CCCA
ACCJE

05 February 2004

Mr. Todd Ducharme
Chair, Professional Regulation Committee
The Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N6

Dear Mr. Ducharme:

Re: Proposed Amendments to Law Society Rules of Professional Conduct on "Up-the-Ladder" Reporting – Submission by the Canadian Corporate Counsel Association ("CCCA")

Thank you for your letter of October 17, 2003 inviting the CCCA to comment on the proposed amendments to Law Society Rules of Professional Conduct on "Up-the Ladder" reporting.

For those of your Committee unfamiliar with the CCCA, we were established in 1988 by the National Council of the Canadian Bar Association to replace the national corporate law section of the CBA. Today, with more than 6,000 members and 11 regional chapters, the CCCA provides a national forum and communal voice for in-house counsel in Canada to advance the development of their practice of law and their professional skills and careers. Our membership is comprised of in-house counsel representing the legal interests of virtually every industry in the country, as well as municipal and crown corporations. The scope of our corporate representation rivals the largest national industry associations and the profiles of our members show they are highly educated and experienced in both law and business and, in many cases, have corporate responsibilities beyond the legal affairs of their corporations.

In presenting our comments on the proposed amendments on "up-the-ladder" reporting rules, we have had the benefit of experienced insight of those familiar with the current US environment and the changing pressures arising within the Canadian context. There are general comments which could be made about the relationship of these proposed amendments to potential separate and distinct criteria which may be promulgated by the Ontario Securities Commission, but we have noted that these proposed amendments have more generic application outside the OSC's oversight of publicly traded corporations. Accordingly, we have restricted our comments to generic issues applicable to all in-house counsel and have synthesized those to four issues for your consideration, some or all of

which may have already been reviewed and determined by your Committee. However, we feel it is appropriate to stress the importance of these issues on behalf of the members of the CCCA:

1. Withdrawal – Proposed amendments to rules 2.02 (5.1) (d) and 5.2 (c) require a lawyer, employed by an organization which proposes to undertake or continue certain wrongful conduct contrary to the lawyer's advice, to "withdraw from acting in the matter in accordance with rule 2.09". The latter merely states that, in such situation, the lawyer must "withdraw". In private practice it is merely a matter of a lawyer "firing" one of many clients and the lawyer's livelihood will, most probably, not be compromised. In an in-house situation, "withdrawal" would mean resignation, which is tantamount to being "fired" by the only client the lawyer has, with resulting significant personal financial impact. We presume this amendment, by referring to a "matter", is intended to allow the in-house counsel to refuse to participate further on any particular issue which is of concern, while continuing in his/her employment to advise on other separate matters. The SEC in its "Proposed Alternative to Noisy Withdrawal Rule" addresses this by providing different withdrawal rules between an in-house counsel and a lawyer in private practice, in that an in-house counsel is required to "cease forthwith from any participation or assistance in any matter concerning the violation" while an outside lawyer in private practice is required to "withdraw from representing the issuer." This is also provided for in Rule #10 of Chapter 9 in the Alberta Law Society Rules. This clarification of the concept of "withdrawal" for in-house counsel should be specifically carried forward into the proposed amendments to Rules 2.02 (5.1) (d), 5.2 (c) and 2.09.

2. Confidentiality – the proposed amendments do not take into consideration possible sanctions or retaliatory discharges against in-house counsel for taking a stand on issues of concern in accordance with the proposed amendments. In addition, rule 2.03 (4) in its current form is very restrictive in setting out the sole exceptions permitting a lawyer to disclose confidential information. Accordingly, an in-house counsel may consider it necessary to resign from a position or may be fired and find that the employing corporation refuses to pay proper compensation in what is effectively a situation of constructive dismissal, and further, the lawyer has no remedy at law because of an obligation to maintain confidentiality. In such case, the in-house counsel should be permitted under Rule 2.03 (4) to disclose the reasons for the resignation or improper termination of employment if legal action is required to protect the proper entitlements of the in-house counsel.

3. Client and Duty – Proposed amendment 2.02 (1.1) sets out the duty of a lawyer employed or retained by a corporation to "act honestly, in good faith and in the best interests of the corporation." It is noted that this is the standard taken from the Ontario *Business Corporation's Act* codifying the duties of directors. It is inappropriate to apply to in-house lawyers legal concepts (and potential liability flowing from those concepts) applicable to directors who have a broader management responsibility. In any event, lawyers are obligated under other rules of professional conduct to act honestly and in good faith for clients, so the only applicable duty in this area of corporate governance should be one of "acting in the best interests of the client". This leads to a deficiency in the proposed amendments in that there is no clear definition of the "client" when reference is made to the "corporation". This is made more ambiguous in the proposed Commentary to this amendment 2.02 (1.1) when it merely states: "A lawyer acting for an organization should keep in mind that….". Notwithstanding the reservations set out in the footnote to this proposed amendment, this rule should clearly state that the lawyer acts for the legal entity of the corporation alone and not for the board of directors, shareholders, members or officers of the organization, with the duty being, as noted above, to act in the corporation's (the client's) best interests.

4. Knowledge – Proposed amendments 2.02 (5.1) and (5.2) require up-the-ladder reporting by a lawyer where the lawyer "knows" that the corporation acts or intends to act "dishonestly, fraudulently, criminally or illegally". The question then becomes what is the materiality standard for knowledge of the wrongful conduct? We suggest the references to "material violations" of applicable US laws and "material breaches" of fiduciary duties arising under US law as set out in the rules of professional conduct for lawyers who appear and practice before the SEC on behalf of issuers would be of value to the proposed amendments, namely, a duty to report arises when the lawyer becomes aware of credible evidence based upon which it would be unreasonable under the circumstances for a prudent and competent lawyer not to conclude that it is reasonably likely that a material violation or material breach has occurred or is likely to occur.

By way of additional comment, without getting into specific recommendations, we also note that the proposed amendments do not include criteria defining subjective concepts such as, what should be considered an acceptable "appropriate response" requiring no further action when a lawyer advises of wrongful conduct "up-the-ladder". This is a product of introducing rules, or amendments to rules, of professional conduct on a topic which has broader implications involving potential criminal sanctions and civil liability outside the purview of Law Society responsibility. We would only suggest that careful consideration be given to the balance between "saying too little" (and therefore creating substantial uncertainty for in-house counsel and other lawyers as to how to act or not to act) and over-regulating (and thereby the Law Society merely duplicating the role of a securities commission).

If providing further comment or clarification would be of assistance to your Committee, the CCCA would be most pleased to do so.

Respectfully submitted,
on behalf of the Canadian Corporate Counsel Association,

John Scott
President