nmay@goodmans.ca

An everyday story of trading Volk

By Neill May

We all know words can have very different meanings depending on the context, intonation and other factors. For example, stating that someone has a "reputation" can refer to a person with esteemed standing, skill or experience, but in a different context, it can have a clearly negative connotation. Similarly, describing an individual as being the "responsible party" might in one situation be understood as recognition of that person's trustworthiness, while in another, it may point to their culpability.

These concepts arose in the recent insider trading decision of *Ontario Securities Commission (In the Matter of Peter Volk)*, which to some degree will take trading decisions in a new direction. And, further to my point, even those words "new direction" can have different meanings based on pronunciation; go ahead, say them out loud.

Taking a step back, most publicly traded issuers have policies that govern insider trading. These policies are important for many reasons. They create a framework for all insiders to know when they should not be trading (because there is material, non-public information, for example, in the periods before financial information is released or when a significant transaction is in the works). They create a system for internal monitoring of trading by insiders and approvals for certain trading activities. And, perhaps most importantly, they set ground rules to protect the reputation of the issuer and its employees. What those policies do not do, because they can't, is remove the judgments that must be made in relation to insider trading, to determine when non-public information is such that trading shouldn't occur for legal or reputational reasons.

The facts in the Volk case involved an issuer, Pacific Rubiales Energy Corporation, that had an insider trading policy, which had typical provisions preventing any trading by insiders during "blackout periods" when company employees had material, non-public information. The policy directed all insiders to give notice of intended trades to the general counsel, Volk, who could confirm whether the company was in a blackout. In early 2015, the company had signed a confidentiality agreement with a potential purchaser of the company that had not yet commenced any due diligence, and it was engaged in diligence meetings with another that had submitted a non-binding expression of interest. Volk self-assessed pursuant to the policy, determined that the interactions with the two parties did not constitute material, non-public information and purchased some company notes.

> **"THE ONLY POINT HERE IS THAT BIAS TOWARD AN ITCHY TRIGGER FINGER ON BLACKOUT PERIODS IS ONLY GOING TO GET STRONGER.**

Based on the statutory language, the question boils down to whether the relevant information would be reasonably expected to have a significant effect on the market price for the issuer's securities. That test obviously involves a meaningful element of judgment, and the layering of reputational considerations adds to the complexity of the exercise.

Executives and their advisors considering these questions typically balance many considerations. First is the hindsight problem; though a corporate development may be at an extremely early stage and its outcome entirely unpredictable, if there is trading and the potential transaction happens, the world will be skeptical about protestations of its early-stage uncertainties. (For Pacific, the proposed transactions never happened, though, of course, that wasn't known at the time.)

Then there is the profit-taking optic of an insider trading in securities ahead of some disclosure and profiting; also not the case in this matter, as Volk lost almost the entire value of his investment. There are also considerations about insider privilege, but Volk had apparently blessed trading activities by several other employees on the same basis. Consistency and precedent matter, too, but with Pacific it appeared that the company had undergone an analysis and imposed blackouts in relation to other potential transactions but had simply concluded that the potential deals in early 2015 did not warrant a similar approach. In fact, the settlement approved the regulator concluded that Volk made a good-faith decision not to impose a blackout, had a good-faith belief that he didn't have material non-public information and had an unblemished reputation.

A settlement was reached imposing financial penalties, some oversight and mandatory educational requirements on Volk, because of his position of high responsibility and trust and because his exercise of judgment was found by the OSC to have been "seriously mistaken." It is difficult to argue against a very prudent approach to insider trading. The only point here is that bias toward an itchy trigger finger on blackout periods is only going to get stronger.

Reading cases about mistakes is always sobering. I do take comfort in the adage that making mistakes is how one learns and in the related rationalization that my quest for enlightenment is why I continue to make so many of them. **CL**

Neill May practises securities, M&A and corporate finance at Goodmans LLP in Toronto. The opinions expressed in this article are his alone.

© 2018 Thomson Reuters Canada Ltd. Reprinted with permission.