibition should apply either where a territorial link is present because the offender is at the relevant time physically present in South Africa, or he was acting through an intermediary who is in South Africa or because the prohibited conduct occurred in South Africa.[88]

Another problem with the extraterritorial application of the FMA's insider trading provisions is timeous recognition and enforcement of foreign judgments in cross-

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[84] *Id*. Market-abuse rules include the FSCA's duties to make relevant rules concerning the following: i) The administration of insider trading provisions; ii) The manner in which insider trading investigations are to be conducted; iii) The notifications of any civil monetary compensatory amounts received; iv) The procedure for lodging and proving claims; v) The administration of trust accounts and distribution of payments in respect of claims; vi) The meetings of the DMA which are generally designed to ensure the DMA and the FSCA are able to perform their duties dealing with the way in which inside information should be disclosed, and with the conduct expected of persons in relation to such information.

[85] The FSCA is a statutory-backed board established in terms of Financial Services Board Act 97 of 1990 as amended. The Board's functions, among others, is to supervise and enforce compliance with laws regulating financial institutions and the provision of financial services.

[86] Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 257.

[87] *Id*. at 260.

[88] *Id*.

border insider trading cases.[89] Chitimira suggests that South African courts should recognize relevant foreign laws where necessary to provide for timeous recognition and enforcement of foreign insider trading judgments.[90]

In addition, the phrase "through an agent" were inserted into some of the insider dealing provisions in the FMA.[91] Thus, any insider who knowingly and indirectly practices insider trading for his own benefit is criminally liable. This is a positive development. However, the question of who exactly an agent is, is unclear. This uncertainty can assist other persons who knowingly deal in listed securities through agents, and such agents themselves, to escape liability. This flaw existed in the SSA. It also remains unsolved in the FMA.[92]

In the FMA, if one is found guilty of insider trading, one would get a fine not exceeding R50 million or imprisonment not exceeding 10 years or both. Criminal sanctions were increased from R2 million under the ITA to R50 million under the SSA, and under the FMA.[93] Relatively high penalties are a positive improvement, however, even the R50 million fine and 10 years imprisonment cannot be an effective deterrent, standing alone. Prospects of huge profits may overshadow the deterring effects of the stipulated fine and/or prison sentence. For instance, companies may regard it as another business expense, especially where the profits gained exceeds the penalty imposed. Moreover, perpetrators may plead guilty and be convicted of lesser offences. This may have an adverse effect on any impact a criminal sanction could have. Furthermore, the difficult burden of proof required in criminal prosecutions has restricted the prosecution of insider trading offences to some extent in South Africa. This is not likely to change in future.[94]

Additionally, under the FMA, violation of insider dealing provisions can result in civil liability. The FMA's provisions are similar to those of the SSA in this respect. The only exception being that the words "compensatory and punitive purposes" are absent in the FMA.[95] A recent case illustrating this point is the case of Steinhoff International Holdings, a South African-German-Dutch international retail holding

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89 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264.

90 This is provided for in section 1(1) of the Law of Evidence Amendment Act 45 of 1988. For example, there is a South African who is an insider and domiciled in New York. He contacts a broker in SA to buy securities on the JSE to hide the illegal nature of such dealing. The FSCA and or a court can cooperatively rely on the US Securities and Exchange Commission (SEC) to investigate and prosecute such person for insider trading. Furthermore, if a judgment relating to such offence is given in South Africa, it will have extraterritorial force in the U.S. *See* Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 260.

91 Just as it was in the SSA.

92 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264.

93 *Id*. at 269.

94 *Id*.

95 *Id*. *See* the discussion of the provisions of the SSA above.

company listed on the German and South African stock exchanges. The Financial Sector Conduct Authority (FSCA) found that on November 30, 2017, shortly before the much-publicized significant decrease in the market value of Steinhoff shares, Markus Jooste, the then Chief Executive Officer who was privy to Steinhoff-related inside information disclosed some of the information in a "warning SMS" encouraging four individuals close to him to dispose of their Steinhoff shares prior to the publication of the information to the rest of the market. On the heels of this disclosure and prodding from Jooste, the three recipients of the "warning SMS" sold their shares in Steinhoff. In October 2020, FSCA fined former Steinhoff CEO Markus Jooste and three others at least R241 million for insider trading-related breaches that date back to 2017.[96] Jooste appealed the FSCA's decision to the Financial Sector Tribunal (FST) but the FSCA's decision was upheld.[97]

In the next section, the Canadian experience in the regulation of insider dealings is examined and the objective is to draw lessons from Canada to improve on the current level of protection offered investors in South Africa. The choice of Canada was informed by the fact that Canada has a well-developed anti-insider trading regulatory framework and presents a case study of international best practices in the regulation of insider dealings.[98] The authors will however specifically focus on the Ontario Securities Act (OSA)[99] and the Canadian Business Corporations Act 9 (CBCA).[100]

3. Regulation of Insider Trading in Canada

Canada has a well-developed anti-insider trading regulatory framework. Thus, the focus of this section is to examine Canada's model which is believed to be one of the international best practices in insider trading regulation.[101]

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96 *See* Financial Sector Conduct Authority (FSCA), FSCA fines Mr Markus Jooste and three others around R241 million for insider trading related breaches, FSCA Press Release, 30 October 2020 (Dec. 21, 2021), available at https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20FSCA%20fines%20Markus%20Jooste%20and%20others%20%20R241%20million%20for%20insider%20trading%20breaches%2030%20October%202020.pdf.

97 *See* Helena Wasserman, *Markus Jooste fights back against R162m insider trading fine*, Business Insider South Africa, 15 February 2021 (Dec. 21, 2021), available at https://www.businessinsider.co.za/markus-jooste-fights-back-against-insider-trading-fine-2021-2; Lukanyo Mnyanda, *Tribunal confirms insider trading finding against Markus Jooste*, Business Day, 15 December 2021 (Dec. 21, 2021), available at https://www.businesslive.co.za/bd/companies/retail-and-consumer/2021-12-15-tribunal-confirms-insider-trading-finding-against-markus-jooste/.

98 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 144.

99 Ontario Securities Act of 1990 (Can.)

100 Canadian Business Corporation Act of 1985. This is because insider trading is regulated on a provincial basis in Canada and analysing the legislation of all the provinces will make the scope of this work too wide.

101 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 144.

The overarching objective here therefore is to draw lessons for South Africa. The lessons drawn could be used by parliament to enhance insider trading regulation in South Africa in tandem with international best practices.

3.1. History of Insider Trading Regulation in Canada

In terms of market capitalization, Canada was ranked the seventh in 2018.[102] Its regulatory model is characterized by its relatively strict but effective insider trading prohibition. This framework has been described as one of the most adequate and effective regulatory frameworks to be found in recent years.[103] Insider trading is still regulated on a provincial basis despite attempts to create a federal securities regulator.[104] Regulation is therefore operative at the provincial level; each province enacts and enforces its insider trading laws. Provincial regulators however try to harmonize regulation of the capital markets via the Canadian Securities Administration (CSA). Complaints can be taken to the CSA but enforcement happens locally where the parties are located.[105] The biggest securities exchange – the Toronto Securities Exchange – is located in Ontario.[106] This has informed the choice and focus of this article on the Ontario Securities Act (OSA) as amended in 1990.[107]

The OSA was passed after the Report of the Attorney General's Committee on Securities Legislation was adopted on 11 March 1965.[108] Before this date, insider dealings were not statutorily regulated in Canada. However, this legislation applied only to insider trading activity in the securities of "reporting issuers."[109] This resulted

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[102] Market capitalization of listed companies in current prices, Knoema (Dec. 21, 2021), available at https://knoema.com/atlas/topics/Economy/Financial-Sector-Capital-markets/Market-capitalization.

[103] Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 144.

[104] On 9 November 2018, the Supreme Court of Canada in *Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189, ruled that the establishment of a single federal securities regulatory body as presented in draft federal and model provincial laws was not unconstitutional, thereby overruling a decision from the Quebec Court of Appeal that such a federal regulatory body was unconstitutional. The problem however is that the provincial legislatures are not under the obligation to enact the proposed model legislation into law as it has been written and can make changes to whatever law they decide to enact. *See* also National Securities Regulator Gets Go-Ahead from Supreme Court, Lexology (Dec. 21, 2021), available at https://www.lexology.com/library/detail.aspx?g=493f8984-8406-4ff0-be49-ebcf873b994c; and Sean Kilpatrick, *Top court ruling leaves us no closer to a national securities regulator*, National Post, 9 November 2018 (Dec. 21, 2021), available at https://nationalpost.com/news/canada/top-court-ruling-leaves-us-no-closer-to-a-national-securities-regulator.

[105] James H. Thompson, *A Global Comparison of Insider Trading Regulations*, 3(1) Int'l J. Account. Financ. Report. 1, 9 (2013).

[106] Toronto Stock Exchange, Encyclopedia Britannica (Dec. 21, 2021), available at https://www.britannica.com/topic/Toronto-Stock-Exchange.

[107] Insider trading is regulated on a provincial basis. Thus, the analysis of all the provincial insider trading Acts is beyond the scope of this study.

[108] *Id*. Hereafter referred to as the Kimber Report.

[109] Secs. 108–117 of the OSA. A reporting issuer is a corporation or company whose securities are traded on a stock exchange or other market place. Thus, the OSA at this stage only applied to listed securities.

in many subsequent reviews of this Act and similar statutes in other provinces in order to have more adequate and stricter insider trading provisions.[110]

The Canada Corporations Act (CCA)[111] had an insider trading prohibition.[112] This Act was aimed at preserving the integrity of federal companies by shielding their shareholders from the menace of insider dealing, among other illegal and unethical practices.[113] Moreover, it prohibited insiders or other people holding positions of trust from dealing in the securities of a company if they had price-sensitive information regarding such securities, which all shareholders were unaware of.[114]

The CCA was later amended. This resulted in the enactment of the Canada Business Corporations Act (CBCA).[115] The CBCA prohibited insider trading in a "distributing corporation."[116] Moreover, it prohibited insiders from selling shares that they did not own or have a right to own, and from buying and selling a call or put option regarding a share of the distributing corporation of which they were insiders.[117] Similar provisions were retained with few changes in the CBCA amended in 1985.[118]

An attempt was made to complement and revive the original insider trading provisions contemplated in the OSA. Thus, the Ontario Business Corporations Act (OBCA)[119] was enacted. This Act widened the definition of "insider" to include all the employees of a corporation, as well as senior officers.[120] However, it dealt with the liability of insiders of corporations which do not offer securities to the public. This led to the amendment of the OSA in 1990. This Act extended the reporting duties of all insiders.[121] This was to deter insiders from profiting unfairly from their previous knowledge of any unpublished inside information regarding a company, such as a pending take-over or other acquisition.[122]

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110 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

111 Canada Corporations Act, 1970.

112 Secs. 93–97 of the CCA.

113 *Multiple Access Ltd v. McCutcheon*, (1982) 138 D.L.R. (3d) 18 (Can. Ont. S.C.C.).

114 *Id*.

115 Canada Business Corporations Act of 1985.

116 Sec. 126. A distributing corporation was defined to include a corporation that is a reporting issuer unless it is subject to an exemption from the relevant legislation. Or it has filed a prospectus regarding the public distribution of its shares if such shares and/or their price remain outstanding and that they are held by more than one person. Or if such corporation has securities listed and traded on a stock exchange in or outside Canada.

117 *Id*.

118 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

119 *Id*. Ontario Business Corporations Act, 1982, c. 4 (Can.).

120 Sec. 138.

121 *Id*.

122 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

The Canadian Securities Administrators (CSA) and the federal government introduced a Uniform Securities Law Project (USLP) and a Bill C-46 respectively in order to enhance overall insider trading regulation in all Canadian provinces and address possible cross-border insider trading issues. The USLP aimed to provide a national framework for securities regulation by harmonizing insider reporting duties. Moreover, the Bill C-46 proposed the introduction of the new Criminal Code of Canada which contained insider trading and tipping offences. Later, this bill was introduced in March 2004. It created the first precise Criminal Code crimes regarding insider trading and other related practices. It also criminalized threatening or retaliation against employees who unveil any insider trading or related activities. This is known as whistleblowing.[123]

The provincial regulation of insider trading increased awareness of and contributed a lot to the timeous prosecution of insider trading cases in Canada.[124]

3.2. Insider Trading Prohibition Under the Ontario Securities Act R.S.O. 1990, c. S. 5, 1990 (OSA)

The Ontario Securities Act prohibits any person in "a special relationship" with a reporting issuer and who knows of an unpublished "material change" or "material fact" of relevant circumstances regarding its securities from disclosing this information to others or trading based on such information.[125] Related practices such as tipping are also prohibited.[126]

The insider trading prohibition in section 76 applies to a wider range of persons and companies than is provided for by the definition of "insider" in terms of section 1(1) of the OSA. Thus, the most important definition in section 76 is that of a person in a "special relationship," and not that of an "insider." A person or company in a special relationship with an issuer is defined as follows in terms of section 76(5) –

(a) A person or company that is an insider, affiliate or associate of,

(i) the issuer,

(ii) a person or company that is considering or evaluating whether to make a take-over bid, as defined in Part XX, or that proposes to make a take-over bid, as defined in Part XX, for the securities of the issuer, or

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123 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

124 *Id*. at 147.

125 Sec. 76(1). "Material fact" or "material change" refers to a change in the business, operations or capital of an issuer. Or a fact that reasonably be expected to have a substantial impact on the price or value of the issuer's securities.

126 Sec. 76(2). For example, illegal disclosure to another of undisclosed material information regarding the reporting issuer's securities is prohibited; whether it is by that issuer, a special relationship person or, any other person who has such information. To reduce the risk of insider trading, all persons referred to in section 76 of the OSA are prohibited from speculative trading in the securities of any corporation. *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 158.

(iii) a person or company that is considering or evaluating whether to become a party, or that proposes to become a party, to a reorganization, amalgamation, merger or arrangement or similar business combination with the issuer or to acquire a substantial portion of its property,

(b) a person or company that is engaging in any business or professional activity, that is considering or evaluating whether to engage in any business or professional activity, or that proposes to engage in any business or professional activity if the business or professional activity is,

(i) with or on behalf of the issuer, or

(ii) with or on behalf of a person or company described in subclause (a) (ii) or (iii),

(c) a person who is a director, officer or employee of,

(i) the issuer,

(ii) a subsidiary of the issuer,

(iii) a person or company that controls, directly or indirectly, the issuer, or

(iv) a person or company described in subclause (a) (ii) or (iii) or clause (b),

(d) a person or company that learned of the material fact or material change with respect to the issuer while the person or company was a person or company described in clause (a), (b) or (c),

(e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

In *Finkelstein v. Ontario Securities Commission*,[127] the Ontario Court of Appeal had to decide for the first time the meaning and application of the tipping and insider trading section of the Securities Act, R.S.O. 1990, c. S. 5, which specially defines a person in a special relationship with the issuer in section 76(5)(e) – quoted above – as it can be applied to succeeding tippees who have material information about an issuer that has not yet been made public.[128] The standard of review the court opted for was the standard of reasonableness.[129] The court specifically addressed when it might be inferred that a person is in a "special relationship" with the issuer sufficient to warrant liability. The answer to this question varies depending on several factors, including whether the tippee is registered; registered tippees have the duty to investigate the source of the information they received. A failure to verify is not a legal defense to insider trading or tipping. Essentially, the court confirmed that a person might be liable for insider trading if they deal in the securities of an issuer

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[127] This was on 5 January 2018. *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61 DOCKET: C63514 & C63502 (Can.). Hereafter referred to as *Finkelstein*.

[128] *Id*. para. 1.

[129] *Id*. para. 40.

while they have material information that has not yet been made public and are in a special relationship with the issuer. A person in such special relationship might also be liable for tipping if they pass the non-public material information to another person in a situation that is not in the ordinary course of business. The breath of the special relationship limitation is quite broad. Apart from obvious special relationship parties such as the issuer's directors, officers, employees and affiliates,[130] the following are also in a special relationship with the issuer: 1) parties to whom business or professional functions have been outsourced such as attorneys, accountants, and consultants are included (as well as those considering receiving such business from the issuer);[131] 2) parties working in such positions for another company that seeks to merge with the issuer or acquire them; and 3) parties who receive material information that has not yet been made public from other people they know or reasonably ought to know are involved in a special relationship with the issuer (in other words, the parties aforementioned).[132] The downside to the aforementioned legal requirements is that they can be difficult to prove and costly to prosecute which might lead to lesser tipper-tippee prosecutions in relation to other nations where there are not as many requirements to prove liability.[133]

3.3. Civil and Criminal Sanctions

Civil and criminal sanctions are used to regulate insider trading and tipping in Canada. Any "special relationship" person who violates section 76's provisions, either through tipping or insider trading is criminally liable.[134] If convicted, they can be sentenced to pay a fine equal to the amount of the profit made or the loss avoided up to a maximum of $1 000 000 or to two years' imprisonment or both. These penalties were later increased and offenders can be liable for up to $5,000,000 or imprisonment for a maximum period of 5 years less one day, or both. Such person may be further ordered to pay a maximum fine equal to the profit made or loss avoided. An additional maximum fine equal to the greater of $5,000,000 and/or the amount equal to three times the profit made or loss avoided can also be imposed.[135]

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130 David Badham & Erin Hoult, *"Insider" Trading: Who Is an Insider?*, JD Supra, 7 February 2018 (Dec. 21, 2021), available at https://www.jdsupra.com/legalnews/insider-trading-who-is-an-insider-61016/.

131 *Finkelstein*, para. 54.

132 *Id*. paras. 48 & 55.

133 Anita Anand et. al., *An Empirical Comparison of Insider Trading Enforcement in Canada and the United States*, Osgoode Hall Law School of York University, Osgoode Digital Commons, Articles & Book Chapters, Faculty Scholarship (2019), at 19 (Dec. 21, 2021), available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3752&context=scholarly_works.

134 Sec. 122(1) of the OSA 1990.

135 *Id*. Regarding tipping, it is not required that the "tippees" have traded on the basis of confidential inside information they received from "special relationship" parties, before they can be criminally liable. Maximum prison time is ten years. *See* Thompson 2013, at 16.

Under the CBCA of 1985, persons guilty of insider trading and/or short selling were liable on a summary conviction to a fine not exceeding the greater of $1,000,000 and three times the profit made, or imprisonment for a term not exceeding six months, or both.[136] Bill C-13 of 2004 created the first precise Criminal Code sanctions for insider trading and tipping of a maximum imprisonment term of up to ten years respectively.[137] Both insider trading and tipping are treated as indictable offences in terms of the Code. Canada has relatively been successful in prosecuting criminal cases of insider trading and related practices. For instance, prosecutions and settlements were successfully gotten in thirteen insider trading cases. About $1.9 million in fines and fees was recovered from offenders in 2010.[138]

A civil remedy is available to victims of unlawful insider trading.[139] For instance, if a special relationship party trades in securities while knowing unpublished price-sensitive information, he is liable to compensate all the affected persons for all the losses caused by such trading.[140]

The basis for liability in terms of section 134 of the OSA 1990 is different depending on 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 can recover damages for any loss suffered as a result of the trading from the defendant. Besides, in cases of actions brought by the reporting issuer, the liability of insiders, associates or affiliates of such an issuer is measured by the extent of the benefit they have gained because of the insider trading. Moreover, insiders who commit insider trading and/or tipping will be liable directly to pay compensatory damages to the affected corporation and individuals in terms of the CBCA.[141]

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136 Sec. 130(4) of the CBCA.

137 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

138 Emily Cole, *Canada's First Criminal Conviction for Illegal Insider Trading*, Miller Thompson, 1 February 2010 (Dec. 21, 2021), available at http://www.millerthomson.com/en/publications/newsletters/securities-practice-notes/2010-archives/spring-2010/canadas-first-criminal-conviction-for-illegal. In *SEC v. Grmovsek*, Case No. 09-9029 (Judge McMahon), Cornblum and Grmovsek were found guilty of insider trading in Canada and in the U.S. Later, Grmovsek was sentenced to disgorge illegal profits made of about $8.5 million with a waiver of nearly $1.5 million in the U.S. Further, he was sentenced to 39 months imprisonment and ordered to pay the OSC a total fine of $1.03 million, $283 000 to Ontario's Attorney-General and $250 000 investigation costs to the OSC in Canada.

139 Sec. 126 of the OSA 1990.

140 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145. This civil remedy is available to four classes of plaintiffs. "a) First, those who are the innocent counterparties to unlawful insider trading with insiders; b) Secondly, those who are the innocent counterparties to insider trading with tippees; c) 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 (s 134(3) of the Ontario Securities Act, R.S.O. 1990, c. S. 5, 1990); and d) 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."

141 *Id*. South Africa also has civil and criminal sanctions in place [sec. 82 of the FMA]. However, insider trading was mainly treated as a criminal offence carrying inadequate penalties of R500 000 fine or

South Africa also has civil and criminal sanctions in place.[142] However, insider trading was mainly treated as a criminal offence carrying inadequate penalties of R500 000 fine or imprisonment for 10 years, or both, under the CA 61/73 before 2004. Later, insider trading resulted in civil and criminal liability under the ITA. Offenders were liable to pay the FSCA a maximum of R2 million, or imprisonment for a maximum of 10 years, or both.[143] Eventually, insider trading attracted civil, administrative and criminal liability under the SSA and the FMA. However, offenders were still liable for relatively insufficient penalties of a maximum fine of R50 million or imprisonment of a maximum of ten years, or both under the SSA. These same penalties were retained in the FMA.[144] It is submitted that imposing very heavy penalties will help in deterring more offenders. This is a very salient feature of the insider trading regulatory models in the United States of America and Canada, and it works. The good news however is that the FSCA is trailing in their footsteps by imposing heavy penalties as it is shown in the recent case of *Zietsman and another v. Directorate of Market Abuse and another*.[145]

Currently, criminal prosecution of insider trading offences in South Africa is rare, because of the powers of the FSCA. This is because dealing with insider cases through

imprisonment for 10 years, or both, under the CA 61/73 before 2004. Later, insider trading resulted in civil and criminal liability under the ITA. Offenders were liable to pay the FSCA a maximum of R2 million, or imprisonment for a maximum of 10 years, or both. *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145. Eventually, insider trading attracted civil, administrative and criminal liability under the SSA and the FMA. However, offenders were still liable for relatively insufficient penalties of a maximum fine of R50 million or imprisonment of a maximum of ten years, or both under the SSA. These same penalties were retained in the FMA. It is submitted that imposing very heavy penalties will help in deterring more offenders. This is a very salient feature of the insider trading regulatory models in the United States of America and Canada, and it works. The good news however is that the FSCA is trailing in their footsteps by imposing heavy penalties as it is shown in the recent case of Zietsman and another v. Directorate of Market Abuse and another (A679/14, GNP 24 August 2015-S.A).

142 Sec. 82 of the FMA.

143 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

144 *Id.* at 149. Refer above for a more detailed discussion of civil, criminal and administrative liability for insider trading under these Acts. Unlike the position in Canada, the defendant's civil liability under the FMA does not depend on whether the affected person is an innocent counter party or not. In this regard, a distinction between an innocent counterparty and a counterparty who is not guilty should have been drawn in the FMA to enhance the enforcement of civil remedy in SA.

145 A679/14 (GNP 24 August 2015) (S. Afr.). Hereafter known as *Zietsman*. In this case, the FSCA's enforcement committee found the two appellants guilty of insider trading on the basis that they had traded in securities based on information pertaining to the amount of the loan facility the Industrial Development Corporation (IDC) approved in favour of AC Towers, which was not yet made public. This happened in 2011, thus, the FMA was not in operation at the time. Thus, it constituted insider information as defined in the SSA. They were charged with the contravention of section 73(2)(a) and section 73(1)(a) of the SSA. The appellants argued *inter alia* that the information available to them at the time of the trades did not constitute "insider information" in terms of section 72 of the SSA. The enforcement committee fined the appellants the amount of R1000 000 and ordered them to pay the legal costs, jointly and severally. The court dismissed the appeal against the conviction and the imposed fine with costs. *See Zietsman*, paras. 2–12.

the FSCA's Enforcement Committee is more efficient than criminal prosecutions.[146] This is confirmed in *Zietsman*.[147] The court held that the enforcement committee can make such decisions and impose such penalties as an administrative tribunal.[148] Thus, the FSCA can continue to make such decisions and impose deterrent penalties, without cases having to go to court.[149] This case was decided in terms of section 82 of the SSA. However, section 84 of the FMA provides that the FSCA can exercise similar powers. Thus, the principles in this case apply in the new dispensation in terms of the FMA.

Some defenses and exemptions exist for an insider or person alleged to have violated section 7 of the Ontario Securities Act (OSA) 1990.[150] For example, with respect to tipping, any tippee who intentionally trades based on material confidential information before it is "generally disclosed" may avoid liability if he proves that he did not know or ought not reasonably to have known that the tipper was a person, or a company in a special relationship with the reporting issuer – section 76(4) read with (5)(e). The mere issuing of a press release without actual and timeous disclosure of material facts to the public is insufficient for the purposes of this defense.[151]

Now that the insider trading provisions, sanctions, exemptions, and defenses based on the OSA have been discussed, the next section will focus on benchmarking the regulation of insider dealing in South Africa against the Canadian model with the objective of drawing lessons for South Africa. The lessons drawn could be used by parliament to enhance insider trading regulation in South Africa in tandem with

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146 This is because there is a backlog of cases in South African courts, the heavier burden of proof in criminal cases, and the fact that the "wheel of justice turns very slowly" in criminal matters, according to the head of the Directorate of Market Abuse, which is part of the FSCA. Thus, criminal prosecution of insider trading cases in South Africa is not the solution to this menace in South Africa. *See* Patrick Cairns, *Precedent-setting case clarifies insider trading in SA*, Moneyweb, 7 September 2015 (Dec. 21, 2021), available at http://www.moneyweb.co.za/news/companies-and-deals/precedent-setting-case-clarifies-insidertrading-in-sa/.

147 Paras. 34–36.

148 *Id*.

149 *See* Cairns, *supra* note 146.

150 Sec. 76 of the OSA.

151 *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 150. In contrast, it seems that under the Companies Act as amended prior to 2004 in South Africa, no defenses for insider trading offences were expressly provided. The defenses provided for in the ITA were insufficient. For example, other defenses like Chinese Walls were not considered. Similar defenses and flaws were reintroduced in the SSA. Furthermore, relatively inadequate and few new defenses were introduced in the FMA. For instance, no defense is expressly provided for persons accused of encouraging or discouraging others from dealing in certain listed securities in terms of the FMA. Additionally, the FMA did not expressly provide alternative defenses and exemptions such as Chinese Walls for persons facing civil liability charges for insider trading under the FMA. This contrasts with the Canadian position because the defenses currently stated in the FMA are primarily restricted to instances involving criminal cases of insider trading.

international best practices. Some of the initiatives that have been implemented in both countries will also be discussed.

4. Benchmarking the Regulation of Insider Dealings in South Africa Against the Canadian Model

Canada uses a unique multi-functional regulatory system that does not empower any specific regulatory authority to supervise the regulation of its capital markets and/or the regulation of insider trading at the federal level. This means that insider trading regulation in Canada is a shared duty involving the federal government; provincial governments; other securities regulators such as the OSC, Integrated Market Enforcement Teams (IMETS), and self-regulatory organizations; the Intelligent Market Monitoring System (IMMS); the Canadian Investor Relations Institute (CIRI); the CSA; and the Canadian Institute of Chartered Accountants.[152]

In 1998, the OSC introduced the OC Policy 33-601 to give guidelines relating to employee education, containment of inside information, compliance, and restriction of transactions in order to curb insider trading. Thus, employee education aims to create awareness about insider trading and the regulation thereof, ethical standards and the consequences for violating insider trading provisions. The protection or containment of inside information involves restricting access to inside information, thus, prohibiting unauthorized transmission thereof. Also, information in sensitive areas is kept secure to ensure that electronic transmission of such information takes place under sufficient supervision. Restriction of transactions means that grey lists, information barriers and restricted lists are used. Finally, compliance involves monitoring and reviewing trading in the accounts of OSC registrants, 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 effectiveness of procedures and policies.[153]

Reporting issuers are required by the OSC to report insiders in relation to them within ten days to curb insider trading. A System for Electronic Disclosure (SEDI) was adopted in 2001 to simplify the reporting and filing process of all insiders of the reporting issuers, for this purpose. Moreover, section 135 of the OSA 1990 provides a method by which the OSC, security holders of a reporting issuer or security holders of a mutual fund may institute an action in the name of the issuer or mutual fund against the offenders.[154] Moreover, the federal government established the IMETS

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[152] Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 153.

[153] *Id*. The OSC in some cases managed to impose administrative fines ranging from $100 000 to $1 million on individuals and $5 million on juristic persons.

[154] *Id*. at 153. In terms of section 134(3) or (4) of the OSA. This has assisted the OSC to successfully investigate about eleven insider trading cases between 1995 and 2005. Regardless of these efforts, Chitimira submits that the OSC failed somewhat to consistently and successfully get more convictions

in Toronto, Montréal, Vancouver, and Calgary to investigate capital markets fraud and insider trading cases, as part of its efforts to enhance the regulation of insider trading.[155]

In addition, self-regulatory organizations such as the Market Services Incorporated, the Bourse de Montréal Incorporated, CIRI, CICA, CSA, IMM and the ITTF have to date contributed greatly towards the regulation of insider trading and related practices in Canada. Likewise, the courts have played an important role in this regard. This is shown in some of the reported cases.[156]

In contrast, South Africa does not use the Canadian multi-functional regulatory model to regulate insider trading.[157] Instead, the FSCA has regulatory powers and functions to supervise the regulation of insider trading at a national level. Chitimira suggests that policy makers should enact additional provincial laws to regulate insider trading activities.[158] The authors do not agree with this suggestion. This is because there are no functional securities markets outside Gauteng, for instance.

Having discussed the insider trading provisions, sanctions, exemptions, and defenses based on the OSA, the next section will focus on the place of regulatory bodies in enforcing insider trading laws and will discuss some of the initiatives that have been implemented in Canada and South Africa.

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in insider trading criminal cases. This could have been aggravated by the OSC's failure to use other enforcement methods such as whistleblowing immunity, bounty rewards and the fact that the biggest investigation unit within its enforcement department was understaffed and it only had fourteen employees in late 2010. However, this position will change soon as the OSC successfully launched its own in-house detection platform to detect insider trading and tipping offenders, towards the end of 2010. Furthermore, a new OSC chairman as hired in 2011. He pledged to expand the OSC's cooperation policy to encourage more people to settle with the OSC (bounty rewards) and to seek more resources to improve the enforcement of the insider trading prohibition.

155 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 154. An effective process within the IMETS structure to address unlawful insider trading includes the activities of securities' commissions, self-regulatory organisations, the Department of Justice and police officers who are highly qualified financial investigators. The IMETS has also created some criteria for case assessment and integrated procedures for the speedy prosecution of insider trading cases.

156 *Id*. Examples include *Doman v. British Columbia (Superintendent of Brokers)*, (1998) B.C.J. 2378 (Can.). This case involved approximately $2.3 million in losses avoided. This was after a sale of Doman industries Limited shares in 1988. *Doman* confirmed that all parties impacted by insider trading have a civil remedy available to them. Such parties include innocent counterparties to insider trading involving tippees and insiders, clients of registered dealers or portfolio managers against any person who had non-public, material information based on the investment programs of the funds and gained from trading based on it; and reporting issuers whose insiders and affiliates have made gain based on non-public, material information. *See Id*. at 149. Another case is *R. v. Harper*, (2000) O.J. 3664 (Can.). The perpetrator was convicted based on two counts of insider trading. This case involved approximately $3.6 million in losses avoided from selling Golden Rule Resources Limited shares in 1997.

157 *Id*.

158 *Id*.

5. The Place of Regulatory Bodies and Other Role-Players

The following entities will be discussed: the Intermarket Surveillance Group, the Canadian Securities Administrators, the Ontario Securities Services Commission, and the courts.

The Intermarket Surveillance Group (ISG)

The ISG exists to provide a platform for sharing information and coordinating regulation across securities exchanges in an effort to address potential market abuses. Its members include markets that qualify as "Self-Regulatory Organizations" (SROs) as well as nongovernmental organizations that deliver regulation services to their home markets.[159] Canada is a member of the ISG. Its derivatives and equities markets can therefore trade within similar markets around the world. The ISG's technological surveillance department enables the Canadian markets to effectively detect any signs of cross-border insider trading in similar markets across the globe. The ISG also has a database that assists members markets' regulators to share relevant information and to investigate inter-market insider trading.[160]

The Ontario Securities Commission (OSC)

The OSC is an independent entity that is empowered to supervise securities trading and to provide public scrutiny of the capital markets, in order to combat illegal practices like insider trading.[161] Its regulatory oversight stems from the enforcement of the OSA, the Commodity Futures Act, R.S.O. 1990, c. C.20, and certain provisions of the Ontario's Business Corporations Act, R.S.O. 1990, c. B.16.[162] It has various powers. These powers cover issuing compliance orders, ceasing trade orders, and imposing punitive and administrative penalties in civil cases of insider trading, among others.[163] The FSCA in South Africa has similar functions and powers.[164]

Canadian Securities Administrators (CSA)

The CSA is the umbrella entity which covers all of Canada's territorial and provincial securities regulators. Its aims are: 1) to streamline and improve the regulation of

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159 Intermarket Surveillance Group: An information-sharing cooperative governed by a written Agreement, Intermarket Surveillance Group (Dec. 21, 2021), available at https://isgportal.org/.

160 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 153. The ISG was created to provide an inter-market anti-insider trading regulatory framework for sharing information and coordinating regulatory efforts among securities and commodities markets and market regulators in North America, Europe and Asia. This regulatory framework is responsible for combating the inter-market trading abuses and for developing the best practices. At the time Chitimira wrote his article, it was not clear if Canada had successfully used this database to regulate insider trading.

161 About Us, Ontario Securities Commission (Dec. 21, 2021), available at https://www.osc.ca/en/about-us. *See* also sec. 3 of the OSA.

162 *Id*.

163 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 153.

164 Sec. 84 of the FMA.

Canada's capital markets; 2) attain consensus regarding policy decisions affecting the securities market; and 3) foster collaboration in the enforcement of regulatory policies across the country such as the filings of prospectuses and the review of mandated disclosure.[165] Enforcement of securities laws is however done by each provincial regulator, as already mentioned above.

The Courts

Both the High and Supreme courts are empowered to prosecute insider trading cases as stated in provincial securities Acts and other Acts like the CBCA. However, the orders the courts may make differ from one province to another, under the provincial Acts.[166] Chitimira argues that these courts play a significant role in regulating insider trading and similar practices in Canada, even though the sanctions they impose are not uniform.[167]

The SSA and the FMA in South Africa both stipulate that the prosecution of all criminal cases involving insider trading rests with the Director of Public Prosecutions (DPP) and not with the FSCA.[168] However, the DPP can only exercise his prosecutorial powers on a referral basis. In terms of the SSA, competent courts played an important role in determining and calculating appropriate damages in civil cases involving insider trading. This refers to the compensatory or punitive amounts paid to the FSCA or to victims by offenders. This enabled all claimants to be able to get appropriate monetary remedies awarded to them by the court from the FSCA. The FMA extends the same role of the competent courts regarding insider trading. Nevertheless, the SSA and the FMA provide no appropriate presumptions to help the DPP get more convictions in insider trading cases. Thus, relatively few convictions and settlements have been obtained in insider trading cases by the courts and the FSCA to date.[169]

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165 About Us, Canadian Securities Administrators (Dec. 21, 2021), available at https://www.securities-administrators.ca/about/.

166 *Id*. For example, the disgorgement orders, civil penalties, monetary fines and prison sentences imposed by the courts in Quebec may differ from those imposed by the courts in Ontario. Furthermore, courts in different provinces may impose fines ranging from $1 million to $5 million, or payment of a multiple of profits made and imprisonment periods ranging between three, five and ten years, in quasi-criminal proceedings.

167 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 151. Likewise, the effectiveness of these courts is shown by the number of successful convictions that have been obtained in insider trading cases till date. Regarding civil cases, the OSA 1990 provides clear guidelines to help courts determine compensatory damages for victims. Chitimira again submits that courts have a discretion where required, to supplement the guidelines in section 134(6) of the OSA 1990 with more sufficient and appropriate measures, as the facts of a case may require. This has enabled courts to successfully obtain settlements in civil cases.

168 *Id*.

169 *Id*. Only 32 cases of insider trading and eight cases of trade-based market manipulation were investigated by the FSCA between January 1999 and January 2008. However, no convictions were gotten by the courts in all these criminal cases.

Conclusion

In this article, the authors have argued that the regulation and enforcement of insider trading in terms of the relevant anti-insider dealing laws are insufficient despite the various statutory efforts that have been made in terms of the provisions in the successive legislation enacted in South Africa. It further argued that with creative and appropriate reforms of the current legislation, FMA, the investing public will be adequately protected against insider dealing with the effect of enhancing the investors' confidence and the integrity and the efficiency of the securities markets. Moreover, more people will be willing to invest in South Africa's securities markets, especially if the FSCA exercises its powers effectively in deciding on insider trading cases and imposing deterrent penalties. The conclusion therefore is that with an appropriate amendment of the FMA by parliament, and the courts interpreting the FMA in a creative manner, the investing public will be adequately protected against the menace of insider trading in the nation's securities market. Moreover, if the FSCA exercises its powers effectively in deciding on insider trading cases and imposing deterrent penalties, the investors' confidence and financial markets' integrity and efficiency will be better enhanced and more people will be willing to invest in South Africa's financial markets.

Based on the findings above, the authors therefore make the following recommendations: First, Section 84 of the FMA should be amended to compel the FSCA to impose deterrent penalties in insider dealing cases. Moreover, guidelines on such fines should be given in order to promote legal certainty and fairness. In other words, alternative ways of empowering the FSCA to make its own rules relating to the enforcement of criminal and administrative sanctions for insider dealing offences should be provided. Second, the defenses in respect of the offences in section 78 should be exhaustive. In other words, the appropriateness of other defenses like "Chinese Walls" should be considered.[170] The defenses provided should not mainly be limited to criminal prosecutions. Third, appropriate presumptions should be provided for in the FMA to help the FSCA obtain more settlements in insider dealing cases. Moreover, section 84 of the FMA should be amended to expressly widen the powers of the FSCA by confirming the *ratio decidendi* of the court in *Zietsman*. Thus, there can be a legislative basis for the FSCA having such wide powers as described in this case.[171] Fourth, the FMA should be amended to statutorily and financially empower the FSCA to get its own surveillance systems, so that it has sole anti-insider dealing surveillance responsibility.[172] Fifth, the FMA should be amended to provide

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[170] Especially for people facing civil liability charges for insider trading.

[171] *See* the discussion of the *Zietsman* case in chapter 3.

[172] The JSE currently has this responsibility. However, insider trading regulation would be more effective if the FSCA is the one to detect and deal with insider trading cases. *See* Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 255.

for other enforcement methods like private rights of action and whistleblowing specialized insider dealing courts.

The authors are confident that implementing these recommendations would enhance investors' confidence and financial markets' integrity and efficiency.

The overall implication of this is that more investors will be willing to invest in South Africa's financial markets, especially if the FSCA exercises its powers effectively in deciding on insider dealing cases and imposing deterrent penalties.[173]

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[173] This was confirmed in *Zietsman and another v. Directorate of Market Abuse and another*, A679/14 (GNP 24 August 2015) (S. Afr.).

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