LEGAL OPINIONS:

SAMPLE OPINION LETTER NO. 4A: REAL ESTATE (Fee Simple Title)

The Solicitors’ Legal Opinions Committee was constituted for the purpose of reviewing materials previously published with respect to solicitors’ opinions and preparing guides for the assistance of the profession.

The members of our Committee at this time are:

- Sandra D. Sutherland, Q.C. (Chair)
- Paul D. Bradley of Lawson Lundell LLP
- Byran Gibson of McCarthy Tetrault LLP
- Mitchell H. Gropper, Q.C. of Farris Vaughan Wills & Murphy LLP
- Donald J. Haslam of Kornfeld Mackoff Silber LLP
- Jacqueline Kelly of Davis & Company LLP
- Greg Lewis of Bull, Housser & Tupper LLP
- John O.E. Lundell, Q.C. of Stikeman Elliott LLP
- Mitchell McCormick of Fasken Martineau DuMoulin LLP
- Iain Mant of Fasken Martineau DuMoulin LLP
- John Morrison of Lang Michener LLP
- Robert Shouldice of Borden Ladner Gervais LLP
- Anne M. Stewart, Q.C. of Blake, Cassels & Graydon LLP
- David A. Zacks, Q.C. of Blake, Cassels & Graydon LLP

In November 1999 the Committee created a real estate subcommittee of:

- Nicolaas Blom of McCarthy Tetrault LLP
- Paul D. Bradley of Lawson Lundell LLP
- Donald J. Haslam of Kornfeld Mackoff Silber LLP

Nicolaas Blom was a member of the Committee and chaired the real estate subcommittee until the end of 2005, when he retired from practice. At that time Byran Gibson replaced him on the real estate subcommittee and Paul Bradley replaced him as chair of the real estate subcommittee.

Earlier Statements

Our Committee has issued six earlier statements concerning legal opinions. Those statements are listed as Items 1.1 to 1.6 inclusive on the list of reference materials (the "Reference Materials") included at the end of this statement. Attached Sample Opinion Letter 4A: Real Estate (Fee Simple Title) provides specific opinion language and updates the Statement of the Committee Concerning Legal Opinions: Real Estate issued in December 1993.
and listed as Item 1.5 of the Reference Materials. Our Committee has reviewed the six earlier Statements and, apart from such necessary updating, confirms the principles set out therein.

**Sample Opinion Letter No. 4A: Real Estate (Fee Simple Title)**

The Committee has prepared the attached *Sample Opinion Letter 4A: Real Estate (Fee Simple Title)* as a "third party legal opinion", that is, an opinion to be given by a solicitor for one party in a commercial transaction to the other party in the transaction. *Sample Opinion Letter No. 4A* relates to real property registered in the land registration system established under the *Land Title Act* of British Columbia. The Committee intends in the near future to prepare a sample opinion letter 4B to be used in transactions in which real property registered in British Columbia is held by a trustee.

The assumptions, qualifications, and limitations in *Sample Opinion Letter No. 4A: Real Estate (Fee Simple Title)* are not a replacement for careful, knowledgeable, transaction-specific legal work (including inquiries) which should be undertaken by the solicitor delivering such a real estate opinion. *Sample Opinion Letter No. 4A* merely sets down those basic matters that the members of our Committee consider they would address in an opinion of this nature. Two principles must override all other considerations in this *Sample Opinion Letter No. 4A* and in all similar opinions:

1) the opinion giver may not rely on information (whether contained in certificates or in other documentation) or assumptions, otherwise appropriate in the circumstances, if the opinion giver knows or has reason to believe that the information or assumptions are inaccurate or incomplete; and

2) the opinion giver may not rely on a general qualification or limitation (such as the "bankruptcy and insolvency exception") to the "remedies opinion" (the opinion that a document creates a legal, valid, and binding obligation and is enforceable) if the opinion giver knows or has reason to believe that an existing issue would limit the enforceability of a specific provision of the document or of the entire document, and accordingly either the opinion giver must decline to give the remedies opinion or the existing issue and its effect must be specifically addressed in the opinion.

Wilfred M. Estey has also set down some general rules concerning assumptions in commercial transactions which are worth noting. They are contained at pages 81 to 83, inclusive, of his book *Legal Opinions in Commercial Transactions*, 2nd edition, listed as Item 4 of the Reference Materials. Briefly, Mr. Estey states that assumptions should be limited, so far as possible, to matters of fact, assumptions of facts should not be made as to matters that it would normally be the duty of the giver of the opinion to inquire into, and assumptions of fact that render a legal conclusion meaningless should be avoided in virtually all circumstances. The last point is a reference to some fortunately rare requests to make particular assumptions that go to the heart of the opinion requested in order to arrive at a particular legal conclusion.

Although it would appear to many that contemporary opinions are burdened with an ungainly number of assumptions and qualifications, there are almost an equal number of unstated assumptions which apply to opinions. Because solicitors are not normally able or expected to investigate impossibility or illegality which may arise, not on the face of the instrument, but out of an undisclosed intended use of the instrument, opinions are generally not qualified as to these kinds of vitiating elements unless the giver knows or has reason to believe such a vitiating element exists. Our Committee has concluded that a similar unstated assumption applies in respect of statutes of limitations. Although clearly such statutes limit the enforceability of every instrument, to our knowledge, qualifications for such statutes are generally not inserted into enforceability opinions.

**OCTOBER 19, 2006**
Our Committee points out that the equitable principles limitation included in Sample Opinion Letter No. 4A: Real Estate (Fee Simple Title) covers both the traditional discretion of a court of equity and the newly emerging concepts of materiality, reasonableness, good faith and "fair dealing". Refer to pages 206 to 216 of Wilfred M. Estey’s book Legal Opinions in Commercial Transactions, 2nd edition, listed as Item 4 of the Reference Materials. A doctrine of performance in good faith appears to be emerging from recent Canadian decisions (some unreported).

Sample Opinion Letter No. 4A: Real Estate (Fee Simple Title) is not intended for use as a multi-jurisdictional opinion. It does not address conflicts issues, choice of law clauses, or jurisdictional questions. If the facts of the transaction require that such matters be addressed, then assumptions, qualifications, and limitations will be required in addition to those contained in Sample Opinion Letter 4A. Our Committee refers the reader to Item 8 of the Reference Materials as a source for information on multi-jurisdictional opinions.

The organization of a commercial opinion varies from firm to firm. Some firms append the qualifications and limitations as a separate schedule to the opinion. Some firms incorporate by reference terms defined in the documents into the opinion letter. Sample Opinion Letter No. 4A: Real Estate (Fee Simple Title) merely indicates one way of organizing the material, which our Committee considers is by no means the only way.

Guidelines

In the October 1992 Statement, our Committee recommended adherence to Certain Guidelines for Negotiation and Preparation of Third Party Legal Opinions (the "Guidelines"), listed as Item 9 of the Reference Materials, which were published with the Silverado Accord, listed as Item 5 of the Reference Materials. The Guidelines address many of the ethical issues that arise between lawyers when they are negotiating and preparing opinions. The Guidelines can be read and applied quite separately from the Silverado Accord. Our Committee continues to endorse the Guidelines for third party legal opinion practice in British Columbia. With the permission of the American Bar Association, the full text of the Guidelines was reproduced and attached to the October 1992 Statement of the Committee listed as Item 1.3 of the Reference Materials.
Reference Materials

1. Statements of the Solicitors' Legal Opinions Committee:


   1.4. *Statement of the Solicitors' Legal Opinions Committee Concerning Legal Opinions: PPSA Sample Opinions, with Sample Opinion Letters No. 1 and No. 2*, adopted 4 March 1993

   1.5. *Statement of the Solicitors' Legal Opinions Committee Concerning Legal Opinions: Real Estate*, December 1993

   1.6. *Statement of the Solicitors Legal Opinions Committee Concerning Sample Opinion No. 3: Commercial, with Sample Opinion Letter No. 3*, adopted February 2002


5. *Third Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 1991 (the "Silverado Accord")


9. *Certain Guidelines for Negotiation and Preparation of Third Party Legal Opinions*, The Committee on Legal Opinions of the Section of Business Law, American Bar Association, 1991 (now replaced by *Guidelines for the Preparation of Closing Opinions*, The Committee on Legal Opinions of the Section of Business Law, American Bar Association, February 2002). *The Business Lawyer* 875, which Guidelines can also be found at:

SAMPLE OPINION LETTER NO. 4A: REAL ESTATE (Fee Simple Title) (British Columbia Transaction)

(to be given by lawyer for one party to the other party and, if appropriate, the lawyer for the other party)

(limited to an opinion on land registered in the registration system established under the Land Title Act)

[DATE]

[ADDRESSEE]

Dear < >

Re: ____________________________________________

We have acted as [i] counsel to [ii] [X Co] (the “Corporation”) in connection with [iii] [describe transaction; eg. purchase of land etc.] pursuant to [iv] [describe principal agreement; eg. purchase and sale agreement, loan agreement etc.] (the “Principal Agreement”) between the Corporation and [insert applicable party or parties (the “Mortgagee”).]

Terms used in this opinion letter and defined in the Principal Agreement but not in this opinion letter have the meanings given to them in the Principal Agreement.

If the Principal Agreement does not contain a precise legal description of the lands to which this opinion relates, and a defined term identifying those lands, insert PID number and legal description, including city/municipality and define lands to which opinion relates. If the Lands are a strata lot add “together with an interest in common property in proportion to the unit entitlement as shown on Form V”.

The description of the Lands is complete without reference to easements and restrictive covenants which may be appurtenant to it.

Endnote 1

OCTOBER 19, 2006
The opinion should not be based on any document or certificate which the opinion giver knows or has reason to believe is inaccurate or incomplete. If any document or certificate is not current, add an appropriate assumption, as in 2.3 or 2.4.

Endnote 2

List documents and certificates which were reviewed, stating whether they were originals, copies or certified copies. If the latter, consider whether the person certifying is appropriate to do so.

For 1.2, consider whether additional assumptions or qualifications are appropriate where you are acting for the Mortgagee and Mortgagee requires that its “standard” Express Mortgage Terms be used without review or alteration.

Certificate under 1.4 - Facts only. e.g. confirmation that there is no leasehold interest of 3rd parties for term not exceeding 3 years under which there is actual occupation; that Corporation (if registered owner) is not acting as trustee and has not disposed of its interest in the Lands by an unregistered document. SEE SUGGESTED FORM OF OFFICER’S CERTIFICATE ATTACHED AS APPENDIX I

Certificate(s) under 1.5 - include Certificate of incorporating jurisdiction if Corporation is extra-provincial corporation.

If applicable, list additional documents in connection with the transaction which were reviewed.

1. EXAMINATIONS

In connection with this opinion letter, we have examined the following: [copies of which are enclosed or have been previously delivered to < >]:

1.1 the Principal Agreement;

1.2 the Form B mortgage (including the Mortgage Terms – Part 2 (the “Mortgage Terms”) [attached thereto/filed under No. • and incorporated therein by reference) in the principal amount of $• made by the Corporation in favour of the Mortgagee dated • (the “Mortgage”);

1.3 [Identify any other transaction documents e.g. purchase agreement, Form A Transfer];

(collectively , with the Principal Agreement and the Mortgage, the “Documents”):

1.4 a certificate dated < > of [an officer] of the Corporation;

1.5 a copy of Certificate of [Good Standing] [Compliance] with respect to the Corporation issued on < > by [the Registrar of Companies] [Industry Canada];

1.6 [other].

We have also examined such other corporate records and documents and certificates of public officials, made such investigations and searches and considered such questions of law as we have considered necessary to give the opinions expressed in this letter. The opinions expressed herein are based on our search(es) of the records of the [applicable] Land Title Office (the “LTO”) made at _______ AM/PM on

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2. ASSUMPTIONS

For the purposes of the opinions expressed in this letter we have assumed:

2.1 the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity with authentic originals of all documents submitted to us as copies, the identity and personal legal capacity of all individuals acting or purporting to act as corporate officers, and the identity and capacity of all individuals acting or purporting to act as public officials;

2.2 the accuracy and completeness of all information provided to us by offices of public record;

2.3 that the facts set out in the certificate described in section 1.4 are true and correct [and that there has been no change in those facts set out in such certificate since the date of such certificate:]

2.4 that the Certificate(s) of [Good Standing] [Compliance] [Status] for the Corporation remains valid as of the date of this opinion;

2.5 that each of the Documents creates legal, valid and binding obligations of, and is enforceable in accordance with its terms against, each of the parties thereto other than the Corporation;
2.6 that the [yearly/half-yearly] rate of interest disclosed in the Mortgage for the purposes of Section 6 of the *Interest Act* (Canada) is accurate.

3. **OPINION**

Based and relying upon, and subject to, the foregoing and subject to the qualifications and limitations set out below, we are of the opinion that:

3.1 the Corporation exists as a company under the *Business Corporations Act (British Columbia)* and is, with respect to the filing of annual reports, in good standing with the Office of the Registrar of Companies for the Province of British Columbia;

or

3.1 the Corporation exists as a corporation under the *Canada Business Corporations Act*. has sent to the Director under said Act all required annual returns, has paid all fees required under the Act, is registered as an extraprovincial company under the *Business Corporations Act (British Columbia)* and is, with respect to the filing of annual reports, in good standing with the Office of the Registrar of Companies for the Province of British Columbia;

3.2 the Corporation has the corporate power and capacity to own its interest in the Lands and to enter into and perform its obligations under each of the Documents to which it is a party;

3.3 the execution and delivery by the Corporation of each of the Documents to which it is a party, and the performance by the Corporation of its obligations thereunder, have been
3.4 each of the Documents to which the Corporation is a party has been duly executed and delivered by the Corporation;

3.5 each of the Documents to which the Corporation is a party creates legal, valid and binding obligations of the Corporation and is enforceable against the Corporation in accordance with its terms;

3.6 the execution and delivery of the Documents to which it is a party by the Corporation and the performance by the Corporation of its obligations thereunder do not conflict with or result in a breach of any provisions of the constating documents of the Corporation (If appropriate, refer to unanimous shareholders agreement etc.):

3.7 the execution and delivery of the Documents to which it is a party by the Corporation and the performance by the Corporation of its obligations thereunder do not violate, conflict with, or result in a breach of any laws of British Columbia or the laws of Canada applicable in British Columbia;

3.8 no consent, approval, authorization, exemption, filing, order or qualification of or with any governmental authority is required under the laws of British Columbia or the laws of Canada applicable in British Columbia for the execution, and delivery by the Corporation of the Documents to which it is a party or the performance by the Corporation of its obligations therein:

3.9 the Corporation is the registered owner of the Lands in fee simple subject only to:

(a) the exceptions and reservations stated in subsections 23(2)(a), (b), (c), (e), (f), (h), and (i) and 108(2) of the
be done by way of officer’s certificate.

In (a) add reference to 23(2)(d) if officer’s certificate does not address unregistered leases for terms of 3 years or less or confirms existence of such leases.

Endnote 8

Legal notations which refer to benefits which are appurtenant to the Lands, such as easements, restrictive covenants over other lands etc, should be described separately as shown below.

No comment is made as to the proper form of opinion where the title to the Lands or minerals is an absolute title. See section 174 of the LTA.

Land Title Act (British Columbia),

(b) the exceptions expressed in sections 50 and 55 to 58 of the Land Act (British Columbia),

(c) where any of the Lands is or becomes a strata lot, any lien registered by the strata corporation pursuant to Section 116(1)(a), (b) or (c) of the Strata Property Act (British Columbia),

(d) the equitable discretion of the Court to order rectification of any instrument relating to an interest in land,

(e) [list (or add as schedule) all legal notations ranking in priority to the Mortgage which are in the nature of restrictions or charges, registered charges, registered liens and registered interests or use a term like “Permitted Prior Encumbrances” if appropriately defined in the Principal Agreement]; [if there is a restrictive condition, right of reverter, or obligation imposed on the Lands by the Forest Act (British Columbia) which is endorsed on title specify the nature of the endorsed right (see 23(j) LTA)],

(f) the Mortgage, and

(g) [list (or add as schedule) all legal notations ranking subsequent to the Mortgage which are in the nature of restrictions or charges, registered charges, registered liens and registered interests or use a term like “Permitted Subsequent Encumbrances” if appropriately defined in the Principal Agreement].

[If applicable add: The following interests are registered as being appurtenant to the Lands: (a) an easement registered under No. ...... against [describe servient tenement]; (b) a restrictive covenant .....etc..]

3.10 the Mortgage was registered in the LTO on ● under No. ● and constitutes a fixed and specific mortgage and charge on the Lands, subject only to the matters specified in clauses (a) to (e) inclusive of section 3.9 hereof.
This opinion would not usually be given to an experienced BC Mortgagee, but may be appropriate where the Mortgagee is unsophisticated or otherwise unfamiliar with the BC Land Title Office. When giving this opinion, ensure that the Mortgage contains no other charges (e.g. grant of security interest) which might require registration.

No qualification should be included with regard to a fact which the opinion giver knows, or has reason to believe is inaccurate or incomplete.

Known bankruptcy, insolvency and similar issues must be specifically addressed.

Endnote 9

Endnote 10 and 11

3.11 [the registration of the Mortgage in the LTO is the only registration or filing of or with respect to the Mortgage or the mortgage and charge thereof in any office of public record in the Province of British Columbia which is necessary or desirable to preserve or protect the mortgage and charge of the Mortgage or the priority thereof].

4. QUALIFICATIONS AND LIMITATIONS:

4.1 Enforceability of the Documents is subject to:

(a) applicable bankruptcy, insolvency, receivership, fraudulent preference, fraudulent conveyance, reorganization, moratorium, arrangement, winding up and other similar laws generally affecting the enforcement of the rights of creditors or others;

(b) general principles of equity (whether or not enforcement is considered in a proceeding in equity or at law), including the discretion exercisable by the court with respect to equitable remedies such as specific performance and injunction and the concepts of materiality, reasonableness, good faith and fair dealing in the performance and enforcement of a contract required of the party seeking its enforcement;

(c) the discretion exercisable by the court with respect to stays of enforcement proceedings and execution of judgments;

(d) the effect of a vitiating factor such as mistake, misrepresentation by a person other than the Corporation, fraud, duress or undue influence;

(e) each Document will be enforced by the court only to the extent that the court determines that any provision which is unenforceable or invalid can be severed without impairing the interpretation and application of the remainder of that Document;

(f) the rate of post judgment interest applicable to any amount owing under any of the Documents will be the rate specified pursuant to the Court Order Interest Act (British Columbia), subject to variation on application to the court as provided for in such
Act:

(g) the discretion exercisable by the court to enjoin the enforcement of any right of private sale provided for in the Mortgage and to require that the Lands be sold pursuant to a court supervised foreclosure proceeding; and

(h) the possible unenforceability of the provisions of Section 1 of the Mortgage which provide that any receiver appointed thereunder is the agent of the Corporation rather than the agent of the Mortgagee.

4.2 Agreements or arrangements to pay interest at a criminal rate (the terms “interest” and “criminal rate” having the meanings specified in Section 347 of the Criminal Code (Canada)) are not enforceable.

4.3 Any provision in the Documents requiring the payment of interest at a higher rate after rather than before default may be unenforceable.

4.4 We express no opinion as to the enforceability of provisions of the Documents which require the Corporation to pay any amounts to the Mortgagee in respect of fines, penalties, legal fees or costs levied against, imposed upon or incurred by the Mortgagee, exceeding those awarded to or recoverable by the Mortgagee pursuant to applicable law or the order of a court.

4.5 Section 1 of the [describe document] may be unenforceable if a court decides that the amount required to be paid pursuant thereto constitutes a penalty and not a reasonable pre-estimate of damages.

4.6 Notwithstanding the provisions of the Documents as to the conclusiveness of a fact or the determination of a matter a court may permit the Corporation to introduce evidence in proceedings for the purpose of proving that the conclusiveness of a fact or the determination of a matter is contrary to the evidence.

See Interest Act (Canada) Section 8
4.7 The enforcement of the Documents is subject to the discretion of a court to impose restrictions on the rights of creditors to enforce immediate payment of amounts stated to be payable on demand.

4.8 We express no opinion as to the priority of the Mortgage with respect to advances made after the [initial] advance made on [date]. The Mortgagee should search title to the Lands immediately prior to each advance under or secured by the Mortgage.

4.9 Any court action to recover any amount payable in a foreign currency will require conversion of such amount into Canadian dollars at a rate of exchange which may not be the rate in effect on the date of payment or the rate prescribed in the Documents.

4.10 We have made no independent investigations of the facts referred to in the certificate described in section 1.4 hereof.

4.11 We express no opinion on any interest in or registered in respect of the Lands that may be held or claimed by or for any aboriginal people in their capacity as an aboriginal people.

4.12 The opinions expressed herein are restricted to the laws of British Columbia and the laws of Canada applicable in British Columbia on the date hereof.
4.13 We have, pursuant to your instructions, used the Mortgage Terms without review or amendment. Accordingly, we express no opinion as to any limitations on the enforceability of the Mortgage arising from such Mortgage Terms.

4.14 In the event of expropriation of any of the Lands pursuant to the Expropriation Act (British Columbia), payment of the Mortgage will be determined in accordance with the provisions of such Act and the General Regulation thereunder.

[Add specific qualifications arising from the documents and the nature of the transaction, if any]

This letter is solely for your use and benefit in connection with the transaction described in the first paragraph of this letter and may not be disclosed to or relied upon by anyone other than you or used for any other purpose.
OFFICER'S CERTIFICATE

TO: [ADDRESSEES OF OPINION]

RE: [Describe and define the Lands]

The undersigned hereby certifies, without incurring personal liability, on behalf of [name of corporation] (the “Corporation”) that I am the [insert title] of the Corporation and that:

1. The Corporation is the owner of the entire fee simple interest in the Lands.

2. No person has a leasehold interest in the Lands for a term of 3 years or less under which there is actual occupation [except as set out in Schedule A hereto].

3. The Corporation has not disposed of the whole or any part of its interest in the Lands to anyone by an unregistered document [except as set out in Schedule “A” hereto].

IN WITNESS WHEREOF, the undersigned has executed this Certificate on [insert date].

____________________________________
[Name]
[Title]
ENDNOTES:

1. While the Sample Opinion has been drafted to be given by the lawyer for the Corporation to the Mortgagee (and possibly to the Mortgagee’s lawyer), it has been prepared in this way primarily for illustrative purposes and the Sample Opinion can be adapted to reflect different circumstances (e.g. an opinion given by the Mortgagee’s lawyer to the Mortgagee). The structure of the Sample Opinion should not be taken as a statement by the Committee that it will always be appropriate for the lawyer for the Corporation to provide such an opinion. The Committee has previously expressed its view that the usual practice in the Province of British Columbia is that lawyers for borrowers do not, in most circumstances, provide enforceability opinions on “standard form” security documents.

If the addressee is a B.C. lawyer, the addressee should consider the extent at law to which he or she will be entitled to rely on such opinion, except as to matters within the particular knowledge of the opinion giver (such as incorporation, existence and corporate capacity and power of the Corporation and the due authorization, execution and delivery of specified documents by the Corporation).

2. It is important that consideration be given to all applicable corporate records, all documents necessary in connection with the transaction, all places of public record where there may be relevant documents (which will require knowledge of the nature of the business of the Corporation), all relevant searches and usually all applicable statutes.

Practice varies as to the detail of documents and searches listed. The opinion giver must ensure that copies of all documents examined or relied on by the opinion giver are delivered to the other side.

3. Irrespective of assumptions in the opinion as to identity of individuals, the opinion giver should be aware of, and take steps to counter, the risks of fraud which can arise from impersonation or identity theft. This could involve obtaining and keeping photocopies of picture identification of relevant individuals as well as complying with any requirements imposed by the Mortgagee (where the solicitor for the Mortgagee is the opinion giver) regarding the confirmation of identities of individuals.

4. An opinion that the Corporation has complied with ALL laws relating to its business should not generally be given, even if limited or qualified.

5. If the Corporation acquired the Lands prior to the date of the Certificate referred to in clause 1.5 of the opinion, it is important for the opinion giver to determine whether or not the Corporation has ever been struck off or dissolved. If this has happened the opinion giver must determine that the Corporation has been restored. If a British Columbia company was restored prior to the Business Corporations Act coming into effect the opinion giver needs to ensure that the appropriate language (e.g. “the company shall be deemed to have been continued in existence as if its name had never been struck off” - see Natural Nectar Products Canada Ltd. v. Theodor (1990) 46 BCLR (2d) 394 (BCCA)) was in the restoration order and, as the opinion addresses title to real property, that no real property escheated to the Crown. For a British Columbia company restored after the coming into effect of the Business Corporations Act, as the opinion addresses title to real property, the opinion giver must ensure that there has been compliance with the requirements of the Escheat Act.

6. An opinion is sometimes requested that the owner of real property “has good, safe-holding and marketable title” to such property: such a request will most often come from an out of province opinion recipient. It is not the usual practice of British Columbia lawyers to provide an opinion.
in this form, as the wording of the opinion does not reflect the title provided by the Torrens system under the Land Title Act. Providing such an opinion may require consideration of matters which are not addressed in the Sample Opinion (such as determining the existence of a bare trust or unregistered instrument, considering whether possible contamination may affect the marketability of the land, identifying ambiguities in documents registered against the land which could give rise to litigation, etc.).

7. The opinion on title or the registration and priority of the Mortgage can not be given if registration of the applicable Form A Transfer or Mortgage has not been completed. If the application is pending at the time the opinion is given the opinion giver can state: “Upon completion of the registration in the LTO of the Transfer [use defined term] the Corporation will be the registered owner...Upon completion of the registration in the LTO of the Mortgage...We know of no reason why such registration should not be completed in the ordinary course of the LTO procedure.”

8. Courts have an equitable jurisdiction to rectify instruments. It must be established that the written instrument does not reflect the true agreement of the parties and that the parties shared a common intention up to the time of signature that the provision in question stands as agreed rather than as reflected in the instrument. The standard of proof is a stringent one. The B.C. Court of Appeal recognized the applicability of rectification of instruments creating interests in land (but did not grant rectification) in Hawkes Estates v. Silver Campsites Ltd. (1991), 79 D.L.R. (4th) 677, and granted rectification of an easement (expanding the area of its application) in Banville v. White 100 B.C.L.R. (3rd) 88, a 2002 decision of the B.C. Court of Appeal. In Banville both parties had acquired the properties in question subsequent to the granting and registration of the easement and neither was a party to the easement.


10. The Committee considers that giving an opinion as to the validity, legality and binding effect and enforceability of a document does not impose any obligation to enquire into vitiating elements. However, the opinion cannot be given if the opinion giver knows or has reason to believe any of these elements are present.

11. In circumstances where the opinion giver is aware of fraud, illegality, bankruptcy or similar elements in the transaction, the opinion giver should consider any potential effect of those elements on the title opinion – e.g. where title is being acquired pursuant to a transaction reviewable under the Bankruptcy and Insolvency Act (Canada).

12. This qualification is likely to be appropriate only in circumstances where the Mortgagee’s lawyer is providing an opinion to the Mortgagee or where the Corporation’s lawyer is providing an opinion to the Mortgagee and the Mortgagee does not have its own counsel. Mortgagees which are financial institutions will typically have standard form Mortgage Terms which they will specify be used. It is a question of fact, which would have to be reviewed in the particular circumstances of the transaction, as to whether the instructions of the Mortgagee expressly or impliedly require that the standard form Mortgage Terms be reviewed on an individual transaction (the Mortgagee may have such Mortgage Terms reviewed and amended on an ongoing basis by its general counsel). In circumstances where the Mortgage Terms are not to be reviewed, this qualification is necessary to establish that the Mortgagee carries the risk of any enforceability arising from deficiencies in its Mortgage Terms. A lawyer for the Corporation who is not reviewing the Mortgage Terms should, of course, also obtain appropriate instructions.
from the Corporation as to this course of action.

13. Sections 4 and 5 of the General Regulation under the *Expropriation Act* (British Columbia) govern compensation to the holders of security interests (which will include mortgages) in expropriated land. These provisions may prescribe terms applicable to the payment of a deficiency which are inconsistent with the original repayment terms and may be inconsistent with restrictions on or conditions to prepayment. The provisions may also limit an action for any deficiency, but this has apparently not been judicially determined.

14. This opinion has been prepared in respect of a transaction where the Mortgage is granted to secure indebtedness owing by the Corporation to the Mortgagee in a commercial transaction such as a loan or a sale of real property with a mortgage back. Additional considerations, assumptions or qualifications may be necessary where the mortgagor is an individual (e.g. to determine compliance with interest disclosure requirements under applicable consumer protection or other legislation or in connection with prepayment rights), where the relationship between the Corporation and the Mortgagee or the nature of the amount secured by the Mortgage might impact the priority of the mortgage (e.g. the provisions of section 5 of the Partnership Act (British Columbia)) or where the Mortgage purports to secure certain types of obligations other than or in addition to “normal” indebtedness (e.g. a profit participation or an option to acquire the mortgaged property).

A “generic” qualification is often found in opinions for U.S. real estate financings in a form such as the following:

“Certain provisions of the Documents may be unenforceable, but such unenforceability will not, subject to the other exceptions, qualifications and limitations in this opinion, render any Document invalid as a whole or substantially interfere with realization of the principal benefits provided by each Document.”

The use of this form of qualification is rare in British Columbia or elsewhere in Canada. While an argument can be made that it is appropriate where there are a number of minor enforceability issues which cannot be dealt with by amending the document (e.g. the document is a “standard form” document, the document has been executed prior to review by the opinion giver, etc.), the Committee is of the view that the usual and better practice is to identify specific enforceability issues by way of individual qualifications.