

BRITISH COLUMBIA SOLICITORS' LEGAL OPINION COMMITTEE

NOTES RE: SAMPLE OPINIONS

The British Columbia Solicitors' Legal Opinions Committee (the "Committee") was constituted for the purpose of preparing recommended forms of legal opinions for use by British Columbia lawyers in commercial transactions and preparing guides for assistance to the profession.

Comments on the Sample Opinion

The Committee is of the view that it is acceptable, and has become the general practice, for a financial institution and its solicitor to request from the solicitor for the borrower an opinion that is limited to existence, corporate capacity, and power of the borrower and as to due authorization, execution and delivery of all standard forms of documents. The Committee continues to be of the view that an opinion with respect to "legal, valid and binding" and "enforceability" should not be required or given in the case of standard forms of documents. A standard form of document is a document that is developed and provided by one party to an agreement and is used by that party in substantially the same form for similar matters, and it not to be materially changed for use in a specific transaction. The Committee's original statement on this matter is set out in the Statement listed as Item 1 in the Reference Materials. While the original statement referred to financial institutions and their standard forms, the committee is of the view that the statement should apply to all forms of transactions in which standard forms of documents are used.

Where the opinion is given in circumstances where standard forms of documents are not used, the Committee is of the view 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". The Committee considers that the authorities are unclear as to precisely what is meant by each of the terms "legal", "valid", "binding", and "enforceable" in the remedies opinion and to what extent such terms overlap. The contemporary practice is to use all of these terms in rendering the remedies opinion and the Committee endorses that practice. The Committee is of the view that deleting, some, but not all, of these terms will not limit the scope of an opinion, and any attempt to do so is unlikely to be accepted.

The Committee has prepared the Sample Opinions as "third party legal opinions", that is, opinions to be given by a law firm for one party in a commercial transaction to the other party (and to the law firm for the other party) in the transaction.

Where the opinion is to be given in circumstances where standard form documents are used, the recommended form of opinion is attached to item 1 in the Reference Materials as "Standard Form Documents".

The Committee notes that while often opinions such as the Sample Opinions are addressed to the solicitor for the other party, as well as to that party, current practice is to provide the opinion only to the other party, and not its solicitor. The Committee is of the view that, it is better for a solicitor not

to rely on the opinions of other counsel, and therefore there is no need for opinions to be addressed to counsel. It is sufficient if the opinions are addressed to the relevant parties.

The assumptions, qualifications and limitations in the Sample Opinions are not a replacement for careful, knowledgeable, transaction-specific legal work and inquiries, which should be undertaken by the solicitor delivering such a commercial opinion. The Sample Opinions attempt to include those matters that the members of the Committee consider should address in opinions of this nature. Two principles must override all other considerations in the Sample Opinions 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. Accordingly, the opinion giver must either 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, 3rd 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. However, the Committee has concluded that a qualification should be included respect of the Limitations Act. Although the Limitations Act applies to limit the enforceability of every instrument, the Committee has included "limitations" in the qualifications for enforceability opinions.

The Committee points out that the equitable principles limitation included in the Sample Opinions cover 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, 3rd edition, listed as Item 4 in the Reference Materials.

A doctrine of performance in good faith has emerged from recent Canadian decisions. As a result the Committee has added the following qualifications to the "General Principles of Law and Equity"

qualification stating “*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*”; and to the qualification “*Conclusiveness of Determinations*” “*a failure to exercise discretion reasonably and in good faith*” to recognize the decisions of the Supreme Court of Canada in “*Bassin*” and “*Wastech Services*” and their effect upon the enforceability of both contractual terms and the exercise of discretion.

Guidelines

The Committee continues to endorse and recommends 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 1.2 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*.

Multijurisdictional Opinion

The *Sample Opinions* are not intended for use as a multi-jurisdictional opinions. They do 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 the *Sample Opinions*. The Committee has published a recommended form of “foreign law” opinion. See: Model Form of Addendum to Commercial Opinion re Foreign Law

Reference Materials

1. Statements of the Solicitors' Legal Opinions Committee:
 - 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; and
 - 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.
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. Wilfred M. Estey, "Legal Opinions in Commercial Transactions", 3rd ed. (Markham: Lexis Nexis).
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*.
11. "Legal Opinions in Business Transactions (Excluding the Remedies Opinion) The Corporations Committee of the Business Law Section of the State of California – 2005 Report (October 2007 Printing – as revised).