

## FOREIGN LAW ADDENDUM<sup>1</sup>

**To be added to our previously published opinions as an alternative to legally binding and enforceability opinions in situations where those opinions are inappropriate because the Documents are governed by foreign law. Use only paragraphs that are applicable to the particular opinion. This opinion should be read in conjunction with the statements attached to Sample Opinion No. 3. See also endnote 1 below. This addendum is prepared as at February 10, 2011. The areas of law covered by this opinion are dynamic as new legislation is enacted and new case law is decided. Users of this addendum should ensure that it represents the current state of the law at the time of its use.**

1. Assuming that the choice of **[name of jurisdiction]** law (the “Governing Law”) is legally binding and enforceable under the Governing Law, the choice of the Governing Law to govern the Documents will be recognized and applied by a British Columbia court of competent jurisdiction<sup>2</sup> (a “BC Court”) in any proceedings that are heard in the BC Court to enforce the Documents, provided that:

- (a) the choice of the Governing Law is *bona fide* and legal and was not made to avoid the application of the law of another jurisdiction;
- (b) the choice of the Governing Law is not contrary to public policy (“Public Policy”) under the laws of British Columbia and the laws of Canada applicable in British Columbia (“BC Law”);

and in any such proceedings the BC Court will apply the Governing Law if specifically pleaded and proved in the BC Court except that:

- (c) the BC Court may decline to give effect to any Governing Law to the extent that to do so would be contrary to Public Policy<sup>3</sup>;
- (d) the BC Court will not apply Governing Law which it characterizes as revenue, expropriatory, penal or similar laws;
- (e) the law governing the validity, perfection and effect of perfection or non-perfection of any security interest in personal property of the type which is subject to the *Personal Property Security Act* (British Columbia) will be determined in accordance with the conflict of law provisions of that Act<sup>4</sup>;
- (f) the validity and enforceability of any interest in land in British Columbia created by the Documents will be governed by BC Law<sup>4</sup>;
- (g) the BC Court will not enforce the performance of any obligation provided for in the Documents if such performance is illegal under the laws of any jurisdiction in which such obligation is to be performed;

(h) [specify any substantive BC Law which has overriding effect or applies notwithstanding the Governing Law<sup>3,5</sup>]; and

(i) on matters governing procedure before the BC Court, BC Law will be applied.

2. Assuming that the provisions of the Documents (the “Submission Clause”) whereby the Corporation has submitted to the jurisdiction of the courts (the “Foreign Court”) of competent jurisdiction in [name of jurisdiction] (the “Foreign Jurisdiction”) are legally binding and enforceable under the Governing Law, the Submission Clause will be recognized and given effect by a BC Court as an effective submission by the Corporation to the jurisdiction of the Foreign Court in any action in a BC Court with respect to the enforcement of the Documents for the amount due under a final and conclusive judgment *in personam* granted by a Foreign Court.<sup>6</sup>

3. Subject to the qualifications in paragraph 6, a final and conclusive judgment *in personam* in an action with respect to the enforcement of the Documents for a sum certain<sup>7</sup> granted by a Foreign Court<sup>8</sup> that is subsisting and unsatisfied and has not been stayed is enforceable without reconsideration of the merits in a BC Court by an action on such judgment for the amount due under such judgment:

(a) if the judgment is obtained after valid service of process on the Corporation in accordance with the laws (the “Foreign Law”) of the Foreign Jurisdiction;

(b) if the Foreign Court acted within its jurisdiction under the Foreign Law;

(c) if the judgment is not impeachable as void or voidable or otherwise ineffective under the Foreign Law;

(d) if the judgment was not obtained by fraud or in any manner contrary to the rules of natural justice;

(e) if the enforcement of the judgment would not be inconsistent with Public Policy;

(f) if the enforcement of such judgment in British Columbia does not constitute, directly or indirectly against the Corporation, the enforcement of laws characterized by a BC Court as being a revenue, expropriatory, penal or similar law;

(g) if no new evidence that the defendant could not have discovered and brought to the attention of the Foreign Court through the exercise of reasonable diligence is discovered prior to the enforcement of the judgment by the BC Court<sup>8</sup>;

(h) if:

(i) the BC Court has territorial competence under the *Court Jurisdiction and Proceedings Transfer Act* (British Columbia)<sup>2</sup> and does not decline to exercise its territorial competence on the ground that a court of another state is a more appropriate forum in which to hear the action; or

- (ii) the BC Court exercises its discretion under the *Court Jurisdiction and Proceedings Transfer Act* (British Columbia) to hear the action despite lacking territorial competence;
- (i) if the action to enforce such judgment is commenced and maintained in accordance with the procedural requirements of BC Law;
- (j) if the action to enforce the judgment is commenced against the Corporation within the applicable limitation periods under BC Law;
- (k) if no order affecting the judgment has been made by the Attorney General of Canada under the *Foreign Extra-Territorial Measures Act* (Canada)<sup>10</sup>;
- (l) if no order has been made by the Competition Tribunal under the *Competition Act* (Canada) relating to the enforcement of the judgment as a result of the finding of the Competition Tribunal of an adverse effect, restraint or injury to competition in Canada or the domestic or foreign trade and commerce of Canada;
- (m) unless the judgment was obtained by default and there is a manifest error on the face of the judgment<sup>11</sup>; and
- (n) unless the judgment was obtained by default and
  - (i) there is no real and substantial connection between the Foreign Jurisdiction and the facts of the proceeding in which the judgment was pronounced<sup>12</sup>; and
  - (ii) the judgment debtor did not voluntarily submit to the jurisdiction of the Foreign Court and was not physically present in the jurisdiction of the Foreign Court by carrying on business there at some reasonably permanent place of business<sup>13</sup>;

provided that the BC Court may stay the action because an appeal is pending or the time for appeal has not expired.

4. Subject to the qualifications in paragraph 6, a judgment creditor may apply to register a judgment in respect of enforcement of the Documents given in a court (the “Foreign Court”) of **[name of reciprocating state]** (the “Foreign Jurisdiction”)<sup>14</sup> in a civil proceeding for payment of money in the British Columbia Supreme Court (the “BC Court”) unless:

- (a) the time for enforcement has expired in the Foreign Jurisdiction;
- (b) 10 years have expired after the date the judgment became enforceable in the Foreign Jurisdiction;
- (c) the Foreign Court acted either:
  - (i) without jurisdiction under the conflict of law rules of the BC Court; or

- (ii) without authority, under the law of the Foreign Jurisdiction to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the judgment debtor;
- (d) the judgment debtor, if a person who was neither carrying on business nor ordinarily resident in the Foreign Jurisdiction, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of the Foreign Court;
- (e) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the Foreign Court and did not appear, even though the judgment debtor was ordinarily resident or was carrying on business in the Foreign Jurisdiction or had agreed to submit to the jurisdiction of the Foreign Court<sup>15</sup>;
- (f) the judgment was obtained by fraud;
- (g) an appeal is pending or the time in which an appeal may be taken has not expired;
- (h) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the BC Court;
- (i) the judgment debtor would have a good defence if an action were brought on the judgment; or
- (j) the judgment enforces a judgment in respect of the Documents given by a foreign Court of a jurisdiction which is not a reciprocating jurisdiction under Part 2 of the *Court Order Enforcement Act* (British Columbia).

On application to register the judgment, the BC Court may order that the judgment be registered.

5. Subject to the qualifications in paragraph 6, a Canadian judgment<sup>16</sup> (as defined in the *Enforcement of Canadian Judgments and Decrees Act* (British Columbia)) that requires a person to pay money<sup>17</sup> may be registered under the Act and enforced if:

- (a) it is a final judgment;
- (b) the time for enforcement of the judgment has not expired in the province or territory where the judgment was made;
- (c) not more than 10 years has passed after the date on which the judgment became enforceable in the province or territory where it was made; and
- (d) directions of the BC Court are obtained if:
  - (i) the enforceability of the judgment is, by its terms, subject to the satisfaction of a condition; or
  - (ii) the judgment was obtained without notice to the persons bound by it.

6. The enforceability or registration in British Columbia of a judgment of a Foreign Court is subject to:

- (a) applicable bankruptcy, insolvency, moratorium, arrangement, winding up and other similar laws generally affecting the enforcement of rights of creditors;
- (b) general principles of equity<sup>18</sup>;
- (c) the qualification that a judgment of a BC Court will be given only in Canadian Dollars<sup>19</sup>; and
- (d) the qualification that interest accruing on the judgment of the Foreign Court will be calculated in accordance with the *Court Order Interest Act* (British Columbia)<sup>20</sup>.

#### ENDNOTES

<sup>1</sup> This addendum is intended for use in opinions regarding credit facilities or debt or securities issues where the governing law of the contract is not BC Law or, in the case of paragraph 2, the Corporation has contractually submitted to the jurisdiction of a court outside British Columbia. The general provisions of Sample Opinion No. 3 apply.

If the Documents provide for arbitration, consider whether an opinion as to enforceability of a foreign arbitration award is more appropriate.

<sup>2</sup> The *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, C.28 governs when a BC Court has, and may exercise or decline to exercise, territorial competence. If requested, it is appropriate to set out the relevant specific wording of the Act.

<sup>3</sup> See *Avenue Properties Ltd. v. First City Development Corp.* (1987) 32 D.L.R. (4<sup>th</sup>) 40 (BCCA) where it was commented that it might be held that it is against public policy to enforce a contract in B.C. made in clear contravention of British Columbia legislation, notwithstanding that Ontario law was the proper law of the contract. The decision can also be interpreted as an example of qualification 1(h). If asked to include comfort on public policy, use of the following language may be considered; “assuming that the same meaning would be given to the terms used in the Documents under the Governing Law as under BC Law, none of the provisions of the Documents would be contrary to British Columbia Public Policy”.

<sup>4</sup> (e) applies only when there is a security interest in personal property and (f) applies only where there is an interest in land in British Columbia. Consider whether other exceptions like (e) and (f) are appropriate based on the nature of the assets or the agreement.

<sup>5</sup> See also *Cordel Leasing Ltd. v Maxmenko* (1991), 2 P.P.S.A. (2d) 302 and Estey, *Legal Opinions in Commercial Transactions* (2<sup>nd</sup> ed.) p.373. Estey categorizes the decision as an example of public policy.

<sup>6</sup> In order for this opinion to be given, the Documents must contain a Submission Clause. Consider referring to the specific section(s) of the Documents instead of the general description in paragraph 2.

7 In some cases, courts will enforce judgments other than for payment of a sum certain but  
that is outside the scope of this opinion.

8 See *Beals v Saldanha*, [2003] 3 S.C.R. 416 at paras. 43-53.

9 If the Foreign Jurisdiction is a reciprocating jurisdiction, consider including paragraph 4.  
If the Foreign Jurisdiction is the United Kingdom, see also the *Court Order Enforcement  
Act* R.S.B.C. 1996, c.78, ss. 41 to 46 and the Convention for Reciprocal Recognition and  
Enforcement of Judgments in Civil and Commercial Matters set out in Schedule 4  
thereof.

10 The *Foreign Extra-Territorial Measures Act* does not apply to judgments of Canadian  
courts.

11 See *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4<sup>th</sup>) 654.

12 See *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4<sup>th</sup>) 256, [1990] 3S.C.R.  
1077 and *Beales v. Saldhana*, [2003] 3S.C.R. 416, 234 D.L.R. (4<sup>th</sup>) 1.

13 Submission may be voluntary (by agreement or by attorning to the jurisdiction of the  
Foreign Court) or by presence in the Foreign Jurisdiction (see Estey p.385). If (i) or (ii)  
are met, (n) should be deleted.

14 Paragraph 4 addresses reciprocal enforcement of judgments under the *Court Order  
Enforcement Act*, R.S.B.C. 1996, c. 78. Remove paragraph 4 if the state in which the  
judgment was given is not a reciprocating state under that Act. In paragraph 4, the BC  
Court is the British Columbia Supreme Court.

15 s.28(2) of the *Court Order Enforcement Act* says that personal service means actual  
delivery of process, including actual service *ex juris* of the Foreign Court.

16 Remove paragraph 5 if the judgment is not a Canadian judgment (as defined in the  
*Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29, s. 1(1)).

17 The *Enforcement of Canadian Judgments and Decrees Act* also provides for the  
registration and enforcement of non-monetary Canadian judgments.

18 The *Enforcement of Canadian Judgments and Decrees Act*, s. 5(2) provides that  
“equitable doctrines and rules of law in relation to delay apply to the enforcement of a  
Canadian judgment, to the extent that it provides for relief other than the payment of  
money”. Therefore, 6(b) should be deleted in relation to opinions under paragraph 5  
relating to judgments for payment of money.

19 See *Currency Act*, R.S.C. 1985, c. C-52, s. 12.

20 See *Court Order Interest Act*, R.S.B.C. 1996, c. 79, ss. 1 and 2.