**UNITED STATES COURT OF APPEALS**
**for the**
**THIRD CIRCUIT**

**Case No. 06-2915**

**IN RE: TELEGLOBE COMMUNICATIONS CORPORATION, et al., Debtor**

**TELEGLOBE USA INC.; OPTEL COMMUNICATIONS INC.; TELEGLOBE HOLDINGS (U.S.) CORPORATION; TELEGLOBE MARINE (U.S.) INC.; TELEGLOBE HOLDING CORP.; TELEGLOBE TELECOM CORPORATION; TELEGLOBE INVESTMENT CORP.; TELEGLOBE SUBMARINE; TELEGLOBE SUBMARINE INC.; OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TELEGLOBE COMMUNICATIONS CORPORATION; TELEGLOBE COMMUNICATIONS CORPORATION; TELEGLOBE LUXEMBOURG, LLC; TELEGLOBE PUERTO RICO INC.**

**v.**

**BCE INC.; MICHAEL T. BOYCHUK; MARC A. BOUCHARD; SERGE FORTIN; TERENCE J. JARMAN; STEWART VERGE; JEAN C. MONTY; RICHARD J. CURRIE; THOMAS KIERANS; STEPHEN P. SKINNER; H. ARNOLD STEINBERG,**

**Appellants.**

**VARTEC TELECOM, INC.,**
**Defendants/Intervenor in District Court**

# BRIEF OF *AMICI CURIAE* LEADING CANADIAN PUBLIC COMPANIES ALCAN CORPORATION, BOMBARDIER INC., CANADIAN NATIONAL RAILWAY COMPANY, MANULIFE FINANCIAL CORPORATION, AND NORTEL NETWORKS CORPORATION IN SUPPORT OF APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Appellate Rule 26.1, *Amici* Alcan Inc., Bombardier Inc., Canadian National Railway Company, Manulife Financial Corporation, and Nortel Networks Corporation make the following disclosures:

None of the *Amici* are owned by parent companies.

No publicly held company owns more than 10 percent of any of the *Amici*'s stock.

*Amici* are not aware of any publicly held companies that have a financial interest in the outcome of the proceeding and that are not parties to the proceedings before this court.

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*Amici curiae* Alcan Inc., Bombardier Inc., Canadian National Railway Company, Manulife Financial Corporation, and Nortel Networks Corporation respectfully submit this brief in support of reversal of the District Court of Delaware's Order of June 2, 2006.[1]

## STATEMENT OF INTEREST OF AMICI CURIAE

Amici are large Canadian corporations with numerous subsidiaries operating in the United States and throughout the world. The configuration of these subsidiaries is not static. With varying degrees of frequency, Amici acquire, divest, and spin off subsidiary corporations. In addition, Amici have in-house legal departments whose lawyers often advise several subsidiaries as well as the parent corporation. For these reasons, Amici have a strong interest in legal rules that preserve the attorney-client privilege as against subsidiaries no longer within their control, which is the subject of the Order appealed from.

### Alcan Inc.

Alcan Inc. ("Alcan") is a global materials company and one of the world's leading producers of primary aluminum. Alcan is also a technology leader in this sector and a significant global producer of bauxite, alumina, value-added engineered products, composites, and packaging solutions. Headquartered in Montreal, Alcan is a multilingual and multicultural organization with approximately 65,000 employees in 59 countries and regions.

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[1] Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *Amici* state that all parties have consented to the filing of this *amicus curiae* brief in support of Appellants.

Alcan's stock is traded on the Toronto, New York, London, Paris, and Swiss stock exchanges, and Alcan is subject to securities law disclosure and related securities law compliance requirements in multiple jurisdictions, including the United States and Canada.

Alcan has several hundred subsidiaries throughout the world, the majority of which are wholly owned. Alcan frequently acquires and divests businesses and subsidiaries in carrying out its corporate strategy. In January 2005, Alcan completed a major spin-off of most of its former rolled products division, as a result of which several businesses and subsidiaries were transferred to the spun-off entity. Alcan did not retain any residual equity interest in the spun-off entity but maintains several meaningful, arm's length supplier-customer and other contractual relationships with such entity in which the interests of Alcan and such entity may become adverse.

Alcan has approximately 40 in-house lawyers based in eight countries who provide operational support to Alcan's global operations, perform compliance functions for both Alcan and its subsidiaries and provide advice on litigation matters, mergers and acquisitions, and other legal and regulatory issues arising in connection with Alcan's global business.

Although many of Alcan's lawyers provide services to a specific business group or function, the holding structure for Alcan's subsidiaries is not designed to align precisely with Alcan business group structures or other operational structures. For example, subsidiaries in a given country may conduct the

business of several Alcan business units which may, in some cases, relate to wholly different Alcan business groups. Moreover, Alcan's lawyers, whether in operations support or compliance functions, regularly advise Alcan subsidiaries that do not have their own legal staff. Nonetheless, all Alcan in-house lawyers report functionally, directly or indirectly, to Alcan's chief legal officer.

**Bombardier Inc.**

Bombardier Inc. ("Bombardier") is based in Montreal, Quebec, and is listed on the Toronto Stock Exchange. Bombardier does business throughout the world, with 98 percent of its revenues generated outside of Canada. It has approximately 58,000 employees worldwide, of which only about 150 are at Bombardier's corporate offices in Montreal. Bombardier currently has approximately 200 subsidiaries. Bombardier's core businesses include aerospace (such as Learjet, based in Wichita, Kansas) and transportation services (which involve the development and manufacture of railway and subway cars and turnkey railway systems such as the Las Vegas Monorail). Bombardier acquires and divests subsidiaries.

Although Bombardier's business and management is decentralized, it has centralized internal audit, compliance, and risk management functions based in Canada. Bombardier has approximately 125 in-house lawyers worldwide, five of whom are based in the Montreal corporate office and deal with issues at the parent company level, such as disclosure, financing, corporate governance, and compliance issues. In performing these functions, Bombardier's in-house

lawyers rely on advice and information from lawyers and other personnel at the subsidiaries, who are closer to the actual operations of the company. The in-house lawyers frequently provide advice across the lines of the specific legal entities, often in the specific legal or product area in which they specialize.

**Canadian National Railway Company**

Canadian National Railway Company ("CN") is a Canadian corporation and a leader in the North American railway industry. CN has 95 subsidiaries, of which 27 are operating companies. Over the last five and a half years, CN has divested six companies. CN's shares are traded on the Toronto Stock Exchange and the New York Stock Exchange.

CN has 22 in-house lawyers, who regularly provide legal advice to both the parent corporation and its subsidiaries. CN's in-house lawyers advise its subsidiaries on a broad range of legal requirements. In addition to regulations applicable to all businesses, CN's United States rail operations are subject to regulation by the Surface Transportation Board, the Federal Railroad Administration, and numerous state and local regulatory agencies. CN's operations are subject to a wide range of federal, provincial, state, municipal, and local environmental laws and regulations, and CN often is involved in private litigation brought by persons claiming personal injury, property damage, or other injury. CN is also subject to statutory and regulatory directives in the United States regarding homeland security concerns.

**Manulife Financial Corporation**

Manulife Financial Corporation ("Manulife") is a leading Canadian-based financial services company, operating worldwide and offering a diverse range of financial protection products and wealth management services. It has more than 20,000 employees and thousands of distribution partners serving millions of customers in 19 countries and territories around the world. Manulife is the largest life insurance company in Canada, the second largest in North America, and the fourth largest in the world based on market capitalization. Manulife is listed on the Toronto, New York, Philippines, and Hong Kong Stock Exchanges. Manulife has 231 subsidiaries throughout the world, of which approximately 189 are active. Manulife frequently engages in corporate acquisition and divestment transactions.

Manulife has approximately 120 in-house lawyers, of which 54 are in Canada, 53 are in the United States, and 13 are in Asia. These lawyers are in legal or compliance functions and report, directly or indirectly, to the general counsel. The lawyers at the operating company level of Manulife advise on litigation matters, as well various legal and regulatory issues, including insurance regulations, banking regulations, and regulations governing broker-dealers and mutual funds (with regard to Manulife's wealth management business). Many of these lawyers specialize in particular areas—a necessity in light of the complex regulatory and legal environment in which Manulife's businesses operate—and most of them advise the businesses across the lines of

the legal entities. It would be impractical and extremely costly for each subsidiary to have its own legal staff.

**Nortel Networks Corporation**

Nortel Networks Corporation ("Nortel") is a global supplier of communications equipment serving both service provider and enterprise customers. Nortel also provides networking solutions that consist of hardware, software, and services, and its business activities include the design, development, assembly, marketing, sale, licensing, installation, servicing, and support of these networking solutions. Nortel's headquarters is in Brampton, Ontario, but it does business throughout the world and has customers in 150 countries. Its stock is traded on the Toronto and New York stock exchanges.

Nortel has approximately 170 direct or indirect active subsidiaries, including joint ventures. Nortel has about 35,000 employees worldwide. Of those, about 8,000 are in Canada, 14,000 in the United States, 7,000 in Europe-Middle East-Asia, and the remainder are scattered throughout the world. Nortel has 98 in-house counsel located in 16 countries worldwide. There are 22 counsel in Canada and 35 in the United States. All in-house counsel report directly or indirectly to the chief legal officer in Canada. In-house counsel regularly advise across the lines of the various legal entities on various legal and regulatory matters, including litigation, corporate governance, securities, compliance, finance, environmental, employment, acquisition and divestment, tax, insurance, and intellectual property issues.

* * * * *

Amici have a strong interest in the application of legal rules that appropriately preserve the attorney-client privilege and take into account the realities of complex legal practice in large corporate groups. The district court's June 2, 2006 decision (the "Order") did neither. Amici will be directly affected by the ruling of this case. If the Order is upheld, Amici face the specter of being forced either to drastically alter the operation of their legal departments or to forgo the attorney-client privilege to the extent that their interests ever become adverse to their subsidiaries. Accordingly, Amici submit this brief to urge this Court to consider the policy implications of the privilege rules at issue.[2]

## SUMMARY OF ARGUMENT

This case presents the Court with a fundamental question related to the operation of the attorney-client privilege in the corporate context. Specifically, this Court must decide how the "joint-client" exception to the privilege rule—under which joint-clients are generally not allowed to claim privilege against each other—applies to corporate attorneys who provide advice to corporations and their subsidiaries. The decision of this legal issue has potentially far-reaching policy implications for the continued vitality of corporate monitoring and compliance efforts.

[2] Amici take no position with respect to any factual findings of the district court or the specifics of the dispute between the parties to this appeal. Amici's sole interest lies in ensuring the adoption of proper general rules governing privilege.

The district court held that BCE Inc. ("BCE") could not assert the attorney-client privilege as against Teleglobe Inc. ("Teleglobe") for any documents that were prepared by or shared with BCE's in-house lawyers because, it concluded, these lawyers jointly represented BCE and Teleglobe. The district court's decision to apply the "joint-client" exception was error because it will interfere with corporations' abilities to engage in meaningful efforts to ensure that their subsidiaries fully comply with the law.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court established that one of the primary purposes of the attorney-client privilege in the corporate context is to ensure that corporations are able to obtain advice about how to meet their legal obligations. In reaching that result, the Supreme Court was acutely aware of the practical realities facing corporations, which have long relied on their attorneys to provide advice on how to follow the law. To make those programs manageable, corporations have generally adopted so-called monitoring and compliance programs that provide advice across the corporate group. In fact, it is a normal and standard practice for in-house lawyers in a corporate group to advise several corporations within the group, particularly in light of the specialization required for many areas of the law and product lines, and therefore not limited within one country or legal entity. It would be impractical and costly to provide each subsidiary with a full complement of in-house lawyers to specialize in each area of the law relevant to the subsidiary and who could or should only act for only one subsidiary.

Legal commentators and policy makers have noted the importance of these company-wide monitoring and compliance efforts and have noted that these programs can be truly successful only if in-house lawyers are actively involved. In fact, the United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") expressly encourage such programs, and Congress, through the Sarbanes-Oxley Act, has mandated that corporate counsel take active roles in monitoring and compliance programs.

The district court's Order runs directly counter to this broad acceptance of the need for robust monitoring and compliance efforts. Under the Order, corporations face a stark choice: either forgo their compliance efforts, expend unreasonable resources to create complete legal departments for each corporate entity, or deny themselves confidential legal advice from their in-house lawyers. The district court's Order cannot be squared with the teachings of *Upjohn*. Rather than aiding corporations in their attempts to ensure that their subsidiaries comply with legal requirements, the district court's Order would punish corporations for doing so. This Court should reverse the district court's Order.

## ARGUMENT

### I. *UPJOHN* REQUIRES PRIVILEGE RULES TO BE APPLIED BROADLY TO PROMOTE CORPORATIONS' COMPLIANCE WITH LAWS

In its landmark case of *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court addressed the attorney-client privilege in the corporate context and firmly established that the attorney-client privilege rules should be

crafted to encourage corporations to seek advice on how to abide by the law. That case arose in the context of an internal investigation that had been conducted after allegations surfaced of potential legal violations. The internal investigation at issue focused on the actions by officials of Upjohn's foreign subsidiaries and Upjohn's in-house lawyers had been involved in the investigation. The government subpoenaed the documents created during the internal investigation, arguing that they were not protected by the attorney-client privilege. The government contended that discussions between Upjohn's counsel and lower-level employees of its subsidiaries outside the "control group" were not protected by privilege. The Supreme Court rejected that argument, holding that the attorney-client privilege extends not only to communications between attorneys and the "control group" but also to communications between attorneys and lower-level employees. *Id.* at 397.

To decide the case, the Supreme Court looked to the policies underlying the attorney-client privilege rule. The Court noted that the purpose of the attorney-client privilege in general is to "encourage full and frank communication between attorneys and their clients *and thereby promote broader public interests in the observance of law and administration of justice*." *Id.* at 389 (emphasis added).[3] The *Upjohn* Court noted that this policy concern

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[3] *Accord Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); *United States v. Doe*, 429 F.3d 450, 452-53 (3d

is especially strong in the corporate context because corporations often need legal advice to know *how* to comply with the law: "in light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Id.* at 392 (internal citations omitted).[4]

After having set forth the rationale behind the attorney-client privilege, the Supreme Court applied the rule to the facts before it. The Court observed that the narrow scope of the attorney-client privilege that had been proposed by the government and adopted by the lower court would "threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* The Court then rejected that rule in favor of a more protective privilege regime that encourages broader legal compliance efforts. Thus, in addition to its black-letter holding, *Upjohn* stands for the general principle that the rules governing the attorney-client privilege should be construed broadly to encourage corporations to engage in legal compliance efforts.

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Cir. 2005) (by "encourag[ing] full and frank communication between attorneys and their clients," the privilege "promote[s] broad[] public interests in the observance of law and administration of justice") (internal quotations omitted).

[4] A recent survey by the Association of Corporate Counsel shows that the rationales for the attorney-client privilege are well-founded and relied upon by corporations. *See* Herbert S. Wander *et al.*, *Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?*, SK084 ALI-ABA 191, 196-97 (2005).

## II. ROBUST MONITORING AND COMPLIANCE EFFORTS WITH THE INVOLVEMENT OF IN-HOUSE LAWYERS ARE CRITICAL TO ENSURING LEGAL COMPLIANCE

Consistent with *Upjohn*, legal commentators and policymakers have emphasized the importance of the involvement of counsel, particularly in-house counsel, in effective legal and regulatory compliance. Effective compliance efforts are a necessity because today's corporations exist in the context of an incredibly complex web of legal and regulatory obligations.[5] Corporate attorneys—especially in-house lawyers—have taken active roles in these monitoring and compliance efforts. Indeed, some commentators have noted that the involvement of in-house counsel is "critical" to the success of compliance efforts. *See*, *e.g.*, Lisa H. Nicholson, *Sarbox 307's Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 Mich. St. L. Rev 559,

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[5] Corporations, of course, must comply with a broad array of federal statutory and regulatory provisions. To name just a few of United States legal and regulatory regimes with which corporations must comply: (a) the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 *et seq.*; (b) regulations prohibiting the export of certain materials to certain countries, 50 U.S.C. §§ 2401 *et seq.*; 50 U.S.C. §§ 1701 *et seq.*; 15 C.F.R. §§ 700 *et seq.*; (c) antitrust and competition laws, 15 U.S.C. §§ 1 *et seq.*; (d) statutes related to the treatment of employees, (*e.g.*, 15 U.S.C. §§ 651 *et seq.*; 42 U.S.C. §§ 2000e *et seq.*; 29 C.F.R. §§ 1900 *et seq.*; 29 C.F.R. §§ 2509 *et seq.*; 29 C.F.R. §§ 500 *et seq.*); (e) various environmental laws, (*e.g.*, 33 U.S.C. §§ 1251 *et seq.*; 42 U.S.C. §§ 7401 *et seq.*; 42 U.S.C. §§ 9601 *et seq.*); (f) the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78a; (g) the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*; and (h) the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*

Compliance programs have become so commonplace that an industry has sprung up to help corporations establish, oversee, and administer them. *See*, *e.g.*, KPMG's International, Regulatory & Compliance Services, *available at* http://www.kpmg.com/Services/Advisory/RAS/Services/RCS/RCS.htm.

593-94 & nn.166-168 (2004) ("Nicholson, *Sarbox 307's Impact*") ("[The general counsel's] assistance in administering and overseeing the company's compliance program is critical."); Report of the American Bar Association Task Force on Corporate Responsibility at 32 (Mar. 31, 2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf (recommending rules that would require counsel to report evidence of possible legal violations to corporate decision-makers).[6]

The involvement of legal counsel in compliance efforts is crucial not only because they can bring their legal knowledge to bear but also because they have broad knowledge about the overall operation of the corporation and of the risks facing the corporation. Indeed, knowledge of the overall corporate activities and broad risks facing the corporation are as unique to the general counsel's office as is the legal knowledge:

> While the managers involved in each project may have made a careful judgment about what they believe to be the legal risk involved, in fact, the scope of that risk, its wider consequences for the company, the relationship between that risk and others, and the aggregate risk being assumed by the company often are matters

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[6] The commentary noting the importance of involving counsel in monitoring and compliance efforts is legion. *See*, *e.g.*, Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, 21 NO. 5 ACCA Docket 92, 101 (May 2003); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 Emory L.J. 1201, 1203-04 (1997); Timothy P. Terrell, *Professionalism as Trust: The Unique Internal Role of the Corporate General Counsel*, 46 Emory L.J. 1005, 1009 (1997); Marc I. Steinberg, *The Role of Inside Counsel in the 1990s: A View from Outside*, 49 SMU L. Rev. 483, 489-91 (1996); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 279-89 (Jan. 1985); John C. Taylor, III, *The Role of Corporate Counsel*, 32 Rutgers L. Rev. 237 (1979).

> that only the general counsel is in a position to assess in their entirety.

Stephen J. Friedman & C. Evan Stewart, *The Corporate Executive's Guide to the Role of General Counsel*, 18 NO. 5 ACCA Docket 58, 60-61 (May 2000).

The importance of monitoring and compliance efforts and of the involvement of counsel in those efforts has been expressly recognized by federal policy makers as factors determining the scope of punishments for corporations found to have violated the law. The DOJ and the SEC, for example, consider whether corporations have monitoring and compliance efforts in deciding whether to initiate criminal or enforcement actions against corporations when legal violations do occur. *See*, *e.g.*, Memorandum from United States Department of Justice, Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (the existence of a monitoring and compliance program mitigates against a criminal charge); SEC, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decision*, Release No. 44969 (2001), *available at* http://www.sec.gov/litigation/investreport/34-

44969.htm#P16_499 (SEC did not bring enforcement action because of prompt investigation, disclosure, and remediation of improper activities at subsidiary).[7]

Similarly, in passing the Sarbanes-Oxley Act, Congress mandated active monitoring and compliance efforts with the aid of in-house counsel. Under the Act, the Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") of a reporting company must certify the accuracy of the company's financial statements and must certify that the company has adopted appropriate internal controls. *See*, *e.g.*, 15 U.S.C. § 7241(a)(3)-(6) (imposing reporting requirements); *see also id.* § 7262(a)(1) (CEO and CFO also responsible for "establishing and maintaining an adequate internal control structure and procedures for financial reporting").[8] The financial statements, internal

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[7] *Accord* Remarks of James K. Robinson, Assistant Attorney General, United States Department of Justice, Criminal Division, Sponsoring Partner Forum Ethics Officer Association (Apr. 6, 2000), *available at* http://www.usdoj.gov/criminal/fraud/speech/ethics.htm (describing case in which parent corporation was not criminally charged because of its effective compliance program and its speedy and full investigation and disclosure of improper activities at subsidiary).

Canadian officials have taken a similar position. *See* Ontario Securities Commission Staff Notice 15-702, *Credit for Cooperation*, ¶¶ 8-9, *available at* http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part1/sn_20020628_15-702.pdf.

[8] The SEC has adopted rules pursuant to the Sarbanes-Oxley Act that similarly require senior management to evaluate the issuer's "disclosure controls and procedures." 17 C.F.R. § 240.13a-15. "Disclosure controls and procedures" include "controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the [Securities Exchange] Act is accumulated and communicated to the issuer's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely

controls, and certifications referred to in these sections encompass the subsidiaries. *See* 17 C.F.R. § 210.3A-02.

The SEC has emphasized that the Sarbanes-Oxley Act and the rules promulgated pursuant to it require monitoring and compliance efforts and the timely flow of information within companies:

> Companies also must have internal communications and other procedures to ensure that important information flows to the appropriate collection and disclosure points on a timely basis. Given the growing size, complexity and sophistication of corporate organizations and operations and the increasing importance of timely information, we believe that it is necessary and appropriate, in furthering our investor protection mission, to propose requiring companies to maintain these procedures and to periodically evaluate them.

Securities and Exchange Commission, *Proposed Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports*, Release No. 34-46079 (June 18, 2002), *available at* http://www.sec.gov/rules/proposed/34-46079.htm. To achieve that goal, the SEC recommended that companies set up internal committees with representatives from throughout the organization. The disclosure committee thus would include the general counsel of the company and individuals from the company's business units (which in many cases would be the company's subsidiaries):

> We do recommend, however, that a company create a committee with responsibility for considering the materiality of information

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decisions regarding required disclosure." *Id.* § 240.13a-15(e). The issuer's management, "with the participation of the issuer's principal executive and principal financial officers," must evaluate "the effectiveness of the issuer's disclosure controls and procedures" on a periodic basis. *Id.* § 240.13a-15(b).

> and determining disclosure obligations on a timely basis. It seems logical that such a committee would report to senior management, including the principal executive officer and the principal financial officer. Officers and employees of the company who have an interest in and the expertise to serve on the committee could include:
>
> - the principal accounting officer or the controller;
> - the general counsel or other senior legal official with responsibility for disclosure matters who reports to the general counsel;
> - the principal risk management officer;
> - the chief investor relations officer (or an officer with equivalent responsibilities); and
> - such other officers or employees, including individuals associated with company's business units, as the company deems appropriate.

*Id*. In performing the evaluations and making the certifications required by the Sarbanes-Oxley Act, the CEO and CFO generally rely on the company's in-house legal advisors. *See* Robert E. Bostrom, *Corporate Governance, Risk Management and Compliance after Sarbanes-Oxley: Some Thoughts on Best Practices and the Role of the General Counsel – Part II*, 11/02 Metro. Corp. Couns. 14 (Nov. 2002).

Beyond the suggestion that general counsel be involved in the disclosure committees, the Sarbanes-Oxley Act requires attorneys to play an active role in monitoring the corporations for which they work. The Act directed the SEC to issue rules that would set minimum standards for attorneys who practice before the SEC. *See* 15 U.S.C. § 7245. The Act provides that the rules should require "an attorney to report evidence of a material violation of securities law . . . by the company or any agent thereof, to the chief legal counsel or the chief

executive officer of the company." *Id.* The Act further requires the SEC to promulgate rules that compel attorneys to report such potential violations to the audit committee, to a committee of independent directors, or to the board of directors in the event that the chief legal counsel or CEO do not take proper actions in response to the initial report. *See id.* Thus, the Act provides that both in-house and outside counsel are required to "report up" potential legal violations, and these reports are to be funneled through the corporation's general counsel.

The rules adopted by the SEC require that a corporation's chief legal officer play an active role in the process. Specifically, the rules mandate that in-house and outside counsel report evidence of "a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law." 17 C.F.R. § 205.2(i). The reports must be made to the issuer's senior officials including the chief legal officer. *See id.* §§ 205.3(b), (c), 205.4, 205.5, 205.2(k). Upon receiving such a report, the chief legal officer "shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur," or refer it to a previously established qualified legal compliance committee for further action. *Id.* § 205.3(b)(2). Moreover, the chief legal counsel is required to take "all reasonable steps" to cause the

company to remedy any violations. *Id.* Thus, the Sarbanes-Oxley Act and the regulations promulgated pursuant to it require corporate lawyers to be vigilant about possible legal violations and envision that a corporation's chief in-house lawyer will be involved in compliance. *See*, *e.g.*, Alan L. Beller, *Remarks before the American Bar Association's 2003 Conference for Corporate Counsel* (June 2003), *available at* http://sec.gov/news/speech/spch061203alb.htm (discussing the role of attorneys in corporate compliance post-Sarbanes-Oxley).

In light of the actual practices that have been adopted by corporations and mandates from Congress and federal law-enforcement officials,[9] there can be little doubt that corporate monitoring and compliance efforts with active involvement of in-house counsel play a crucial role in ensuring corporate compliance with applicable law.

## III. THE DISTRICT COURT'S ORDER SHOULD BE REVERSED BECAUSE IT CREATES A DISINCENTIVE FOR CORPORATIONS TO ENGAGE IN ROBUST MONITORING AND COMPLIANCE EFFORTS

The district court ignored the teachings of *Upjohn* when it concluded that the "joint-client" exception prevented BCE from asserting privilege against

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[9] Canadian officials have proposed requirements similar to the Sarbanes-Oxley Act. *See* Canadian Securities Administrators Notice 52-313, *Status of Proposed Multilateral Instrument 52-109* (Mar. 10, 2006), *available at* http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/csa_20060310_52-313_status-52-111.pdf (discussing certification requirements); The Law Society of Upper Canada, Rules of Professional Conduct 2.02(5.1) & 2.02(5.2), *available at* http://www.lsuc.on.ca/regulation/a/profconduct/rule2/ (imposing reporting-up requirements on lawyers).

Teleglobe. Although the district court recognized the potential difficulties created by its decision (referring to the implications of the Order as "harsh"), it concluded that the result was acceptable because BCE could have avoided the need to produce the documents by "walling off" its in-house lawyers from communications with BCE's outside counsel or by "clearly terminat[ing]" the attorney-client relationship between its in-house counsel and Teleglobe. That was precisely the wrong approach. Rather than construing privilege rules to promote corporate legal compliance, as required by *Upjohn*, the district court imposed restrictive privilege rules because the rules did not make it impossible for corporations to protect the privilege. Under *Upjohn*, impossibility is not the standard. Instead, courts should adopt rules that actively encourage legal compliance efforts and should eschew rules that could impede such efforts.

The alternatives proposed by the district court actually highlight the overly restrictive nature of the Order. First, the suggestion that a parent company's in-house counsel could "clearly terminate" the attorney-client relationship with corporate subsidiaries simply ignores practical and legal realities. Under the Sarbanes-Oxley Act, it is far from clear that a corporation's general counsel could refuse to be involved in monitoring and compliance efforts for corporate subsidiaries. But even if Sarbanes-Oxley allows in-house counsel to take such a hands-off approach, they surely should not be required to do so. Some courts have held parent companies criminally liable for the acts of

their subsidiaries,[10] so parent companies have a substantial interest in ensuring that their subsidiaries comply with the law. And a parent corporation that specifically advised its in-house counsel not to monitor its subsidiaries would surely expose itself to litigation.[11] Ultimately, the district court erred in suggesting that in-house lawyers should refuse to provide legal compliance advice to corporate subsidiaries.

Nor does the prospect of "walling-off" in-house counsel provide a viable alternative. That approach would deny parent corporations advice from the most knowledgeable attorneys—the in-house lawyers who have been involved with their subsidiaries. Because a parent corporation's in-house lawyers are customarily and appropriately involved in the compliance advice provided to the subsidiaries, the district court's suggestion would force parent corporations to rely exclusively on outside counsel for advice that they wish to remain confidential as against any subsidiaries. Thus, the district court's Order leads to the anomalous result that a corporation's general counsel cannot provide advice

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[10] *See*, *e.g.*, *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399 (4th Cir. 1985) (holding that a company could be held criminally liable for the actions of an employee of a subsidiary who was responsible for Food and Drug Administration compliance because the employee was acting as an agent of the parent company).

[11] Corporate directors would also likely face litigation for any instruction that in-house counsel not provide compliance advice. *See In re Caremark Int'l Inc. Derivative Litig.*, No. 13670, 1996 Del. Ch. LEXIS 125, at *38 (Del. Ch. Sept. 25, 1996) (shareholder derivative suit alleging inadequate compliance efforts).

to a parent company about its relationships with subsidiaries with the expectation that it will remain privileged.

Moreover, legalistic approaches such as "walling-off" certain attorneys would likely lead only to the exclusion of lawyers from the process:

> The more that considerations of privilege force in-house lawyers to impose legalistic formalities on communications with other employees, the less likely it is that those employees will be inclined to engage in those communications or provide the sort of full information to the in-house counsel that is conducive to effective legal advice.
>
> Outside of certain very limited contexts—a meeting specifically to discuss the matters at issue in a lawsuit, for example—strict application of these protective measures will likely simply mean that lawyers get invited to fewer meetings, get consulted less often, and are generally marginalized within the organization.

William W. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for Upjohn*, 61 Bus. Law. 95, 129-30 & n.86 (Nov. 2005).

Precisely these types of concerns emerged with Enron, which provide a stunning and unfortunate example of the problems that can be created by fragmented compliance efforts:

> The Enron corporate legal department was decentralized, fragmented and multi-layered. In fact, James Derrick, Enron's former executive vice president and general counsel, reportedly had no means of controlling or supervising all of the legal advice the company had been receiving because the different business divisions all had their own in-house legal staff as well as outside firms. Enron's lawyers also were unable to obtain information about a particular transaction's purpose or its underlying facts from their discussions with the corporate managers before the lawyers were asked to certify its legality.

Nicholson, *Sarbox 307's Impact* at 600 (footnotes omitted).

This court should not countenance an approach, like the one adopted by the district court, that sanctions that type of fragmentation in in-house counsel departments. The district court's suggestion that BCE should have walled-off its in-house lawyers, therefore, does not provide a reasonable alternative.[12]

[12] Although the district court did not expressly address the issue, other legalistic solutions are similarly unavailing. One might argue, for example, that the joint-client exception does not create significant concerns because corporations are free to contract around the exception. But that argument has no application to an insolvency such as the one at issue in this appeal. In any event, the availability of contractual provisions in certain circumstances is no substitute for a sensible default rule when subsidiaries are sold, spun off, or otherwise divested. Under *Upjohn*, the Supreme Court established that courts should adopt privilege rules that will actively encourage compliance efforts. Moreover, relying on contractual provisions would create traps for the unwary and require fact-intensive application that would general substantial uncertainty regarding the sufficiency of the contractual provisions in any given case. *See Upjohn*, 449 U.S. at 393 (stating that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected" and that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all").

## CONCLUSION

For the foregoing reasons, the district court's Order should be reversed.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

**Bar Membership:** Pursuant to Third Circuit Local Appellate Rule 28.3(d) and 46.1(e), I hereby certify that at least one of the attorneys whose names appear on this brief is a member of the bar of this court.

**Compliance with Fed. R. App. P. 32(a):** I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that this brief complies with the applicable type-volume limitations of Rule 32(a)(7)(B) because it contains 5,721 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font, and accordingly complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

**Identical Compliance of Briefs:** I hereby certify, pursuant to Third Circuit Local Appellate Rule 31.1(c), that the text of the electronic (PDF) version of this brief (sent to the Court by e-mail) is identical to the text in the paper copies of the brief sent to the Court by overnight mail.

**Virus Check:** I hereby certify, pursuant to Third Circuit Local Appellate Rule 31.1(c), that a virus detection program (Symantec AntiVirus, version 10.0.1.1000, last updated July 25, 2006) has been run on the electronic version of the brief and that no viruses have been detected.

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## CERTIFICATE OF SERVICE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 25(d)(2), that the foregoing Brief of *Amici Curiae* Leading Canadian Public Companies Alcan Corporation, Bombardier Inc., Canadian National Railway Company, Manulife Financial Corporation, and Nortel Network Corporation in Support of Appellants was timely filed in accordance with Rule 25(a)(2)(b) by sending 10 paper copies of the brief via overnight mail to the Office of the Clerk on July 26, 2006. An electronic version of the brief in PDF format was sent by e-mail to: electronic_briefs@ca3. uscourts.gov.

I further certify that on July 26, 2006, I caused two (2) copies of the foregoing document to be served upon the counsel of record listed in the attached service list by first-class mail, postage prepaid.

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