



OFFICE OF THE PRESIDENT

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February 06, 2004

Denise Brosseau, Secrétaire
Commission des valeurs mobilières du Québec
800 Victoria Square
Stock Exchange Tower, 22nd Floor
P.O. Box 246
Montreal, PQ H4Z 1G3

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West, 19th Floor
P.O. Box 55
Toronto, ON M5H 3S8

Dear Ms. Brosseau and Mr. Stevenson:

Re: Canadian Securities Administrators' Request for Comment Notice 51-402 Comments on the Illegal Insider Trading in Canada: Recommendations on Prevention, Detection and Deterrence, Report from the Insider Trade Task Force, November 2003

I am pleased to provide you with the comments of the Federation of Law Societies of Canada on the Report from the Insider Trading Task Force dated November 2003.

1. Introduction to the Federation

The Federation of Law Societies of Canada (the "Federation") is an organization the membership is comprised of the 14 law societies in Canada. These are (provinces then territories, west to east):

- The Law Society of British Columbia
- The Law Society of Alberta
- The Law Society of Saskatchewan

FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA
FEDERATION OF LAW SOCIETIES OF CANADA

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- The Law Society of Manitoba
- The Law Society of Upper Canada (Ontario)
- Barreau du Québec
- Chambre des notaires du Québec
- Law Society of New Brunswick
- Nova Scotia Barristers' Society
- The Law Society of Prince Edward Island
- The Law Society of Newfoundland
- The Law Society of Yukon
- Law Society of the Northwest Territories
- Law Society of Nunavut

The Federation represents the regulatory bodies of the legal profession who regulate some 86,000 lawyers in Canada, including notaries in Quebec. It was created in 1926 and was then known as the "Conference of Governing Bodies of the Legal Profession in Canada". It became an autonomous body when it was incorporated under *Canada Corporations Act* on July 21, 1972.

The objects of the Federation are the following:

- to identify and study matters of essential concern to the legal profession in Canada and to further co-operation among the governing bodies of the legal profession in Canada with a view to achieving uniformity in such matters;
- to operate as a forum for the exchange of views and information of common interest to the governing bodies of the legal profession in Canada and facilitate the governing bodies working together on matters of common concern;
- to improve the understanding of the public respecting the work of the legal profession in Canada; and
- in appropriate cases, to express the views of the governing bodies of the legal profession on national and international issues in accordance with directions of the Members of the Federation of Law Societies.



2. No consultation with the regulators of the Canadian legal profession.

We were surprised that the Task Force solicited comments only from the Canadian Bar Association (the “CBA”). To our knowledge, the Task Force did not solicit comments from either the Federation or any of its member law societies. Although the CBA has an important role to play on the Canadian legal scene, law societies in Canada have the legislative authority to regulate the legal profession and set the ethical standards for professional conduct of lawyers in each province and territories, and for notaries in Quebec.

One of the most important roles of the Federation is to express the views of the governing bodies of the legal profession on national and international issues. To this end, we have had an opportunity to review the report and the recommendations of the Insider Trading Task Force. The Federation has only recently become aware that the Canadian Securities Administrators has solicited comments by February 2, 2004. We have since informed that the deadline was a guideline and that the CSA would accept our comments at this date; for this, we thank you.

3. Comments

In our view, recommendations 3 & 4 of the Task Force’s Report affect the public interest in the administration of justice by unnecessarily interfering with the solicitor-client relationship. Our comments concerning the recommendations are as follows:

a. Lawyers are currently prohibited from engaging in insider trading.

Canadian law societies regulate and deal with lawyers who act illegally by trading on or benefiting from inside information. It is contrary to the interests of the legal profession and contrary to professional standards for a lawyer to engage in illegal or unlawful activities, including insider trading.

The Professional Codes of Conduct of the law societies in Canada prohibit lawyers from benefiting from information that they would have obtained from their clients.



For instance, the Code of Conduct of the Barreau du Québec¹ provides the following:

“3.06.01 An advocate shall not make use of confidential information or documents to the prejudice of the client or **with a view to obtaining a direct or indirect benefit for himself or for another person.**” [emphasis added]

A lawyer who acts in a manner contrary to these provisions (or to similar provisions in all other provinces and territories) faces disciplinary sanctions from his or her provincial or territorial law society.

b. “Best practices” cannot be enforced.

The right to offer legal services is governed by provincial and territorial legislation. Under provincial and territorial legislation, only the law societies as the self-regulatory authority over the legal profession can impose regulations on the conduct of lawyers in Canada and notaries in Quebec. Each law society has developed or adopted a Professional Code of Conduct and a set of rules, regulations or by laws, which is enforced.

Several decisions from the Supreme Court of Canada have recognized that the public is well protected by the Professional Codes of Conduct and the regulatory regimes put in place by the law societies and imposed upon lawyers and notaries.

“Best practices”, on the other hand, are neither regulations nor rules. “Best practices” are only guidelines for the legal profession, and represent a recommended course of conduct. Best practices can never apply to every situation. There will always be specific fact situations where following the “best practices” may be ill advised. There may, as well be other practices which, although not defined as “best” practices, are nevertheless the best practices to use in the circumstances.

The public is well served by the Professional Codes of Conduct and existing regulatory requirements of the law societies. Creating a set of “best practices” will not assist the law societies in enforcing ethical and regulatory standards on lawyers.

¹ L.R.Q. c-B-1, r.1



c. Recommendation No. 4 – Retaining only lawyers who have adopted best practices is not enforceable.

The conduct of lawyers in Canada is vested exclusively upon the law societies and recommendations that only certain lawyers can be retained must be considered as an infringement on the fundamental rights of Canadians to retain a lawyer of their choice.

The Federation is of the view that the equity marketplace cannot interfere with the delivery of legal services to clients. The equity marketplace cannot interfere with the solicitor-client relationship, and particularly must not interfere with determining whether a particular lawyer may be retained by a client. If a lawyer is to be deemed unworthy or unable to provide legal services to a client, that decision must be made by the independent self-regulatory bodies which govern lawyer conduct.

Citizens must be free to choose the lawyer they wish to represent them on any given legal matter. A lawyer's failure to implement "best practices" cannot, in and of itself, be a sufficient reason to interfere in the solicitor-client relationship.

3. Protection of the Public

The fourteen (14) law societies are responsible for regulating Canada's lawyers and Quebec's notaries in the public interest. Professional Codes of Conduct prohibit lawyers from benefiting from the use of confidential client information. Trading on "inside information" is conduct that is subject to discipline sanctions. There are adequate measures in place within the law societies to ensure that lawyers understand the professional consequences of trading on confidential or "inside" information.

4. Conclusion

The Federation is opposed to any effort to implement "best practices" for the purposes outlined in the Recommendations 3 and 4 of the Task Force Report. However, the Federation is not necessarily opposed to the development of guidelines to assist lawyers in "information containment". I am prepared to discuss this possibility with you further, so long as you understand that any guidelines thus created would be solely for information purposes, and that no effort would be made by the equity marketplaces to prevent issuers from retaining



lawyers who do not adopt them.

I am happy to discuss these comments in further detail, if you wish. I look forward to working with you on these matters.

Yours truly,

Bâtonnier Francis Gervais
President, Federation

c.c. Members of Council of the Federation
CEOs of the law societies
Securities Commissions in all provinces and Territories