

Note – This form of opinion letter should only be used in transactions where the security documents are not standard form security instruments. If the opinion is in respect of standard form security instruments, the recommended form of opinion is found under 2. Model Form of Opinion for Standard Form Documents (Search the Web. “Legal Opinions British Columbia”)

Solicitors using this opinion should refer to the comments under “Notes Re: Sample Opinions for guidance on the use of this opinion and summary explanations of some of the terms used

SAMPLE REAL ESTATE OPINION

(Fee Simple Title)

To be given by counsel to the Corporation (as defined below)

(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 counsel to [X Co.] (the “Corporation”) in connection with a loan transaction pursuant to [describe principal agreement; e.g. loan agreement, commitment letter, credit agreement, etc.] (the “Principal Agreement”) between the Corporation and [insert applicable party or parties (the “Mortgagee”)] in respect of the lands and premises described in Schedule A hereto (the “Lands”).

Capitalized 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. DOCUMENTS, SCOPE OF REVIEW AND RELIANCES

In our capacity as counsel to the Corporation, we have reviewed an original or copy of a signed copy of:

- 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 \$• [and the assignment of rents (“Assignment of Rents”) contained therein] made by the Corporation in favour of the Mortgagee dated • (the “Mortgage”);

- 1.3 *[if the Assignment of Rents is a separate instrument and is not incorporated as part of the Mortgage, add: the Form C assignment of rents made by the Corporation in favour of the Mortgagee dated •(the "Assignment of Rents")];*
- 1.4 *[Identify any other transaction documents e.g. purchase agreement, Form A Transfer];*
(collectively the "**Documents**");

[copies of which are enclosed or have been previously delivered to •].

We have also made such investigations and searches, examined such other documents and certificates of public officials and have considered such questions of law as we have considered necessary to provide the opinions set out below. In particular, we have, without independent investigation or verification, reviewed and relied upon the following, copies of which are enclosed or have been previously provided to you:

- 1.5 as to certain matters of fact, a certificate of •, as •, of the Corporation (the "**Certificate of Officer**"), dated as of the date of this opinion letter, to which are attached, among other things:
 - 1.5.1 copies of the notice of articles and articles of the Corporation (the "**Constituting Documents**");¹
 - 1.5.2 [if applicable, a copy of the shareholders' agreement made among the Corporation and its shareholders, •, • and • dated as of •;]
 - 1.5.3 a copy of a resolution of the directors of the Corporation with respect to, among other things, the execution, delivery and performance by the Corporation of its obligations under the Documents (the "**Directors' Resolution**"); and
 - 1.5.4 an incumbency schedule identifying [certain of] the directors and officers of the Corporation and providing specimen signatures for [certain of] them (the "**Incumbency Schedule**"); and
- 1.6 a certificate of good standing issued by the Office of the Registrar of Companies for British Columbia (the "**Companies Office**") with respect to the Corporation on • (the "**Certificate of Good Standing**" and together with the Certificate of Officer, the "**Certificates**" and either one, a "**Certificate**"). [alternatively, if Corporation is a CBCA corporation... a certificate of status issued by the Director, *Canada Business Corporations Act* with respect to the Corporation on •]

We have not reviewed the minute books or any of the other corporate records of the Corporation, except for the extracts therefrom attached to the Certificate of Officer.

¹ Use equivalent terms from the CBCA where Debtor is a federal corporation.

We have conducted public searches under sections 30 and 35 of the *Land Owner Transparency Act* (“**LOTA**”) for the sole purpose of informing the officer signing the certificate described in section [2.1] of the results of our searches.²

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 the _____ day of _____, 20____.

2. **APPLICABLE LAW**

Our opinions given below are limited to the laws of the Province of British Columbia and the federal laws of Canada applicable therein (collectively, “**Applicable Law**”) and we express no opinion herein as to the laws of any other jurisdiction.

3. **ASSUMPTIONS**

For the purposes of the opinions expressed below, we have, without independent investigation or verification and with your concurrence, assumed:

- 3.1 the genuineness of all signatures, the authenticity of all documents submitted to us as originals, and the conformity to authentic original documents of all documents submitted to us as certified, conformed, photostatic, facsimile, scanned or other copies;
- 3.2 the identity and capacity of all individuals acting or purporting to act as public officials and of all individuals executing the Documents or any Certificate, whether in an individual capacity or on behalf of any party thereto;
- 3.3 all facts set forth in the official public records, indices, filing and registration systems and all certificates, documents and printed results supplied or otherwise conveyed to us by public officials on which we have relied for the purposes of this opinion are complete, true, accurate and current at the time this opinion is delivered;
- 3.4 the accuracy and completeness of all statements of fact made in the Certificates and that all such statements remain true, accurate and current at the time this opinion letter is delivered;
- 3.5 that each Document 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;
- 3.6 that the **[yearly/half-yearly not in advance]** rate of interest disclosed in the Mortgage for the purposes of Section 6 of the *Interest Act* (Canada) is accurate; and
- 3.7 to the extent such matters are governed by laws other than Applicable Law, that each Document has been duly executed and delivered by the Corporation under and in accordance with such laws.

² The LOTA paragraph has been incorporated in the expectation that LOTA searches will become part of standard commercial practice

4. **OPINIONS**

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

- 4.1 The Corporation was incorporated as a company under the laws of the Province of British Columbia, is a valid and existing company and is, with respect to the filing of annual reports with the Companies Office, in good standing.

[or, if Corporation is a CBCA corporation – The Corporation exists as a corporation under the Canada Business Corporations Act, has sent to the Director under that Act all required annual returns, is registered as an extra-provincial company under the Business Corporations Act (British Columbia) and is, with respect to the filing of annual reports, in good standing with the Companies Office.]

- 4.2 The Corporation has the corporate power and capacity to own its interest in the Lands and to enter into and perform its obligations under the Documents to which it is a party.
- 4.3 The Corporation has taken all necessary corporate action to authorize the execution, delivery and performance by it of the Documents to which it is a party.
- 4.4 The Corporation has duly executed and delivered the Documents to which it is a party.
- 4.5 Each Document to which the Corporation is a party constitutes a legal, valid and binding obligation of the Corporation, enforceable against the Corporation in accordance with its terms.
- 4.6 The execution and delivery by the Corporation of the Documents to which it is a party and the performance by the Corporation of its obligations thereunder, do not:
- 4.6.1 conflict with or result in a breach of any of the provisions of the Constituting Documents of the Corporation *[and, if appropriate...or the unanimous shareholders agreement in respect of the Corporation]*; or
 - 4.6.2 violate, conflict with, or result in a breach of Applicable Law.
- 4.7 No consent, approval, authorization, exemption, filing, order or qualification of or with any governmental authority is required under Applicable Law for the execution and delivery by the Corporation of any Document to which it is a party or the performance by the Corporation of its obligations thereunder.
- 4.8 The Corporation is the registered owner of the Lands in fee simple subject only to:
- 4.8.1 the exceptions and reservations stated in subsections 23(2) and 108(2) of the *Land Title Act* (British Columbia);
 - 4.8.2 the exceptions expressed in sections 50 and 55 to 58 of the *Land Act* (British Columbia) and claims of aboriginal peoples;

4.8.3 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);

4.8.4 statutory or deemed trusts arising under federal or provincial statutes which extend to the lands or any portion thereof;

4.8.5 the following legal notations, liens, charges and interests:

[list all legal notations, liens, charges and interests ranking prior to the Mortgage / Assignment of Rents; it is recommended that each instrument be reviewed to determine whether there is a subordination clause contained within the instrument itself or whether there is a subordination pursuant to a registered priority agreement];

4.8.6 the Mortgage; **[and] [if the Assignment of Rents is a separate instrument and is not incorporated as part of the Mortgage, add: the Assignment of Rents;]** and

4.8.7 the following additional liens, charges and interests:

[list (or add as schedule) all liens, charges and interests ranking subsequent to the Mortgage / Assignment of Rents or use term like “Permitted subsequent Encumbrances” if appropriately defined in the Principal Agreement].

4.9 The Mortgage was registered in the LTO on • under No. • and constitutes a valid fixed and specific mortgage and charge on the Lands, subject only to the matters specified in clauses 4.8.1 to 4.8.3 inclusive and 4.8.5 and (to the extent any such trust ranks in priority to a registered mortgage under Applicable Law) clause 4.8.4 hereof.

[or, if the Mortgage has not yet been fully registered and this Opinion is being rendered based on pending registration numbers – The Mortgage was submitted for registration in the LTO on • as pending registration No. • and subject to completion of registration of the Mortgage in the LTO, constitutes a valid fixed and specific mortgage and charge on the Lands, subject only to the matters specified in clauses 4.8.1 to 4.8.3 inclusive and 4.8.5 and (to the extent any such trust ranks in priority to a registered mortgage under Applicable Law) clause 4.8.4 hereof.]

4.10 *[if the Mortgage contains an Assignment of Rents or if the Assignment of Rents is a separate instrument and is not incorporated as part of the Mortgage, add: The Assignment of Rents was registered in the LTO on • under No. • and constitutes a valid assignment of the interest of the Corporation in the rents from the Lands, subject to notice thereof being given to tenants of the Lands and to any restrictions on assignability in the instruments creating or affecting of such rents.]*

[or, if the Mortgage / Assignment of Rents has not yet been fully registered and this Opinion is being rendered based on pending registration numbers – The Assignment of Rents was registered in the LTO on • as pending registration No. • and subject to completion of registration of the Assignment of Rents in the LTO, constitutes a valid

assignment of the interest of the Corporation in the rents from the Lands, subject only to notice thereof being given to tenants of the Lands and to any restrictions on assignability in the instruments creating or affecting of such rents.]

5. LIMITATIONS AND QUALIFICATIONS

The foregoing opinions are subject to the limitations and qualifications set out below:

- 5.1 **Bankruptcy/Insolvency.** The enforceability of the Documents is subject to bankruptcy, insolvency, winding-up, reorganization, moratorium, arrangement, fraudulent preference and conveyance and other similar laws of general application affecting the enforcement of a creditors' rights and remedies.
- 5.2 **Remedies Limitation.** No opinion is given as to the availability of any specific remedy and, in particular, no opinion is expressed as to the availability of any equitable remedy, including that of specific performance or injunctive relief, for the enforcement of any provision of the Documents. In particular, a court has equitable and statutory powers to stay proceedings and the execution of judgments and nothing in this opinion is to be taken as indicating that the remedy of, or any order for, specific performance or the issuance of any injunction will be available other than through the exercise of the discretion of a court.
- 5.3 **General Principles of Law and Equity.** The enforceability of the Documents, any rights or remedies thereunder of a party thereto or in connection therewith and any judgment arising out of or in connection therewith is subject to and may be limited by general principles of law and equity, including, without limitation:
 - 5.3.1 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;
 - 5.3.2 the possible unenforceability of the provisions of Section • of the Mortgage which provide that any receiver be appointed thereunder is the agent of the Corporation rather than the agent of the Mortgagee;
 - 5.3.3 fraud, mistake, undue influence, unconscionability, duress, misrepresentation and deceit;
 - 5.3.4 estoppel, waiver and laches;
 - 5.3.5 the requirement that a party to a Document act honestly in the performance of its obligations and reasonably and in good faith in the exercise of discretionary rights or powers;
 - 5.3.6 consideration of the impracticability or impossibility of performance at the time of attempted enforcement;
 - 5.3.7 the requirement to give reasonable notice prior to enforcement of rights under a Document;

- 5.3.8 rules of court procedure which affect rights, powers, privileges and remedies of creditors generally; and
 - 5.3.9 the powers of a court to grant relief from forfeiture, to stay proceedings before it and to stay executions on judgment and to grant relief from the consequences of default.
- 5.4 **Effectiveness of Non-Waiver Provisions.** A British Columbia court may apply such doctrines as waiver, election, acquiescence or estoppel to deny the enforceability of any provision of the Documents that attempts to limit or prohibit the rights of the Corporation. In particular, but without limiting the foregoing, we express no opinion as to the enforceability of any provision contained in the Documents which:
- 5.4.1 states that consents, amendments or waivers that are not in writing will not be effective;
 - 5.4.2 purports to waive, or have the effect of waiving, any statutory rights or defences;
 - 5.4.3 purports to restrict access to a court, or waive the benefit of, equitable remedies or defences;
 - 5.4.4 constitute a general waiver of legal or equitable defences or which constitute a general agreement not to challenge the validity or enforceability any right or remedy; or
 - 5.4.5 absolve or exculpate a party to a Document or any agent of such party from any liability or duty otherwise owed by it.
- 5.5 **Exculpatory Provisions.** We express no opinion as to the validity or enforceability of any provision in the Documents which purports to:
- 5.5.1 indemnify any party thereto in respect of any breach of law by such party;
 - 5.5.2 establish evidentiary standards; or
 - 5.5.3 state that matters or determinations of fact are conclusive.
- 5.6 **Severability.** No opinion is given as to the effectiveness or enforceability of any provision inserted in any agreement or instrument which purports to sever from the agreement or instrument any provision which is prohibited or unenforceable under Applicable Law without affecting the enforceability or validity of the remainder of the agreement or instrument.
- 5.7 **Penalties and Forfeitures.** Courts in British Columbia have the power to grant relief from penalties and forfeitures generally and we express no opinion herein as to the enforceability of any provision of the Documents which provides for the payment of any amount which may be characterized by a court as a penalty.

- 5.8 **Conclusiveness of Determinations.** We express no opinion as to the enforceability of any provision of the Documents which asserts that any certificate or determination shall be conclusive or which purports to confer a unilateral or unfettered discretion. Without limiting the foregoing, any determination made or provided under the Documents may be subject to challenge on the grounds of a failure to exercise discretion reasonably and in good faith or of fraud, collusion or mistake.
- 5.9 **Reasonable Time to Pay or Perform Obligation.** Notwithstanding any provision to the contrary contained in the Documents, including those which provide that a given payment or other amount is payable on demand, the other party to the Documents may be required to give the Corporation a reasonable time to pay or perform any obligation prior to a party taking any action to enforce any of its rights or remedies in respect thereof.
- 5.10 **Interest Act (Canada).** Under Section 4 of the *Interest Act* (Canada), except as to mortgages on real property, whenever any interest is made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding five percent per annum shall be payable unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.
- 5.11 **Post Judgment Interest.** Under the *Court Order Interest Act* (British Columbia) post judgment interest on any judgment awarded or enforced in British Columbia may be limited to a prescribed rate.
- 5.12 **Criminal Interest.** No opinion is expressed herein as to the enforceability of any Document if the “interest” (as that term is understood for the purposes of Section 347 of the *Criminal Code* (Canada)) which is payable to or to be received by the other party or which is intended to be secured by the Mortgage, would constitute interest at a “criminal rate” within the meaning of Section 347 of the *Criminal Code* (Canada).
- 5.13 **Interest After Default.** Any provision in the Documents requiring the payment of interest at a higher rate after rather than before default may not be enforceable.
- 5.14 **Inherent Power of Courts.** Courts in British Columbia may decline to hear an action if it is contrary to public policy (as such phrase is understood in British Columbia) for it to do so, or if it is not the proper forum to hear such action or concurrent proceedings are brought elsewhere.
- 5.15 **Judgment Currency.** Judgments of the courts of British Columbia may be awarded only in Canadian dollars and, accordingly, to the extent that any obligation evidenced or secured by the Documents is payable in a currency other than Canadian dollars, any judgment in respect thereof will be stated in Canadian dollars and will require conversion of the amount constituting the obligation secured into Canadian dollars at a rate of exchange which may be other than the rate in effect on the date of payment.
- 5.16 **Entire Agreement Clauses.** Notwithstanding any provision in the Documents which states that such agreement constitutes the entire agreement between the parties thereto, a

court may in certain circumstances give effect to other agreements or obligations, whether written or oral, between the parties.

- 5.17 **Exclusive Jurisdiction of Courts.** We express no opinion as to the enforceability of any provision of the Documents which purports to confer exclusive jurisdiction over any action or proceeding arising out of or relating to the Documents on the courts of a specified jurisdiction or waiving any objection that a party might otherwise be entitled to assert to the jurisdiction of such courts.
- 5.18 **Mortgagee as Mortgagee in Possession.** To the extent that it becomes a mortgagee in possession and notwithstanding provisions to the contrary contained in the Mortgage, the Mortgagee may become liable for loss of or damage to Lands or any improvements thereon or property therein. The Mortgagee may further be held responsible for the improvident sale by it of the Lands or other property charged by the Mortgage notwithstanding provisions to the contrary contained therein.
- 5.19 **Costs and Expenses.** Courts in British Columbia have discretionary powers with respect to the awarding of costs, notwithstanding any provision regarding the recovery of costs in the Documents. Without limiting the foregoing, provisions in the Documents which provide for the recovery of fees and expenses from the Corporation may be restricted by a court to a reasonable amount, and legal fees and disbursements may be subject to taxation.
- 5.20 **Limitation Periods.** The enforceability of the Documents is subject to applicable limitation periods.
- 5.21 **Licences, Approvals, Permits Etc.** We express no opinion as to any licences, franchises, permits, consents, approvals, registrations, filings or other authorizations or exemptions that may be required in connection with the carrying on of the business of the Corporation. Without limiting the foregoing, we express no opinion as to whether it may be necessary, in connection with the enforcement of the Documents, for the Mortgagee, or any person proposing to acquire, own or operate all or any part of the Lands, to obtain any licence, franchise, permit, consent, approval, registration, filing or other authorization or exemption.
- 5.22 **Powers of Attorney.** Any provision of the Documents granting a power of attorney or appointing an agent may be revocable or may terminate by operation of law in certain circumstances, notwithstanding any purported agreement to the contrary, if such grant or appointment is not coupled with an interest.
- 5.23 **Arbitration.** A court may set aside or remit for reconsideration an arbitral award if:
 - 5.23.1 it was improperly procured; or
 - 5.23.2 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:

- 5.23.3 the importance of the result justifies intervention and the determination of the question may prevent a miscarriage of justice;
- 5.23.4 the question is of importance to some class or body of person of which the appellant is a member; or
- 5.23.5 the question is of general or public importance.
- 5.24 *[Guarantees. Guarantees or similar instruments may be unenforceable where the actions or failures to act by the recipient of the guaranteed obligations or waivers or amendments of the obligations guaranteed: (i) so radically and fundamentally change the essential nature of the terms and conditions of the obligations guaranteed and the related transactions so that a new relationship or new obligation is created which is substantially different from that contemplated by the Documents; or (ii) impair the guarantor's recourse against the primary obligor.]*
- [This qualification may be applicable if the Mortgage is given as collateral security for obligations pursuant to a guarantee.]*
- 5.25 **Expropriation.** 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.
- 5.26 **Priority with Respect to Subsequent Advances.** We express no opinion as to the priority of the Mortgage with respect to advances made after the time of our LTO search(es) for the Lands. The Mortgagee should search title to the Lands immediately prior to each advance under or secured by the Mortgage.
- 5.27 **Aboriginal Rights or Title.** We express no opinion on any interest in or in respect of the Lands that may be held or claimed pursuant to aboriginal rights or title recognized under s. 35(1) of the Constitution Act, 1982.
- 5.28 *[Mortgage Terms. The Mortgage Terms and any additional or modified terms prescribed by the Mortgagee are included in the Mortgage pursuant to the Mortgagee's instructions. Accordingly, we express no opinion as to the binding nature or enforceability of any particular provision of the Mortgage Terms or of any such additional or modified term prescribed by the Mortgagee.]*
- [This qualification is optional, and may also be applicable in respect of other standard form documents provided by the Mortgagee which are not amended.]*
- [Add specific qualifications arising from the Documents and the nature of the transaction, if any]*

6. RELIANCE

The opinions and advice expressed herein are provided solely for the benefit of the addressees in connection with the transactions contemplated by the Documents and may not be used nor relied

upon by the addressees for any other purpose or by any other person for any purpose whatsoever, in each case without our prior written consent.³

Yours very truly,

³ Note that, depending on the circumstances of a given transaction, the opinion provider may be asked to expand the scope of the reliance limitation. For example, a lender might request that its successors and assigns also have the benefit of and be permitted to rely on the opinion, particularly in circumstances in which a loan secured by the Mortgage is or is expected to be syndicated or participated to other lenders. In such circumstances, language such as the following could be used to achieve this “..., except that copies of this opinion letter may be delivered to, and the opinions and advice expressed herein, as of the date hereof, may be relied upon by, any permitted assignee of or successor to the rights and interests of the Mortgagee or any permitted participant of the interests of the Mortgagee, in each case, under the Documents.” The question of whether any requested expansion of the reliance limitation is appropriate or should be accepted is one to be considered by the opinion provider taking into account the broader circumstances of the subject transaction.

SCHEDULE A

Legal Description of the Lands

[Insert legal description for the Lands]

APPENDIX I

[Form of accompanying Officer's Certificate for Corporation]

OFFICER'S CERTIFICATE

TO: [ADDRESSEES OF THE 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. Attached as Schedule A hereto is a true copy of the constating documents of the Corporation (the "**Constating Documents**"). No steps or proceedings have been taken by the Corporation or are pending to supersede, cancel, surrender or amend the Constating Documents as at the date hereof.
2. **[if applicable, add:** Attached as Schedule B hereto is a true copy of the shareholders' agreement made among the Corporation and its shareholder(s) •, • and • dated as of • (the "**Shareholders' Agreement**").]
3. Attached as Schedule [B][C] hereto is a true copy of the resolutions of the directors of the Corporation (the "**Resolutions**") which Resolution was validly enacted by the Corporation on •, is true and correct and is in full force and effect, unamended as of the date hereof;
4. Schedule [C][D] hereto are the names, offices and signatures of each person who has executed and delivered any of the [insert description of Mortgage and other documents executed by the Corporation (the "**Documents**"), each person named in such Schedule [C][D] validly holds the office specified and each signature in such Schedule [C][D] is the true and correct signature of the specified person;
5. No person has a leasehold interest in the Lands for a term of 3 years or less under which there is actual occupation or, to my knowledge, any other unregistered interest in the Lands [except as set out in Schedule [D][E] hereto].
6. 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 [D][E] hereto].
7. The addressee(s) hereof and [its/their] solicitors may rely upon this Certificate in connection with the Documents and the transactions contemplated thereby.

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

[Name]

[Title]

[INSERT SCHEDULES]

[Note – this form of Certificate addresses only issues which are relevant to the opinion. Additional provisions may be necessary or desirable in connection with a purchase or financing transaction (e.g. certification as to payment of taxes, absence of ongoing construction, etc.)]