

## LEGAL OPINIONS: STANDARD FORM SECURITY INSTRUMENTS

The Solicitors' Legal Opinions Committee has been constituted for the purpose of reviewing materials previously published with respect to solicitors' opinions and possibly preparing a guide for the assistance of the profession.

The members of the Committee are:

Sandra D. Sutherland, Q.C., Freeman & Company (Chairman); George P. Reilly, Ladner Downs (Deputy Chairman); Hamish C. Cameron, Bull, Housser & Tupper; Herbert D. Dodd, Farris, Vaughan, Wills & Murphy; Bo W.F. Fodchuk, Russell & DuMoulin; Mitchell H. Gropper, McCarthy & McCarthy; Donald J. Haslam, Angus, McClellan, Rubenstein & Haslam; John O.E. Lundell, Lawson, Lundell, Lawson & McIntosh; John D. Montgomery, Campney & Murphy; Donald H.C. Paterson, Davis & Company; Gilbert R. Schmitt, Q.C., Ferguson Gifford; George C. Stevens, Lang, Michener, Lawrence & Shaw; Anne M. Stewart, Blake, Cassels & Graydon; Gordon W. Young, Clark, Wilson.

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Solicitors for borrowers (a term used here to include guarantors and the grantors of other security as well as borrowers) have from time to time complained of requests made to them by financial institutions and their solicitors for opinions as to the validity, legality, binding effect and enforceability of standard form security instruments. The basis most often given for the complaints is that:

- when there are no changes of substance made to a standard form security instrument, the solicitors for the financial institution should have previously satisfied themselves as to those aspects of the instrument;
- the solicitor for the borrower is likely to be less familiar with a standard form security instrument than the financial institution's own solicitors; and
- the work involved in examining a standard form security instrument and in considering the matters of law required in order to give the requested opinion may impose an unnecessary financial burden on the borrower.

The Committee was requested specifically to consider the complaints of solicitors for borrowers.

The Committee has concluded that it concurs with the general practice. The general practice is that, regardless of the amount being secured, opinions from solicitors for borrowers as to the validity, legality, binding effect or enforceability of standard form security instruments are neither requested nor given, except in unusual circumstances.

Some examples of unusual circumstances are:

- (1) if changes are made which are reasonably considered to alter the nature or effect of the instrument as to require a fresh judgment on the validity, legality, binding effect or enforceability of the instrument, an opinion on those matters is requested;
- (2) if the borrower is incorporated by or under a statute other than the *Company Act* of British Columbia or the *Canada Business Corporations Act*, an opinion is requested as to whether the validity, legality, binding effect or enforceability of the instrument is affected by the statute;
- (3) if the borrower or its business is regulated by statute, an opinion is requested as to whether the validity, legality, binding effect or enforceability of the instrument is affected by the statute;

- (4) if the borrower is bound by complicated constating documents, agreements or instruments which may prohibit or adversely affect the security to be given, an opinion is requested as to their effect; and
- (5) if the instrument is given under the laws of a jurisdiction other than British Columbia or creates security on assets of the borrower located outside British Columbia, an opinion, supported by opinions of agents in other jurisdictions as necessary, is requested as to the validity, legality, binding effect and enforceability of the instrument.

The Committee is aware that some solicitors for financial institutions request an opinion of the solicitor for a borrower as to the validity, legality and binding effect of a standard form instrument because they believe that by so opining the solicitor is also opining that the instrument is free from vitiating elements such as mistake, misrepresentation, duress and undue influence.

We consider that giving an opinion as to the validity, legality and binding effect of an instrument does not impose any obligation to enquire into vitiating elements although, of course, if the solicitor is aware of any of these elements he or she cannot properly give that opinion or other opinions concerning the instruments. If a financial institution wishes to obtain assurance that there are no vitiating elements then, rather than seeking reassurance indirectly by requesting an opinion as to validity, legality and binding effect, the financial institution should seek certificates of borrowers or officers of borrowers or perhaps its own officers as to the existence or absence of the relevant facts.

The Committee also considered some other opinions commonly requested from solicitors for borrowers on standard form security instruments. The Committee concluded that when the borrower is a corporation, 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 incorporation, existence and corporate capacity and power of the borrower and as to due authorization, execution and delivery of the standard form security instrument.

The Committee did not attempt to consider all the opinions which can be requested from solicitors for borrowers in respect of standard form security instruments.

Adopted May 2, 1989