

LEGAL OPINIONS:

SAMPLE OPINION LETTER NO. 3: COMMERCIAL

(Revised May 1, 2007)

(British Columbia Transaction)

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, Q.C. 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

Earlier Statements

Our Committee has issued seven earlier statements concerning legal opinions. Those statements (the "Earlier Statements") are listed as Items 1.1 to 1.7 inclusive in the list of reference materials (the "Reference Materials") included at the end of this statement. The Statement listed as Item 1.7 updated the Statement listed as Item 1.5 and this statement itself will update the Statement listed as Item 1.6. Our Committee has reviewed the Earlier Statements and, apart from such necessary updating, confirms the principles set out in each.

Our Committee continues to concur with the general practice that opinions from solicitors for borrowers as to the legality, validity, binding effect or enforceability of standard form security documents are neither requested nor given except in unusual circumstances. This matter is set out in

more detail, along with some examples of unusual circumstances, in the Statement listed as Item 1.1 in the Reference Materials.

Our Committee continues to consider that it is quite common and acceptable, although not necessarily the general practice, for a financial institution and its solicitor to request from the solicitor for the borrower an opinion as to existence, corporate capacity, and power of the borrower and as to due authorization, execution and delivery of the standard form security instrument. This matter too is set out in more detail in the Statement listed as Item 1.1 in the Reference Materials.

Our Committee continues to believe that an opinion as to the legal, valid and binding effect of an instrument is not also an opinion that the instrument is free from all vitiating elements such as mistake, misrepresentation and fraud, although, of course, such an opinion cannot be given if the giver of the opinion is aware of any of these elements.

The opinion that a document creates a legal, valid and binding obligation and is enforceable is generally referred to as the "remedies opinion". Our Committee considers that the authorities are unclear as to precisely what is meant by the terms "legal", "valid", "binding", and "enforceable" in the remedies opinion and to what extent such terms overlap. The contemporary practise is to use all of these terms in rendering the remedies opinion. The Committee is of the view that an attempt to limit the scope of an opinion by deleting, some, but not all, of these terms is unlikely to be effective and there are no circumstances in which giving such an opinion would be appropriate.

Our Committee considers that the comments set out above, some made originally only as to standard form documents in lending transactions, apply equally well to standard form documents in most other commercial transactions, for example, franchises and leases. We have not said "*all commercial transactions*" because, although our Committee has been unable to think of a single exception, it may well be that we have not considered all possible standard form instruments used in commercial transactions.

Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) (British Columbia Transaction)

The Committee published Sample Opinion Letter No. 3: Commercial in November 2001 attached to the Statement listed as Item 1.6 in the Reference Materials. Attached Sample Opinion Letter 3: Commercial (Revised May 1, 2007) (British Columbia Transaction) updates the earlier sample opinion letter.

The Committee has prepared Sample Opinion Letter 3: Commercial (Revised May 1, 2007) 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.

Our Committee suggests that, in those cases where the documents used in the commercial transaction are standard form documents, only parts of Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) would be incorporated into the final opinion, in accordance with the general practice discussed above under the heading "Earlier Statements". Those parts that would be incorporated would relate to

existence and corporate capacity and power of the client of the opinion giver and to due authorization, execution and delivery of the standard form instrument by that client.

Our Committee notes that often opinions such as Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) are addressed to the solicitor for the other party, as well as to that party. However, our Committee suggests that, if both solicitors are British Columbia lawyers, the recipient lawyer should consider the extent at law to which he or she will be entitled to rely upon such an opinion except as to matters within the particular knowledge of the giver of that opinion, such as existence and corporate capacity and power of the client of the giver of the opinion and as to due authorization, execution and delivery of specified documents by the client of the giver of the opinion.

The assumptions, qualifications and limitations in Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) are not a replacement for careful, knowledgeable, transaction-specific legal work (including inquiries) which should be undertaken by the solicitor delivering such a commercial opinion. Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) 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 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 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 in 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 also a 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.

Our Committee points out that the equitable principles limitation included in Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) 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 in the Reference Materials. A doctrine of performance in good faith appears to be emerging from recent Canadian decisions (some unreported).

Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) 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 this sample opinion. Our Committee refers the reader to Item 8 in the Reference Materials as a source for information on multi-jurisdictional opinions. Our Committee intends at a later date to prepare a sample multi-jurisdictional opinion letter.

Although Sample Opinion Letter No. 3: Commercial (Revised May 1, 2007) includes in the Addendum certain qualifications suitable for use in a lending transaction, it is not itself a sample lending opinion. Our Committee intends at a later date to prepare a sample opinion letter for commercial lending.

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. 3: Commercial (Revised May 1, 2007) 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 in the Reference Materials, which were published with the Silverado Accord, listed as Item 5 in 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 in the Reference Materials. The Guidelines are also available on the web as indicated in Item 9 in the Reference Material.

Reference Materials

1. Statements of the Solicitors' Legal Opinions Committee:
 - 1.1. Statement of the Solicitors' Legal Opinions Committee Concerning Legal Opinions: Standard Form Security Instruments, adopted 2 May 1989 and published in the Benchers' Bulletin, 1989: No. 10 November
 - 1.2. Statement of the Solicitors' Legal Opinions Committee Concerning Legal Opinions: Personal Property Security Act, adopted 4 July 1991 and published in the Benchers' Bulletin, August 1991
 - 1.3. Statement of the Solicitors' Legal Opinions Committee Concerning Legal Opinions: The Silverado Accord Including Certain Guidelines, adopted August 1992 and distributed by the Law Society of British Columbia in October 1992
 - 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
 - 1.7. Statement of the Solicitors' Legal Opinions Committee Concerning Sample Opinion No. 4A: Real Estate (Fee Simple Title), with Sample Opinion No. 4A, adopted 19 October 2006
2. Paper of the Subcommittee of the Commercial, Consumer & Corporate Law Section of the British Columbia Branch of the Canadian Bar Association: Solicitors' Opinions in Commercial Transactions, 1977
3. Legal Opinions in Corporate Transactions, by A. Field and R. Ryan, Business Law Monographs Vol. C6, Mathew Bender, New York, 1988
4. Legal Opinions in Commercial Transactions, 2nd edition, by Wilfred M. Estey, Butterworths, 1997
5. Third Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association, 1991 (the "Silverado Accord")

6. *Fitzgibbon and Glazer on Legal Opinions*, by Scott Fitzgibbon and Donald Glazer, Aspen Publishers, last supplemental dated 2/3/2006. Many significant documents and reports relating to Legal Opinions are collected in the Appendixes at the end of *Fitzgibbon and Glazer*, such as the *Third Party Legal Opinion Report and Legal Opinion Accord of the Section of Business Law of the American Bar Association* (also published at 47 *Business Lawyer* 167 (1991)).
7. *Opinions Requested by Lenders: Not a Negotiable Instrument II*, Sandra D. Sutherland, Q.C., Vancouver, B.C., Continuing Legal Education of British Columbia, November, 1989
8. *Cross Border Issues in Secured Lending*, David Zacks, Insight Conferences, "Commercial Loan Transactions, Achieving Bullet-Proof Security", May 30, 1996, Vancouver, (see also the paper of Michael Disney and Ian McBride for Toronto Conference on the same subject, January, 1996)
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 57 *The Business Lawyer* 875, which Guidelines can also be found at:
<http://www.abanet.org/buslaw/tribar/materials/20050120000001.pdf>)
10. Selected TriBar and ABA Section of Business Law reports are posted in the [Legal Opinion Resource Center](#). <http://www.abanet.org/buslaw/tribar/>. All ABA and TriBar reports are published in *The Collected ABA and TriBar Legal Opinion Reports-1994-2004* By the *Committee on Legal Opinions and the TriBar Opinion Committee*.

MAY 1, 2007

**SAMPLE OPINION LETTER NO. 3:
COMMERCIAL**

(Revised May 1, 2007)

(British Columbia Transaction)

**(This sample opinion letter should be read in conjunction
with the accompanying Statement dated May 1, 2007)**

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

(assumes British Columbia law governs the transaction)

[DATE]

[ADDRESSEE]

When other lawyer is an addressee see
Statement, page 3

Dear < >

Re:

Describe: [i] limited or special role, if
appropriate; [ii] the Client; [iii] the
transaction; [iv] the principal agreement

We have acted as [i] counsel to [ii] (the "Corporation") in connection with
[iii] [describe transaction; e.g. purchase, credit facility, etc.] pursuant to
[iv] describe principal agreement, e.g. purchase and sale agreement,
credit agreement, etc.] (the "Principal Agreement").

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.

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 [Identify transaction documents e.g. bill of sale, assignment,
transfer, purchase agreement, etc.]

(collectively the "Documents");

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

Endnote 1

List documents and certificates which
were reviewed, stating whether they were
originals, copies or certified copies. If the
latter, consider whether the person

<p>certifying is appropriate to do so</p> <p>Endnote 2</p> <p>This assumes that the Corporation has been transitioned. If the Corporation has not transitioned changes will be required</p> <p>If BC company, check Articles to determine what kind of resolution is required to authorize transaction</p> <p>Facts only. Deal with the business/assets of the Company and other matters</p> <p>If CBCA corporation, deal with Unanimous Shareholder Agreement and if BC company check Articles to determine whether there has been a transfer of powers under section 137. Ensure the correct persons have authorized transaction</p> <p>Endnote 3</p> <p>If applicable, list additional documents in connection with the transaction which were reviewed including any documents mentioned in paragraph 3.6 if it is included</p> <p>No assumption should be made with regard to a fact which the opinion giver knows or has reason to believe is inaccurate or incomplete (See Statement page 3)</p> <p>It may not be appropriate to assume the identity or genuineness of signatures of corporate officers if the opinion is being given in respect of the opinion giver's own corporate client</p>	<p>1.2 a copy of the Notice of Articles and Articles [Articles and Bylaws] of the Corporation certified to be a true copy on < > by < >;</p> <p>1.3 a copy of a Certificate of [Good Standing] [Compliance] [Status] [] with respect to the Corporation issued on < > by the [Registrar of Companies] [Director, Canada Business Corporations Act] [];</p> <p>1.4 a copy of a resolution of the directors of the Corporation certified to be a true copy on < > by < >;</p> <p>1.5 [if required] a copy of a[n] [ordinary] [special] [exceptional] resolution of the Corporation certified to be a true copy on < > by < >;</p> <p>1.6 a certificate dated < > of [an officer] of the Corporation;</p> <p>1.7 [other].</p> <p>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.</p> <p>2. ASSUMPTIONS</p> <p>For the purposes of the opinions expressed in this letter we have assumed:</p> <p>2.1 the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity with originals of all documents submitted to us as copies, the identity 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;</p> <p>2.2 the accuracy and completeness of all information provided to us by offices of public record or through electronic searching of public databases;</p>
---	---

<p>Include when appropriate (see endnote 7)</p> <p>Include when appropriate (see note opposite 3.5)</p> <p>Include when appropriate</p> <p>Include assumptions about consent etc., needed from third parties and other assumptions appropriate to the transaction</p> <p>Inquire whether Corporation was ever struck off or dissolved (see endnote 4)</p> <p>An opinion that the Corporation is "qualified" or "duly qualified" to carry on its business should not be given</p> <p>Inquire whether corporation was ever struck off or dissolved (see endnote 4)</p> <p>Obtain and rely on a certificate describing the business and assets of the Corporation</p>	<p>2.3 [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;]</p> <p>2.4 [that the Documents have been unconditionally delivered by the Corporation;]</p> <p>2.5 [that there has been no change in the facts set out in any certificate mentioned in paragraph 1 since the date of that certificate.]</p> <p>3. OPINION</p> <p>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:</p> <p>ALTERNATIVE 3.1 A</p> <p>3.1 the Corporation exists as a company under the <i>Business Corporations Act</i> (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;</p> <p>ALTERNATIVE 3.1 B (if CBCA corporation registered extra-provincially in BC)</p> <p>3.1 the Corporation exists as a corporation under the <i>Canada Business Corporations Act</i>, has sent to the Director under said Act all required annual returns, is registered as an extra-provincial company under the <i>Business Corporations Act</i> (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;</p> <p>3.2 the Corporation has the corporate power and capacity to own or lease its assets and to carry on its business;</p> <p>3.3 the Corporation has the corporate power and capacity to execute, deliver and perform its obligations under each of the Documents to</p>
--	---

<p>An opinion that a document has been duly delivered requires that the opinion giver be satisfied that delivery has occurred without conditions</p> <p>Endnote 7</p> <p>Endnote 8</p> <p>List appropriate to each transaction should be settled by clients</p> <p>Endnote 9</p> <p>For compliance with laws see Endnote 10</p> <p>Obtain and rely on a certificate as to assets and business</p> <p>List consents etc. which have been obtained</p> <p>No qualification should be included with</p>	<p>which it is a party;</p> <p>3.4 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 duly authorized by the Corporation;</p> <p>3.5 each of the Documents to which the Corporation is a party has been duly executed and delivered by the Corporation;</p> <p>3.6 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;</p> <p>3.7 the execution and delivery of each of the Documents to which it is a party by the Corporation and the performance by the Corporation of its obligations thereunder:</p> <ul style="list-style-type: none">(a) do not conflict with or result in a breach of any of the provisions of the constating documents of the Corporation (If appropriate, unanimous shareholders agreement etc.);(b) do not conflict with, result in a breach of, or constitute a default under, any of the provisions of the agreements listed in Schedule < >;(c) 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; <p>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 thereunder, except:</p> <p>4. QUALIFICATIONS AND LIMITATIONS</p> <p>4.1 The opinion expressed in paragraph 3.6 is subject to:</p> <ul style="list-style-type: none">(a) applicable bankruptcy, insolvency, receivership, fraudulent preference, fraudulent conveyance, reorganization,
--	--

<p>regard to a fact which the opinion giver knows, or has reason to believe is inaccurate or incomplete</p> <p>Endnote 8 Known bankruptcy, insolvency and similar issues must be specifically addressed</p> <p>Endnote 5</p> <p>Endnote 6</p> <p>Use whether or not the document contains severability clause</p> <p>Use only if opinion giver is satisfied BC law governs. In other situations give a reasoned opinion.</p>	<p>moratorium, arrangement, winding up and other similar laws generally affecting the enforcement of the rights of creditors or others;</p> <p>(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;</p> <p>(c) the discretion exercisable by the court with respect to stays of enforcement proceedings and execution of judgments; and</p> <p>(d) the effect of a vitiating factor such as mistake, misrepresentation by a person other than the Corporation, fraud, duress or undue influence.</p> <p>4.2 Each of the Documents 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 the Document.</p> <p>4.3 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.</p> <p>[Add specific qualifications arising from the Documents and the nature of the transaction, see Addendum for examples]</p> <p>[Also add other qualifications appropriate to the transaction, e.g. statutory limitations, non-competition clauses, issues concerning receiver's liabilities and powers, etc.]</p> <p>This letter is solely for your use and benefit in connection with the Principal Agreement and may not be disclosed to or relied upon by anyone other than you or used for any other purpose.</p> <p style="text-align: center;">ADDENDUM</p> <p>Some Specific Common Qualifications to be used where appropriate</p>
--	--

This assumes the language in the arbitration clause states that the award is final and binding

1. **CURRENCY**

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 nor the rate prescribed in the Documents.

2. **ARBITRATION**

A court may set aside or remit for reconsideration an arbitral award if:

- (a) it was improperly procured; or
- (b) the arbitrator engaged in corrupt or fraudulent conduct, was biased, exceeded his or her powers or failed to observe the rules of natural justice.

In addition, a court has the discretion to hear an appeal of an arbitral award on any question of law if the court determines that:

- (c) the importance of the result justifies intervention and the determination of the question may prevent a miscarriage of justice;
- (d) the question is of importance to some class or body of person of which the appellant is a member; or
- (e) the question is of general or public importance.

3. **SPECIAL EXCEPTIONS
(restraint of trade, public policy, exculpatory clauses, indemnities, waiver, modifications and amendments)**

We express no opinion with respect to [itemize and describe paragraphs] of the [describe document].

4. **INTEREST (CRIMINAL RATE)**

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.

5. **INTEREST AFTER DEFAULT**

Any provision in the [describe document] requiring interest to be paid at a higher rate after default may be unenforceable.

6. **COSTS, ETC.**

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

7. **PENALTIES**

Paragraph < > of the < > 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.

8. **POST JUDGMENT INTEREST**

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.

9. **CONCLUSIVENESS**

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.

<p>If the transaction involves the granting of security on personal property, see also Sample Opinion Letter No. <> PPSA.</p> <p>If the transaction involves real estate see also Sample Opinion Letter No. 4A Real Estate (Fee Simple Title).</p>	<p>10. NO INDEPENDENT INVESTIGATION</p> <p>We have made no independent investigation of the facts referred to in the certificate described in section 1.6 hereof.</p> <p>FOR BORROWING TRANSACTIONS</p> <p>See also 4 to 10 (above)</p> <p>11. DEMAND OBLIGATIONS</p> <p>The enforcement of < > 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.</p>

ENDNOTES

1. 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.
2. 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. It is not uncommon for the resolutions described in paragraphs 1.4 and 1.5 to be attached to the certificate described in paragraph 1.6 and for that certificate to contain the necessary certification language.
4. 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, in order to give the opinion, 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 in to 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, if the opinion addresses title to property, that no property escheated to the Crown or fell to the Crown as *bona vacantia*. For a British Columbia company restored after the coming into effect of the Business Corporations Act, if the opinion addresses title to real property, the opinion giver must ensure that there has been compliance with the requirements of the Escheat Act.
5. Paragraph 4.1(b) (the equitable principles limitation) covers the traditional discretion of a court of equity as well as newer concepts of materiality, reasonableness, good faith and “fair dealing”. Field & Ryan Legal Opinions in Corporate Transactions (New York, 1988) as quoted in Estey, Legal Opinions in Commercial Transactions (Toronto, 1997) p. 210.
6. 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.
7. The general practice is that opinions from solicitors for borrowers as to the validity, legality, binding effect or enforceability of *standard form security instruments* are neither requested or given. See Benchers Bulletin - 1989 No. 10 November and endnote 8. The committee now recommends the same practice for other *standard form documents* (for example, standard form commercial leases of land or equipment and franchise documents). See Statement page 2. Accordingly, if the Documents are *standard form documents*, except in special circumstances, paragraphs 3.6, 3.7(c), 3.8 and 4.1 can be omitted, paragraphs 3.7(a) and 3.7(b) might be omitted, and paragraph 2.3 is unnecessary.
8. The authorities are unclear as to precisely what is meant by the terms “legal”, “valid”, “binding” and “enforceable” and to what extent such terms overlap. The modern practice is to use all of these terms in rendering an enforceability opinion. The Committee is of the view that an attempt to limit the scope of an opinion by deleting some, but not all, of these terms is unlikely to be effective and there are no circumstances in which giving such an opinion would be appropriate.
9. An opinion that the execution and delivery of the Documents and the performance by the Corporation of its obligations thereunder do not conflict with, result in a breach of, or constitute a default under any agreement to which the Corporation is a party should not generally be given, as the opinion-giver is unlikely to be aware of all such agreements. The Committee considers the best practice to be to list the agreements to which the opinion applies, either in the Documents or in an officer’s certificate on which the opinion is based, but this is not the most common method used in practice. More often, the “no breach etc of

agreements” opinion will be qualified by the phrase “to our knowledge”. This will necessitate an addition to the opinion outlining what constitutes knowledge, in a form such as the following:

“Whenever our opinion herein is qualified by the expression “to our knowledge” or words to like effect, it is based solely on (i) the actual current knowledge of our lawyers directly involved in, and obtained during the course of, representing the Corporation in connection with the matters contemplated by the Documents; and (ii) a review of the officer’s certificate. No inference should be drawn from our past and current representation of the Corporation, other than in connection with the matters contemplated by the Documents.”

The opinion may also contain further details as to the extent of enquiries made (or not made) by the opinion-giver.

The “no breach etc of agreements” opinion is sometimes given on the basis of a certificate of an officer which restates the no breach language. The Committee feels it is inappropriate to rely on such a certificate in respect of a matter which is really a question of law rather than a question of fact.

10. An opinion that the corporation has complied with ALL laws relating to its business should not generally be given.