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## DUE DILIGENCE CHECKLIST

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### Solicitors Legal Opinions Committee (SLOC) Model Form of Commercial Legal Opinion for Corporations

*This checklist is a resource for practitioners as they prepare a commercial legal opinion based on the SLOC Model Form of Commercial Opinion and sets out the typical underlying due diligence usually reviewed in connection with giving such opinions.*

*References in the footnotes of this checklist are to:*

- *The CLE BC Practice Manual “Advising British Columbia Businesses”, by Kendall E. Andersen et al., 2020 Update (“**Advising BC Businesses**”)*
- *“Legal Opinions in Commercial Transactions”, by Wilfred M. Estey, 4<sup>th</sup> Edition, 2022 (“**Estey**”)*
- *British Columbia Business Corporations Act, SBC 2002, c 57 (“**BCBCA**”)*

When reviewing the underlying due diligence, solicitors may find it useful to list out for reference and to have on hand the specific documents upon which they will be opining, and which comprise the “**Documents**” referred to in the checklist below:<sup>1</sup>

1. [list documents]
2. [list documents]
3. [list documents]
4. [list documents]
5. [list documents]

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<sup>1</sup> Estey, pages 88-96; *Advising BC Businesses*, s. 7.21: Consider what documents need to be reviewed or what investigations need to be done. It is likely that counsel receiving the opinion will object to a statement in an opinion that the opinion is based only the examination of certain documents. In the legal opinion, it is preferable to list specific documents that were reviewed, as well as include a general statement to the effect that such other documents have been reviewed and such other investigations have been made as were considered necessary or appropriate.

Opinion Given	What to Consider to Give Opinion	Status/Comments/References/Notes (i.e. date of Certificate of Good Standing, sections of Articles, statutes, date of resolutions, etc.)
<p>1. <u>Corporate Status</u><sup>2</sup></p> <p>The Corporation was <b><u>Incorporated / amalgamated /continued into British Columbia from the jurisdiction of [x]</u></b><sup>3</sup> as a company under the laws of the Province of British Columbia,<sup>4</sup> is a valid and existing company and is, with respect to the filing of annual reports with the Companies Office<sup>5</sup>, in good standing</p> <p><i>[or, if Corporation is a CBCA corporation... the Corporation exists as a corporation under the Canada Business Corporations Act, has filed the required annual returns and has paid all prescribed fees required [and if applicable: 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 British Columbia, in good standing with the Companies Office]</i></p>	<ul style="list-style-type: none"> <li>• Certificate of Incorporation / Amalgamation / Continuation, as appropriate<sup>6</sup></li> <li>• Corporate search from BC Online</li> <li>• Certificate of Good Standing</li> <li>• CBCA Certificate of Compliance</li> <li>• Corporate Records / Officer's Certificate</li> </ul>	
<p>2. <u>Power and Capacity</u><sup>7</sup></p> <p>The Corporation has the corporate power and capacity to enter into and perform its obligations under the Documents to which it is a party.</p>	<ul style="list-style-type: none"> <li>• Articles of the Corporation</li> <li>• BCBCA / CBCA</li> </ul>	

<sup>2</sup> *Estey*, pages 177-188; *Advising BC Businesses*, s. 7.24: The generally accepted custom and practice is to give an incorporation and existence opinion, together constituting the “corporate status opinion”, the purpose of which is to confirm that the corporation was created as a corporation and that it still exists.

<sup>3</sup> *Estey*, pages 177-188; *Advising BC Businesses*, s. 7.24.

<sup>4</sup> *Estey*, pages 191-197; *Advising BC Businesses*, s. 7.25-7.26: This is a generally accepted statement, but when giving an opinion, one must understand what each part of the sentence means. In some circumstances, only the existence opinion may be given — and not an incorporation opinion, on the cost-benefit assessment of the value of receiving an incorporation opinion. However, see comment on BCBCA in Note 7.

<sup>5</sup> The Term “Companies Office” is a defined term in the sample opinion prepared by the Solicitors’ Legal Opinions Committee, but note that this may be defined differently as “Office of the Registrar” etc. in any given opinion.

<sup>6</sup> See BCBCA, s. 18; *Advising BC Businesses* s. 7.26: Examination of original certificate or a certified copy is no longer required by the Province of British Columbia. Whether or not the requirements precedent and incidental to incorporation have been complied with, a notation in the corporate register that a company has been incorporated is conclusive evidence that the company has been duly incorporated on the date shown and the time, if any, shown in the corporate register.

<sup>7</sup> *Estey*, pages 206-218; *Advising BC Businesses*, s. 7.30.

Opinion Given	What to Consider to Give Opinion	Status/Comments/References/Notes (i.e. date of Certificate of Good Standing, sections of Articles, statutes, date of resolutions, etc.)
3. <u>Authorization</u> <sup>8</sup>		
The Corporation has taken all necessary corporate action to authorize the execution, delivery and performance by it of the Documents.	<ul style="list-style-type: none"> <li>• BCBCA /CBCA</li> <li>• Articles of the Corporation <sup>9</sup></li> <li>• Directors' resolutions</li> <li>• Shareholders' resolutions, if required by the above</li> </ul>	
4. <u>Execution and Delivery</u> <sup>10</sup>	<ul style="list-style-type: none"> <li>• Signed pages</li> <li>• Officer's Certificate — including incumbency language and intention to deliver</li> <li>• Satisfactory confirmation that the executed Documents have been unconditionally delivered to the other party or parties thereto</li> </ul>	
5. <u>Legal, Valid and Binding</u> <sup>13</sup>		
Each Document to which the corporation is a party constitutes a legal, valid and binding <sup>14</sup> obligation of the Corporation, enforceable against the Corporation in accordance with its terms. <sup>15</sup>	<ul style="list-style-type: none"> <li>• Review each Document term by term, section by section</li> <li>• Agreements not contrary to law and within corporate capacity</li> <li>• Agreements not void or voidable at the election of any party or for uncertainty</li> </ul>	

<sup>8</sup> *Estey*, pages 219-236; *Advising BC Businesses*, s. 7.32: This is usual to state in a commercial transaction opinion. However, see *Estey*, page 136 for a discussion on due diligence: the generally accepted custom and practice is that the opinion giver may assume that all appropriate formalities (such as the election of directors, appointment of officers, convening and holding of meetings) were duly complied with, unless he or she has actual knowledge to the contrary.

<sup>9</sup> *Estey*, page 228: It is not necessary to conduct a full minute book search to confirm that all necessary corporate formalities (including the proper election of directors) were duly complied with for purposes of this opinion; generally, it is considered appropriate to rely on a certified copy of the directors' resolutions.

<sup>10</sup> *Estey*, pages 236-263.

<sup>11</sup> *Estey*, pages 237-240 (traditional closings) and pages 248-261 (virtual closings); *Advising BC Businesses*, s. 7.33: Counsel should not rely on apparent or ostensible authority principles to give this opinion; actual authority should be established.

<sup>12</sup> *Estey*, pages 240-245 (traditional closings) and pages 261-262 (electronic closings); *Advising BC Businesses*, s. 7.34: The document must have been delivered and released without conditions.

<sup>13</sup> *Estey*, pages 263-284; *Advising BC Businesses*, s. 7.35: This is usually the key paragraph in any third party commercial transaction opinion, and is almost always subject to a bankruptcy and equitable principles qualification, as well as any other qualifications specifically relevant to the agreement. See also list of the effect of this opinion in *Estey*, page 271. Note that this opinion is rarely given in the context of real estate financing in British Columbia. See <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/SLOC/1-1.pdf>.

<sup>14</sup> *Estey*, pages 265-268; *Advising BC Businesses*, s. 7.35: There is considerable difference of opinion as to what each of these three terms means individually, but each overlap with the others and none of them are perceived to be sufficient by itself — they are viewed as a unit.

<sup>15</sup> *Estey*, page 267: No significant difference between "enforceable" and "enforceable in accordance with its terms" — but usual to include an equitable principles qualification); *Advising BC Businesses*, s. 7.36: Usually the inclusion of "in accordance with its terms" is more likely to imply an opinion as to the availability of specific performance, but often qualifications are included in the agreement regardless of the words used.

<b>Opinion Given</b>	<b>What to Consider to Give Opinion</b>	<b>Status/Comments/References/Notes</b> (i.e. date of Certificate of Good Standing, sections of Articles, statutes, date of resolutions, etc.)
	<ul style="list-style-type: none"> <li>• Must have offer, acceptance, capacity, consideration, execution, delivery</li> <li>• Agreements free from other vitiating elements such as mistake, misrepresentation, duress, undue influence</li> <li>• Consider any conditions precedent in the agreements wholly or partially within the control of one of the parties</li> <li>• Consider whether any concurrence or ruling or a third party or government ruling is required</li> <li>• Not contrary to public policy (especially non-competition agreements)</li> <li>• Insert qualifications as necessary re enforceability</li> <li>• Identify a particular remedy available to a damaged party <ul style="list-style-type: none"> <li>◦ If specific performance or damages are not available as a remedy then don't give an opinion or qualify opinion</li> </ul> </li> <li>• Consider arbitration clauses</li> </ul>	