

Ontario insider trading amendment removes enforcement loophole

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Ontario's recently – and quietly – amended insider trading provisions will significantly increase the Ontario Securities Commission's (OSC) enforcement capabilities, experts said. The Securities Act amendments closed a loophole that prevented the OSC from wielding its full sanctioning powers against Ontario residents using insider information to trade securities listed outside of Ontario.

The previous language required the purchase or sale of Ontario-listed securities in order for insider trading to constitute a clear contravention of the act. As a result, the OSC often relied on the weaker public interest jurisdiction to obtain administrative penalties. Insider trading is a quasi-criminal offence in Ontario, and can therefore be brought before the courts, which have harsher sanctions at their disposal.

Technical defence eliminated

The OSC will no longer "lose on the technicality created when the respondent wasn't trading on an Ontario listing," said Ellen Bessner, a partner at Toronto-based litigation firm Babin Bessner Spry LLP. "So if Ontario traders are using insider tips to trade shares listed on NASDAQ, the OSC can pursue them on insider trading."

"It looks like a minor revision, but it's actually fairly significant," said Janice Wright, a partner at Wright Temelini LLP, a Toronto-based securities litigation firm. "The amendment will allow the OSC to escalate more cases into the quasi-criminal realm (i.e. provincial court)."

Wright stressed that the amendment will clarify to market participants that the "extra-territorial nature [of an insider trading case] will no longer be a technical defense." She added: "Now [participants] will be caught by the Securities Act, not by the public interest jurisdiction."

Recent OSC rulings have shown that public interest findings can be subjective, Wright said. "There is an ebb and flow [to such ruling patterns], which creates problems not only for staff and defense counsel, but also for all market participants, because they would prefer to have clarity in terms of proscribed activity."

Enforcement outcomes prompted change

The change was prompted by recent OSC enforcement outcomes, a spokesperson for the Ministry of Finance told Thomson Reuters. "Recent OSC decisions suggest that it would be appropriate for Ontario insider trading provisions to extend to [trading of and tipping on] non-Ontario reporting issuers which are publicly traded," the spokesman said. Applicable circumstances would include, "where the person trading or tipping is in Ontario and/or other elements of the offence take place or are in Ontario," he added.

When asked why the amendment was passed in a budget bill (PDF), without public consultation, the Ministry of Finance said: "This amendment appropriately addresses an identified need in the interests of investor protection and fostering fairness and efficiency and confidence in capital markets".

The OSC declined to answer questions related to the amendment and any involvement it had in its adoption.

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