The Use of Inside Information in the United States, Canada, Great Britain and the Federal Republic of Germany. A Comparative Analysis.

by Ulrich Pohl

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Institute of Comparative Law
McGill University, Montreal

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Abstract

An inside information is the knowledge of material corporate facts not publicly disclosed permitting an insider to make a personal, inequitable profit by dealing in the securities of a company . Disclosure is necessary to enable the general public to trade on an equal basis. Insider trading regulations containing disclosure requirements, trading prohibitions and sanctions are designed to balance the interests of investors and insiders.

The American solution is dominated by two statutory provisions and elaborate jurisdiction.

The Canadian federal and provincial statutes provide detailed and advanced regulations.

The British jurisdiction applies the principle of fiduciary duty supplemeted by some statutory provisions of the Companies Acts and the City Code on Take-Overs and Mergers, a voluntary solution.

The West-German Insider Trading Guidelines are also based on a voluntary agreement of the parties involved.

The purpose of this research is to compare how these considerably different systems are dealing with common problems.

Précis

L'information d'initié est la connaissance des faits corporatifs materiels, qui ne sont pas connus au public et utilisés par l'initié pour faire un profit injuste et personel à l'occasion d'une transaction sur les actions de sa corporation. Leur divulgation est necessaire pour permettre au public de conclure un marché sur une base égale. Les règlementations des transactions d'initié, lesquelles contiennent des prescriptions de rapport, des prohibitions de transactions d'initié et des sanctions sont destinées à mettre sur un pied d'égalité les intérèts des investisseurs et des initiés.

La solution Américaine est gouvernée par deux lois principales et possède un vaste champ d'application.

Les statuts fédéraux et provinciaux Canadiens sont detaillés et tellement modernes.

La jurisdiction Anglaise fait usage du principe du devoir fiduciaire, lequel est complété par quelques provisions des Companies Acts et du City Code on Take-Overs and Mergers, qui est une reglémentation volontaire.

Les directives Allemandes sont aussi fondées sur un accord volontaire des parties concernées.

L'intention de cette recherche est d'établir une comparaison de ces systèmes differents et de leurs solutions des mêmes problèmes fondamentaux.

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A: Introduction

An inside information is the knowledge of facts not available to the general public[1]. The basic problem to be dealt with can be outlined very illustratively by describing an archetypical situation of the use of inside information as it occured in a leading American case[2]. Texas Gulf Sulphur is a publicly held American corporation with its securities listed and traded on the New York Stock Exchange. In 1964, the company made an extraordinary mineral discovery on its Canadian property near Timmins, Ontario. The information about this development was withheld by the company officials for several months in order to enable TGS to acquire the adjoining land. In the meantime, several officials purchased shares of TGS stock on the open market and one of them advised his friends and associates to purchase this stock. Furthermore, the board of directors, without knowledge of the importance and potential profitability of the new discovery issued stock options being exercisable at the current market price of the stock to certain key management officials, who were aware of the Timmins discovery. Subsequently, the company issued a press release discounting as unfounded rumors that there had been a significant ore strike. Several days later news confirming the extent and significance of the discovery was released to the public and the price of TGS stock increased substantially. Before the end of the press conference at which this news was made public, certain directors instructed their brokers to purchase the company's stock or suggested that others with whom they were associated to do the same. On the basis of the information about the Timmins ore discovery the "insiders" of TGS were able to make a considerable

1) Black's Law Dictionary, 715, 5th ed. 1979
2) SEC v. Texas Gulf Sulphur 401 F2d 833 (2nd Cir. 1968)

personal profit. Since this information was not available to the general public, there was no expectancy of a sudden price hike and therefore no reason to acquire TGS stock. Their unequally advantageous position as corporate officials enabled the TGS "insiders" to make use of an inside information for their personal profit.

This inequality is the fundamental issue of the problem. Its elimination or diminuition has been or should be the goal to be achieved by legislative or judicial efforts. All investors should have equal access to the rewards of participation in securities transactions[3]. They should be subject to identical market risks and opportunities. Information should enable them to trade on an equal footing. This so-called "theory of the equal risk and opportunity" for every investor is the fundamental issue of the following comparative study.

In North America, this subject is not a very recent one. There is already a considerable body of literature and an abundance of cases, articles and essays dealing extensively with nearly every aspect of the use of inside information. On the other hand, in Great Britain and West-Germany this topic has not drawn very much attention and has been neglected so far. The German language does not even have an expression of its own for this phenomenon. This certainly raises the question why the problem of the use of inside information has got extensive coverage in the U.S. and to a certain extent in Canada, but not in the two European countries, which will be examined. All four countries being subject of this study are highly industrialized with flourishing capital markets trading actively in all kinds of securities. Therefore it might be presumed that the problem of the use of inside infor-

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3) SEC v. Texas Gulf Sulphur, 401 F2d 833, 851 (2nd Cir. 1968)

mation affects each securities market to a certain extent. This, however, is not the case.
There may be two explanations for this discrepancy. At first, the approach might be fundamentally different. The use of inside information may not be considered to be wrong. Therefore there is no need to regulate it. No one is really hurt by the exploitation of an inside information because the negligible quantity of inside transactions affects the securities market only slightly[4]. Insider trading might even have a stabilizing impact by reflecting the true value of securities. Accordingly, one may argue the least regulated market is the best one.
On the other hand, it cannot be denied that insider trading has a considerable impact on the evaluation and the price development of stock[5]. At least it can be stated, that intensive accumulation of stock by insiders may outperform the market for a limited period[6]. Intensive insider trading may be an indication for abrupt and considerable price changes.[7] Insiders tend to buy more frequently before large price hikes and sell more and as fast as possible before price decreases in order to avoid losses or to make a handsome profit. Therefore the first argument that there is nothing wrong with the use of inside information is far from being convincing. The need to regulate insider trading cannot be disputed seriously. If the opportunity is unequal an investor will lose his confidence in the company itself and particularly in this type of investment. Regulating insider trading is to create equal opportunities for every investor in order to main-

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4) H.G. Manne, "Insider Trading and the Stock Market" 96-99 (1966)
5) Lorie, Niederhoffer "Predictive and statistical properties of insider trading" 11 Journal of Law and Economics 35 (1968)
6) idem 35, 52 (1968)
7) idem 35, 46 (1968)

tain the confidence of the investing public in the integrity of the securities market[8]. This confidence is a necessary prerequisite to attract investors providing capital resources for a continuous expansion and economic development of the company. In addition, the necessity of regulating the use of inside information is also a matter of competition between different securities markets and stock exchanges. An investor who is outmanoevered in one market or country will perhaps try another chance by investing in securities traded on another stock exchange. Neglecting to regulate the activities of insiders means to weaken the competitive position of the stock exchange or market concerned. This will result in a loss of customers and capital to the concurrence providing an equal opportunity. Therefore an additional justification to regulate the use of inside information can be found in the competition among several stock exchanges or markets.

It has to be admitted that the creation of perfect equality, which means that every potential investor has access to the same information at the very same moment, is an utopian goal. Therefore the question to be examined has to be raised differently: To what extent do the different regulations provide an equal opportunity and a fair share of risk?

Because of its elaborate case law American experiences will often serve as the starting point for focusing on a problem. Consequently, it will be tried to apply th solutions of the three other systems to fundamental issues which have been raised by the U. S. jurisdiction. By this means, a comparative analysis will test the applicability and flexibility but also prove the deficiencies of the four different solutions.

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8) Fleischer, "Federal corporation law, an assessment, 78 Harvard L. Rev. 1146, 1174 (1965)

B:The regulatory pattern

The solutions can be distinguished in three major groups: The first and most important one consists of a variety of statutory regulations. Secondly, we find the application of some basic common law principles. The third solution based on a totally different philosophy is a system of voluntary self-regulation.

I. Great Britain

The British "system" is a patchwork containing all three elements.

1) The Companies Acts of 1967 and 1976

Some safeguards are provided by the Companies Act of 1967 [9] and the Companies Act of 1976 [10]. There is no supervizing institution resembling the North American Securities Commission. The main enforcement power is given to the company itself . Because of its limited applicability, which will be illustrated later on, both Companies Acts do not play an important role within the British regulatory pattern.

2)The Common Law principle of fiduciary duty

The British solution of the problem of insider trading is still dominated by the application of the principle of fiduciary duty. In order to define the legal nature of a director's duty in the context of the use of inside information, certain analogies have been drawn. A director's duty may resemble in some aspects, but is also somewhat

9) Great Britain Statutes, Companies Act 1967, chapter

10) Great Britain Statutes, Companies Act 1976, chapter

different from that of either an agent[11] or a trustee[12]. Trustees, agents and directors, however, have one duty in common: Broadly speaking they are all bound by a fiduciary duty.
It is generally agreed that there is no precise valid definition of this principle. This term has to be defined by different classes of fiduciary situations[13]. The category which is important in the context of the use of inside information concerns persons having control of property of another person. The application of this concept, however, raises a difficult question: Is an information " property" in the equitable meaning? In Boardman v. Phipps[14] Lord Hodson held that confidential information could be considered as the property of a trust.
This concept of an information which can be the subject of an equitable proprietary interest has been widely criticised. Information is basically a mental or physical concept , but property is a legal idea[15]. On the other hand, an information or idea has been recognized to be able to be the subject of a property interest in cases of patents and copyrights. Property generally extends to every species of valuable right and interest [16]. Since an information is considered to be a valuable and marketable commodity, it seems to be a logical conclusion that the property concept may cover also certain types of inside information. As it

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11) Gore-Browne on Companies 27-3,43 ed. 1977
12) Gore- Browne on Companies 27-5, 43 ed. 1977
13) Sealy, "Some principles of fiduciary obligation " 1963 Cambridge L.J. 69, 73
14) 1967 2 A.C. 46, 111; 1966 3 All. E.R. 721; 3 W.L.R. 1009 (H.L.)
15) E.E.Palmer, D.D.Prentice, B.Welling "Canadian Company Law" 6-48, 2nd ed, 1978
16) Black's Law Dictionary [illegible]

is in the case of copyrights and patents, the extent and type of information to be covered must be clearly defined. A possibility might be to protect every information which is likely to affect materially the market value of certain securities. Despite the quoted hint in Boardman v. Phipps it is not clear how far the courts of equity are prepared to go in applying the legal construction of property to mental concepts as inside information. This is a fundamental uncertainty affecting the applicability of the principle of fiduciary duty to directors and other types of insiders.

In its application, this category of a fiduciary duty contains four specifications[17]. Directors having control of property have to act "bona fide", that means according to their own opinion in the best interest of the company. They have to act within the given scope of their authority and are not allowed to fetter their future discretion. The most important specification in the context of the use of inside information is the requirement that directors have to avoid a conflict of duty and personal interest. No fiduciary may profit personally from the position entrusted to him by another person at the other's expense[18].

Generally, the principle of fiduciary duty is applicable to insider trading situations. It faces, however, difficult conceptual questions and - as we shall see- a very limited applicability.

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17) L.C.B. Gower, " The principles of modern company law" 520 pp. 3rd ed. 1969

18) Jones, "Unjust enrichment and the fiduciary duty of loyalty" 84 L.Q.R. 472 (1968)

3) The City Code on Take-Overs and Mergers.

The third element of the British regulations is the "City Code on Take-Overs and Mergers". This is not a Code in the original sense, since it is not enacted by a body having a legislative mandate. It is a self - regulatory solution created by the parties involved in the trade of securities on the stock exchange, i.e. by the "City Working Party", a body convened by the Governor of the Bank of England and composed of the major financial institutions in the city of London [19]. Its duty is the enforcement of good business standards and not the enforcement of law [20, 21]. Its main objectives are the similar and equal treatment of all shareholders and the prevention of the creation of a false market in the case of a take-over attempt[22], which is one of the most attractive and dangerous situations for the use of inside information.
The provisions of the City Code can be distinguished in two categories. At first, they are a codification of good standards of commercial behavior, which have to be observed in take-over situations. Secondly, there are rules, which are concrete examples of application of the general principles as well as rules of procedure. Special attention should be focused on the so-called "Practice Notes" providing helpful interpretation guidelines of the provisions of the entire City Code.

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19) G. Cooper; R. Cridlan "Law and procedure of the stock exchange " 93 (1971)

20) Weinberg and Blank on Take-Overs and Mergers, 2701-2702 4th ed. 1979

21) Gore- Browne on Companies, 29-4,43 ed. 1977

22) The City Code on Take-Overs and Mergers, revised ed. April 1976, Issuing Houses Ass. London 1976 General principle No. 5

The Code is administered by the "Panel on Take -Overs and Mergers", whose role is merely supervisory. It is a permanent institution also available for consultations before and during the course of a take-over transaction. Its role includes prevention measures as well as some limited sanctions for misbehavior. The major advantages of the Panel's procedures are considered to be its flexibility and informality[23]- the opposite of a statutory pattern. This, however, does not compensate its major shortcoming: the lack of power to undertake investigations on its own initiative or at least to organize a hearing. These omissions became rather obvious in the "Pergamon Press " affair[24], where the Panel finally recommended to the Department of Trade to undertake an investigation.
Another major disadvantage of such a self-regulatory solution is the impossibility to enforce the rules, which are subject to the Panel's control.
The British patchwork of some statutory provisions, the application of the principle of fiduciary duty and the additional self-regulatory solution of the City Code is far from providing a perfect safeguard system. Its elements, however, have to be regarded in collaboration and completion to each other. If a given situation is not covered by one of the provisions of the Companies Acts, the prin-

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23) Prentice, "Take-over bids - The City Code on Take-Overs and Mergers " 18 McGill L.J. 385, 414 (1972)

24) Pergamon Press Ltd. v. Maxwell (1970) 1 W.L.R. 1167. Davies, "An affair of the city : A case study in the regulation of take-overs and mergers" 36 M.L.R. 457, 458 pp. 475 (1973)

ciple of fiduciary duty may be likely to be applied. The mere establishment of the City Code, however, demonstrates already that the "professionals" involved in the securities' trade do not consider the statutory and case law regulations to be sufficient. Otherwise an additional code of behavior would not have been necessary.

II. U.S.A.

It is somewhat surprising, that particularly the United States as the dominating and traditional advocate of the "free enterprise" philosophy were the first country in the world which sought to enact legislation regulating the conduct of its securities industry. The development started with the enactment of state securities laws commonly referred to as "Blue Sky Laws[25]".

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25) They were named so because they were designed to prevent slick Eastern salesmen from selling Kansas farmers a fee simple in the blue sky. Today most of the states have a regulation of this type. Its abundance of widely different provisions, exemptions and administrative procedures makes any useful generalization about state securities regulation very difficult. Because of its limited applicability and diminued importance with regard to the prevailing federal regulations, they will be neglected for the purpose of this research.
for a more detailed information see:
L. Loss; E. Cowett, "Blue Sky Law"pp. 3,4 bibliography p. 442 (1958);
D. Ratner, "Securities Regulations", 5 (1975)

As far as the problem of insider trading is concerned, the two dominating statutory provisions are section 16 of the Securities Exchange Act of 1934[26] and SEC-rule 10b-5 based on section 10 b SEA.[27]

1) The role of the S.E.C.

The SEC has been created as a "watchdog of Wall Street".[28] As a federal agency it is its major responsibility to administrate, supervize and enforce the various securities laws. The Securities and Exchange Commission has broad rule making powers unde the various statutes it administers and has exercised this authority extensively. SEC- rule 10b-5 which since 1942 became an important device against the abuse of inside information is probably the most illustrative example of this administrative rule making power. The rules serve various purposes: They define some of the general terms used in the statutes or prescribe certain procedures[29]. The forms to be submitted for the various statements and reports , which have the legal nature of rules, define, for instance, the extent of disclosure and other requirements. The SEC expresses its views and positions in statements of policy, the so-called "releases" and in "No-Action'letters" providing an additional source of some sort of informal law making and interpretation[30]. They provide important guidelines for

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26) hereinafter referred to as SEA, 15 U.S.C. §78 (1964)
27) CFR § 240 10b-5 (1964)
28) Gadsby, "Historical development of the SEC- the government view" 28 George Washington L.Rev. 6, 16 (1959)
29) D. Ratner, "Securities Regulation " 17,18 (1975)
30) D. Ratner, "Securities Regulation " 18 (1975)

individuals or firms intending to carry out a transaction in a specified manner. The SEC has also a broad power to exempt certain securities, persons and institutions from statutory and administrative requirements. [31] As to the SEC's remedial possibilities they will be referred to later on.

2) Section 16 SEA

The major device to regulate the use of inside information is section 16 SEA. The act was designed to protect the investing public by maintaining fair and open markets for the trade of securities and by preventing the abuse of the market facilities.
Section 16 (a) SEA[32] is a reporting or disclosure provision requiring an insider to report the aquisition and changes of ownership of equity securities of his company.
Section 16 (b) SEA[33] is an automatic short - swing liability provision providing for corporate recovery of profits from insiders.
If the purchase and sale of securities, which are subject of the reporting requirements of sect. 16 (a) SEA, occures within a six months period, sect. 16 (b) will be the basic liability provision.
Sect. 16 (c) SEA provides for some trading prohibitions and sect. 16 (d) SEA exempts a specified group of persons from the disclosure and liability provisions.

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31) Cook;Feldman "Insider Trading under the Securities Exchange Act" 66 Harvard L.Rev. 385, 388; 612, 632 (1953)
32) 48 Stat. 896 (1934); 15 U.S.C. § 78p (a) (1964)
33) 48 Stat.881 (1934); 15 U.S.C. § 78 (1958) as amended 15 U.S.C. § 78 (1964)

3) The promulgation of SEC-rule 10b-5

Since particularly section 16(b) SEA has according to its formulation certain inherent limits - it does not provide for a civil liability - the SEC and the American courts have promulgated and interpreted SEC rule 10b-5 based on sect. 10 (b) SEA[34] as a broad antifraud device covering also insider trading situations. Its broad formulation gave the SEC and the courts the possibility to extend it flexibly. The language of the rule is nearly identical with that of Section 17 (a) of the Securities Act of 1933. A direct application of this section, however, turned out to be unsatisfactory, because there were too many loopholes remaining. Interpreted extensively by the courts of all levels, it became an effective and flexible antifraud device. As far as the problem of the use of inside information is concerned, rule 10b-5 became the legal basis for a private cause of action, which is not provided by section 16 SEA.
The application of this broad antifraud device, however, is creating some specific problems. Since the 1ob-5 liability is based on a kind of fiduciary relationship [34a] the courts refer to some of its basic elements in order to establish a sort of relationship between the buyer and the seller of securities. These

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34) 15 Stat. 896 (1934); 15 U.S.C. § 78 p (1964)

34a) Jennings, "Insider trading in corporate securities :A survey of hazards and disclosure obligations under rule 10b.5" 62 Nw. Univ. L. Rev. 809, 815 (1968) elements are materiality[34b], scienter[34c] and privity[34d]. By applying these principles, however, the courts ran into difficulties to prove a certain state of mind or a connection between a vendor and a purchaser of stock in the almost anonymous stock market. That is why they subsequently abandoned these impracticable requirements. These difficulties demonstrate that the promulgation of rule 10b-5 was a possible but not the optimal device to cover insider trading situations. Rule 10b-5 started to develop its own peculiarity. Consequently, 10b-5 claims have skyrocketed in recent years. The likelihood of a successful claim has been increased as well by the subsequent erosion of the named principles.

34b) SEC v. Texas Gulf Sulphur 401 F2d 833, 850 (2nd Cir. 1968)

34c) Kohler v. Kohler Co. 319 F2d 634, 642 (7th Cir. 1963) Texas Continental Life Insurance v. Banker's Bond Co. 187 F Supp. 14, 23 (W.D.Ky. 1966); Texas Continental Life Ins. v. Dunne 3o7 F2d 242, 249 (6th Cir. 1962); Myzel v. Fields 386 F2d 718, 734-735 (8th Cir. 1967) see detailed discussion in Bromberg, A."Securities Law" vol.III 8.4. (p.544) supp 1977

34d) W. Painter, "Federal Regulation of Insider Trading" 112 (1968) Texas Continental Life Ins. v. Dunne 307 F2d 242, 249 (6th Cir 1962); Ruder, "Pitfalls in the development of a federal law of corporations by implications through rule 10b-5" 59 Nw. U. L. Rev. 185, 196-206 (1964); Painter,"Inside information, growing pains for the development of federal corporation law under rule 10b-5" 65 Columbia L.Rev. 1361, 1372-1382 (1965)

In order to limit this development American courts introduced the so-called " due diligence" burden or "duty of due care"[34e] urging the plaintiff to exercise due care in making his investment decision upon which he based his claim. In other words, the plaintiff's failure to meet the duty of due care will preclude any recovery under rule 10b-5. Theoretically, this requirement has some roots in rationals such as waiver, laches, estoppel, scienter and negligence, reasonable reliance and even materiality[34f]. Thereby at least some of the elements formerly abandoned are reintroduced. The duty of due care serves the same purpose to set up a standard of state of mind the plaintiff has to meet. The extent is to be determined by the particular circumstances of the case. This reintroduction of formerly erased requirements shows that the American jurisdiction has recognized that it might have gone already too far by trying to cover every alleged fraudulent or similar device by the broad wording of SEC-rule 10b-5.

4) The supplementary application of Common Law principles

Nevertheless, there is still room for the direct application of Common Law principles, if the statutes do not cover a specific situation. In two recent cases American state courts relied on the principle of fiduciary duty. In Diamond v. Oreamuno[35] two directors sold their shares

34e) Comment, "The due diligence requirement for plaintiffs and rule 10b-5, 1975 Duke L.J. 753 Wheeler, "Plaintiff's duty of due care under rule 10b-5:An implied defense to an implied remedy" 70 Nw. U. L.Rev. 561 (1975); Comment, "The due diligence requirement for plaintiffs and rule 10b-5" 1975 Duke L.J. 753, 757 pp.

34f) Affiliated Ute Citizens 406 U.S. 128 (1972)

35) Diamond v. Oreamuno, 248 NE 2d 910 (1969)

on the basis of a confidential information, that there would be a sharp drop in corporate earnings. The plaintiff was a shareholder filing a derivative action to compel an account for profits allegedly aquired as a result of a breach of fiduciary duty. In Schein v. Chasen[36] the Diamond reasoning was extended to permit corporate recovery from a brokerage firm, one of its employees and a mutual fund having received a tip. It was held that third parties outside the corporate structure become automatically fiduciaries through the aquisition of confidential information which is owned by someone else. The basis of breach of fiduciary duty was necessary, because SEC- rule 10b-5 was not applicable, since neither the corporation nor the stockholder were buyers or sellers having suffered a loss. Only the president of the corporation came within sect. 16 (b) SEA, but he did not realize any profit. The court assumed a "common enterprise" between the corporate officer concerned and the outsiders , who used confidential corporate information for their own personal enrichment[37]. This seems to be an adaption of one of the earlier approaches, the so-called "special facts doctrine[38]", to a tipping situation. This doctrine imposed a fiduciary relationship between a director and an individual shareholder, usually if there was a close relationship between the persons involved.

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36) Schein v. Chasen 313 So 2d 739(Fla. 1975)
478 F 2d 817 (2nd Cir. 1973)

37) 478 F2d 817,822 (2nd Cir 1973)

38) Strong v. Repide 213 U.S. 419, 431 (1909)
Magnusson "Insider trading:The basis of liability"
1 Queen's Intramural L.J. 53, 64 (1968)

The applicability of the concept of fiduciary duty in the U.S. has been diminued somehow by the expansive scope of section 16 (b) SEA and the broad interpretation of SEC - rule 10b-5. Nevertheless, if certain situations are not covered by the named federal statutory provisions, American state courts are still prepared to use this Common Law principle as an additional and supplementary device.

III. Canada

1) The legislative development

The problem of insider trading was not faced by Canadian legislative bodies before 1963.
In that year, the Attorney General of Ontario formed a committee led by J.Kimber, the chairman of the Ontario Securities Commission, an administrative body formed already in 1937 according to the model of the American SEC. This commission was charged to determine the deficiencies of the existing securities regulations and to recommend up-to-date provisions. The use of inside information was one of its dominating issues. The Kimber Committee based the need for legislation on the ideal of a free and open market with prices based on full possible knowledge of all relevant facts in order to maintain the confidence of the investing public in the integrity of the market[39].
Its recommendations received rapid legislative enactment with the Ontario Securities Act of 1966, which became effective in May 1967. The act introduced disclosure and reporting requirements for corporate insiders and a civil liability remedy for improper use of inside information. The Ontario

39) Ontario, Attorney General's Committee on Securities Legislation, Report 2:02 (1965)

Securities Act was followed by the four Western provinces and served as a model[40] for amendments to the Canada Corporations Act[41], for the Canada Business Corporations Act[42] and the Quebec Securities Act[43], particularly as far as the insider trading regulations were concerned[44]. Quebec also established a securities commission while contol and enforcement on the federal level is executed by the Corporations Branch of the Department of Consumer and Corporate Affairs.
In comparison to the broad language of section 16 SEA and SEC-rule 10b-5, the Canadian statutes are far more elaborate and explicit. Undoubtedly, their enactors have been able to profit from American experiences and have tried to avoid some interpretation problems created by the more general wording of the American regulations.

2) The relationship between Federal and Provincial securities regulations

In contrast to the U.S., the existence of Federal and Provincial laws dealing with the same subject

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40) David L. Johnston, "Canadian Securities Regulation" 16 (1977)

41) R.S.C. 1970 C. 32 as amended by c. 10 (1st. supp.) (1969-70) c. 70, cited as the Canada Corporations Act (CCA); 1964-65 c. 52 s.1

42) S.C. 1974-75 c. 33 amended by 1978-79 c. 9 ; 1978-79 c. 11; cited as the Canada Business Corporations Act (CBCA)

43) Revised Statutes of Québec, c. 67 (1973)

44) In fact, there are two Ontario enactments regulating insider trading, the 2nd is the Ontario Business Corporations Act R.S.O. 1970 c. 53 amended 1971 c. 26 ; 1972 c. c.138 (OBCA) Because there is no substantial difference in terms of the manner of regulating the practice of insider trading, it is referred only to the Ontario Securities Act S.O. 1978, c. 47

matter creates the additional problem of their relationship to each other. The regulation of trading in securities falls generally within Provincial legislative authority.[45;46] Under certain circumstances, however, Federal and Provincial insider trading provisions operate concurrently[47]. The important factor is the place of registration of the company either under the law of one of the provinces or under federal regulations requesting registration for certain companies. In the latter case of so-called Dominion Companies the solution of the question of choice of law is merely a question of fact where the actual steps of the trade took place[48]. There is a reasonable tendency to give the broadest construction to Provincial legislation and to apply its provisions, if only one act of an operation, which is mainly extraprovincial, takes place within the particular province.[49] The constitutional issue of the relationship between federal and provincial securities regulation in Canada is far from being solved. It gives federal and different provincial courts the possibility to claim jurisdiction based on the same facts at the same time according to the motto:" First claim - first serve". This is

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45) Laskin's Canadian Constitutional Law 359, 4th ed. 1973

46) The federal regulatory power in this field is the result of a preeminence of section 91 of the British North America Act over section 92 allowing the application of either the "property and civil rights " clause or the "trade and commerce" clause.

47) Lederman, "The concurrent operation of Federal and Provincial Laws in Canada" 9 McGill Law Journal 185, 193 (1973)

48) Manitoba v. Rosenbaum (1930) 1 D.L.R. 152 (Manitoba K.B.); Lymburn v. Mayland (1932) 2 D.L.R. 6

49) Laskin's Canadian Constitutional Law 360 4th ed. 1973.

a very unsatisfactory solution , but justifies a more exhaustive analysis of at least two Canadian provincial regulations - those of Ontario and Quebec.

3) The applicability and development of Common Law principles

As we have already seen in the U.S., the Canadian courts also apply the general principle of fiduciary duty in cases which are not covered by either a Provincial or a Federal statute.[50;51] The leading case in this context is Canadian Aero Service v. O'Malley[52]. Here the statutory provisions were unapplicable, because the defendants had resigned from their positions as corporate officers before they formed another company to pick up a corporate opportunity of which they had learned during their employment with Canadian Aero Service. In this case, however, the court held that the equitable principle of fiduciary duty had been already overzealously applied and based its decision on the "theory of corporate opportunity", which concerns an arising business opportunity which should be aquired for the company. If diverted by the insider, the opportunity is subject to a constructive trust for the benefit of the corporation. An insider may pick up a business opportunity only, if his company is definitely unable to do so. This is the only situation which is not deemed to be a corporate opportunity and prevents the application of the constructive trust construc-

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50) Zwicker v. Stanbury (1953) 2 SCR 438; (1954) 1 D.L.R. 257

51) Peso Silver Mines v. Cropper 58 D.L.R. (2d) 1 (1966)

52) 40 D.L.R. (3d) 371; (1974) SCR 592

tion.[53] This example demonstrates that Canadian courts are not only prepared to apply the principle of fiduciary duty, but also to expand it, if statutory provisions are not met. This possibility, however, is just a supplementary solution.

IV. The Federal Republic of Germany

In the Federal Republic of Germany the approach to the problem has been fundamentally different.

1) The legislative history

Whenever a discussion to introduce some regulatory pattern came up, the American model was totally refused in favor of a complete self-regulatory solution.[54] In West-Germany, the problem of insider trading is not considered to be very urgent. Since only a few cases have been reported so far, there seems to be no need for an immediate drastic action[55].
The initiative to examine the use of inside information in Germany had been taken by the "Börsensachverständigenkommission", a commission of experts consisting of representatives of the major private and public financial and credit institutions, the Federal Reserve Bank,[56] several important industrial associations, the stock exchanges and some economic experts, a permanent institution advising the Minister of Finance[57].

53) Slaughter, "The corporate opportunity doctrine" 18 Sw. L. J. 96, 100 (1964)
54) K. Hopt. M. Will, "Europäisches Insiderrecht" 111 (1973)
55) Jentsch, "Die Neufassung der Insider-Regelungen", Bank-Betrieb 1976, 186;
D. Hoffmann, "Der Aufsichtsrat" § 511 (1979)
56) Bundesbank, in Germany an independent institution directing the financial and monetary policy and not responsible or acting upon directives of the federal or a provincial government.
57) Ernst, "Die Insiderfrage" 2, (1977)

They recommended in 1970 the first draft of the "Insiderhandelsrichtlinien",[58] the "Händler-und Beraterregeln"[59] and a "code" of procedure, the "Verfahrensordnung"[60]. After a few years of experience and mainly as a result of the Rheinstahl case [61] several shortcomings and loopholes were eliminated by amendments in 1976.[62]

2) The legal nature of the Insider Trading Guidelines and its scope of regulation.

The legal nature of the Insider Trading Guidelines is similar to the British City Code. Since it is a voluntary agreement among the major associations of the West-German industry, trade and commerce, there is no legal enforcement[63].
According to the different branches they belong to, West-German firms are organized in associations representing them in common issues and forming mainly a counterpart against the trade unions[64].
The Guidelines contain rules of good behavior disapproving generally the use of inside information. They apply to members of the board of directors, the supervisory board, major shareholders and some specified employees. The HuBR are mainly designed for securities dealers, brokers and financial and investment advisors. The VerfO regulates the procedure in case of alleged violations.
Firms of an association, which became a party of

58) in furtherance referred to as InshdR or Insider Trading Guidelines
59) in furtherance referred to as HuBR
60) in furtherance referred to as VerfO
61) Der Betrieb (DB) 1973, 2288
62) K.Hopt; M.Will,"Europäisches Insiderrecht" 117 (1973)
63) H. Bremer, "Die Sachverständigenkommission " 27(1976)
64) for a detailed listing of the members see D. Hoffmann, "Der Aufsichtsrat" § 511 (1979)

the agreement are obliged to guarantee that the board members, major shareholders and specified employees submit to the Guidelines by signing a declaration [65], which - in the case of a director for instance- becomes a part of the employment contract which he has made with the company[66].
The recognition of the guidelines has been quite successful. Now 91% of the persons deemed to be insiders of companies registered on one of the stock exchanges have submitted to the guidelines.[67]
On the other hand, representatives of the trade unions, who were elected to some supervisory boards have been more reluctant to sign the required declaration. The unions are still opposing a voluntary solution and favour legal sanctions instead.[68]

3) Enforcement

The guidelines are enforced by investigation committees established on every stock exchange and headed by an independent judge of the local court of appeal, who is experienced in matters of trade and commerce.[69] These commissions may start an investigation upon request or their own initiative. While it is normally not their duty to investigate in facts and circumstances of a

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65) § 5 InshdR
66) H. Bremer, "Die Sachverständigenkommission" 28 (1976)
67) Ernst, "Die Insiderfrage" 3, (1977)
68) D.Hoffmann, "Der Aufsichtsrat" § 513 (1979)
69) In Germany, there are generally separate chambers for matters of trade and commerce at the civil court. (Kammer für Handelssachen)

case, they may request the delivery of data and material by the parties involved[70]. The commissions are not entitled to inquiry in cases which are or have been subject to trial in any kind of court even if no legal sanctions were finally imposed. A possible sanction is the publication of the results of the inquiry. The Guidelines also provide for accountability of profits to the company.[71] To the particular problems of this sanctuary system it will be referred to in a subsequent chapter.

The commissions do not require a huge administrative body since its members meet only in case of an actual inquiry. This, however, has not happened very frequently so far. Between 1976 and March 1980 there have been only 14 inquiries started by one of the commissions. In none of them sufficient proof was found or submitted to justify the start of an official procedure.[72]

This, in contrast to the numerous cases which arose particularly in the U.S., somewhat astonishing figure may be the result of a basic difference: In the United States, the common type of stock consists of registered shares. This type permits to identify easily the owner of securities and a change of ownership. In Canada and Great Britain, registered shares are also the type most frequently used.

In West-Germany, stock consists commonly of bearer shares. The change of ownership is achieved as soon as the certificate is handed over to the purchaser. Thus it is almost impossible

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70) § 4 b VerfO

71) § 5 VerfO

72) Börsenzeitung, March 7, 1980

to follow the course of stock and prove insider trading[73]. This point will be emphasized further on. It is probably one of the crucial deficiencies of the West-German regulatory pattern.

4) Advantages and inconvenients of a voluntary solution

The system of the Federal Republic of Germany and the British "City Code on Take-Overs and Mergers" raises already the question of the advantages and inconvenients of a voluntary in comparison to a statutory solution.
The basic purpose of the voluntary regulations is exactly the same. The German "Börsenreformkommission" also emphasized the necessity to maintain the investor's confidence in a regular and fair securities market.[74] The crucial question, however, was how to achieve this goal. The issue is the same - the means of realization are quite different. Generally, a certain interest of the West-German securities industry to avoid a statutory regulation can hardly be denied.[75] Its representatives are eager to point out that the moral deterrent effect of a voluntary agreement is far better than that of statutory sanctions. It is argued that the actual abuse of inside information can only be prevented by a bilateral accord of the parties involved in the securities' trade who are convinced that

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73) Hölzler;Hoffmann "Schützen die Insider-Vorschriften den Insider" Zeitschrift für das gesamte Kreditwesen (ZfK) 1975, 310

74) Jentsch, "Die Neufassung der Insider - Regelungen" Bank-Betrieb 1976, 186, 186

75) Bundesverband der Deutschen Industrie (BDI) circular to all members dated Sept. 17, 1976 urging all members to sign the requested declaration

insider trading is immoral.[76] Persons or institutions violating this agreement will become outlaws who will loose their personal reputation and the public's confidence in their integrity. This result might be a more effective sanction than a fine or even imprisonment. It is estimated, that the institutions supervizing a voluntary agreement will be able to maintain a higher standard of conduct.[76a] The validity of this hypothetical argument, however, is hard to prove.

Legal sanctions may result in a sort of negative solidarity leading to a search for loopholes and deficiencies instead of obeyance[77]. Tax laws are a good example for this tendency.
In a "voluntary" investigation more information might be given than in public or court hearings,[78] because there is no or less pressure by the public opinion and media. On the other hand, the principle of public legal investigation may destroy trade and banking secrets and thus deteriorate the investor's confidence in the securities industry.[79] This might be a convincing argument against certain extensions of disclosure requirements, but not against the principle itself.

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76) Ernst, "Die Insiderfrage" 13 (1977)
76a) Ernst, "Die Insiderfrage" 15 (1977)
77) Ernst, "Die Insiderfrage" 16 (1977)
78) Jentsch, "Die Neufassung der Insider-Regelungen" Bank-Betrieb 1976, 186, 189
79) Ernst, "Die Insiderfrage" 20 (1977)

Voluntary solutions may provide more flexibility and adaptablity to economic developments than statutes which can hardly cover every imaginable situation[80]. This, however, mainly depends on the actual formulation of a statutory provision and a possible narrow or extensive interpretation by the courts - as the example of the American SEC- rule 10b-5 shows. Therefore it is questionable why only a voluntary solution might be able to maintain the investor's confidence in the integrity of the securities market and the customers' interest in investing in it.[81,82]

V. The basic philosophy of regulations: The need to balance the interests of both parties

This brief exposure of the regulatory pattern of the four different countries shows already considerable differences in the means and philosophy to approach the problem of insider trading. The different types of solutions use different ways in order to achieve a common goal: To improve the position of the investing public in order to create an equal opportunity for everybody!
There is a need to balance the interests of both sides involved in the problem of the use of inside information, of those who invest in the securities and on the other hand of the insiders who are responsible to manage the companies successfully.

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80) Börsenzeitung March 7, 1980
81) Ernst, "Die Insiderfrage" 17 (1977)
82) Ernst, "Die Insiderfrage" 18 (1977)

Undoubtedly, the investing public has to be protected against the use of inside information. On the other hand, tight regulations and restrictions may paralyze a manager's initiative and diminue his efforts for the company. That is why the interests of these two opposing groups have to be balanced. Thus the question to be answered cannot be exclusively how to achieve equality and fairness of trade, but also how to avoid to impose too much burden by requirements and sanctions on an insider. According to the different approaches existing in the four countries this balance is shifted differently.

C: Key problems and solutions

I. The nature of an inside information

In order to be able to examine how these contrasting interests are finally balanced by the four jurisdictions it is necessary to determine the character of an inside information.
The statement that an inside information is an information not publicly disclosed is covering the problem only partially and very broadly.
But it may serve as a starting point in an attempt to elaborate a valid definition covering the basic problems. This simple statement demonstrates that the nature of an inside information is linked with the term " disclosure".
An information being disclosed to the general public cannot be an inside one. An insider is a person having access to an information not publicly disclosed. By narrowing down the problems of disclosure it will be tried to develop a definition of the term "inside information".

By definition, disclosure is said to be the impartation of what is secret [83]. Thus lifting an inside information means revealing certain knowledge. But in between total secrecy and full revelation there are some important steps leading to several fundamental questions.

1) The scope of persons concerned

The first one concerns the group of persons who are having; valuable information. Data or opinions expressed by a clerk or typist may be of a totally different value than those to be obtained by the chairman of the board or a major shareholder. A clerk's statement hardly bothers anybody and is very unlikely to affect the market value of a company's stock. That is why it may be sufficient to impose a duty of disclosure only on some key figures of a company.

2) The material market impact

The character of an information is another key factor. The acquisition of a new office building by a company, for instance, will not attract much interest among the investing public. But the publication of a considerable ore or oil discovery on a company's land or the mere expectancy of huge losses will respectively either boost or drop the marker price of the shares concerned. That is why only informations having a certain market impact should be deemed to be an information to be disclosed. But to what extent? To return to the example of the ore discovery, a poten-

83) Black's Law Dictionary 412, 5th ed 1979

tial investor definitely wants to know whether it is a verified claim or still a mere expectancy or whether it is a commercially mineable body of minerals or not. According to the extent and the quality of an information its market impact will be quite different.[84] This problem has been generally articulated in terms of "materiality" of facts or information.[85] Typical facts being regarded to be material include an extraordinary discovery of natural resources, a substantial reduction in dividends or a merger proposal resulting in substantial changes in the market price of the shares of the merging companies[86].

3) The timing of disclosure

An additional issue arising is the timing of disclosure. A long delay in the publication of a material information may still allow insiders to trade before the general public will get access to the same information. A delayed information may be a worthless information. This is the case, for instance, if directors withhold an information about a discovery of some natural resources in order to enable the company to acquire options on the sur-

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84) W. Painter, Federal Regulation of Insider Trading" 172 (1968).

85) Fleischer, " Securities trading and corporate information practices" 51 Virginia L.Rev. 1271, 1288-89 (1965)

86) Northern Trust Co. v. Essaness Theatres Corp. 103 F Supp 954 (N.D. Ill.1952)

rounding land.[87] That is why disclosure only makes sense within a specified short time limit.

4) The problem of partial disclosure

Another important implication in this context is the request for full and not only partial disclosure. A partial and incomplete information may be misleading and confusing and result only in a deterioration of the market. That is why an insider should be obliged to reveal all he knows without omitting material particulars which may affect and influence an outsider's decision.

5) Dissemination

Even the most complete disclosure will not be effective until the information is distributed broadly enough to reach all those affected by it in an understandable manner. Important factors governing this problem are the choice of the medium of publication itself, its distribution, its quantity and level of readers, listeners

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87) W. Painter, "Federal Regulation of Insider Trading" 170 pp. (1968); SEC v. Texas Gulf Sulphur 401 F2d 833 (2nd Cir. 1968) ; Fleischer, "Securities Trading and corporate information practices" 51 Va. L.Rev. 1271, 1291 (1965)

and viewers and its reputation. As far as the information itself is concerned it may depend on the nature quality and complexity of a certain information, the class of security, its distribution and the type of corporation involved. Another important element is the availability of alternate and perhaps more effective means of publication and disclosure.[88] Generally, the way of dissemination should be considered to be adequate, if the means chosen for publication are likely to reach the audience the information is designed for.

6) Leakage

The distribution of an information may not occur intentionally. The stock exchange is always a creative playground of rumours, fairytales and gossip, which may be created by some leakage of corporate information. Nevertheless, they have an impact on the market. In huge public companies and corporations it is almost impossible to keep an information, which is not or not yet designed for publication totally secret because of the involvement of many persons. The persons spreading rumours are very often not well informed. But does a company have the duty to deny, specify or affirm or if necessary even correct an incorrect information affecting the market value of its stock? On the other hand, an unauthorized leaking of an information is not enough to meet disclosure standards. It requires some further confirmation, but does not allow an insider to trade on this basis.

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88) D. Johnston, "Comment: Gren v. Charterhouse Group Canada Ltd. et al." 51 Can. Bar Rev. 676,687(1973)

7) Attempt of a definition

These are the basic problems to determine the nature of an inside information. Thus an information which is supposed to have a material impact on the securities market and is completely and intentionally revealed by the right person or institution at the right time by an appropriate means of publication is not deemed to be an inside information. Not to comply with one of these elements creates an inside information prohibiting an insider to trade in the securities concerned.

II. Disclosure requirements

Since the term disclosure is the key element of the definition given above, the disclosure provisions are the starting point of the comparison of the four different jurisdictions.

1) Definition of the term "insider"

At first, it has to be stated that the meaning of the term "insider" differs according to different purposes. An insider for disclosure requirements does not necessarily have to be the the same person as for liability purposes and vice versa. That is why the following chapter faces exclusively the definition of the term insider for disclosure requirements.

a) U. S. A.: Sec. 16 (a) SEA

Sec. 16 (a) SEA imposes a reporting duty on every officer or director of a company having issued equity securities registered on a stock exchange as well as every person who is directly or indirectly the beneficial owner of more than 10% of any class of any equity security.

b) Canadian statutes

Sec. 100(1) CCA defines "insider" as a director or officer of a corporation and a person who beneficially owns or exercises control over equity shares of a public company which carry more than 10% of the voting rights attached to all its outstanding equity shares.
The crucial term in these two definitions is the determination of an equity security depending on the stock or bonds the company has registered.
These sections do not apply to any of the securities - even equity securities - of a company having only registered convertible bonds.[89]
In order to avoid this result, the definition of "share" in sec. 121 (1) CBCA contains an extension to currently convertible securities and currently exercisable options and rights to acquire shares carrying voting rights. It also includes persons being able to gain influence in a corpration because of their mere ability to obtain equity shares. This extension, however, may have an opposite effect, because the determination of the percentage held must be based on the total

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89) L. Loss. "Securities Regulation" vol.II 1039
2nd ed. 1961

number of "shares" issued. Therefore a shareholder of a corporation having issued a considerable number of convertible bonds, who holds more than 10% of the outstanding voting shares, may hold less if conversion or acquisition rights are taken into account[90].

The insider definition of sec. 1(1)(17)OSA contains basically the same elements as sec. 16(a) SEA and sec. 100(1) CCA with two alterations: The term corporation has been replaced by "reporting issuer" so that the reporting requirements apply also to unincorporated associations. Instead of "equity shares" the OSA uses the expression "voting securities".[91]

The definition of sec. 139(c) QSA is substantially the same as the one in sec. 100(1) CCA. In addition, the Canadian federal statutes extend the insider definition to persons who may have access to corporate information because of a special relationship with one part of a group of corporations under common control[92].

c) British regulations

In Great Britain, the Companies Acts provide for disclosure by directors, their spouses and children and shareholders with 5% or more of the voting shares of a listed company.[93]

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90) Anisman, "Insider Trading under the Canada Business Corporations Act", McGill University, Meredith Memorial Lectures 151 (1975)

91) Sec. 1 (1) (44) OSA

92) Sec. 100 (2) CCA; 121 (2) and(3) CBCA

93) Sec. 27, 31, 33 CA 67; 26 (2) CA 76

Rule 17 and Practice Note Nr.9 of the City Code on Take-Overs and Mergers require disclosure by every director and any person "acting in concert" with the offeror. Acting in concert with someone "includes all persons who, pursuant to an agreement or understanding actively co-operate through the acquisition by any of them of shares in a company to obtain or consolidate control of that company[94]." This definition covers members of a group holding more than 20% of its share capital, close relatives and related trusts or pension funds of a company and each of its directors as well as agents, investment companies or financial advisers[95].

d) West - Germany

The West-German guidelines are lacking any type of disclosure requirement. § 2 InshdR gives a general definition of the term "insider" applicable to trade prohibitions and liability purposes. It will be referred to in the special sections devoted to these problems.

e) Comparison

At first, the comparison of the persons and institutions mentioned proves one obvious result: Each regulation includes directors, corporate officers and major shareholders of a margin from 5 to 25% equity ownership. The efforts to extend the scope

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94) Weinberg and Blank on Take-Overs and Mergers 912, 4th ed. 1979

95) Weinberg and Blank on Take-Overs and Mergers 914, 4th ed. 1979

of definition beyond this "inner circle" of persons having access to inside information comply with the recent development of the securities industry. Affiliated enterprises, investment companies, banks and financial advisers now are in a comparable position to acquire and market inside information. On the other hand, a reporting duty imposed on this group of persons and institutions may involve considerable workload for them. Brokers, banks and financial advisers use to acquire an abundance of corporate informations which can impossibly be completely registered and reported to a securities commission. That is why it is probably undesirable to extend the disclosure requirements beyond the group of persons mentioned in sec. 16 (a) SEA, the Canadian statutes and the Companies Acts. For the purpose of disclosure it seems to be sufficient to cover the "inner circle" of insiders. Despite the difficulties to properly determine insiders beyond this circle, the gain of a little bit more information about possible abuse of inside information would lack any relationship to the burden and workload involved. Thus the definitions of sec. 16 (a)SEA, 100(1) CCA, 121(1)CBCA,1(1)(17) OSA, 139(c)QSA; and sec. 31, 33 CA 67,26(2) CA 76 can be considered to be sufficient. The more broad wording of the City Code provisions is necessary to include everybody involved in a takeover attempt. This group of persons acting "in concert" in the course of such an undertaking is easily determinable and limited. Therefore these provisions are not likely to create many problems.

2) Content of the reports required

The second problem in this context concerns the content of the reports to be filed.
Under sec. 16 (a) SEA an insider has to report his holdings of all the issuer's equity securities and any change in it.
In Canada, the content of the required report is the same under both federal acts [96]. The insider has to indicate his "insider interest" meaning his holdings, which have to be distinguished in securirties owned beneficially and equity shares over which control or direction is exercised.
In the case of indirect ownership the report has to disclose the intermediary and if control or direction is exercised, the capacity in and the means by which it is exercised , has to be illustrated.
A report of changes of an insider's holdings has to contain basically the same informations as the initial report [97]. Detailed information is required about each transaction, the number of securities bought and sold and the price at which it was effected.
Even more elaborate information is required, if the insider acquires securities by the exercise of an option, by a transaction not taking place in the open market,where neither a purchase or

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96) Canada Corporations Regulations, Form 1
Canada Business Corporations Regulations, Form 24
97) Canada Corporations Regulations, Form 2
Canada Business Corporations Regulations, Form 25

sale is involved and if the insider sells to and purchases directly from the issuing corporation[98]. Basically the same requirements apply in Ontario[99] and Québec[100].

Under sec. 27 and sec. 31 CA 67 and sec. 40 CA 76 British insiders have to disclose particulars of all interests and occurrences regarding interests i.e. holdings and dealings in the securities of the company or associates.

The City Code requires detailed disclosure by the directors of the offeror and any person acting in concert with the offeror of shareholdings in the offeree company. The same rule applies vice versa to directors of the offeree company and persons acting in concert with it, if the consideration offered includes equity securities in the offeror company.[101] The term "interest" is considered to have the same meaning as in the Companies Acts of 1976 and 1967[102].

As far as the content of required reports is concerned, the regulations show no basic differences. They all ask for more or less detailed disclosure of all holdings of the company's and affiliated companies' securities and any change in it.

3) Time limits

Because of the importance of the timing of disclosure, the statutes set certain time limits within the reports have to be submitted.

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98) Canada Corp. Reg. Form 2, Instruction Nr. 9 Canada Bus. Corp. Reg. Form 25, Item 8, Instructions Nr. 7-9.

99) Ontario Securities Regulations, Part VII, sec. 147-156, Forms Nr. 36 and 37

100) sec. 141-147 QSA

101) City Code rule Nr. 17; practice note Nr. 9

102) Weinberg and Blank on Take-Overs and Mergers 2325 4th ed. 1979

In the U.S. the insider usually has ten days after the actual date of purchase or change in the ownership of the securities to deliver the requested data.[103] These reports, however, have to be received and not only posted within this specified ten day period.[104]

In Canada, the insider report must be filed within ten days of the end of the month in which the event in question occured[105]. Accordingly, this period may sum up to a maximum of 41 days - enough time for some undisclosed trading. The only exception applies to the acquisition of 20% ownership in voting securities under sec. 103 OSA, which has to be reported within three days after the date of acquisition.

Under sec. 27(3) CA 67 a director has to give the notification within five business days of the occurrence. In the case that he is not aware of this fact at that time, the report has to be submitted within five business days after he becomes aware of the fact[106]. The City Code does not contain a specific time limit. It provides only, that the requested disclosure has to be made in the offer document. That means that disclosure is not required at the time of pending take-over negotiations, which may last for a long time. Sec. 17(4) CC only provides for a statement in the document of the offeree company advising its shareholders on an offer to list dealings in the shares in question during the period commencing twelve months prior to the

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103) sec. 16 (a) SEA

104) L.Loss, "Securities Regulation", vol. V, 3002 2nd ed. Supp. 1969

105) sec. 100 (1) CCA; 122 CBCA; 102 OSA; 141-144 QSA

106) read with sec. 27 (12) CA 67 and sec. 24 CA 76 excluding weekends, legal and bank holidays.

beginning of the offer period. This provision, however, hardly improves the position of the shareholders and the investing public. At the time of the notification insiders might have already dealt extensively, but for the shareholders particularly of the offeree company the same chance is gone.
The possible 41 day period of the Canadian statutes and the deficient formulation of sec. 17(4)CC leave enough time to an insider to deal in the securities of his company on the basis of information due to disclosure later on. These provisions are weakening considerably the efficiency of these disclosure provisions.

4) Publication

The mere collection of information by the responsible institutions does not mean anything without effective publication, dissemination and digestion.
In the U.S. the reports are made available to the public both at the SEC's office and at the stock exchanges[107]. They are published in a monthly pamphlet to be obtained at every exchange and regional SEC office and is widely distributed among brokers, investment firms and financial services.
In Canada, all reports filed are also made available for public inspection[108]. The publication in a monthly periodical is either authorized or mandatory[109]. As a matter of fact, Canadian financial publications and even newspapers now report regularly important developments from insider reports.[110]

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107) SEC-rule 24b - 3 (a)
108) sec. 100.2.(1)CCA; 259 CBCA; 137 OSA; 148 QSA
109) sec. 100.2.(3)CCA; 123 CBCA; 116 OSA; 148 QSA
110) Anisman , "Insider Trading under the Canada Business Corporations Act" McGill Univers. Meredith Memorial Lectures 151 - 201 (1975)

The British Companies Acts provide for the collection of the informations delivered by the directors in a register to be kept up to date by the companies themselves and open for public inspection[111]. If the directors' reports contain informations about securities listed on a recognized stock exchange, which is the usual case, this institution has to be notified immediately to the same extent[112]. The stock exchanges are authorized to publish the informations in an adequate manner[113].
Generally it can be stated that these provisions provide for an adequate and sufficient publication, dissemination and digestion of the reported insider activities. Another question, however, is, whether these publications are actually read by the persons concerned.

5) Enforcement

The sanctions for enforcing compliance with sec. 16 (a) SEA are criminal prosecution and mandatory injunction [114]. Against exchange members or registered broker dealers administrative disciplinary action might be taken.
In Canada, the Minister or the Securities Commissions are authorized to apply to a court for an order forcing an insider to obey the statutory provisions.[115]The failure to file an insider re-

111) sec. 27 CA 67
112) sec. 25. CA 76
113) Weinberg and Blank on Take-Overs and Mergers 2319 4th ed. 1979
114) SEC v. Great American Industries Inc. 259 F Supp 99 (1966); SEC v. Golconda Mining Co. 291 F Supp 125 (1968)
115) sec. 100. 3. (5) CCA; 245 CBCA; 122 OSA; 154 QSA

port or the submission of a false and misleading statement will be punished as a criminal offense[116]. The penalties range from a fine of 1000 Dollars in sec. 100. 3(1)CCA which is now increased by sec. 122(9);(10)CBCA to 5000 Dollars to 25,000 for non-individuals and companies in Ontario and possible imprisonment between a maximum of six months and one year(sec. 118 OSA) or both.

In Britain, the sanctions for non-compliance under the CA 67 and CA 76 are comparable. The maximum penalty to be imposed on a director failing to notify or submitting false or misleading statements deliberately or recklessly is a fine not exceeding 200 Pds. or up to two years imprisonment or both[117].
A failure to record information submitted [118] or to inform the stock exchange[119] may lead to a penalization of the company and every officer intentionally authorizing the default by a fine not exceeding 500 Pounds and an additional default fine for each day the default continues.
These partially harsh and severe sanctions against non-compliance with the disclosure provisions have undoubtedly a deterrent effect.

6) Exemptions

The statutes, however, authorize the administrative bodies to grant certain exemptions from the reporting requirements. Under sect. 16 (a)SEA these exemptions are limited to some administrative

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116) sec. 100. 3. (1) CCA; 122 (9);(10); 243 CBCA;
118 OSA; 160 QSA
117) sec. 27 (8) CA 67
118) sec. 29 (12) CA 67
119) sec. 25 CA 67

simplifications of some reporting duties in order to avoid multiple submission of the same report.[120]

The Canadian commissions respectively the Minister have the general authority to exempt a person totally or partially from the reporting duties upon application[121], even with retrospective effect[122] or upon his own motion[123].

In Québec, exemptions may only be granted in case of a conflict with another jurisdiction or if other regulations have a substantial similarity to Quebec's requirements[124] and if it is not opposing to the public interest[125].

The possibility to exempt a person based on a commission's discretion is said to be frequently applied[126] particularly in cases of inter-corporate holdings. The guiding principle to grant these exemptions is the test of access to specific confidential information. The determination of persons having access to this type of information depends on the structure of a group of companies. The companies involved will always be highly interested to exempt as many persons as possible.

In addition, the Ontario Securities Commission requests affidavits from specified non-exempted insiders who have to guarantee not to transfer

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120) L. Loss, "Securities Regulation" vol. V,3000 2nd ed. Supp. 1969

121) sec. 100. 1. (10) CCA; 117 (2) (a)(II) OSA

122) sec. 122 (8) CBCA

123) sec. 117 (2) (a) and (b) OSA

124) sec. 149 QSA

125) D. Johnston, "Canadian Securities Regulation" 292 (1977)

126) D. Johnston, "Canadian Securities Regulation" 292 Fn. 67 (1977)

confidential information to exempted persons within an interlocked corporate structure[127].
In Great Britain, there are no comparable exempting provisions to be found.
The possibility to grant certain exemptions does not only diminue the administrative workload and expenses for Commissions and companies and avoids the submission of multiple reports, but also provides a certain flexibility, which may avoid injustice and clashes between different jurisdictions. This is particularly necessary in Canada, where we have concurrent application of Federal and Provincial regulations. A frequent use, however, is likely to weaken the whole system.

7) Comparison

With one exception - West Germany which has no disclosure regulations at all- the reporting provisions are resembling to each other. They enable the administrative bodies to control the actual ownership of insiders' securities and every change in it and impose some severe sanctions in case of non-compliance. The City Code and the Canadian statutes are deficient as far as the reporting periods are concerned.
But do they really achieve the goal - to ensure disclosure in order to create an equal opportunity for every investor? That has to be doubted, because the provisions examined provide only for the disclosure of how it may be called "secondary information" If an insider reports to have purchased or sold securities in his company, he might have already reacted to some initial "primary" information. The "primary" information is the initial information about some confidential corporate facts

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127) D. Johnston, "Canadian Securities Regulation" 293 (1977)

which are likely to affect not only the insider's but also every potential investor's decision to invest in this particular security. Secondary informa- provides only for disclosure of possible insiders' reaction to it. The reporting insider complying with the disclosure provisions might have already dealt in the securities concerned, before an "outsider" will get a chance do do the same. Thus disclosure of secondary information combined with a certain time lag to submit the required reports is far from improving the position of the investing public. The reporting duties may only facilitate to a certain extent the proof of an actual violation of insider trading prohibitions.

It has to be admitted that the achievement of disclosure of the so-called primary information in the original sense is an utopian goal, because the actual moment of acquisition of an initial primary information can hardly be determined, proven and controled. Disclosure cannot take place at the same moment the information is acquired. Thus the question becomes a problem of the value of secondary information. It might be helpful to a certain extent to distribute it widely among professional dealers, brokers and financial advisers, who will be able to assess secondary information and advise customers accordingly. The normal investor is not supposed to read these publications anyway. But it is at least doubtful whether the disclosure of mere secondary information justifies the establishment of huge and costly administrative bodies and impose considerable workload on an administration and the insiders. There is hardly any justifiable relationship between this burden and the result to be achieved. That is why it appears to be more logical to restrain from any sort of reporting duties and its administrative efforts and expenses involved.- as West-Germany does.

III. Trading prohibitions

In addition to provide for a detailed disclosure of shareholdings and dealings the regulations impose certain restrictions on insider trading. They either prohibit completely the use of inside information or forbid expressly certain transactions being attractive as such or methods and schemes to circumvene the disclosure and liability provisions.

1) Express prohibition of certain transactions

a) U. S. A.: Sec. 16 (c) SEA

Sec. 16 (c) SEA [128] contains a prohibition of short sales or "sales against the box" by insiders[129]. In order to hide his intentions the seller who owns and possesses stock which he is theoretically able to deliver avoids disclosure and subsequent liability by not delivering the shares. He borrows some other stock to make the delivery. There is also the possibility that the insider does not even own the securities sold but borrows in order to be able to deliver. The transaction is completed by either buying stock or using the existing stock to repay the lenders[130]. This scheme known as "selling against the box" is not a short sale in the original sense because the customer does not have to repurchase the stock but may deliver any security being " in his box " at that time. The shares acquired are not and those being sold remain registered under the name of the insider. In this case, the insider is totally indistinguishable

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128) 15 U.S.C. § 78 p (c)

129) L. Loss, "Securities Regulation", vol. II, 1090 2nd ed. 1961

130) L. Loss, "Securities Regulation", vol. II, 1230 Fn. 26, 2nd ed. 1961

from any other short seller, because he is entitled to deliver any type of security he wants. Thus sec. 16 (a) and (b) do not apply.[131] Sec. 16 (c) SEA is exacly designed to prohibit this circumvening scheme.

The basic problem of this prohibition is the definition of the term "ownership". A person "owns" the securities only if he has a surplus of the securities concerned but not if the shares existing on on his account and the borrowed ones are at even and in the case of a surplus of borrowed shares[132].

In Fuller v. Dilbert[133] it is argued that the term ownership has to be interpreted broadly to include " a substantial property interest sufficient for the purposes of entering in a contract of sale[134]".

b) Canadian statutes

In contrast to Ontario and Quebec the Canadian Federal statutes [135] are resembling to sec.16 (c) SEA. These sections are clearly inapplicable if there is no intention to sell short and the securities are actually delivered[136]. In contrast to sec. 16 (c) SEA the CCA [137] contains a defense against unfair application of this short sales prohibition.

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131) Cook, Feldman, "Insider Trading under the Securities Exchange Act", 66 Harvard L. Rev. 612, 637 (1953)

132) Cook, Feldman, Insider Trading under the Securities Exchange Act", 66 Harvard L. Rev. 612, 638 (1953)

133) 244 F Supp 196 (SDNY 1965)

134) 244 F Supp 196, 214 (SDNY 1965)

135) Sec. 100. 6 CCA; 124 CBCA

136) Anisman, "Insider Trading under the Canada Business Corporations Act", McGill University, Meredith Memorial Lectures 151, 205 (1975)

137) Sec. 100. 6 (1) (b) CCA

Certain transactions, which are clearly outside the legislative intent are exempted from section 16 (c) SEA. They include sales by a broker who has no personal interest [138], underwriting transactions which are also exempted from sec. 16(b) SEA [139] and the issuance of securities [140].
Sec. 124(1) CBCA has modified the prohibition by precluding the sale of shares by an insider, which are not fully paid or the sale of shares held on margin. This provision, however, may be easily overcome by a bridging bank loan to pay off the margin immediately before the sale of the shares or by full payment for the shares with borrowed funds. Thereby this provision can be easily circumvened. [141]

c) Exercise of options

A second category of trading prohibitions introduced in Canada and Great Britian concerns the exercise of options by insiders.
The CCA and the CBCA [142] prohibit the purchase of a "put"or a " call" by an insider in respect of securities in his corporation. A "put" is a transferable bearer option to deliver and a"call"is an option to demand delivery of a specified number or amount of securities at a specified price within a specified time period [143]. These provisions are designed to prevent insider trading in option dealings.

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138) SEC-rule X-16c-1; 17 CFR § 240 16-c-1 (1949)
139) SEC-rule X-16c-2; 17 CFR § 240 16-c-2 (1949)
140) SEC-rule X-16c-3; 17 CFR § 240 16-c-3(supp. 1952)
141) Anisman, "Insider Trading under the Canada Business Corporations Act", McGill Univers. Meredith Memorial Lectures 151, 205, (1975)
142) sec. 100. 6 (2) CCA; 124 (2) CBCA
143) sec. 100. 6 (6) CCA; subsect. 2 (1) definitions CBCA

Sec. 25 CA 67 contains a similar prohibition. The use of the word"buy" in the statutes mentioned, however, opens certain loopholes. It does not prevent a director either to purchase a right to subscribe shares or debentures or the acquisition of convertible stock[144], the granting of an option to a third person or the acquisition of an option without consideration, which is not deemed to be a purchase. These are definitely some shortcomings of the Canadian and British restrictions to prevent option dealings by insiders.

2) Total prohibition of insider trading

A different means of restriction is a total prohibition of insider dealing and the granting of certain specified exemptions, a method chosen by the voluntary solutions, the City Code and the West-German insider trading guidelines.[145;146]
Thus the question has to be: Which dealings are permitted rather than prohibited?.
Under the City Code an insider may deal in the securities of his company, if the take-over or merger offer is not considered to be price sensitive[147] or if he complies with the disclosure provisions of sec. 31 CC.
§ 1(2) InshdR exempts dealings made upon instructions or directives and those which are specified by the by-laws of the corporation [148]. This provision also exempts trades, which fit in a long term entrepreneurial conception of the company[149].

144) Weinberg and Blank on Take-Overs and Mergers 2326, 4th ed. 1979
145) rules 7 and 30; practice noteNr. 9 City Code
146) § 1 InshdR
147) rule 30 City Code
148) § 1 (2) (a) InshdR
149) § 1 (2) (b) InshdR

This latter exception, however, does not permit short term speculation profits. It is designed to allow the realization long-term entrepreneurial economic projects. The third exemption [150] applies to banks and professional economic advisers who use to deal to safeguard the interests of their customers or within the scope of their usual securities business. This provision was introduced in order not to exclude professional dealers from trading in a specified security in the usual course of business.

3) Comparison

The comparison of the two basically different approaches may back the argument that the statutory provisions encourage the search for loopholes. The American and Canadian federal statutes and the Companies Act 67 are expressly prohibiting some specified types of transactions. Accordingly, every other transaction not expressly listed is permitted. Vice versa, a total prohibition granting certain exemptions specifies the transactions allowed. All other transactions not expressly permitted are generally prohibited. This different approach has an important impact on knew unknown schemes, which may be designed to circumvene existing regulations. They are generally permitted under the American and Canadian express restrictions method but prohibited under the total restriction approach, because they are not expressly listed. The first system requires continuous legislative updating of provisions, while a total prohibition is flexible enough to cover new schemes arising, which may be expressly permitted if they turn out to be harmless.

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150) § 1 (2) (c) InshdR

The American and Canadian approach may be preferable from the insider' s point of view, who definitely knows, whether an intended undertaking is prohibited or not. Under the German approach and that of the City Code he has to assume, that it is prohibited if not expressly exempted. The total prohibition method has advantages for the investing public, which can be sure not to be outperformed by some new circumvention schemes. This problem is actually the first point where the different solutions are balanced in favour of either the insider or the investing public.
The enactors of the SEA, the Canadian Federal Statutes and the Companies Acts have chosen not to tie too much the hands of the insiders, whereas the German solution of insider trading prohibition and that of the City Code are strengthening the position of the investing public.

IV. Sanctions

Despite the existence of disclosure provisions and trading prohibitions insiders keep on trading in securities of their companies. That is why all the jurisdictions examined provide for a selection of sanctions penalizing the actual abuse of inside information. This has generally to be considered to be the most interesting and difficult section within that context, since the sanctuary and liability principles have been subject to considerable extensions and important developments in order to adapt the regulations and its interpretations by the courts of the different jurisdictions to expanding necessities of the problem.

1) Liability

The most effective sanction is to provide for a type of liability, if an insider has actually traded in the securities of his company. The basic American liability provisions are sec. 16 (b)SEA and for the purpose of a private cause of action rule 10b-5.
The Canadian liability regulations are to be found in sec. 100.4 CCA, 125 CBCA, 131 OSA and 151 QSA.
In Great Britain, there are no statutory liability provisions.Here we find an extensive application of the principle of fiduciary duty.
The West-German liability provision is § 4InshdR.

a) The extension of the definition for liability purpose

In order to cover the full scope of the liability provisions, it is necessary to have another look at the definition of the term "insider", which for liability purposes goes far beyond the one used for the reporting requirements. Transactions by persons not deemed to be insiders within the scope of the reporting duties motivated directly or indirectly occur as well, but would likely pass unnoticed.[151] The definition adequate for disclosure purposes covers only the top of an iceberg. Therefore courts and legislators have considerably expanded the"insider " definition for liability purposes in order to include persons having access to inside information in- and outside the corporate structure. They will be dealt with according to the different groups they belong to.

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151) W. Painter, "Federal Regulation of Insider Trading" 136 (1968)

aa) intra-corporate extensions

(1) § 2 InshdR

Since the German definition particularly applies to liability situations, this regulation has to be introduced here. According to § 2 InshdR, "insiders" are deemed to be the legal representatives, i.e. executive directors and members of the supervisory board of a corporation and the named persons of joint common domestic enterprises, if they hold a position giving them access to inside information. Shareholders holding more than 25% of the equity shares, their legal representatives and members of the supervisory board are deemed to be insiders as well. The definition covers also employees of the company, of a joint common domestic enterprise and of a 25% equity shareholder, if they hold a position giving them access to inside information. There are unfortunately no general criteria to determine who actually belongs to the group of persons having access to inside information. This basically depends on the structure of a company and its interlocking with other firms and the usual circulation of information within the corporate structure.
Under certain circumstances [152] banking institutions, the members of the supervisory board, executives and employees being able to acquire confidential corporate information become insiders too. This somewhat unique requirement is the result of the exposed and close relationship German banks have to corporate customers. They provide several services being executed in Noth America by brokerage firms, trusts and financial and investment advisers.

152) § 2 (1) InshdR

simply listing a few key positions proved to be insufficient.[154] In Colby v. Clune [155] the 2nd Circuit defined an officer to be " a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions". This definition covers every corporate employee having - even just occasionnally- access to confidential information.

In Lockheed Aircraft Corp. v. Rathman[156] the Court, however, held an assistant treasurer not to be an officer, because the work he performed did not correspond exactly to the duties to be executed by the original treasurer, ignoring the fact that the assistant treasurer temporarily substitued for the treasurer and the Lockheed by-laws listed the assistant treasurer as an officer. This court merely looked at the function of the employee and not a possible or actual access to confidential information.

The Kimber Committee [157] also put the emphasis on access to inside information and those persons who take part in the formulation of corporate decisions. The same applies to the German guidelines[158].

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154) Cook, Feldman,"Insider Trading under the Securities Exchange Act" 66 Harvard L.Rev. 385, 396 (1953)

155) Colby v. Clune 178 F2d 872,873 (2nd Cir. 1949)

156) Lockheed Aircraft Corp.v. Rathman 106 F Supp 810 (S.D. Cal.1952)

157) Ontario, Attorney General's Committee on Securities Legislation, Report 2.06;2.10(1965)

158) § 2 (1) InshdR

Since the British Companies Acts do not provide for any liability at all, the Courts merely recourse to the principle of fiduciary duty, particularly to the specific requirement to avoid a conflict of duty[159] and personal interest. The application of this principle narrows the scope of persons to be covered down to every employee without regard to his actual or possible access to confidential information. This coverage is even broader than the other regulations examined.

(3) Partners and associates

A problem related to the definition of directors, officers and other corporate employees is the possible liability of partners and perhaps the partnership itself.
Although directors of a corporation who are at the same time members of a partnership usually are individuals representing their own interests, there are situations where a partnership owning substantial holdings in a corporation elects a member to represent its interests on the corporation's board of directors. In this special situation, the question arises, whether the partnership and its members may be subject to liability.
The first American case dealing with that subject matter of a possible liability under sec. 16 (b) SEA was Rattner v. Lehman Bros.[160] In his concurring judgement, Mr. Justice Hand stated, that if a firm "deputed" a partner to represent its

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159) Jones, "Unjust enrichment and the fiduciary duty of loyalty", 84 L. Q. R. 472 (1968).

160) 193 F2d 564 (2nd Cir. 1952)

interests as a director on the board of another firm, the other partners would not be liable. This was the origin of the so -called"deputization theory"[161]. Lehman Bros., an investment banking and brokerage partnership, realized short-swing profits by trading in common stock of"Consolidated Vultee Aircraft Corp.", while a Lehman partner, Mr. Hertz, was at the same time a director of Vultee. Unfortunately, this decision gives no clear explanation of what was meant by"deputization".

In a series of subsequent cases, the courts assumed the existence of the deputization theory[162, 163, 164], which as a question of facts had to be adapted case by case. In Marquette Cement Manufacturing Co. v. Andreas[165], for instance, the Court held the mere positioning of an Andreas' partner on Marquette's board and the engagement of the trust in short swing speculations involving Marquette stock to be enough evidence to show a deputization of Andreas to Marquette's board of directors.

In Feder v. Martin Marietta Corp.[166] the Second Circuit elaborated six factual indications to point out a deputization[167].

The series of American cases dealing with the problem of liability of partners fails to provide clear standards for a determination of deputization. Every court emphasized different facts. The determination has to be made case by case, a method implying severe evidentiary

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161) Wagner, "Deputization under sect. 16 (b):The implications of Feder v. Martin Marietta Corporation" 78 Yale L.J. 1151, 1154 (1969)

162) Blau v. Lehman 286 F2d 786(2nd Cir. 1960)

163) Marquette Cement Manufacturing Co. v. Andreas 239 F Supp. 962 (1965)

164) Feder v. Martin Marietta Corp. 406 F2d 260 (2nd Cir. 1969)

165) 239 F Supp. 962 (1965)

166) 406 F2d 260 (2nd Cir. 1969)

167) 406 F2d 260, 265 (2nd Cir. 1969)

problems for the plaintiff[168]. But if a partner sitting on the board of another corporation is deemed to be deputized he has to disgorge all his profits derived from this position.
Under sec. 100(1) CCA any partner of the person acting by or for the partnership is deemed to be an associate for liability purposes.
Since a partner does not meet the definition of an "affiliate" under sec. 125(1)(b)CBCA, a partner may be covered only by the general definition of sec. 125(1)(f) CBCA deeming a person receiving specific confidential information from an insider to be subject to liability. Here, however, a receipt or exchange of inside information must be proven. It imposes no automatic liability of a partner as sec. 100(1)CCA does.
Québec has chosen a similar construction by using the formulation"every person related to the insider[169]".
The regulation of Ontario[170] is more problematic, because it refers to " every person in a special relationship with a reporting issuer." But if we apply the definition of a reporting issuer to one of the American cases mentioned above, it has to be stated, that the term"issuing corporation" applies to the corporation, on whose board one of the partners is sitting and covers this person, but not the question raised by the American cases, whether one partner may be deemed to have a special relationship to the corporation on whose board of directors another partner is sitting. A generalization of the term special rela-

168) Lusardi,"The liability of corporations and partnerships under sect. 16 (b) of the Securities Exchange Act of 1934 " 11 B.C. Indus. & Commerce L.Rev. 272, 282 (1970)
169) sec. 151 QSA
170) sec. 131 (1);(2) OSA

tionship is difficult to undertake. The result is likely to resemble the American "deputization" approach producing a case by case decision based on the particular facts.

As far as British law is concerned, it is difficult to apply the principle of fiduciary duty to every fellow partner. A partner is not always involved in a conflict of duty and interest. He has no duty, if he does not get any information personally. The situation, however, may arise, if one partner is holding shares for another as a "nominee"[171] - an approach approach resembling to the deputization theory or Ontario's "special relationship" formula.

Section 30 CC applies to all persons concerned with the discussion and consideration of any proposed offer. If a partnership becomes a financial adviser of one of the parties involved in a take - over attempt, not each partner is necessarily informed about this project. Under this approach, however, only minimal knowledge about the undertaking might be likely to cover a fellow partner. A person concerned with the take-over bid is not allowed to deal in shares of the corporations involved contrary to any advice given to the shareholders without giving sufficient public notice of his intention[172]. This situation is unlikely to occur very often. Like the other solutions, sect. 30 CC does not impose an automatic liability on fellow partners.

The German guidelines do not include an express or general reference covering situations described by the American cases cited above.

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171) Regal (Hastings) Ltd. v. Gulliver (1942) 1 All. E.R. 378; 1967 2 A.C. 134 (H.L)

172) Practice note Nr. 9 City Code
Weinberg and Blank on Take-Overs and Mergers 27170 4th ed. 1979

With two exceptions - the CCA providing for an automatic liability and the InshdR not dealing with the subject at all- the problem of the liability of fellow partners is governed by broad principles permitting a flexible case by case approach and a wide range of equitable case law solutions. This flexibility allows the courts to balance the interests of the parties involved according to the specific facts of the case. The reverse side is the lack of a clear standard of determination.

(4) intercorporate holdings, affiliates and subsidiaries

A similar problem may arise within a corporate entity. In order to facilitate the administrative procedure, only an insider of either the head company, one subsidiary or affiliate of a conglomerate of intercorporate holdings or trusts is usually required to file a report. This, however, does not permit insiders to deal with the stock of the named bodies. For liability purposes, the regulations are generally more extended and specified.
In the U.S., sect. 16 (b)SEA imposes liability, if the holding company is more than a 10% beneficial owner. A problem, however, arises, if the ownership rate is just below the 10% mark. In this context, we find another example of the expanded scope of SEC-rule 10b-5. The most elaborate test is to be found in the Commission's opinion in the Cady, Roberts case,[173] stating two principal elements: "First, a relationship

173) 40 SEC 907 (1961)

giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone and second, the inherent unfairness involved where a party takes advantage of such information[174]". Despite the fact that this case concerned the activities of a broker-dealer, the principles of access to confidential information and unfairness are also applicable within corporate holdings. The Commission, however, did not clearly explain the nature of a relationship giving access to inside information[175]. A position within a corporate holding might be a classic example to illustrate this sort of relationship.

The Canadian statutes include associates, affiliates and subsidiaries in the statutory definitions[176] and presumptions. The broad Ontario provision requiring a special relationship is covering this problem as well[177].

For liability puposes under British law, the fiduciary duty is owed to the company only. This principle cannot be extended to associated bodies e. g. holding companies[178] and subsidiaries[179],

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174) 40 SEC 907, 912 (1961); quoted and followed by SEC v. Texas Gulf Sulphur 401 F2d 833, 848 (2nd Cir. 1986)

175) Fleischer, "Securities trading and corporate information practices: The implications of the Texas Gulf Sulphur proceeding" 51 Va. L.Rev. 1271, 1281 (1965)

176) sec. 100. 4(1); 100(1);(2) CCA; 125 (1)(b); 2 (c)(d) CBCA; 151 QSA

177) sec. 131(1);(2) OSA

178) Bell v. Lever Bros.Ltd. (1932)A.C. 161, 228(H.L.) Pergamon Press Ltd. v. Maxwell (1970) 1 W.L.R. 11(

179) Lindgren v. L&P Estates Ltd. (1968) Ch. 572 (C.A.

nor does it operate in favour of any person simply because he is a person to whom the company itself stands in a fiduciary relationship[180]
This limitation is based on the holding in Percival v. Wright[181], where directors purchased shares from the members of their company without disclosing that negotiations were in progress for the sale of the company. The Court established the principle, that a director's fiduciary duty is owed to the company itself and not to the individual shareholder. The directors are not trustees for individual shareholders and may purchase their shares without being obliged to disclose pending negotiations for the sale of the company's undertaking to individual shareholders.
Under certain circumstances, however, a fiduciary relationship between a director and an individual shareholder may be established. The Privy Council[182] distiguished Allen v. Hyatt from the Percival holding on the fact, that there was a kind of authorization by the shareholders to negotiate on their behalf with a take-over bidder. Since Allen v. Hyatt had been distinguished on mere facts, the principle established by the Percival holding is still the binding authority of Common Law.
The result, however, might be different, if a director exercises his power in accordance with the instructions of an outsider, which is the case, for instance, if a holding company has a "nominee" director on the board of one of its subsidiaries[183].

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180) Wilson v. Bury (Lord) (1880) 5 Q.B.D. 518 (C.A.)
181) (1902) 2 Ch. 421
182) Allen v. Hyatt (1914) 17 D.L.R. 7 (P.C.)
183) Scottish Co-operative Wholesale Soc. Ltd. v. Meyer (1959) A.C. 324 (H.L.)

here the liability also extends to the instructing party.
The German definition of §2(1)(b) InshdR includes legal representatives and members of the supervisory board of affiliated companies having access to inside information.

(5) Comparison

The provisions and cases imposing liability on persons within the corporate structure show two basic lines of approaches to deal with the problem. Some rules are leading to a kind of automatic liability, if a person belongs to a certain class of insiders. The majority prefers a more flexible case by case approach emphasizing the actual access to inside information and a kind of unfairness. The only jurisdiction having already difficulties to extend the scope of liability beyond the class of directors and corporate officers is the one of Great Britain as a result of the limitation in"Percival v. Wright". The evasion to the"nominee" construction is extremely limited and implies- as the deputization theory- severe evidentiary problems for the plaintiff. The Percival holding still being the law and authority in Great Britain is a clear obstacle to adapt the fiduciary principle to modern economic needs and is a proof of its very limited applicability.

bb) Extra-corporate extensions

These tendencies may become even more obvious, if the governing principles are applied to include persons acting outside the corporate structure in the insider definition for liability purposes.

(1) Professional financial advisers

The first group to be examined in this context is that of professional financial advisers like brokers, investment dealers and similar functions executed by banks and trusts. These "professional insiders " usually live on a knife edge. On one side, they have to accumulate as many up-to-date informations as possible in order to be able to advise their clients effectively and successfully. On the other hand, they have to obey the restrictions concerning inside information.
Two questions have to be distinguished in this context. A financial or investment adviser may make use of an inside information either for his own personal profit or in favour of one of his customers. Only the latter possiblity implements a conflict of duties he owes to two clients.
The leading American case dealing with this subject matter and claiming a violation of SEC-rule 10b-5 is In the Matter of Cady, Roberts & Co.[184] holding that a partner in a brokerage firm, who had learned of a dividend cut from an employee of the corporation concerned violated section 17 of the Securities Act of 1933[185]

184) 40 SEC 907 (1961)
185) 48 Stat 84 (1933); 15 U.S.C. § 77 q (1958)

and rule 10b-5 under sec. 10b SEA in executing sell orders on the New York Stock Exchange prior to the public announcement of the reduction. As already mentioned, the decision established the "access" and"unfairness" test. The principles involved have been further illustrated by the recent case of"Shapiro v. Merrill Lynch [186] raising the question whether sec. 10b SEA and rule 10b-5 were violated bya prospective managing underwriter of a debenture issue and its officers, directors and employees, when they divulged material inside information to customers for the purpose of protecting the latters' investments in the stock of the issuer. Based on its holding in SEC v. Texas Gulf Sulphur [187] the Court stated a violation of the named section and rule because anyone in possession of material information must either disclose it or obstain from trading in the securities concerned- a strong public policy consideration indeed. This interpretation made the flexible Cady, Roberts approach almost meaningless, because the Shapiro holding looks at the desirable result and not to the actual access to inside information and a possible unfairness of the deal concerned. Since you have acquired the confidential information- no matter by which means- you obviously had access to it. And if this information is used to trade in the securities concerned it is automatically deemed to be unfair, because it was not simultaneously disclosed to all clients and the general public. Following this decision, a broker who has acquired inside information- intentionally or not- has either to disclose it or to obstain from using

186) Shapiro v. Merrill Lynch, Pierce, Fenner &Smith Inc. 495 F2d 228 (2nd Cir. 1974)

187) 401 F2d 833, 848 (2nd Cir. 1968)

it. The Cady, Roberts test might have been too vague and included ill-defined risks for professional financial advisers. Shapiro turned to the other extreme leaving no room at all for this group of persons to execute their functions. Thereby the court has successfully cut off the business community and particularly the investing customer from a principal source of competent and important advice. This sort of "protective overkill" does definitely not serve the best interest of either the securities industry and the investing public.

(2) Tipping

The question of liability of financial advisers being a kind of intermediary between the securities industry and the investing public is leading directly to one of the key questions of the problem of insider trading: The liability of a"tipper" and a "tippee". These expressions, of course, come from"tip", a slang expression for a piece of non -public information upon which one may act to his advantage due to the fact that it is not generally known[188]. A tipper is a person who transmits an inside information to a third party, a tippee is the one who receives and makes use of it. A partner or financial adviser may be either one , but not exclusively. Tipping is a key mechanism for the exchange and marketing of inside information. It has to be distinguished from total disclosure, since involves only a selective transmission and dissemination of material non-public

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188) Steele, " Liability of tippees under rule 10b-5 of the Securities Exchange Act of 1934" 30 Wash. and Lee L.Rev. 527, 529 Fn. 7 (1973)

information[189].
The rationcle for holding tipping to be a violation of sec. 10b SEA and SEC-rule 10b-5 was to ensure equal access of all investors to material information[190] and to the rewards of trading in order to eliminate informal inequities in the market. It also contains elements of breach of a kind of fiduciary responsibility.
Generally, two approaches to deal with the problem of tipper's and tippee's liability can be distinguished.
The first one is an objective test resulting in a sort of automatic liability for anyone in possession of material undisclosed information, regardless how he learned of it[191]. This opinion imposes liability on the tipper as well as on the tippee because of the mere possession of the information regardless whether it is used for actual trading or not.
A second opinion bases the liability for tipping and the subsequent use of the information on certain criteria, a more fact-oriented subjective approach. At first, there must be a distinction between the two major groups involved. A tipper's liability does not mean an automatic liability of the tippee and vice versa. One may argue, that a tipper cannot be held liable, if the tippee does not make use of the information, in other words, that tippee trading is an essential element

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189) A. Bromberg, "Securities Law", vol. II 7.5 (2) supp. 1977

190) A. Bromberg ,"Securities Law" vol.II7.5.(3)(a); 7.5(5)(b); SEC v. Texas Gulf Sulphur 401 F2d 833, 849-852 (2nd Cir. 1968)

191) Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc. 495 F2d 228 (2nd Cir. 1974)
SEC v. Texas Gulf Sulphur 401 F2d 833, 848 (2nd Cir. 1968)

for a tipper's liability [192]. On the other hand, it can be justified to penalize the tipper, not because the tippee acts upon his tip, but because he creates an opportunity and a danger, which may result in a damage to a third innocent party [193]. As soon as the information is passed to the tippee, the tipper looses any control, how and to what extent his information will be exploited. That is why the act of tipping itself violates rule 10b-5. If the tippee actually trades or not may influence the assessment and measure of damages but not the original cause of action.
The main issue in this context is to prevent the use of inside information for personal purposes on any level. That is why the transmission of information should not be a violation, if it is done with regard ta a corporate purpose [194]. The transfer of an information to a lawyer for advice or to a consulting engineer or laboratory for the evaluation is made for a corporate purpose and not for private use. In this situation, the opportunity is not created intentionally, even if there is a chance for a couple of people to use the knowledge for private purposes. The inclusion of these situations in the liability provisions would hinder a lot of important business activities.
The liability, however, does not only cover the persons included in the traditional insider definition as directors, corporate officers and major shareholders, but also any other person

192) Brunelle, "Securities law- rule 10b-5 - civil liability of tippers and tippees :Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc." 16 B.C. Indus. and Commerce L.Rev. 503, 507 (1974)

193) A. Bromberg, "Securities Law" vol. II, 7.5(3)(c) supp. 1977

194) A. Bromberg, "Securities Law", vol. II. 7.5(3)(d) supp. 1977

having access to confidential information[195; 196]. Generally, every tipper who passes on some inside information is to be held liable.

On the other hand, there must be a limit to a tipper's liability, because he will rarely be able to control the further exploitation of the information by the tippee, how many other persons will be informed and how the news will finally spread. By holding tipping as such to be a violation, the tipper is treated equally to any original insider. That is why the extent of a tipper's liability should not exceed the one imposed on an original insider, i.e. the accountability of profits[197].

Various factors have to be considered for the more complex problem of a tippee's liability. The variety of problems involved and the possible inequity arising from the strict objective approach require a more comprehensive and flexible assessment of factors.

The first one is the specification of an information referring to its character, extent and quality. A recommendation like "Dow Chemical will be a good buy" has a different quality from"Dow Chemical will double its dividend on July 1st". The more specific the information,the more likely and attractive will be its use for speculative private purposes.

Closely related to the character of an information is the problem of its probability or accuracy, which highly depends on the source and its reliability.[198]

195) Ross v. Licht 263 F Supp. 395 (SDNY 1967)

196) Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc. 495 F2d 228 (2nd Cir. 1974)

197) A. Bromberg,"Securities Law", vol.II 7.5 (4)supp.19'

198) A. Bromberg, "Securities Law" vol.II 7.5 (6)(e) supp. 1977

An information may loose some specification in a chain of tippers and tippees because of generalization, distortion, falsification or misunderstanding. That is why it may be arguable to impose a lesser responsibility on remoter tippees than on those closer to the original source.
The second criteria should be the knowledge or reason to know that the information stems from a company source and is not yet made public[199].
This factor can be influenced by the following circumstances: The nature and the timing of the information, the manner by which it was obtained, facts relating to the informant including his relationship to the recipient and to the source of information and the tippee's sophistication and knowledge of the issues and related facts.
In this context, the proposition has been made to shift the burden of proof, that the information was already public at the time of trading[200] or that the tippee knew, that the specific information was given in breach of trust[201], to the defendant.
This alteration, however, may not only imply some severe evidentiary problems, but would also narrow the flexibility of the whole approach.
The third criteria to be taken into consideration for the assessment of a tippee's liability concerns the degree of diffusion of an information or the tippee's positive knowledge of its non-public character. It is arguable, that an information overheard in a locker-room discussion, for instance, is already made public because of the con-

199) Steele, "Liability of tippees under rule 10b-5 of the Securities Exchange Act of 1934" 30 Wash. and Lee L.Rev. 527, 540 (1973)

200) A. Bromberg, "Securities Law" vol.II).5 (6)(c) supp. 1977

201) L. Loss, "Securities Regulation" vol.III 1450-1451 2nd ed. 1961

text and locality this disclosure has been made[202]. It may loose its non-public character by this particular means of dissemination. This, of course, raises the question of the extent of dissemination, the necessity to publish an information by particular means or the quantity or class of shareholders to be informed[203], inother words when an information may be considered to be sufficiently disclosed.

Another problem involves the extent of the use of an information by a tippee. He may receive some inside information and trade in the securities concerned, but motivated by some other reasons prevailing and not or less influenced by the confidential information. This consideration assumes the actual use of an inside information as a basis for liability and not mere possession[204; 205]. It is however, extremely difficult to prove which motives were decisive for an investment decision. In this case, the burden of proof should be imposed on the defending tippee, since it is more likely, that his trading was influenced by the confidential information rather than other motives prevailing. These are the criterias influencing the determination of a tippee's liability, a tendency being only suggested by some authors mentioned so far, but not yet adopted by the American jurisdiction, which seems still to prefer the strict objective"automatic" liability approach.

202) W. Painter, "Federal Regulation of Insider Trading" 142 (1968)

203) A. Bromberg, "Securities Law" vol.II 7.5 (6)(d) supp. 1977

204) A. Bromberg, "Securities Law" vol. II 7.5(6)(f) supp. 1977;

205) Steele, "Liability of tippees under rule 10b-5 of the Securities Exchange Act of 1934" 30 Wash. and Lee L.Rev. 527, 540 (1973)

The situation in Canada, as far as the treatment of the tipping problem is concerned, is as follows: Sec. 125(1)(f)CBCA provides, that a person receiving confidential information from an insider is deemed to be one as well. This provision, however, concerns only the intentional transfer of an information, but not the locker room situation. In addition the person receiving the information has to know that his counterpart is giving the information as an insider described by the section. The Ontario provisions cover the tipping situations too[206], since they hold every person informing the purchaser or vendor of a material fact or change other than in the ordinary course of business. The other Canadian statutes are lacking similar provisions.

That, however, does not mean that it is impossible to impose any sort of liability on persons involved in the tipping process. Canadian courts have gone far beyond the rulings of the British counterparts by applying the fiduciary principle to persons who recieve non- public information from a fiduciary whom they know or ought to have reason to know that he is breaching his duty to the corporation by giving it[207; 208]. A person receiving such an information participates in the breach by either making use of it for his personal profit or informing a third party. Therefore he becomes

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206) sec. 131 (1);(2) OSA

207) Liquid Veneer Company v. Scott (1912) 29 R.C.P., 639 (Ch)

208) Canadian Aero Service v. O'Malley (1974) S.C.R. 592; 40 D.L.R. (3d) 371

liable as a constructive trustee to account to the corporation for his profits[209]. This is a good example of the interference and collaboration of statutory law and the application of common law principles in the case, that the statutes do not cover a specific situation.

The British courts-as already mentioned - are bound by the principle expressed in Percival v. Wright, that the fiduciary duty is owed to the company only. That is why the British courts are not prepared to cover the tipping problem at all. A tipper, who is an officer, director or employee of the company, can be held liable, but not the tippee, who owes no duty to the company. There is also no possibility to cover an intermediary, who only transfers some information. The Canadian courts have tried to overcome this omission by stressing the constructive trust principle, a holding which has not been followed by the British Courts. From a conceptual point of view, the principle of a constructive trust is severely stretched, if a constructive trust may be erected for an idea or information instead of property. On the other hand, it is possible to interprete it as a legal recognition of an information being a valuable market commodity. This excessive interpretation of the trust principle, introduced by Canadian courts, but refused in Great Britain, clearly demonstrates the difficulties of Common Law and Equity to deal effectively with modern economic problems as tipping.

As a result of the Rheinstahl-case, the West-German guidelines put financial advisers who have access to inside information into a position[210]

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209) Canada Safeway v. Thompson (1951) 3 D.L.R. 295 (B.C.S.C.1950) ; D. Johnston," Canadian Securities Regulation" 171-172 (1977)

210) § 2 InshdR

equal to an insider. This regulation, however, covers only a small part of the whole tipping problem, which is - despite this exception- not regulated at all.
As far as the coverage of the tipping problem is concerned, considerable variations are to be found. Undoubtedly, we have the most deficient solutions in Great Britain and West-Germany. The principle of Percival v. Wright is definitely too narrow to include persons outside the corporate structure. Since tipping is considered to be one of the key problems of insider trading, the omission to regulate this area is a major shortcoming of the British and West-German solution. This loophole opens a wide range for speculative abuse. Statistic data are not available, but it may be estimated, that the transfer of inside information to and its use by outsiders occurs quite frequently. If this problem is not regulated, however, the problem is only shifted from one group originally deemed to be insiders to persons outside the corporate structure. The director, for instance, will be penalized for using inside information. His tipped wife will not. That is why a jurisdiction omitting to regulate this problem, does not eliminate existing inequalities, but virtually creates new ones by permitting to transfer the confidential information to a third person, who is not subject to any sort of liability. This possibility makes existing regulations rather ineffective, because persons deemed to be insiders will achieve basically the same result by tipping a third party and sharing and distributing profits according to a separate agreement.
The CBCA and Ontario provide effective regulations. In addition, the Canadian courts have tried to overcome a deficiency in some statutes by stressing the constructive trust principle- a questionable

solution, but better than no regulation at all. The American courts have probably gone already too far by imposing a sort of automatic liability on all persons involved in the tipping process. A more flexible approach taking into account all the different steps and problems involved, would be preferable.

(3) Relatives

Surprisingly, the American courts have not followed the tipping line of cases while dealing with the liability of spouses and other relatives. This group of persons may be generally a part of the tipping problem. The courts, however, did not impose the same kind of automatic liability as they did in other tipping situations, but merely looked at the particular facts of the case. In Blau v. Potter [211] the court refused to aggregate an officer's trading with the trading of his wife, because he received no personal benefit from his wife's dealings. She maintained a separate brokerage account with her own funds and conducted the trades entirely without his consent, contributed none of theses funds to the maintenance of the household nor commingled her funds with his ones and never discussed company affairs with her husband.
An opposite result has been achieved, where the wife's income was used to pay household and other expenses and where the wife also loaned the husband funds to finance his purchase of securities and both shared a common investment adviser[212].

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211) CCH Fed. Sec. L.rep. 94.115 (SDNY 1973)
212) Whiting v. Dow Chemical Co. 523 F2d 680 (2nd Cir. 1975)

In a similar holding[213] an insider was held to be the beneficial owner of his wife's shares, because, as president of a family corporation he had personal control over his wife's securities and transactions and could benefit from them as a result of his interest in a family estate plan. In the light of the tippee jurisdiction these reasonings do not appear to be consequent, but are definitely a step into the right direction towards a more flexible approach to deal with tipping situations.
In Canada, spouses and other close relatives are likely to be treated similar to tippers and tippees under the broad formulations of sec. 125(1)(f) CBCA, 131(1);(2)OSA and the extension of the constructive trust theory, which might be even more suitable in such a case of a very close relationship between two persons as husband and wife.
The British and German regulations do not cover this problem at all creating the same problems as the lack of effective tipping regulations.

(4) Nominee shareholding

A related problem being a more subtle form of circumvening and outmanoevring insider trading regulations by the use of another name is that of nominee shareholding. Under these inequitable circumstances even the British jurisdiction saw fit to extend the fiduciary principle in order to cover the nominor's activities[214].
In Canada and the U.S., this loophole has been closed by the introduction of the term "indirect beneficial ownership including the transfer of

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213) Altamil Corp. v. Pryor 405 F Supp. 1222 (S.D.Ind. 1975)

214) Scottish Co-operative Wholesale Soc. Ltd. v. Meyer(1959) A.C. 324 (H.L.)

title to a nominee[215]". The German guidelines do not contain any reference to this problem.

(5) Comparison

The problem of defining the term "insider" for liability purposes has shown considerable differences between the four jurisdictions examined. The U.S. and Canada clearly put the emphasis on the effective protection of the investing public. The automatic approach of the Shapiro and Texas Gulf decisions and the extensive stressing of the constructive trust principle are designed to extend liability even to remote tippees outside the corporate structure. These solutions take into account to tie the hands or at least to hinder the activities of financial advisers and other key personnel. These inconveniences, however, have to be borne by a few people in order to achieve effective protection of the general public. Despite some minor points of criticism, the American and Canadian solutions are quite satisfactory.
Just the opposite has to be stated for the incomplete coverage of potential insiders outside the corporate structure by the German and British solutions. The ratio decidendi of Percival v. Wright makes it impossible to expand liability to persons outside the corporate structure. The German guidelines provide for a liability of financial advisers, but completely fail to face the tipping problem. Since tipping, however, is a key problem within the context of the use of inside information, the lack of any regulation definitely results

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215) Sec. 16 (a)SEA; 100.1(1)(a)CCA;1(1)(17)(iii) OSA; 139 (c) (ii) QSA
Cook, Feldman;"Insider Trading under the Securities Exchange Act " 66 Harvard L.Rev. 385, 405 (1953)

in an incomplete and insatisfactory protection of the investing public. As a consequence, these shortcomings undoubtedly weaken the effectivity of existing regulations, because they can easily be avoided by transfering the confidential information to a third party. Thus the British and German regulations are far from improving the situation of the investing public.

b) Transactions covered

Another key problem for liability purposes concerns the transactions to be covered. The modern securities industry has developed so many sophisticated transaction possibilities and devices, which were hardly foreseeable by the enactors of the statutes . That is why we have to look at the different types of transactions to be covered by regulations and possible interpretations by the courts.
Generally, transactions may be executed in different types of securities. It is, however, not necessary to refer to transactions according to different classes and types of securities, since all the definitions try to cover the scope exhaustively[216].
Despite some minor alterations and differences in formulation and listing of the securities to be covered, there is virtually no problem from a comparative point of view. If necessary, distinctions will be made with reference to the special problem dealt with.

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216) sect. 3(a)(II)SEA; 3(1) definitions CCA; 2(1);121(1) definitions CBCA; 1(1)(40) OSA; 112 (e) QSA; 27 (1)(a) CA 67; 455(1) CA 48 § 1 (2) InshdR

Generally, the regulations penalize the use of inside information to acquire or sell securities. At first sight, the scope of at least these types of transactions appears to be obvious.

But not every transaction in corporate securities is executed by a mere purchase or sale. There are special situations like the conversion of preferred stock into common shares, the exercise of warrants and preemptive rights to subscribe to stock and exchanges of securities pursuant to mergers and consolidations resulting also in a change of ownership in securities. The use of inside information may influence these transactions too. The following chapter will examine how the diferent provisions and jurisdictions are dealing with these special problems.

aa) The problem of defining purchase and sale

Under sec. 16 (b) SEA it is even not undisputed, what is deemed to be a "purchase"or"sale" within the meaning of that section, since it requires that the beneficial owner be "such both at the time of purchase and sale". Even if this problem may concern at first glance only the period of time for which an insider status is required, it is nevertheless the starting point of the American legal discussion. In Stella v. Graham-Paige Motors Corp.[217] a purchaser increased his holdings from 6,25 % to 21 %. At the time of purchase Graham-Paige did not hold 10% of the stock in question. Nevertheless, the court held him liable in order to avoid that a person purchases

217) 104 F Supp. 957 (SDNY 1952)

a large block of stock, sells it out until his ownership is reduced to less than 10% and then repeats the process ad infinitum[218]. Such a construccion may permit major stockholders to avoid the sanctions of section 16 (b)SEA. Such schemes were held to be covered by the congressional intent in enacting this provision.

The Stella approach based on policy considerations rather than on legal arguments has been refused by two recent decisions [219]. They took the view, that the legislative intent of sec. 16 (b)SEA was not to include a transaction whereby a person holding previously less than 10% increases his holdings to more than that margin. The issue now seems to be settled by a decision of the U.S. Supreme Court[220]. It was held that it was not Congress' intent to cover this specific situation[221] since the size of holdings of less than 10% prior to the transaction did not include the potential for access to corporate inside information.[222] This decision, however, affirmed the legality of a scheme particularly designed to circumvene the prescriptions and sanctions of sec. 16 (a)and(b) SEA, if it is possible for an insider to acquire more than 10%, sell to a percentage short of this margin, increase his holdings by using an inside information and sell again in order to make a handsome profit. Even if all these transactions occur within a six months period the insider never holds more than 10% at the time of the purchase and sale. This is exactly the method the court of the Stella decision tried to penalize.

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218) 104 F Supp. 957, 959 (SDNY 1952)

219) Allis-Chalmers Mfg. Co. v. Gulf Western Industries Inc. 527 F2d 335 (7th Cir. 1975); Provident Securities Co. v. Foremost-McKesson Inc. 506 F2d 601 (9th Cir. 1974)

220) Foremost-McKesson Inc. v. Provident Securities Co. 423 U.S. 232 (1976)

221) 423 U.S. 232,252 (1976)

The possibility to avoid liability under sec. 16(b) SEA by splitting sale transactions into two parts was reconsidered by the Supreme Court in Reliance Electric[223]. This case concerned an owner of more than 10% of Dodge Mfg. Co's stock, who sold enough shares to a broker to reduce his holding to 9,96% for the purpose of immunizing the disposal of the remainder from liability under sec. 16(b) SEA. Thereby the Supreme Court revised the decision of the District Court [224] imposing liability only if the two sales were interrelated parts of a single plan. It also reviewed the legislative history of the section and applied a sort of objective approach[225] being consistent with the congressional intent and expressly referred to the possibility that sect. 16 (b) may be avoided by careful planning and splitting of the sales[226]. This view may be justified on the basis, that sec. 16(b) SEA was not designed to be a broad antifraud provision, so that an extensive interpretation in this direction was not necessary. This limited applicability of sec. 16 (b) SEA, however, required a broadening of other sections, particularly section 10(b) SEA and rule 10b-5.
This problem of defining "purchase" and "sale" is somewhat unique, since the Canadian,British and German regulations have not adopted this "short-swing" liability provision, which requires purchase and sale to take place within a certain period of time.

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223) Reliance Electric Co. v. Emerson Electric Co. 404 U.S. 418 (1972)
224) 306 F Supp. 588, 592 (E.D.Mo.1969)
225) 404 U.S. 418, 423 (1972)
226) Lustbader, "Split sale schemes under 16(b): Additional justification for the Supreme Court Majority's approach in Reliance Electric Co. v. Emerson Electric Co. 45 Temple L.Q. 501, 511 (1972); Butla, "Reliance Electric Occidental Petroleum and sect. 16 (b) :Interpretive quandary

bb) conversion of securities

The second issue in the context of the transactions to be covered concerns the conversion of securities from one class or type into another.
In the U.S. the question arose in Park&Tilford v. Schulte[227]. Here the defendants being trustees of a family trust held preferred and common stock representing a controling interest in the company. Because of a spectacular rise in the market price of the common stock based on a rumour about the distribution of a liquor dividend, they converted their preferred into common stock, which was sold again within the six months period. Judge Clark held a conversion of preferred into common stock followed by a sale within six months to be a "purchase and sale" covered by the statutory language of section 16 (b)SEA. He relied on the definiton of purchase in sec. 3(a)(13)SEA including"any contract to buy, purchase or otherwise acquire[228]". The defendants were held to have acquired the stock within the meaning of the act, because they did not own it before having exercised the option but afterwards they did. Clark's opinion was based on a broad interpretation of the term "acquisition" in sec. 3(a)(13) SEA. This decision implements that no director or officer or 10% beneficial owner may be allowed to buy preferred or sell common shares without risking that a conversion within the next six months would perhaps lead to sec. 16(b) liability.[229]

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227) 160 F2d 984 (2nd Cir. 1974)
228) 160 F2d 984, 987 (2nd Cir. 1974)
229) L. Loss,"Securities Regulation" vol. II 1067-1068 (2nd ed. 1961); Meeker, Cooney, "The problem of definition in determining insider liabilities under sect. 16 (b) 45 Va. L.Rev. 949 (19

This restrictive view has been reversed by a more pragmatic approach[230]. The Ferraiolo decision introduced the argument of economic equivalence. Because the preferred and the common stock were selling on the stock exchange at equivalent prices, the exchange was held to be equivalent to a purchase or sale[231]. This argument, however, was rejected in a subsequent case[232]. Despite one return to the strict approach of Park & Tilford[233] a more flexible view now seems to prevail. Surprisingly, the same court, which laid down the restrictive view in Park & Tilford, reversed its opinion in Blau v. Lamb [234]. The crucial point in this case was, whether a conversion of preferred into common stock constituted a "sale" of the preferred, which could be linked with the preferred's prior purchase[235], a question which was answered in the affirmative by the Third Circuit in the Heli-Coil decision. The District Court had based its finding on the argument, that the preferred and common stock had not been "economic equivalents", because of a high dividend return, increased voting rights and a better marketability of the common shares. The Circuit Court refused the argument of economic equivalence by stating, that the increased dividend and voting rights are irrelevant for the determination of a difference, since they are already reflected in the market price of the preferred

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230) Ferraiolo v. Newman 259 F2d 342 (6th Cir. 1958) W. Painter, "Federal Regulation of Insider Trading " 45 Fn. 47 (1968)
231) 259 F2d 342, 345 (6th Cir. 1958)
232) Petteys v. Northwest Airlines Inc. 246 F Supp. 526 (S.D.Minn. 1965)
233) Heli-Coil Corp. v. Webster 352 F2d 156 (3rd Cir. 1965)
234) 363 F2d 507 (2nd Cir. 1966); 385 U.S. 1002 (1967)
235) 363 F2d 507, 520 (1966)

stock. There was also no real difference between the marketability of preferred and common stock, because one was easily exchangeable into the other[236] and therefore equally resaleable. Nevertheless, by following this line of argumentation, the court admitted the persuasiveness of the economic equivalence reasoning in certain situations[237]. It finally based its finding on SEC-rule 16b-9[238] exempting an actual conversion, if not more than nominal cash is paid or received on exercise of the conversion privilege from 16(b) liability[239].

In Blau v. Max Factor & Co.[240], a decision of the Ninth Circuit, the corporation had issued common stock and class "A" stock. Although each class was carrying equivalent rights, the directors could declare a lower dividend on the common. Since the common stock was exchangeable for the class "A" at any time, the stockholders and directors exchanged their common for class"A" stock. The directors thereafter sold their class "A" to the public within six months. The court held that there was no purchase, because the different classes of stock were of an economic equivalence and freely exchangeable. It concluded, that the actual exchange was only a step in the whole process of the sale. This decision justified the application of the economic equivalence argument better than Ferraiolo, where the two types of securities involved did not carry the same rights. This reasoning was followed in another subsequent decision[241]. The flexible approach confirmed by the three latter cases mentioned may lead to the conclusion,

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236) 363 F2d 507, 522, 523 (1966)

237) 363 F2d 507, 523-524 (1966)

238) SEC Sec. Ex. Act. Release No. 7826;CCH Fed. Sec. L.Rep. 77.329 (1966)

239) 363 F2d 507, 525 (1966)

240) 342 F2d 304 (9th Cir. 1965)

241) Petteys v. Butler 367 F2d 528 (8th Cir. 1966);

that not every conversion from one type of stock to another has necessarily to be within the scope of 16(b) liability. The American jurisdiction, however, is far from being settled. An express SEC statement or a Supreme Court decision seems to be necessary to resolve the conflict between the different existing approaches.

Similar problems are likely to occur in Ontario, since sec. 131 OSA penalizes the insider, who "sells [242]" or "purchases [243]" securities of a reporting issuer. The conversion of rights, however, is included in the detailed definition of "securities" in sec. 1(1)(40)(VI)OSA. This definition seems to eliminate this particular problem. There is, however, no case giving further interpretations.

The other Canadian statutes do not face this problem. They generally prohibit every transaction relating to or being in connection with (capital) securities of the company or corporation[244]. These broad wordings cover any type of conversion of securities.

In contrast to the American and Canadian regulations, the purchase of debentures to be converted into shares is not expressly prohibited by the CA 67[245]. Nevertheless, the recourse to the general principle of fiduciary duty may still be open to fill this gap.

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242) Sec. 131 (1) OSA

243) Sec. 131 (2) OSA

244) Sec. 100.4(1) CCA; 125 (5) CBCA; 151 QSA

245) Sec. 25 (4) CA 67; Palmer's Company Law 61-10 (1976); Gore-Browne on Companies 27-24, 43rd ed. 1977

In Germany, the acquisition of debentures or option rights is prohibited, since these rights are covered by the definition of insider securities[246]. An insider, however, may convert debentures or execute options before getting into this position[247]. Therefore the acquisition of debentures or options is possible, but a subsequent conversion by using inside information will be penalized.
With one exception, all the regulations and jurisdictions expressly prohibit the conversion of rights into common stock. Thus the standard to be met by insiders and the protection of the investing public are quite similar.

cc) Acquisition and sale of stock purchase rights

To go one step backwards, a comparable question concerns the acquisition and sale of stock purchase rights by insiders. One may argue that these rights have an equal and comparable value to stock and therefore the trade of warrants, options and subscription rights has to be eliminated as well. On the other hand, if the conversion of these rights is already prohibited, these rights cannot effectively be used to the detriment of other shareholders. The latter position was actually taken by the court in Shaw v. Dreyfus[248]. In this case, a director and major shareholder received a large number of warrants evidencing rights to subscribe for additional shares of common stock. A part of these rights he sold through a brokerage firm realizing approximately 6,000 Dollars from the sale, the other part he exercised receiving thereby 3,000 shares of common stock. There was no question,

246) § 2 InshdR
247) InshdR, Comment Nr. 1; Jentsch,"Die Neufassung der Insider-Regelungen", Bank-Betrieb 1976, 186, 187 (1976)
248) 172 F2d 140(2nd Cir. 1949)

that the acquisition of the 3,000 shares by exercising the option rights was a purchase within the meaning of sec. 16 (b) SEA. The question concerned the sale of the warrants. It was held, that " inside information which the directors may have, cannot possibly be used to the detriment of other stockholders in voting to grant rights to all stock holders with regard to the proportion of their existing holdings, all are treated equally". Their preemptive right to be offered the new stock is essentially analogous to a stock dividend. The Court also refused the appellant's reference to sec. 3(a)(13)SEA, because it understood "purchase" as to acquire something by one's own act or agreement for aprice. The granting of warrants, however, is no acquisition since no consideration is given for the receipt of the rights. The rights are mere offers by the corporation, which may be converted into contracts to purchase by acceptance[249]. Therefore the decision might be different, if the right is not granted but bought by giving some sort of consideration.
A recent decision[250] involved the question of matching different securities raising the issue, whether so-called "put" and "call" options are themselves equity securities, whose purchase and sale would permit the application of sec. 16(b)SEA. A"put" is an option to sell and a "call" is an option to buy a security within a certain period of time at a specified price[251]. Generally, they are sold independently of the underlying security. They permit an opportunity for speculation on a small

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249) 172 F2d 140 142 (2nd Cir. 1949)

250) Miller v. General Outdoor Advertising Co. 337 F2d 944 (2nd Cir. 1964)

251) Michaely, Lee, "Put and call options: Criteria for applicability of sect. 16(b) of the Securities Exchange Act of 1934" 40 Notre Dame Lawyer 239 (1965) giving a detailed description [illegible] with this instrument.

amount of capital. It was held, that, because this instrument implemented an encouragement for speculation and thus could give rise to short-swing profits, it should be included in the definition of an equity security.

A solution similar to the holding in Shaw v. Dreyfus has been enacted in Ontario, since the purchase and sale of stock acquisition rights are included in the definition of a security[252].

The other Canadian statutes cover this problem by the broad definition of the term "transaction" or express prohibition[253].

The CA 67[254] makes it an offence for a director or his spouse or infant children to buy options in quoted shares or debentures of the company or of certain related companies specified in sect. 25(2)CA 67. It penalizes the purchase of "call[255]", "put[256]" and "double[257]" options.

The penalization of option dealings does not extend to the acquisition of options in securities of private companies or in unquoted securities of a public company[258]. In addition, the purchase of a right to subscribe for shares or debentures directly from the company and the purchase of debentures carrying the right to subscribe for shares of the company is permitted[259,260].

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252) Sec. 1(1)(40)(vii)OSA
253) Sec. 100.6(2)COA;124(2)CBCA
254) Sec. 25(1) CA 67
255) Sec. 25(1)(a) CA 67
256) Sec. 25(1)(b) CA 67
257) Sec. 25(1)(c) CA 67
258) Sec. 25(2) CA 67
259) Sec. 25(4) CA 67
260) see generally Gore-Browne on Companies 27-24 43rd ed. 1977; Pennington's Company Law 542 4th ed. 1979

In Germany, there is no additional regulation for the acquisition and sale of stock purchase rights.

As far as the acquisition and sale of stock purchase rights and its conversion into stock is concerned, the other jurisdictions, particularly Canada, seem to have learned from the unexact formulation of the American sec.16(b)SEA by enacting detailed and express provisions. Therefore transactions other than direct and obvious sales and purchases create problems only for U.S.courts.

There are no major differences concerning the transactions involved. The American approach is creating some uncertainties and needs to be settled. The British regulation provides some detailed regulations for stock acquisition rights and the possibility to apply the principle of fiduciary duty to conversion cases and affiliated problems. The Canadian statutes are specifically designed to cover the whole range of problems. The German regulation can be reduced to a prohibition of the conversion, but not the purchase and sale of stock acquisition rights. The provisions and cases examined provide some detailed guidelines for the insiders concerned and-despite some minor exemptions- adequate protection of the investing public.

dd) Take-over bids, tender-offers, mergers, corporate reorganizations

Similar problems arise from take-over bids or tender - offers, mergers and corporate reorganizations, because these operations usually involve a kind of exchange of the securities of one company into those of another.
After the approval and public announcement of a merger or consolidation between different companies the securities concerned are treated like convertible ones.[261] The interesting period, however,

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261) Cook,Feldman,"Insider Trading under the Securities Exchange Act" 66 Harvard L.Rev.612,626 (1953)

being attractive for the use of inside information in order to acquire stock of another partner with whom the insider's company is negotiating a merger, corporate reorganization or similar transaction, is the period of pending negotiations, which are commonly executed exclusively by insiders. It has been argued, that this situation does not encourage an insider to abuse confidential information for his personal profit, because all the stockholders have to approve the transaction. [262]
This argument is highly theoretical, because the majority of shareholders of large public companies and corporations usually follows the recommendations of the board of directors. The board might even be authorized to approve its own decision by collecting enough proxy votes.
The second argument, that the insider has no advantage because he acquires the shares of another or new corporation on the same basis as the other shareholders is even less persuasive. Nobody and nothing prevents an insider of an offeree company to purchase a substantial amount of shares of the offeror company in anticipation or on the basis of actual knowledge of a favorable exchange rate before the process of approval and exchange gets under way.
In addition, the goal of the provisions prohibiting or penalizing insider trading is not exclusively the protection of other stockholders but also of the general investing public. [263]
Despite the fact that there are types of mergers of relatively minor significance to the stockholders of a particular company - a take- over of a small machine shop by GM for instance is unlikely to affect the market price of GM stock and thus in-

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262) Lang, Katz, "Liability for short-swing trading in corporate reorganizations" 20 Sw. L.J. 472 (1966)

263) George, R.J.jr. "The application of section 16(b) to mergers; a hidden hazard" 47 Texas L.Rev. 1417, 1426 (1969)

attractive for inside speculation[264]- it is hard to deny that mergers or consolidations involve a great opportunity for the abuse of inside information.

(1) U.S.

The American cases dealing with this particular problem basically belong to the line of "conversion" decisions examined above. In its intention to apply sec. 16(b)SEA to merger situations, the courts have used familiar arguments.
Blau v. Hodgkinson[265], a merger case, generally follows the "rule of thumb"or objective approach established in Park & Tilford and Heli-Corp..
Here, the parent corporation intending to simplify the corporate structure acquired the stock of one of its subsidiaries and distributed the parent's stock in exchange. The defendants were important stockholders of the subsidiary and directors of the parent company. The court held, that the acquisition of stock of the parent company by the directors constituted a purchase within the meaning of sec. 16(b)SEA[266], because they had the choice to accept the cash value of their assets instead of receiving stock of the parent company. Thus they received something totally different from that they surrendered- stock in a different corporation.

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264) These cases are now covered by SEC-rule 16-7; 17 C.F.R. § 240 ; 16b-7(1950) holding that, when a subsidiary which is at least owned at a 85% margin (assets or equity securities) receives its parents' securitites, is neither considered a purchase by the subsidiary's stockholders or a sale by the parent. The receipt by the parent of the subsidiary's stock, however, is regarded to be a sale by the subsidiary, see Cook, Feldman, "Insider Trading under the Securities Exchange Act" 66 Harvard L.Rev. 612, 627 (1953)

265) 100 F Supp.361 (SDNY 1951)

Blau v. Mission Corp. involves the exchange of stock in a third corporation between a parent and a wholly-owned subsidiary[267]. Mission having acquired Tide Water Ass. Oil Co. transferred the Tide Water stock to the recently incorporated and wholly owned Mission Development Co. in exchange for newly issued shares of the latter one. Mission proceeded to distribute shares of Development as dividends to its own stockholders. By a second subsequent similar transaction Mission reduced its holdings in Development to 60%. The question raised by the court was whether the exchanges of Tide Water stock resulted in a sale by Mission. It held that the transaction in question was not a sale, because the stock of Development had no public ownership and no independent market value, but was merely a transfer between corporate pockets[268]. It can be argued, however, that the first transaction was only the initial step in a chain of events designed to give some insiders an unfair trading advantage. At least since its registration on the New York Stock Exchange there was a public market for Development stock. Thus the stock exchanged for Tide Water stock in the second transaction had an independent market value and could hardly be considered as an exchange only between corporate pockets. The court based the liability of the directors for profits derived from the second transaction on the argument that after the first transaction Development was no longer an " alter ego" of Mission, because Development's stock was independently traded at a price substantially different from Mission's. Therefore the second transaction constituted a sale within the scope of sect. 16(b)SEA[269].

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267) Blau v, Mission Corp. 212F2d 77 (2nd Cir. 1954); 347 U.S. 1016 (1954)

268) 212 F2d 77, 80 (2nd Cir. 1954)

In Booth v. Varian Associates the court faced the question whether an exchange of shares pursuant to the acquisition constituted a purchase- not a sale as in Blau v. Mission Corp.[270, 271]. Varian Assoc. acquired 80% of Bomac Laboratories stock from the defendants still holding the remainder. In 1959, they became directors of Varian and agreed to sell their remaining Bomac stock in return for Varian shares. The actual exchange took place in 1962 and the defendants sold their newly obtained Varian stock within six months. The court rejected the argument that the defendant's "purchase" of the Varian stock did not occur in 1962 but in 1959, because they had no investment in the new Varian shares until 1962. Therefore the transaction took place within the required six months period. These two latter cases demonstrate, that the courts have been prepared to abandon the objective approach of Blau v. Hodgkinson imposing a kind of automatic liability. They rather looked at the specific facts to determine whether insiders achieved a kind of unfair trading advantage. This more flexible approach was followed by Robert v. Eaton[272]. Holding that a reclassification of stock did not constitute a purchase emphasizing - similar to the argumentation in Blau v. Mission Corp. - that there is no room for abuse of inside information, when a security is received, which has no pre-existing market value. This might be true at the date of the receipt, but there is still enough room for insider speculation, if a director knows that newly established stock will be registered and traded in the near future, this information may cause him to buy before.

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270) Booth v. Varian Associates 334 F2d (1stCir.1964) 379 U.S. 961 (1965) see also

271) Fistel v. Christman 135 F Supp. 830 (SDNY 1955)

272) 212 F2d 82 (2nd Cir. 1954); 348 U.S. 827 (1954)

In Marquette Cement[273] the defendants telied on the subjective approach of Roberts v. Eaton. A plan of reorganization was agreed with North American Cement Co., whereby North American would sell all its assets to Marquette in exchange for the latter's stock. The defendant, a stockholder of North American Cement, subsequently became a director of Marquette. After the exchange took place, the director sold his stock within a six months period. The issue of this case was, whether the director's acquisition of Marquette stock, pursuant to the reorganization, constituted a "purchase" within the scope of sec. 16(b) SEA. The court held the defendant liable by distinguishing Marquette from Roberts v. Eaton on three reasons: It held that - in contrast to Roberts v. Eaton - the circumstances making a manipulation impossible, were not present. Here a block of stock was acquired by a seperate interest group at a special price. The defendants did not retain the same interest in the corporation concerned before and after the transaction. The most convincing argument was that Marquette common stock had long been traded on the NYSE and had a totally independent market value[274]. In order to impose liability, the court did not return to the strict objective approach, but achieved this goal by flexibly distinguishing the instant case from "Roberts v. Eaton".

A very illustrative case for this flexible approach is Newmark v. General Inc.[275]. RKO held a controling interest in Frontier Airlines, which was negotiating a merger with Central Airlines.

273) Marquette Cement Mfg.Co. v. Andreas 239 F Supp. 962 (SDNY 1965)

274) 239 F Supp. 962, 966 (SDNY 1965)

275) 294 F Supp. 358(SDNY) aff'd 425 F2d 348 (2nd Cir. 1970) cert. den. 400 U.S. 854 (1970)

In order to maintain control of the merging companies, RKO approached several of Central's major stockholders and purchased options to buy 49% of outstanding Central stock. Within six months both Airlines merged. Pursuant to the merger plan , stock in the new corporation was issued to the shareholders of former Frontier and Central.The issue was, whether the exchange of the Central stock purchased by RKO prior to the merger into stock of the new corporation resulted in a"sale" within the meaning of sec.16(b)SEA. Relying on Blau v. Lamb the court imposed liability, because the transaction in question allowed the unfair use of inside information that sec. 16(b) SEA was designed to prevent[276]. It also refused the "economic equivalence"defence, because the participation RKO held prior to and after the transaction was considerably different[277].
The flexible approach of RKO and similar decisions was affirmed by the Supreme Court in Kern County Land Co. v.Occidental Petroleum Corp.[278]. In this case, the respondent bought more than 10% of the outstanding stock of the petitioner's predecessor, Old Kern, during a take-over campaign. He was blocked in his effort to gain control by a defensive merger between Old Kern and Tenneco, by which Old Kern stockholders received new Tenneco stock on an equal to equal basis. Now the respondent faced the dubious question either to sell his shares and becoming subject to short-swing liability or to keep them and litigate the question, whether his purchase and the subsequent exchange of Old Kern into new Tenneco stock would be considered to be a "sale" imposing liability under the same

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276) 294 F Supp. 358, 365 (SDNY 1970)
277) 294 F Supp. 358, 365 (SDNY 1970)
278) 411 U.S. 582 (1973)

section. That is why he negotiated a binding option to sell to Tenneco at a date over six months after the tender offer expired all the new Tenneco stock he was entitled to. Since the option was exercised more than six months after the respondent had acquired the Kern shares, the only question the court had to decide was, whether the granting of an option was itself a "sale" and whether the actual exchange of Old Kern shares for Tenneco stock was a "sale" within the scope of sec. 16(b) SEA. The court answered both questions in the negative by emphasizing the lack of any potential for speculative abuse of inside information. Unlike in RKO, the respondent tried to gain, but was finally unable to control the merging corporations[279]. The option agreement was held not to be a sale because the position of Occidental as a minority shareholder did not offer a possibility for speculative abuse of inside information.[280]
By facing the special facts of every individual merger, take-over attempt or corporate reorganization, the American courts have now refused the strict objective approach of Park &Tilford and Blau v. Hodgkinson being too unflexible to achieve equitable solutions. They rather emphasized the intent of sec. 16(b)SEA by looking for a potential or actual speculative abuse of inside information. Consequently, the liability under sec. 16(b)SEA does not have necessarily to be imposed automatically.

(2) Canada

It is questionable, whether the Canadian statutory regulations permit the same kind of flexibility. The situations discussed by the American courts can generally be distinguished into two groups.

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279) 411 U.S. 582, 599 (1973)
280) 411 U.S. 582, 601 (1973)

At first, there are reorganizations of the corporate structure including affiliated or subsidiary companies. Canadian statutes will have little difficulty to cover the speculative abuse of inside information in these cases, since this possibility is eliminated by definition[281].

The second situation concerns cross-over profit taking in merger cases. Insiders of the offeree company acquire stock of the offeror company or vice versa expecting a price hike or a favorable exchange rate while the take-over negotiations are still pending.

The CCA contains insider reporting [282] and liability provisions[283] covering cross-over situations. This regulation provides, that an officer, who will become a director of the merged company is deemed to have been an insider of this company already for the previous six months. For difficult takeover attempts involving huge public companies or corporations even this period seems to be too short, because a lot of merger negotiations use to last longer.

The Québec Securities Act contains similar provisions[284].

The CBCA goes one step further and expressly includes amalgations as well as business acquisitions of assets[285].

The broad language of the OSA may create some interpretation problems[286] by rendering an insider liable for trading with knowledge with respect to the reporting issuer. The difficulty, however, has been solved by expressly including take-overs,

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281) Sec. 100.4(1) CCA;125 (1);(5) CBCA; 131 (1);(2) special relationship-; 151 QSA

282) Sec. 100. 1 (5) CCA

283) Sec. 100. 4 (3) CCA

284) Sec. 153 QSA

285) Sec. 125 (3) (a);(b)(4);(5) CBCA

286) Sec. 131 (1);(2) OSA

amalgations and mergers in the definition of a reporting issuer[287].

These Canadian statutory provisions, however, impose a kind of automatic liability the American jurisdiction finally abandoned. Since the Canadian regulations are that detailed, it is unlikely, that Canadian courts will be able to follow the American approach. This, however is still a speculative assumption, because there are no Canadian precedents covering this problem so far. But the strict American approach has proven to have some difficulties in finding equitable solutions for complicated take-overs, mergers and corporate reorganizations, particularly if there is no real potential for speculative abuse. In these situations, however, the Canadian statutes have to be applied. Thereby its enactors have probably tied the hands of the securities industry more than necessary.

(3) Great Britain

As the name already implies, the"City Code on Take-Overs and Mergers" is expressly designed to cover the named situations. Its mere issuance may be an additional argument, that particularly the"professionals" organized in the City Working Party consider these situations to be dangerous and attractive for the use of inside information. Since it is referred to it in the general context, a detailed examination in this chapter is unnecessary.

The British Companies Acts do not provide for any disclosure or liability in a take - over or merger situation. By no means the insider is prevented from taking advantage of his knowledge of pending take- over negotiations and dealing in the securities of the other company involved.

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287) sec. 1 (1) (38) (v) OSA

In such a case, however, the holding company would be entitled to claim the insiders profits derived from the deal based on the general equitable principle of fiduciary duty[288]. This result, however, can only be achieved, if the fiduciary duty is owed to one of the merging companies, which will be the case in the majority of situations.

(4) West-Germany

The Germans learned from experience. In 1973 the inquiry commission of the Düsseldorf Stock Exchange launched an investigation against the August-Thyssen-Hütte-AG and the Dresdner Bank AG, one of West-Germany's major bank corporations, for having used inside information to deal in stock of the Rheinstahl-AG, a corporation Thyssen was negotiating to take over.[289] The commission based its suspicion on the very active trading and the considerable price hike of Rheinstahl stock before the official publication of the take-over. The Dresdner Bank AG was involved because it was supposed to finance the undertaking. At this time, neither the cross-over profit situation nor the position of a financial adviser was covered by regulations of the InshdR. Even if there would have been provisions similar to the amendments of 1976, the commission saw itself unable to prove any wrongdoing by either Thyssen or Dresdner Bank personnel. That is why financial advisers are now treated equally to original insiders[290]. As a result of the experiences of the Rheinstahl case, cross-over situations are now covered by two means.[291] According to § 2 (2) (c)

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288) Regal (Hastings) v. Gulliver (1942) 1 All.E.R. 378 (H.L.); Phipps v. Boardman (1967) 2 A.C. 46

289) reported in Der Betrieb (DB)1973, 2228, 2234

290) § 2 InshdR

291) Hölzler, Hoffmann,"Schützen die Insidervorschriften den Insider? ZfK 1975 , 310

InshdR securities of a company to be merged, amalgated, reorganized or taken over are deemed to be insider securities. Informations concerning a take-over attempt or tender - offer, amalgation, integration, transfer of assets, reorganization or dissolution are regarded to be inside informations[292]. These regulations now cover the majority of imaginable situations in this context. The long-term entrepreneurial planning exemption,[293] however, provides the commissions with some kind of flexible device to avoid inequitable hardship. In the context of conversion of securities, the acquisition and sale of stock purchase rights, tender - offers, mergers and corporate reorganizations two approaches to deal with these problems can be distinguished. The flexible interpretation of statutory provisions facing the special facts of a particular case is more likely to deal effectively with these complex and sometimes tricky situations rather than statutory provisions leaving no room for interpretation. The Canadian regulations definitely provide effective protection of the investing public, but lead to a kind of automatic liability, which may create some difficulties in order to find equitable solutions in some cases. Particularly the complexity of modern take-over and merger situatuions require a certain flexibility, which has been developed by the American jurisdictions and to a limited extent in Germany and Great Britain. This still remains to be done in Canada.

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292) § 2 (3) (c) InshdR
§ 2 (3) (d) InshdR
§ 2 (3) (e) InshdR

293) § 1 (2) (b) InshdR

c) The type of liability

If an insider is held to be liable for having violated one of the provisions or principles, the next question will be: To whom does that liability exist? Basically, there are two possibilities: First, the accountability of profits derived from the use of inside information to the company concerned and secondly, the private cause of action designed to reimburse an individual shareholder for damages suffered by the insider's transaction.

aa) Accountability to the company

This type of liability is to be found in all four jurisdictions.
Section 16(b)SEA provides that any profit realized shall be recoverable by the issuer[294].
Since this section applies only, if the insider is an officer, director or 10% shareholder having traded within a six months period, there are two other alternative ways, by which the insider's profits may be recovered by the company. The SEC may bring an injunctive action against an insider for having traded in violation of rule 10b-5. requesting a decree ordering the defendant to turn over his profits to the company[295]. Additionally, in certain states a corporation may be able to recover insider trading profits under the common law principle of fiduciary duty[296].

294) Smolowe v. Delendo Corp. 136 F2d 231, 235 (2nd Cir 1943)cert. den 320 U.S. 751 (1943)

295) SEC v. Texas Gulf Sulphur Co. 312 F Supp.77 (SDNY 1970) aff'd 446 F2d 301 (2nd Cir. 1971); SEC v. Golconda Mining Co. 327 F Supp. 257 (SDNY 1971)

296) Diamond v. Oreamuno 24 N.Y, 2d 494; 301 N.Y.S. 2d 78, 248 N.E. 2d 910 (1969); Schein v. Chasen 313 So. 2d 739 (Fla. 1975); 478 F2d 817 (2nd Cir. 1973)

The Canadian statutes[297] hold an insider accountable to the company or the reporting issuer for any benefit or advantage received or receivable.

In Great Britain, the accountability of profits was established by the leading case of Regal (Hastings) Ltd. v. Gulliver[298]. In this case, the plaintiff company owned a cinema and intended to purchase two others in order to sell the whole undertaking. For this particular purpose, they formed a subsidiary company to take a lease of the two other cinemas. But the owner of the cinemas insisted, that the subsidiary company should have paid-up capital, which was greater than the plantiff company could afford to subscribe. The ordinary directors, who refused to give personal guarantees, subscribed at par for part of the balance themselves, the remainder was taken up by "outsiders" in the name of the chairman and by the plaintiff's solicitor. Later the original plan was altered and instead of selling the whole undertaking, all shares in both companies were sold. The former directors made a considerable profit. The plaintiff company sued its former directors, the chairman and the solicitor for an account of their profits on the resale. Based on the general principle of fiduciary duty, it was held, that a person in a fiduciary capacity is not allowed to make a profit out of property in regard to which the fiduciary relationship exists. It was found, that they all had acted honestly throughout the whole transaction, but nonetheless the ordinary directors, who had taken their shares as beneficial owners, were held liable to account their profits to the plaintiff. The court did not

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297) Sec. 100.4 (1) CJA; 125 (5) (b) CBCA; 131(4) OSA; 151 QSA

298) (1942) ; All.E.R. 378, 389; (1967) 2 A.C. 134,149

consider the mere facts, that the 3,000 shares in the subsidiary had never been the company's property and the company virtually lacked the funds to acquire them. It was held that only disclosure to and approval by the general meeting would have saved them. On the other hand, the chairman escaped liability because the outsiders, who beneficially owned the shares, for which he had subscribed, owed no fiduciary duty to the company. The solicitior escaped also although owing fiduciary duties to the company, his breach thereof could be and was effectively sanctioned by the company.
Regal was followed by the House of Lords in Boardman v. Phipps [299]. The appellant Boardman was a trustee's solicitor and J.Pipps a beneficiary of a trust. A substantial part of the trust holding was shares in a private company, which at the date of the testator's death were not a profitable investment. Boardman and T. Phipps, a brother of J. Phipps, intended to obtain control of the company by purchasing the outstanding shares.
During the negotiations with its directors being the controlling shareholders, they obtained certain valuable information about the company. They acquired a part of the shares for themselves, a deal which turned out to be highly profitable for the trust, Boardman and T.Phipps. By a capital distribution and a later resale, both made a profit of more than 75,000 Pounds. A majority of the House of Lords held Boardman and T.Phipps liable to account these profits. By purporting to represent the trust in their negotiations with the directors, they had placed themselves in a special fiduciary position. This special position and the information they had acquired as fiduciaries enabled them to buy the shares. It was held to be irrelevant, that they had acted honestly and obviously in a manner

299) (1967) 2 A.C. 46

highly beneficial to the trust. Their liability was based on the possibility of a conflict between their personal interest and their duty owed to their principal - the trust[300]. The mere possibility of a conflict of interest was held to be sufficient to assume an actual breach of a fiduciary duty. In addition, Lord Hodson held, that a confidential information could properly be regarded as the property of the trust[301]. This concept of an information as a corporate asset has been subject of strong criticism, because information is deemed to be a mental, but property a legal concept[302]. The view of the majority has been affirmed by the recent decision of IDC v. Cooley[303]. In this case, the defendant Cooley had been appointed as a director by IDC, an industrial enterprise providing comprehensive construction services. The contract had been concluded with regard to Cooley's contacts to gas boards in order to obtain construction jobs offered by the boards. The defandant was approached and appointed privately by Eastern Gas to run four construction projects. Before he accepted this appointment, Cooley resigned from his IDC job presenting a false statement of health. IDC sued Cooley for an account of profits obtained by breach of fiduciary duty. Roskill J. stated a plain conflict of interest. The defendant was held to have abused his position as a director of a company breaching a fiduciary duty. It did not matter that IDC never would have been awarded this construction job, because Eastern Gas principally did not deal with this type of construction firm. Cooley acquired the appoint-

300) (1967) 2 A.C. 46, 103 per Lord Cohen
301) (1967) 2 A.C. 46, 111;
(1967) 2 A.C. 46, 127-128
302) Palmer, Prentice, Welling "Canadian Company Law" 6-48, 2nd ed. 1978
303) (1972) 2 All.E.R. 162

ment and thus the profits while still employed by IDC. Therefore he was in breach of fiduciary duty, because he failed to pass all the relevant informations received to the plaintiff company. Therefore he was held liable to account to his former employers for all the benefits he had received and would receive under the contract with the Gas Board. Since the fiduciary duty is owed to the company only, the accountability of profits to the company is the logical consequence of this principle.

The German liability provision of § 4 InshdR has been modeled after § 88 Aktiengesetz. It provides, that advantages derived from a prohibited use of inside information by an insider or a person or institution in an equal position are accountable to the company. The term "advantage" does not only cover profits but also losses being avoided by an insider transaction. The basis of the claim is the voluntary recognition of the guidelines by the insider, which becomes a part of his employment contract with the company.

Since there is no contract between a person in a position equal to an insider - like banks and other financial advisers are deemed to be- the contract between this person or institution is considered to be a contract in favour of a third party according to § 328 BGB. This construction gives the corporation, whose shares have been traded in violation of the insider trading prohibitions an original cause of action against one of the contracting parties.

Generally, the accountability to the company is undisputed. Its existence, however, raises the question, whether the company itself really suffers a damage, when its stock is traded by use of inside information. It is clear that the company is usually the source of the information, but the company itself rarely trades in its own shares. In Germany it is even prohibited to do so. Therefore the company cannot miss any chance or suffer a detriment by the transactions concerned, because the shares are the object, but the company usually is not a party of the trade. Thus the accountability of profits to the company is no compensation for a loss occured. The only imaginable indirect detriment could be a certain damage of reputation, which may result in a certain decrease of its stock value. This may influence the acceptability and marketability of the stock, a damage, however, which hits the shareholders but not the company itself. This sanction is lacking any compensatory effect. That is why it is highly questionable to entitle the company to recover the profits, particularly if it is the only legal person or institutiton which has the right to account for profits as it is in Great Britain and the Federal Republic of Germany.

bb) Civil liability

On the other hand, who is actually suffering some damage? It is the individual shareholder or a member of the investing public, who does not get an equal opportunity to deal on the same basis of information. A potential investor, for instance, would have acquired this type of stock as such or far less expensive or a shareholder would have sold earlier for a better price. That is why the private cause of action being available in the U.S. and Canada gained much more importance in recent years. In the U.S., the private right of recovery is based on an extensive interpretation of rule 10b-5 by the jurisdiction. They have developed different rationales for a civil liability under this rule. The most frequently used is the so-called tort

-doctrine[304]. It stems from the rule that a violation of a duty imposed by specific or general law and not only by mere agreement of the parties is tortious, if it results in an injury that the rule concerned was intended to prevent and that the injury was suffered by a member of a class of persons that the rule was designed to protect. Consequently, an insider's liability should be limited to the detriment the plaintiff actually suffered.

The second one - the policy rationale - assumes that the courts are charged with the duty of making remedial legislation like the securities laws fully effective by developing the necessary remedies which Congress may have overlooked.

This are the basic justifications for the introduction of a private cause of action in the U.S.

This right, however, does not entitle every shareholder or potential investor who might have missed a chance to instigate an action against an insider.

Since rule 10b-5 provides that the alleged fraud has to be in connection with the purchase or sale of a security, it was held in Birnbaum v. Newport Steel Corp.[305], that the plaintiff has to be either a seller or a purchaser of securities. This case involved the sale of control of a steel company to an outsider, the selling shareholder received a premium for his shares. The plaintiff minority shareholders were held to be unqualified to bring an action under rule 10b-5 because they had neither purchased nor sold shares.

Several courts, however, tried to abandon this so-called Birnbaum-doctrine and held, that the critical factor should not be the actual purchase or sale of some securities but the fraud respectively the non-disclosure, which affected or would have affected the decision to purchase or to sell[306].

304) A. Bromberg, "Securities Law" vol. I 2.4(1)(a) supp. 1977

305) Birnbaum v. Newport Steel Corp. 193 F2d 461, 464 (2nd Cir. 1952)

306) Stockwell v. Reynolds & Co. 252 F Supp. 215

A seller is injured just as much when he suffers a loss on the sale of securities, which he has been induced to retain as when he is induced to sell them[307]. The Securities Commission argued[308], that the general purpose of the SEA is to protect security holders, who may suffer losses and should have a remedy, even though they may not have sold or purchased stock. The courts, however, did not go so far to grant a cause of action to the "aborted" purchaser who just might have bought stock[309]. This result, however, creates a certain inequity for potential investors, but may be justified on the reason, that a private cause of action must be limited to some extent.

In Blue Chip Stamps v. Manor Drug Stores the U.S.[310] Supreme Court has upheld the Birnbaum doctrine in order to prevent an undesirable and unmanageable opening of the private cause of action to all sorts of potential plaintiffs. On the other hand, the Blue Chip holding is far from restoring the privity requirement, since it does not request that the plaintiff must have purchased or sold shares directly from or to the defendant. Thus the private action for

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307) 252 F Supp. 215, 219 (SDNY 1965)

308) Vine v. Beneficial Finance Co. Inc. 374 F2d 627 (2nd Cir. 1967); Mutual Shares Corpv. Genesco 384 F2d 540 (2nd Cir. 1967); Weitzen v. Kearns 271 F Supp. 616 (SDNY 1967)

309) Hirsh v. Merrill Lynch, Pierce, Fenner & Smith Inc. 311 F Supp. 1283(SDNY 1970)
Lanning v. Serwold 474 F2d 716 (9th Cir. 1973)
Ashton v. Thornley Realty Co. 346 F Supp. 1294 (SDNY 1972) aff'd 471 F2d 647 (2nd Cir. 1973)
Mount Clemens Industries Inc. v. Bell 464 F2d 339 (9th Cir. 1972)

310) Blue Chip Stamps v. Manor Drug Stores 421 U.S. 723 (1975)

recovery of profits under rule 10b-5 is available for shareholders, even if they may not have sold or purchased stock immediately in connection with a non-disclosure, but not for every potential "aborted" investor, who missed a chance.
The Canadian statutes[311] provide for a private liability " to compensate any person for any direct loss suffered by that person as a result of the transaction." The language implies a sort of causation between the transaction and the loss suffered. Problems may stem from the interpretation of the term"direct". It has been introduced to limit the types and scope of losses to those having a connection to the transaction in question[312].

cc) The problem of double recovery

The language of the Canadian statutes and the extension of rule 10b-5 by American courts have established two distinct causes of action. This possibility of double recovery, however creates a subsequent problem: Surprisingly, it has not been stated explicitly, whether there is also double recovery, whether the insider may be compelled to pay double damages also, i.e. to disgorge profits to the company and to compensate another person for a loss suffered as a result of the same transaction. It may be argued, that, if there are two rights of action to be executed by two independent parties, these parties should be entitled to enforce their respective rights separately[313]. On the other hand, the insider may defend himself

311) Sec. 100.4(1) CCA; 125 (5)(a) CBCA; 151 QSA; different wording, same result 131 (1);(2) OSA
312) Green v. Charterhouse Group Canada Ltd. (1976) 68 D.L.R. (3d) 592; 12 O.R. (2d) 280 (Ont.C.A.)
313) Green v. Charterhouse Group Canada Ltd. (1976) 68 D.L.R. (3d) 592; 12 O.R. (2d) 280 (Ont.C.A.)

by arguing, that damages paid to a private party under rule 10b-5 will eliminate the profit, so that nothing will be left to be accounted to the company[314]. This result, however, presumes that the private action is instigated before the suit of the corporation. And with regard to the question raised above, why should an insider profit be subject to double recovery, if only one plaintiff suffered some measurable damage? This area is far from being settled by American and Canadian courts. There are, however, some hints that there is no absolute rule of law precluding double recovery[315].

By being exposed to double liability, an insider will be punished more than necessary. This result is violating at least two basic principles of tortious liability. At first, only a party having suffered some measurable damage should be entitled to a claim. Secondly, the amount of damages to be paid should be a compensation for a loss actually suffered. It should result in a restitution, i.e. the plaintiff should be put into the same position as whether the violating event never occured. As far as the company itself is concerned, there is no restitution necessary, because it usually suffers no damage. Thus the Canadian statutes and the American courts have definitely gone too far. The possibility of an independent cause of action to be enforced by two separate parties creates a new inequity for the insider. This should be eliminated as soon as possible. It might be possible to give

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314) L.Loss, "Securities Regulation" vol. III,1473 2nd ed, 1961

315) McCandless v. Furlaud 296 U.S. 140, 167 (1935)
Baumel v. Rosen 283 F Supp. 128, 145 (D.Md. 1968)
Pappas v. Moss 257 F Supp. 345 (D.N.J.1966)
Diamond v. Oreamuno 248 N.E. (2d) 910 (1969)

the private right of recovery a certain priority over the accountability to the company or the latter possibility should be eliminated anyway.

dd) Comparison

On the other hand, a total lack of a private cause of action as the situation is in Britain and Germany is quite unsatisfactory too. Here the person who actually suffers some damage is not entitled to claim any compensation.

The German guidelines are unclear as far as this question is concerned, because they provide for "additional civil sanctions[316]." This reference, however, does not mean the introduction of a general private cause of action. Since the insider guidelines become a part of the employment contract between the company and its director, the employer may instigate a civil action because of a violation of obligations thereunder.

The German and British liability solutions providing merely for an accountability of profits and avoiding losses to the company create another type of hardship, since they benefit a party not harmed by the alleged violation of insider trading prohibitions, but they do not compensate a private investor, who might have suffered a substantial loss. It cannot be the goal of effective and equitable insider trading provisions to protect the company but to exclude the private investor. The compensation of a private party is a key element to improve the position of the investing public. It can also be considered as a sort of compensation for the lack of an equal opportunity.

The Canadion regulations and the American jurisdiction have gone far beyond that goal by imposing unnecessary hardship on an insider, while Great Britain and West Germany do not achieve it. Thus both types of liability solutions have to be considered to be quite unsatisfactory.

316) § 4 (1) InshdR "Unbeschadet weitergehender

d) Computation of damages

Another problem to be raised in this context is the computation of damages. Should the plaintiff be entitled to recover only net profits or losses derived from the transaction in question or is he to be compensated also for every possible loss of a bargain?

aa) Section 16 (b) SEA

Under sec. 16 (b) SEA the law seems to be settled. The adopted test requires the court to match the lowest or lower purchase price against the highest or higher one [317]. The court rejected the so-called "first-in first-out rule", which is the usual method of computation for tax purposes, whenever the stock actually purchased and sold is not identifiable as well as the possibility of averaging purchase and sales prices of a six months period. Under the "Smolowe" test, however, an insider who in the average made no profit at all or even suffered a net loss, has to pay damages, because this method overevaluates a high sales price, but underevaluates a low purchase price[318]. This way of computing a profit has a more penalizing rather than a compensatory effect. Certain expenses may be set off[319]. Interest should be included[320].

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317) Smolowe v. Delendo Corp. 136 F2d 231 (2nd Cir. 1943); Gratz v, Claughton 187 F2d 46 (2nd Cir. 1951) cert. den. 341 U.S. 920 (1951)

318) Hunter," Section 16 (b) of the Securities Exchange Act of 1934: An alternative to" burning down the barn in order to kill the rats" 52 Cornell L.Q. 69, 82 (1966)

319) Arkansas Louisiana Gas Co. v. W.R. Stephens Ins. Co. 141 F Supp. 841 (W.D.Ark. 1956)

320) Blau v. Mission Corp. 212 F2d 177 (2nd Cir. 1954)

In unusual situations the computation is not to be based on purchase or sales prices of stock, but on the actual value of what the insider gave in exchange[321]. In this particular case, the defendant was held liable for repayment to his corporation of profits larger than he otherwise would have made by application of the rule that the cost basis for determining the profits realized is fixed by the value of the assets, which the insider transfers for his corporation stock rather than the price or value of the stock received by the purchase. This holding, however, raises the question of evaluation of the assets concerned.
All these American tests go far beyond the necessity to compensate a defendant for damages actually suffered. They result in a kind of penalizing effect for the insider.

bb) rule 10b-5

As far as the computation of 10b-5 liability is concerned, the law is not quite so clearly determinable. Some of the cases have applied a more or less strict out-of-pocket measure of damages, which takes into account the difference between the price actually paid and the real or actual value at the date of the sale[322]. This method prevailing does not only focus actual or possible gains of the defendant, but also losses of the plaintiff. This rule, how-

321) Park & Tilford v. Schulte 160 F2d 984 (2nd Cir. 1947)

322) Kohler v. Kohler Co. 208 F Supp. 808 (E.D. Wisc. 1962)aff'd 319 F2d 634 (7th Cir. 1963); Estate Counselling Service Inc. v. Merrill Lynch, Pierce, Fenner, & Smith Inc. 303 F2d 527, 533 10th Cir. 1962); Myzel v. Fields 386 F2d 718 (8th Cir. 1967); Gottlieb v. Sandia Am. Corp.304 F Supp. 980 (E.D.Pa. 1969)

ever,contains two crucial factors. The first difficulty is the determination of the of the hypothetical value of stock, which would have been purchased in an unmanipulated market. This value can only be estimated. The problem is increased by the requirement, that the determination is to be made for the date of the original transaction. Other courts have adopted a more flexible approach. They accepted the out-of-pocket approach as a starting point, but either permitted a subjective determination of what the plaintiff would have done had there been disclosure[323] or allowed even recovery of unjust enrichment[324] The latter result was achieved by a drastic reduction of the plaintiff's burden to prove an enrichment of any sort. These holdings also show a tendency to punish the insider[325]. Doubts and uncertainties are interpreted in favour of the plaintiff. This attitude now seems to govern the American jurisdiction as far as 10b-5 liablility is concerned.
On the other hand, the American courts did not go so far to award damages for a possible loss of a bargain, because such a computation would be totally speculative[326].It is admitted, however, that such a type of recovery might be justified in cases, where a contractual obligation or fiduciary relation-

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323) Myzel v. Fields 386 F2d 718, 744- 745 (8th Cir. 1967)

324) Affiliated Ute Citizens v. U.S. 406 U.S. 128, 155 (1972); Janigan v. Taylor 344 F2d 781, 786 (1st circuit 1965) cert. den. 382 U.S. 879 (1965) Speed v. Transamericana Corp. 71 F Supp. 457 (D.Del. 1947) 99 F Supp. 808 (D.Del.1951) 135 F Supp. 176 (D.Del. 1955) aff'd 235 F2d 369 (3rd Cir. 1956)

325) Navin "Insider's liability under rule 10b-5 for the illegal purchase of actively traded securitie: 78 Yale Law J. 864, 883 (1969)

326) Smith v. Bolles 132 U.S. 125 (1889)

ship exists between the parties in addition to a violative device of rule 10-b 5[327].

cc) Canadian statutes

The OSA is dealing differently with the problem to measure the damages[328]. Damages are to be assessed on the basis of the average market price of the securities concerned in the twenty trading days following the general disclosure of the material information. The court, however, is free to consider any other computation method being relevant in the circumstances of a particular case. This averaging computation method does not follow the American "penalizing" approach, but merely tries to establish a guideline to measure actual losses and the necessary compensation.

The other Canadian statutes award damages, if they stem from direct losses[329]. These provisions are designed to compensate a plaintiff for losses actually suffered rather than fulfilling his expectation interests or restituting unjust enrichment in the hands of an insider[330]. The adjective "direct" is limiting the scope of a possible award of damages to those actually suffered and excludes losses so covered as a result of factors like price fluctuations unrelated to the insider's conduct and affecting the securities market generally. The formulation also excludes an expectation or lost bargain interest. The Canadian solutions come close

327) Leas, "The measure of damages in rule 10b-5 cases involving actively traded securities" 26 Stanford L.Rev. 371, 383 (1974)

328) Sec. 131 (6) OSA

329) Sec. 100.4(1) CCA; 125 (5)(a) CBCA; 151 QSA

330) Green v. Charterhouse Group Canada Ltd. (1976) 68 D.L.R. (3d) 592; 12 O.R. (2d) 280 (Ont. C.A.)

to the original tort approach to restore the former position of the plaintiff - an approach which lacks the penalizing effect of the American holdings.

dd) The British approach

Since the British solution provides only for an accountability of profits to the company the problem to evaluate these profits is not that serious. The courts, however, have been relatively strict to enforce this accountability. In cases of doubts and uncertainties, they held in favour of the plaintiff company. The assumption is based on the highest market value. The insider has to prove, that he paid the full market price[331]. This approach resembles more to the American approach. The tendency to punish the insider is inherent in the principle of accountability to the company anyway. The British computation method remains consequently.

ee) West-Germany

As far as Germany is concerned, there is no express statement to what extent the commissions are prepared to account liability, because no case has been decided yet and the guidelines fail to cover this problem. It can only be estimated, that the commissions follow the basic approach of the German regulation not to impose unnecessary hardship on an insider. This may result in a strict and limited award avoiding any sort of punishment. This, however, remains to be seen.

e) Proof and its burden

In order to be able to recover some damages, the plaintiff usually has to meet certain standards of proof. In an anonymous open market trade, a

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331) R. Pennington, Company Law, 534, 4th ed. 1979

single shareholder or potential investor may run into severe difficulties, particularly if the company concerned refuses to cooperate. In this case, the plaintiff might be unable to get access to corporate books or transcripts of transactions. With the exception of Germany, this difficulty is somewhat facilitated by the dicsclosure and reporting provisions allowing a plaintiff to follow the course of an insider's activities to a certain extent. The main problem in this context, however, is not only to prove a kind of insider activity, but the actual use of inside information for personal benefits.

aa) Section 16 (b) SEA

This, however, does not have to be established under sect. 16 (b) SEA, which imposes a sort of "automatic" liability as soon as the statutory requirements of a purchase and sale within a six months period is met[332]. It is not necessary to prove the actual use of inside information. The plaintiff has only to show, that some short -swing trade occured within this specified period. The necessary data may be obtained by the SEC or stock exchange registers being open for public inspection. The proof becomes more difficult, if the insider trades in unregistered securities. That is why it has been suggested to shift the burden of proof to the defendant or establish a kind of rebuttable presumption of guilt.

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332) Munter," Section 16 (b) of the Securities Exchange Act of 1934 : An alternative to"burning down the barn in order to kill the rats"" 52 Cornell L.Q. 69, 89- 90 (1966)

bb) Rule 10b-5

In order to obtain damages under SEC-rule 10b-5 the plaintiff must show the following: A purchase or sale, an interstate contact or use of means of interstate communication, the failure to disclose material inside information by the defendant[333], reliance on the non-disclosure[334] and resulting damages. Thus the burden to prove all material facts in order to establish 10b-5 liability is completely imposed on the plaintiff. The most crucial factor in this context is the requirement, that the plaintiff has to show, that the defendant had been inpossession of some type of confidential information at the time of the alleged violation and made use of it.
In addition, the plaintiff has to show that he has exercised the necessary duty of due care[335].

cc) Canada: The implications of Green v. Charterhouse

In Canada, the position of the plaintiff has been strengthened considerably, since the court in Green v. Charterhouse Group Canada Ltd.[336] shifted the burden of proof from the plaintiff to the defendant insider, who now has to show that he in fact did not make use of an inside information in the transaction in question. The plaintiff still has to submit some evidence, that the defendant was in possession of some confidential

333) SEC v. Texas Gulf SulphurCo. 401 F2d 833, 848-853 (2nd Cir. 1968)

334) List v. Fashion Park Inc. 340 F2d 457,463 (2nd Cir. 1965)

335) see above, p. 13 b

336) Green v. Charterhouse Group Canada Ltd. (1976) 68 D.L.R. (3d) 592, 619; 12 O.R. (2d) 280 (Ont.C.

information[337]. This shifting of the burden of proof is an important improvement of the position of a plaintiff providing him with considerable assistance once some basic preliminary facts are evident.

dd) Great Britain

In Great Britain, the plaintiff company has to establish two evidences : that the director's transactions were so related to the affairs of the company, that it can properly be said to have been done in the course of their management duties and in utilization of their opportunities and special knowledge as directors and that the transactions resulted in a personal profit[338]. The submission of the necessary evidence is far easier for the company since it has access to all relevant sources of information. The problem of the burden of proof is not that virulent, because there is no private cause of action.

ee) West-Germany

In Germany, the situation is far more complicated. A formal notice submitted by a private person or company may cause a commission to get an inquiry under way. This notice has to contain some information claiming a conclusive violation of the Insiderhandelsrichtlinien or the Händler-und Beraterregeln[339]. The notification has to refer to specific persons and events, the date of the alleged violation and the date on which the notifying person obtained the concrete knowledge about the events in question.

337) D. Johnston,"Canadian Securities Regulation" 304 (1977)

338) Regal (Hastings) Ltd. v. Gulliver (1942) 1 All.E.R. 378, 391-392

339) § 3 (2)(a) VerfO

Furthermore, the commission has to examine the conclusiveness of the notification. Under German procedural law conclusiveness[340] is a procedural concept which applies if, based on the submitted facts, the alleged violation does not appear to be unlikely. The commission may set up an official inquiry, if it gets to know of credible and concrete informations backing a suspicion[341]. It is, however, not a commission's duty to investigate in facts, which have to be submitted by the plaintiff[342]. The commission is entitled to ask for delivery of relevant documents or require informations to be submitted by the persons or institutions specified in the notification. That means, that basically all the necessary evidence has to be submitted by the plaintiff. As already mentioned, without any registration of insider property in securities of his company and under the prevailing system of bearer shares, already the duty to identify the persons involved in insider trading activities will be almost impossible to fulfill by a person outside the corporate structure. Even if he would be able to narrow down a chain of persons, it still remains for him to prove that these insiders were in possession and made use of material confidential information for personal profits. These difficulties to prove an alleged violation seem to be almost insurmountable and are one of the key reasons, why no official investigation has been started since the introduction of the new guidelines in 1976. The necessity to improve the status of a single shareholder or potential investor became quite obvious in the Rheinstahl case[343],

340) In German: Schlüssigkeit der Klage

341) § 4 (a) VerfO

342) § 4 (b) VerfO

343) 1973 DB 2288

which involved some 160 alleged violations but no concrete evidence. Nevertheless, the amendment to the regulations in 1976 has failed to deal effectively with the problem of proof and its burden.

ff) Comparison

With the exception of Canada where the burden of proof has been shifted to the defendant the necessary evidence has to be submitted by the plaintiff. This rule may create some considerable problems for an outsider having no access to corporate information. As far as the protection of the investing public is concerned, the Canadian decision of Green v. Charterhouse Group Canada Ltd. is quite progressive. It should be considered by the other jurisdictions to follow this example as well.

f) Defences

aa) Non-existence of an inequality

The liability provisions are designed to compensate another party for an unequal exploitation of a confidential information. Therefore the best defence available to the insider is to prove, that this inequality did not in fact exist or could have been avoided[344].
In America, this goal is achieved by the "scienter" and "due diligence" requirements denying liablity, if the plaintiff has failed to make use of all possible sources of information he had or could have had access to, in other words, if he could have acquired the same information as the insider at the same time, but negligently failed to do so. For this type of negligence, of course, the insider cannot be blamed and held liable.

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344) D. Johnston, Canadian Securities Regulation 301(1977

bb) Canadian statutory defences

The Canadian statutes have intoduced another type of defence[345]. The CBCA provides for liability unless " the information was known or in the exercise of reasonable diligence could have been known" to the plaintiff, a standard probably a little bit higher than under the CCA, where the information "ought" to have been known[346]. This distinction may introduce two different standards. These two wordings basically focus on the equal access to the information in question . If both parties have or could have had access to the same information at the same time, no one has a reason to complain[347]. Here the chance of an equal opportunity theoretically existed. One party negligently failed only to make use of it. This Canadian approach contains some similarities even in the wording of the statutes to the American "due diligence" burden. They contain no hint, which standard of reasonable care is required, but it may be assumed to be quite low. In addition, they contain a temporal qualification. The information must or could have been known to the plaintiff at the time of the insider's transaction. This wording may create some difficulties. In case of an open market transaction people trading at the same time can be aware of the same information only, if it has been published before. Here, the defence is unnecessary, because it is no longer an inside information. Therefore this defence applies only to face-to-face transactions and situations, where the plaintiff has access to corporate data equivalent to that of an insider[348]. Thereby the

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345) Sec.. 100.4(1)CCA; 125 (5)(a) CBCA; 131(1);(2) (a-c) OSA; 151 QSA

346) same wording sect. 151 QSA

347) Green v. Charterhouse Group Canada Ltd. (1976) 68 D.L.R. (3d) 592; 12 O.R. (2d) 280 (Ont. C.A.)

348) P. Anisman, Insider trading under the Canada Business Corporations Act McGill Univers. Meredith Memorial Lectures 151,253 (1975)

applicability of the defence is narrowed considerably, which should be designed to cover stock exchange trade as well.

The OSA contains two additional defences. The insider will be held liable unless he had reasonable grounds to believe, that the material fact or chance had already been disclosed[349]. Here a subjective standard applies. The problem, however, does not concern the mere disclosure of an information, but its digestion and dissemination. Under the third defence, the insider may prove, that even in the case of actual knowledge, he did not make use of an inside information. This latter provision is rather difficult to handle, because it implies extensive investigation into the defendant's motives. The mere statement, that other reasons prevailing were motivating the insider's decision to trade in the securities concerned cannot be considered sufficient.

All these defences are based an the same assumption: If the plaintiff actually had or could have had an equal opportunity to acquire the same information completely at the same time, there is no basis for an insider's liability.

cc) The Common Law theory of a corporate opportunity

The British Common Law jurisdiction has focused the problem of possible defences differently. Under its theory of corporate opportunity, the question is not, whether the plaintiff had or could have had access to the same type and quality of information in order to put himself in a position equal to an insider. The theory of corporate opportunity concerns an arising business opportunity, which should be acquired for the

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349) Sec. 131 (1)(a);(2)(a) OSA

company[350]. But if the company is objectively unable to do so, the fiduciary duty owed to it is raised. Thus the alleged insider has to establish the defence, that there was no way for the company itself to make use of the corporate opportunity and that he was therefore free to acquire it for himself. This might be the case, for instance, if the company is unable to finance an undertaking[351], but the insider finds some partners providing the necessary funds.
Some cases decided under the principle of fiduciary duty seem to be consistent also with the scope of this doctrine. The decision of IDC v. Cooley[352] appears to be consequent. The prospective contract with the Gas Board was a corporate opportunity within the scope of its definition, because IDC had been highly interested in being awarded that construction job and there might have been still a chance to alter the mind of the Gas Board's executives. Consequently, IDC was not completely unable to obtain the contract. Thus Cooley was not entitled to take advantage of this situation.
This defence, however, has to be regarded within the context of the whole fiduciary principle, which imposes the duty owed exclusively to the company. Thus the company is the only institution being able to waive this particular duty. Therefore this defence is of a very narrow and limited applicability.

dd) West-Germany

The German guidelines do not contain an express provision or reference to a defence. But it may

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350) Canadian Aero Service v. O'Malley 40 D.L.R. (3d) 371 (1974)

351) Peso Silver Mines Ltd. v. Cropper 58 D.L.R. (2d) 1 (1966)

352) IDC v. Cooley (1972) 2 All E.R. 162

be estimated, that if a person actually had or could have had reasonable access to the same information, the claim would simply be refused as not conclusive[390] and the commission will not consider to instigate an investigation.

g) Comparative Conclusion

As far as the key element of liability is concerned, we have seen a considerable variety of solutions and interpretations. Every jurisdiction faces several shortcomings or difficulties.
The American jurisdiction has to face its major problems in adapting the broad wording of the general antifraud rule 10b-5 to the special circumstances of insider trading cases. In addition, it shows a tendency to penalize the insider more than necessary rather than merely looking for compensation or restitution of damages actually suffered. The major part of the provisions and case law authorities, however, are effectively designed to improve the position of the investing public and to deter an insider from trading in the securities of his company.
The Canadian liability provisions have largely profited from American experiences and precedents. and therefore avoided to make the same faults. Generally, they seem to follow the American tendency to penalize the insider in order to improve the deterrent effect of the statutes. The major achievement of the Canadian jurisdiction is probably the shifting of the burden of proof to the defendant. This results in a considerable improvement of the position of the private outsider plaintiff.
The major difficulty of the British law is, that it holds on the principle of Percival v. Wright, which does not permit an extension of the insider definition for liability purposes beyond the

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353) § 3 (2)(a); 4 (a) VerfO

group of persons inside the corporate structure. But as particularly the American cases have proven, a major part of the problem of the use of inside information concerns persons who don't work for the company itself, but acquire information by some intermediary. By failing to cover professional advisors and the whole tipping problem, the British solution is lacking any sort of regulation for a key section of the whole problem. As far as the effectiveness of the British liability provisions is concerned, it has to be considered to be very deficient.

The second major point of criticism is the lack of any civil cause of action.The mere accountability of profits to the company fails to compensate a party who has actually suffered a measurable loss, but benefits the company which mostly has no damage or detriment at all. This system definitely penalizes and deters an insider, but fails to improve the situation of the investing public.

With the exception, that the insider definition is covering professional financial advisers, a similar résumé applies to the West-German guidelines. In comparison to the British patchwork of solutions, the situation of the German plaintiff is even worse because of the almost insurmountable difficulty to prove an alleged violation. Therefore the German liability solution is even more unsatisfactory and incomplete.

The British and German liability provisions provide very little protection of the investing public and hardly deter anybody from using inside information.

2) Other sanctions

Liability, however, is not the only sanction to be imposed in case of violation of the insider trading provisions. Nevertheless, it is the key element of the American and Canadian solutions.

As shown above, Britain and West-Germany do not go that far as far as liability is concerned. They try to achieve similar goals by other sanctuary means and punishments.

a) Criminal offence

Under the British Companies Act of 1967 the director, who deals in options to buy or to sell quoted shares or debentures of his own company, shall be guilty of an offence, i.e. a felony or violation of criminal law. On summary conviction, the insider can be imprisonned up to three months or has to pay a fine not exceeding 200 Pounds or both, while on conviction on indictment the imprisonment may be up to two years and/or a fine not expressly limited[354]. This has to be considered as a very severe and harsh sanction since no director wants to risk to get a criminal record, which is supposed to ruin his career. The weapon of imprisonment has not been used very frequently so far and only in some extreme cases. The courts moreover relied on the imposition of fines. The mere existence of this penalty, however, may have a sufficient deterrent effect.
The CCA and the OSA contain similar provisions penalizing the general non-compliance or contravention of the insider trading prohibitions as an offence[355]: providing for an imprisonment for a term of not more than one year in case of summary conviction of an individual or a fine up to 2,000 Dollars respectively 25,000 Dollars in case of a non-individual legal entity.
The QSA contains[356] a general offence clause without specifying possible punishments.

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354) Sec. 25 (1)(c)(i);(ii) CA 67
355) Sec. 118 OSA
356) Sec. 162 QSA

These Canadian provisions raise the question of the relationship of this criminal offence to the liability sanction. Generally, the criminal prosecution is to be imposed independently and separately. If we assume an additional possible tax liability, the Canadian insider may become subject to a quadruple punishment. He may go to jail, may have to recover his profits to both the company and a private plaintiff, may have to pay a fine and taxes - a sum of harsh sanctions indeed. This, however, is only a theoretical possibility. These variety of sanctions gives the courts enough flexibility to produce equitable solutions. The mere existence of these four sanctions to be aplied independently from each other demonstrates, that the Canadian legislators put some emphasis on a possible severe punishment of an insider in order to achieve a sufficient deterrent effect. To deter somebody efficiently, it is necessary to go beyond the necessary compensation of people having suffered a measurable loss. For the courts it is definitely an advantage to be able to dispose of a catalogue of different sanctions in order to find equitable solutions. As far as the variety and flexibility of possible sanctions are concerned, the Canadian provisions are the most efficient ones.

b) Suspension of the right to trade

Another possibility to punish an insider having made use of inside information is the temporary or even permanent suspension of his right to trade on a stock exchange. A good American example was the Cady, Roberts case[357], which was originally a disciplinary proceeding brought by the SEC for violation of the antifraud provisions of sec.

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357) 40 SEC 907 (1961)

16 (b) SEA and Sec. 17 (a) of the Securities Act of 1933. In addition of a fine of 3000 Dollars imposed by the New York Stock Exchange, one of Cady's partners, a Mr. Gintel, was suspended for 20 days from trading there.
A suspension is also possible in cases of violations of the City Code[358] and the West-German guidelines[359]. This sanction, however, can only be considered as an additional punishment. In case of a temporary suspension, the dealer concerned may loose some business and income during this specified period.

c) Publication of a violation

The more important implication may be the publication of this measure in the circulars of the stock exchange and the financial press. Thereby the insider is featured as a kind of "outlaw" among honorable and respectable members of the business community. Thus a suspension may have a long term impact on the business reputation of a person concerned.
The German guidelines also provide for a publication of a proven violation as the exclusive sanction available. Since it is a vonluntary agreement without legal enforcement, the commissions cannot impose any remedial or criminal sanction. Generally, the consent of the person concerned is a necessary prerequisite for the publication of the result of an inquiry. The consent is not necessary in case of a severe violation of the guidelines, if a public interest for publication prevails over the protective interest of the person involved. Here, however, the violator has to be notified

358) Cooper, Cridlan, "Law and procedure of the stock exchange" 31 (1971)
359) Jentsch, "Die Neufassung der Insider - Regelungen" 1976 Bank-Betrieb 186, 189

in advance of the intent to publish the commission's report in order to enable him to prevent it by a court injunction.

In the context of the German voluntary solution, a publication of the report of the inquiry is considered to be a sufficient and effective sanction against the abuse of inside information. This assumption is also based on the described outlaw effect, which might be even increased by the fact, that the insiders have agreed voluntarily to respect the provisions of the guidelines as a code of behaviour. The damage of his reputation and its long term impact on his business career is regarded to be a more effective means to prevent people from using inside information rather than a fine or even imprisonment[360]. Because the submission under the guidelines becomes a part of the employment contract, a violation of the guidelines may be a reason for an ordinary or even extraordinary cancellation of this contract between the employer and the insider. These are the possible advantages of a publication as a sanctuary measure.

But its effectivity as the exclusive sanction may be at least doubtful. Generally the reports are published once and finally disappear in a remote shelf of the stock exchange's library. The outlaw effect may last for a couple of months, but after a certain period only a few persons will remember that the partner they are now trading with has once been involved in some sort of prohibited insider trading. In its result, the publication is a very short -living sanction being inherent in some other types anyway, since court rulings are also published and distributed among the business community . After some months there will be almost no damage left to the insider's reputation and business. He will even be able to enjoy the benefits of the deal, if

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360) Ernst, "Die Insiderfrage" 20 (1977)

his company does not insist on a recovery of the profits. Because of its short-living outlaw effect the publication alone cannot be considered to have a sufficient deterrent impact on West-Germany's businessmen.

3) Comparison

The most important element of the American sanctions is the short-swing liability provision of sec. 16 (b) SEA and the private cause of action developed under SEC-rule 10b-5. The Canadian statutes offer the widest variety of possible sanctions from liability provisions to fines and imprisonment for being convicted of a criminal offence. In Britain, the punishment of insider trading as a criminal offence is likely to deter the business community from trading on the basis of confidential information. The possible harsh and severe penalization, however, does not make up completely for the basic shortcoming of the British sanctuary system: The lack of any possibility to compensate a private investor for a loss suffered by the transaction in question. The West-German regulations providing only for an accountability of profits to the company and a publication of a commission's report are definitely very deficient. The deterrent effect is highly questionable. They are lacking any sort of compensation and thus hardly improve the position of the investing public. With regard to the theory of creating an equal opportunity, the German sanctuary provisions have to be considered as a failure.

D: General Conclusion

Despite the fact, that possible sanctions are a key element of every regulation, their effectivity cannot be evaluated on this basis alone. In order to be able to answer the starting question, how the different jurisdictions are balancing the interests of the parties involved, we have to take into account all elements examined.
Despite the questionable value of the reporting provisions, a somewhat narrow approach to the problem of trading prohibitions and the obvious difficulties to adapt the broad antifraud rule 10 b-5 to insider trading situations, the American solution based on sec. 16 SEA , SEC - rule 10b-5 and, if necessary, a recourse to the Common Law principle of fiduciary duty, is dealing effectively with the problems of the use of inside information. By providing for almost total disclosure, prohibiting certain transactions and liability provisions covering a wide range of persons and possible transactions, these regulations undoubtedly improve considerably the situation of the investing public and are able to maintain its confidence in the integrity of the securities market. With regard to a possible double recovery and the methods of computation of profits, the American courts have gone beyond the needs of actual compensation and have imposed a sort of penalizing effect on the insider. On the other hand, this may result in a desired deterrent effect. By its extensive interpretations of the underlying provisions, the decisions have clearly put the emphasis on the protection of the private investor - an argument, which can be backed particularly by the automatic liability approach to the whole range of tipping problems. As far as the matter of competition to other systems and markets is concerned, the American jurisdiction seems to be well prepared to meet their challenge.

For the Canadian legislators, the American provisions and experiences have served as a model. They have been able to achieve a result of similar effectivity and protectiveness, but avoided to adopt the broad wording of the American statutes and its problems. The effectivity of the detailed disclosure provisions is somewhat weakened by a submission period of a maximum of 41 days, which is definitely too long. As far as trading prohibitions are concerned, the Canadian statutes followed the unflexible American approach. Despite some unflexibility in take-over situations, the Canadian provisions are prepared to cover effectively the variety of imaginable transactions and include in its liability provisions the major problematic groups acting in- and outside the corporate structure. They also went beyond the mere compensatory aspect and followed the punishment tendency. As in America, the emphasis of the Canadian Federal and Provincial statutes is to ensure the effective protection of the general public. The position of the plaintiff has been considerably strengthened by the shifting of the burden of proof to the defendant. By avoiding some problems arisen in the U.S. and providing more detailed and elaborate regulations, the Canadian Federal and Provincial solutions, which differ only slightly from each other, now are the most advanced and effective provisions to cover the problem of the use of inside information. They really may serve as a model for other, more deficient jurisdictions.
Just the opposite has to be stated, if we resume the British patchwork of regulations, whose major shortcomings are the lack of any civil cause of action and the impossibility to expand the insider definition beyond the group of persons inside the corporate structure. A deterrent

effect is achieved by making the use of inside information a criminal offence. In Britain, the position of the investing public is improved only in some isolated fields. Particularly the limited scope of the insider definition for liability purposes leaves too many important groups of potential insiders acting outside the corporate structure totallly uncovered. As long this loophole is not closed, the protection of the investing public remains inefficient and incomplete. The interest of an investor requires some compensation for losses actually suffered by the insider's transactions. As long as there is no provision for some sort of civil liability, the interest of the investing public is not met. The inefficiency of protection is increased by the impossibility to enforce the provisions of the City Code and the lack of a safeguarding institution like the SEC supervising and controling insiders' activities on the securities market. Thus the British patchwork is very unlikely to be able to improve or even maintain the confidence of the investing public in the integrity of the securities market, since there are too many unregulated problems and loopholes to circumvene the regulated ones. Therefore the British solution to deal with the problem of the use of inside information is quite unsatisfactory and seems not to be prepared at all to meet the concurrence and challenge of other securities markets.

The same result has basically to be stated for an evaluation of the West-German Insider Trading Guidelines. Their only advantage is the omission of any costly reporting duty. The position of the investing public seems to be strengthened by a total prohibition of insider trading. The guidelines' effectivity is considerably diminued by the lack of any civil liability provision and the impossibility to make them a subject of legal enforcement. Despite a provision for accountability of profits to the company, there are no effective and enforceable sanctions. The tipping problem is unsolved. In addition, the plaintiff has to face almost insurmountable evidentiary problems. To sum up it has to be stated, that the West-German guidelines provide no effective solution at all. They leave the investing public almost unprotected. On the other hand, it is unlikely that they deter any insider from using confidential information for his own profit. This result has mainly to be blamed on the decision to chose a completely voluntary, legally unenforceable solution. An improvement of the situation, however, would require a total change of the approach to deal with the problem of the use of inside information in the Federal Republic of Germany.

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