The Law Society of British Columbia
845 – Cambie Street
Vancouver, B.C. V6B 4Z9

Attention: Jack Olsen – Staff Lawyer, Ethics

April 28, 2004

Dear Mr. Olsen:

Proposed new conflicts rule – acting for and against *sophisticated clients*
We are writing on behalf of the Canadian Corporate Counsel Association, BC Branch (BC Chapter) to oppose the adoption of the proposed new conflicts rule published in the March/April Benchers' Bulletin (the proposed rule). The BC Chapter is also the Corporate Counsel Section of the Canadian Bar Association, British Columbia Branch (Section).

This submission expresses the views of the in-house counsel members of the BC Chapter/Section, not the views of the CBA (BC Branch) generally. The views expressed in this letter are shared by the CCCA (National) and you will receive a separate letter from our national organization to that effect.

Recommendation
We recommend that the Benchers take the approach to modernizing conflicts rules now under consideration by the Canadian Bar Association (set out below).

Background
The BC Chapter/Section wrote opposing the proposed rule on May 27, 2003. We are disappointed that the many submissions you received from the corporate counsel bar did not result in changes to the proposed rule.

We respect the views of our private practitioner colleagues. We understand the difficulties they face when managing conflicts of interest. However, it is important for the Law Society to know the views of those members of the public whose interests the Law Society is mandated to protect.

Who we are
The Canadian Corporate Counsel Association (National) was established as a Conference of the Canadian Bar Association in 1988 by the National Council of the CBA to replace the national Corporate Law Section of the CBA. Membership in the CBA is a prerequisite for membership in the CCCA.

Canadian Corporate Counsel Association / l'Association canadienne des conseilleres juridiques d'entreprises
20 Toronto St. Suite 300, Toronto Ontario, M5C 2B8; tel/tél 416 869-0522; fax/télécopieur 416 869-0946; E-mail/courrier ccca@ccca-cba.o
A Canadian Bar Association Conference   une conférence de l'Association du Barreau canadien

As mentioned above, the BC Chapter and the Section are one and the same. We represent 457 in-house counsel in British Columbia. Within our national membership we represent 3,791 in-house counsel.

Like other Canadian Bar Association Sections, the BC Chapter/Section provides a focus for corporate counsel to participate in continuing legal education, research, and law reform. We provide regular, targeted education to our members. We also review legislative and other legal developments to analyze their impact on the corporate counsel bar and, when appropriate, we make submissions on behalf of the corporate counsel bar.

We offer a unique perspective on the proposed rule change. In-house counsel have one client – the organization that employs us. We typically manage or provide advice on managing our clients' retainer of legal counsel. In this submission, we present the perspective of our clients.

Furthermore, the BC Chapter/Section in-house counsel members have considerable expertise in all areas of corporate governance. We have drawn on this expertise in preparing these submissions.

Issue

The current rule allows lawyers to act both for and against clients on substantially unrelated matters when both clients provide informed consent to the representation and the lawyer has no confidential information that could reasonably affect the representation.

The Law Society proposes that when *sophisticated clients* (clients who regularly retain more than one law firm) are given a general warning at the outset of the solicitor/client relationship, the law firm may act against them in substantially unrelated matters without the sophisticated client having an opportunity to provide informed consent when actual conflicts arise.

The Law Society is a creature of statute and exists at the discretion of the government of British Columbia. The *Legal Profession Act* mandates the Law Society to protect the public in the exercise of its delegated powers. The Law Society may only exercise its powers in the interests of lawyers if that interest does not conflict with the interests of the public. Section 3 says:

> **Public interest paramount**
>
> **3** It is the object and duty of the society
>
> (a) to uphold and protect the public interest in the administration of justice by
> (i) preserving and protecting the rights and freedoms of all persons,
> (ii) ensuring independence, integrity and honour of its members, and
> (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
>
> (b) subject to paragraph (a),
> (i) to regulate the practice of law, and
> (ii) to uphold and protect the interests of its members.

The “public” includes sophisticated clients. The proposed rule change expressly places the commercial interests of some lawyers above the public interest in preserving the duty of undivided loyalty owed by lawyers to clients.

Analysis
As with any other fundamental duty owed by a lawyer to the client within the solicitor/client relationship, the duty of undivided loyalty confers upon the client a benefit that belongs to and protects the client. These duties exist because the solicitor/client relationship demands conditions that will support the highest levels of trust.

It is for the client to decide whether the client is comfortable with the lawyer acting against its interests, whether matters are substantially unrelated, and whether the lawyer has confidential information that could be used against the client’s interests. All of these questions must be measured from the perspective of the client. Only the client has full information on its interests and concerns. An outside lawyer should not be permitted to appropriate these decisions from the rightful decision-maker.

The Benchers’ Bulletin article states that one argument in favour of the proposed rule is that sophisticated clients themselves will have greater choice of counsel because they will be able to overcome conflicts with the advance waiver. In-house counsel and their sophisticated clients are aware that their first choice law firms will be unable, from time to time, to represent them because of a conflict of interest. With the greatest respect to the Benchers, that fact of business life is quite acceptable to sophisticated clients and their in-house counsel. It is an appropriate price to pay, in our view, for the protection and full maintenance of the duty of undivided loyalty.

It is no doubt disappointing to outside counsel to have to decline a new retainer when it seems to the lawyer that the new matter is substantially unrelated to a matter in which counsel already acts on behalf of that client. However, whether the law firm feels that a current client is being unnecessarily cautious, or even obstructive, by declining to give informed consent is not the point. The duty of loyalty is owed to the client, and only an informed client can waive that protection.

Lawyers ought not to be able to control the circumstances under which they act both for and against *any* clients. A lawyer should never be permitted to act against a client’s interests unless:

1. the lawyer communicates to the client what conflict has arisen or may arise;
2. the client has a meaningful opportunity to fully consider the implications of the lawyer acting against its interests including an opportunity should the client wish to seek independent legal advice; and
3. the client grants its informed consent.

The proposed rule is surprisingly silent about what happens if a client declines to sign a law firm’s general waiver or if, having signed the waiver, the client wishes to revoke it. Do the Benchers propose that a law firm ought to be able to turn the client away because the law firm does not want to offer the full duty of undivided loyalty to the client? Or can the client expect that if it does not want to generally waive the duty of loyalty that the law firm must accept the client on the basis that only informed consent will allow the law firm to act against that client’s interests?

Does having signed the waiver mean that the client consents for all purposes to the substitution of the lawyer's judgment for the client? What if the lawyer misjudges a situation and it turns out that the matters are not substantially unrelated or that the lawyer does in fact hold or come into possession of confidential information belonging to the waiving client?

One of our members reports that the member's corporate employer has encountered a troubling situation, both for the company and for the law firm (in another jurisdiction). The situation highlights the difficulties of a law firm acting both for and against a client.

In the case in question, due to an oversight, consent to a conflict was not sought. Some months later, the law firm came into possession of confidential, non-public information relating to the company that it sought to use against the company in the other matter. The decision to use the information benefited the other client, but represented for the company an irreparable rupture of the duty of loyalty it rightly believed it was owed by its lawyers.

Judicial considerations of the duty of undivided loyalty

In the Benchers' Bulletin, you note that the *Neil* decision confirms that a client can only waive the duty of undivided loyalty by providing an informed consent to its lawyer acting against its interests in a substantially unrelated matter. You suggest that, because informed consent can be implied, this somehow means that the proposed rule would be a good approach. Our view is that informed consent is *always* the preferable option that that implied consent should only be resorted to in the rarest of circumstances. If the public interest is paramount, implied, or uninformed, advance consent should never be the rule.

You also suggest that the recent *Ribeiro* case stands for the proposition that our Court of Appeal believes that a lawyer can act against a client on an unrelated matter without the client's consent. On our reading of that case, it is clear that the Court of Appeal expressed discomfort with the fact that the Law Society, through its Professional Conduct Handbook, can significantly affect the right of a citizen to counsel of its choice when the conflict rules come into play. The Court was uncomfortable with the absolute nature of Rule 6.3. But the Court ***expressly deferred to the Law Society's expertise*** on matters of professional conduct.

In the end, the Court took up a practical suggestion made by defendant's counsel in disposing of the case. The case in no way suggests that lawyers ought to be able to avoid having current clients give informed consent to a representation against that client's interests. Instead, it highlights the difficulties of sorting out the conflicting policy goals of allowing a client to retain counsel of the client's choice, and allowing a client to have an opportunity to give informed consent to a representation against its interests.

The proposed Canadian Bar Association approach

The Canadian Bar Association's Standing Committee on Ethics and Professional Responsibility recently released its final report called *Modernizing the CBA Code of Professional Conduct* for consideration by the CBA's governing Council. On the duty of undivided loyalty, the Committee made this recommendation (pp. 8 & 9):

> In *R. v. Neil* , [2002] S.C.J. No. 72 the Supreme Court of Canada held that lawyers must not act against a current client of the firm, even where the firm has no

confidential information that is relevant to the matter. The Committee recommends that Chapter V be amended to reflect this duty of loyalty. The language recommended by the Committee, which is based upon the language of the Supreme Court of Canada in *Neil*, is set out below. …

"The lawyer shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients or the prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest."

The guiding principles that are also under consideration by the CBA suggest that clients asked to give informed consent to a representation that is against their interests should also obtain independent legal advice.

Conclusion

The Law Society's proposed rule is fundamentally flawed because benefits arising from the duty of loyalty belong not to the lawyer but to the client. We urge the Law Society to adopt the approach now under consideration by the Canadian Bar Association. Sophisticated clients are content to pay the price of being conflicted out, from time to time, in return for the protection and full maintenance of the undivided duty of loyalty from its lawyers.

As our current President has noted, we are practicing law at a time when the legal profession's ability to govern itself is in question. The Benchers are concerned that our status as a self-regulatory profession is at risk.

If the Law Society adopts the proposed rule, the client's fundamental right to undivided loyalty will be eroded by eliminating the client's opportunity to give informed consent to a representation against its interests. It will be clear to clients and to many other members of the public that the Law Society is preferring the interests of lawyers in general, and private law firms in particular, over the interests of clients. This is, in our view, contrary to the Legal Profession Act and contrary to *Neil*.

Should the rule be passed, our Section would share its concerns with the general public in order to ensure that they understand the rule change and its implications fully.

Contact Information

We would be happy to discuss these issues further. You can contact:

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Yours truly,

"E. Blair Lockhart"

Blair Lockhart
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Chair, Corporate Counsel Section of the CBA (BC Branch)

cc. Stuart Rennie – Legislation and Law Reform Officer, CBA (BC Branch)
Frank Kraemer – Executive Director, CBA (BC Branch)
Anna Fung, Q.C. – Senior Counsel, Terasen (Past President, CCCA)
John Scott – President, CCCA
Francine Swanson, Q.C. – Vice-President, CCCA
Effie Triantafilopoulos – Executive Director, CCCA
Tamra Thomson – Director, Legislation and Law Reform (CBA)

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Attention: Jack Olsen – Staff Lawyer, Ethics

Re: Proposed new conflicts rule – Acting for and against *sophisticated clients*

Dear Mr. Olsen:

On behalf of the Canadian Corporate Counsel Association (CCCA), I am writing to clearly state our opposition to the Law Society's proposed *sophisticated client* conflicts rule published in the March/April Benchers' Bulletin. Instead, we endorse the submission of the British Columbia CCCA Chapter/Corporate Counsel Section of the CBA (BC Branch). At our national CCCA Board of Directors meeting on April 17, 2004, the Board reviewed our Chapter's submission and voted **unanimously** to endorse it.

The CCCA represents 3,791 in-house counsel across corporate Canada. Within our national membership we represent 457 British Columbia in-house counsel. We are a Conference of the Canadian Bar Association, and a proud member of the CBA family. We provide:

- continuing legal education that specifically meets the needs of in-house counsel in our country, through national conferences, continuing legal education seminars, and Chapter activity;
- important opportunities for in-house counsel to network with each other to discuss issues of concern to the in-house counsel community; and
- legislative/professional development comment, when appropriate, on behalf of the in-house corporate counsel bar.

Our BC Chapter has clearly advocated that the Law Society's proposed rule is fundamentally flawed because the duty of loyalty, like any other duty owed by a lawyer to a client, belongs not to the lawyer but to the client. We support the Chapter's recommendation that the Law Society adopt, instead, the approach now under consideration by the Canadian Bar Association. (Please see BC Chapter submission which is attached).

If the Benchers of the Law Society adopt the proposed rule before them, it will be clear to clients, and to many other members of the public, that the Law Society is preferring the interests of lawyers in general, and private law firms in particular, over the interests of clients. This is, in our view, contrary to the *Legal Profession Act* and contrary to *R. v. Neil* [2002] S.C.J. No.72.

The Canadian Corporate Counsel Association is so concerned about this proposal that we have directly copied the Federation of Law Societies with this letter and our BC Chapter's submission. The umbrella organization for all law societies should be aware that the public interest and the interests of private practice are not aligned on this issue.

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Contact Information
Both I and our Vice President would be happy to address these issues further at any time. You can contact either one of us as follows:

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Yours truly,

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cc. Francis Gervais – President, Federation of Law Societies
Blair Lockhart – President, BC CCCA Chapter/CBA Corporate Counsel Section
Sandy Jakab – CCCA Board Member and Legislative Liaison, BC CCCA Chapter/CBA Corporate Counsel Section
Francine Swanson, Q.C. – Vice-President, CCCA
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