BANKING ON CORPORATE

BY NEILL MAY

Insider trading and the public interest power

There is a scene in *Fiddler on the Roof* where Tevye, the lead character, is asked to settle an argument and concludes both parties are right. When challenged by another person (we can call him the *amicus curiae*) that both sides to the argument can't be right, Tevye says something like, "You know what? You're also right."

Some thoughts just make you spin in a circle. It is not supposed to happen to lawyers, who are expected to get to the point. But sometimes, to distort a proverb, a legal question falls in the forest and we are left to ponder if anyone heard it. And further, if we think about it and end up right where we started, should we docket it?

I have been thinking about this dynamic in the context of recent securities regulatory enforcement activities relating to insider trading. At least from a statutory perspective, insider trading is well covered. There are prohibitions against it in various forms in the Criminal Code, the Canada Business Corporations Act, and our securities laws (the tides have moved resoundingly against the diehard theorists who argue that insider trading is valuable activity that sends efficient signals to the marketplace, though they maintain their small spot on the beach). However, much of the recent enforcement activity has relied on the security commissions' "public interest power" — the power to impose certain remedies where that path is determined to be "in the public interest." In some cases, this "public interest jurisdiction" seems to fill gaps, like in circumstances where the impugned activity looks and smells like insider trading but for various reasons does not satisfy the technical requirements and standards of insider trading laws. The recent cases of *Re Suman* and *Re Donald* are examples where activities that didn't technically contravene the insider trading rules were nevertheless determined to be contrary to the public interest.

In *Suman*, the regulators found the defendants traded based on inside information, but the issuer in question was not a "reporting issuer" in Canada, a requirement to trigger the insider trading provisions. In *Donald*, an executive traded securities based on information gleaned at a company golf day that his employer was considering a bid for a public company, but the Ontario Securities Commission found that the plan to make the bid hadn't quite reached the level of certainty required in order to trigger the insider trading regime.

In other matters, though, the ambit of the public interest discretion has been widened beyond gap-filling. As a case in point, the OSC has initiated action against a senior executive who is alleged to have counseled a friend on how to obscure trading activities (by communicating via Blackberry PIN messages).

There are obvious benefits to the residual public interest power in this context. Capital markets move fast and regulators in the field need to be nimble. And there are evidentiary burdens and challenges with insider trading cases. Older cases, like *Re ATI*, show the high hurdles required for enforcement action under the insider trading regime. Newer cases like *Suman* and *Donald* show that activities that look and smell like insider trading can lack a technical requirement that doesn't change the nature of the activity but puts it beyond the regime's reach. In this regard, the public interest power provides flexibility to the regulator.

That flexibility is not unlimited; there are constraints on the public interest power. The remedies available to the regulators under this power are administrative in nature, and are narrower than the sanctions that can be imposed by a court. And the public interest in this context is confined to the regulators' mandate, as expressly outlined in the Securities Act, to protect investors and the efficiency and integrity of the capital markets.

Still, even with those limits, the public interest power is very broad, and while there are good reasons to be comfortable with its breadth, this is where the circular thinking comes into play. In a democratic society with checks and balances, with accountability and sophisticated thinking about the limits of enforcement, there's a level of trust in prosecutorial power. But do we allow regulators to have that power, flexibility, and trust for the very reason there are clear limits that are generally understood and, no pun intended, policed? And if the flexibility of such power is taken even just a little bit too far, and the predictability of the regime suffers, is there not risk that the trust might erode?

On balance, it's likely manageable but calls for vigilance. I don't know where the line is, though, and *Fiddler on the Roof* does not seem to provide any precise insights on securities laws. Maybe even writing about this isn't a good idea. I mean, it's not contrary to any statute or anything, but it may be misbehaving, or bad conduct of some sort. Uh oh.

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