

**LAW SOCIETY OF UPPER CANADA  
Continuing Professional Development**

**3<sup>rd</sup> Annual Business Law Summit  
May 15, 2013**

Prepared for educational uses only. This is a very basic financing opinion under the Ontario PPSA. It does not involve interests in real estate or intellectual property, *Bank Act* or other special forms of security, guarantees, jurisdictions outside Ontario, and many other possible aspects of a financing transaction. It should be used as an example only and is not intended to represent an authoritative precedent or standard opinion. Further, any actual opinion (including assumptions and qualifications) should be tailored to the specific circumstances, parties, documents and collateral.

**SAMPLE LEGAL OPINION OF BORROWER'S COUNSEL**

**[Letterhead of Ontario Counsel]**

Date:

To: [Insert name of bank acting as lender/administrative agent/  
collateral agent/etc., as appropriate]

Dear Sirs/Mesdames:

**Re: Loan from X Bank (the "Lender") to Y Corp. (the "Borrower")  
pursuant to a Credit Agreement (the "Credit Agreement") dated [●]**

We have acted as Ontario counsel to the Borrower in connection with the Credit Agreement, a share pledge agreement (the "**Pledge Agreement**") with respect to the shares of Subsidiary ("**Subsidiary**") and a general security agreement (the "**GSA**") granted by the Borrower to the Lender. The Credit Agreement, the Pledge Agreement and the GSA are referred to collectively herein as the "**Documents**". The Pledge Agreement and the GSA are referred to collectively herein as the "**Security Documents**".

**I. Examinations**

In such capacity, we have participated in the preparation of and have examined executed copies of the Documents. We have also examined originals or copies, certified or otherwise identified to our satisfaction, of:

- (a) the articles and by-laws of the Borrower (the "**Constating Documents**");

- (b) a certificate of compliance (the “**Borrower Certificate**”) issued by the Director appointed under the *Canada Business Corporations Act* with respect to the Borrower dated [●];
- (c) a certificate of status (the “**Subsidiary Certificate**”) dated [●] issued by the Ministry of Government Services (Ontario) with respect to Subsidiary;
- (d) certificates of officers of the Borrower and Subsidiary dated the date hereof (the “**Officers’ Certificates**”), copies of which are being delivered to you concurrently herewith;<sup>1</sup> and
- (e) an undated transfer and power of attorney executed by the Borrower with respect to the shares of Subsidiary pledged pursuant to the Pledge Agreement (the “**Certificated Pledged Shares**”).

## **II. Reliance and Assumptions**

We have assumed the genuineness of all signatures, the legal capacity of individuals signing any documents, 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, faxed, electronic or photostatic copies.

We have also assumed that:

- (a) all facts set forth in the official public records, indices and filing systems and certificates and documents supplied by public officials are complete, true and accurate;
- (b) the collateral purportedly secured under the Security Documents does not include consumer goods (as defined in the *Personal Property Security Act* (Ontario) (the “**PPSA**”));
- (c) the Lender exists under the laws of its jurisdiction of formation and has the corporate or other power and capacity to enter into and to perform its obligations under the Documents;
- (d) the Documents have been duly authorized, executed and delivered by the Lender and are enforceable against the Lender;
- (e) all facts set out in the Officers’ Certificates are complete, true and accurate; and

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<sup>1</sup> Copies of the Articles, by-laws and relevant directors’ resolutions should be attached to each of the Officers’ Certificates and certified to be true copies. For Subsidiary, a certified share register is also needed.

- (f) the Lender or its agent (other than a securities intermediary) has acquired possession of the certificates representing the Certificated Pledged Shares in the Province of Ontario.

We have relied exclusively as to certain factual matters on the Officers' Certificates. We have not performed any independent check or verification of such factual matters.

With respect to our opinion numbered 1 below, we have relied on the Borrower Certificate and assumed that it remains accurate on the date hereof.

With respect to our opinion numbered 2 below, we have relied on the Subsidiary Certificate and assumed that it remains accurate on the date hereof.

### **III. Law**

Our opinions herein are limited to the laws of the Province of Ontario and the federal laws of Canada applicable therein. Without limiting the generality of the foregoing, we express no opinion with respect to the laws of any other jurisdiction to the extent that those laws may govern the validity, perfection, effect of perfection or non-perfection or enforcement of the security interests created by the Security Documents as a result of the application of Ontario conflict of laws rules, including without limitation Sections 5 to 8.1 of the PPSA. In addition, we express no opinion whether, pursuant to those conflict of laws rules, Ontario laws would govern the validity, perfection, effect of perfection or non-perfection or enforcement of those security interests.

### **IV. Opinions**

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

1. The Borrower is a corporation incorporated and existing under the laws of Canada.
2. The Subsidiary is incorporated under the *Business Corporations Act* (Ontario) and has not been dissolved.
3. The Borrower has the corporate power and capacity to enter into the Documents and to carry out its obligations thereunder.
4. The execution and delivery of and performance by the Borrower of the Documents have been authorized by all necessary corporate action on the part of the Borrower.
5. The Documents have been duly executed and delivered by the Borrower.
6. The Documents constitute legal, valid and binding obligations of the Borrower, enforceable against it by the Lender in accordance with their terms.

7. The execution and delivery of the Documents by the Borrower and the performance of its obligations thereunder do not contravene, breach or conflict with: (a) the Constatng Documents; or (b) any statute or regulation of the Province of Ontario or of Canada applicable therein to which the Borrower is subject.
8. The Security Documents create valid security interests in favour of the Lender in the collateral purported to be secured therein in favour of the Lender and in which the Borrower now has rights (within the meaning of the PPSA), and are sufficient to create valid security interests in favour of the Lender in the collateral purported to be secured therein in favour of the Lender in which the Borrower hereafter acquires rights when those rights are acquired, in each case to secure payment and performance of the obligations of the Borrower to the Lender as set out in the relevant Security Document.
9. The Security Documents (or notices or financing statements in respect of the security interests created thereby) have been registered, filed or recorded in such public offices provided for under the laws of Ontario or the federal laws of Canada applicable therein as necessary to preserve, protect or perfect the security interests thereby created and no further filing, recording or registration in any office of public record maintained under such laws is required in order to preserve, protect and perfect such security interests. The particulars of such registrations in the Province of Ontario are set out in Schedule "A" hereto. Except as provided in our advisory attached as Schedule "B", no further filings are required under the PPSA in its current form.
10. No authorization, consent, approval, order, licence or other action by, or filing or registration with, any federal or provincial governmental or regulatory authority or agency in the Province of Ontario is required at this time in connection with the execution and delivery by the Borrower of the Documents or the performance of its obligations thereunder.
11. The authorized capital of Subsidiary is an unlimited number of common shares. The issued capital of Subsidiary is [●] common shares. The Borrower is the registered owner of all the issued and outstanding shares of Subsidiary.
12. All necessary corporate action has been taken by Subsidiary to authorize the transfer of the Certificated Pledged Shares to the Lender and any subsequent transfer of the Certificated Pledged Shares by the Lender in connection with any enforcement of the Pledge Agreement by the Lender.
13. The security interest of the Lender in the Certificated Pledged Shares has been perfected by control and, accordingly, has priority over any other security interest in the Certificated Pledged Shares to which the PPSA applies.

## **V. Qualifications**

The opinions expressed above are subject to the following qualifications:

- (a) Our opinions herein are subject to bankruptcy, insolvency, reorganization, arrangement, fraudulent preferences and conveyances, assignments and preferences and other similar laws of general application affecting the enforceability of creditors' rights generally.
- (b) The enforceability of the Documents and the rights and remedies set out therein or any judgment arising out of or in connection therewith may be limited by general principles of equity, and no opinion is given as to the availability of any specific remedy (including specific performance and injunction).
- (c) The enforceability of any provision of the Documents may be limited by the powers of a court of competent jurisdiction to grant relief from forfeiture, stay proceedings before it and stay executions on judgment.
- (d) No opinion is expressed as to:
  - (i) the title of the Borrower to any property;
  - (ii) other than as expressly set out in opinion 13 above, the rank or priority of the security interests created by the Security Documents;
  - (iii) any security interest created by the Security Documents with respect to proceeds of property of the Borrower that are not identifiable or traceable;  
or
  - (iv) the creation or perfection of any security interest in collateral to which the PPSA does not apply.
- (e) We have taken no steps to provide the notices or to obtain the acknowledgements prescribed in Part VII of the *Financial Administration Act* (Canada) relating to the assignment of federal Crown debts. An assignment of federal Crown debts which does not comply with that Act is ineffective as between the assignor and the assignee and as against the Crown.
- (f) We express no opinion as to whether a security interest may be created in property consisting of a license, lease or agreement (other than accounts or chattel paper to which s. 40(4) of the PPSA applies) if the terms thereof prohibit its assignment or require, as a condition of its assignability or of the creation of a security interest therein, any consent, approval or other authorization which has not been obtained.

- (g) The PPSA may affect the enforcement of remedies contained in the Security Documents to the extent that those remedies are inconsistent with or contrary to the provisions of the PPSA, and the PPSA may impose procedures which affect the manner of enforcement.
- (h) A receiver or receiver and manager appointed pursuant to one or both of the Security Documents may, for certain purposes, be treated by a court as the agent of the secured party and not solely the agent of the Borrower notwithstanding any agreement to the contrary.
- (i) A security interest in motor vehicles which are classified as equipment or proceeds may be ineffective against certain third parties, unless the vehicle identification number of such vehicle was set out in a financing statement or financing change statement.
- (j) No opinion is given with respect to the creation of a security interest pursuant to or the enforceability of the Security Documents in relation to, and no registration or filing with respect to the Security Documents has been made under, the *Canada Shipping Act* (Canada), the *Copyright Act* (Canada), the *Industrial Design Act* (Canada), the *Integrated Circuit Topography Act* (Canada), the *Patent Act* (Canada), the *Plant Breeders' Rights Act* (Canada), the *Railway Act* (Canada), and the *Trade-Marks Act* (Canada).
- (k) The ability to recover or claim for certain costs or expenses incidental to any court proceedings may be subject to judicial discretion.
- (l) We express no opinion as to the enforceability of any provision:
  - (i) that purports to sever from the relevant Document any provision that is prohibited or unenforceable under applicable law without affecting the enforceability or validity of the remainder of that Document, or
  - (ii) which states that amendments or waivers that are not in writing will not be effective.
- (m) The *Currency Act* (Canada) precludes a court in Canada from giving judgment in any currency other than lawful money of Canada.<sup>2</sup>
- (n) The provisions for the payment of interest in the Documents may violate section 347 of the *Criminal Code* (Canada) if the effective annual rate of interest, within the meaning of section 347, exceeds 60%.

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<sup>2</sup> Include if the Documents contemplate payment in another currency.

- (o) A Court may require that discretionary powers afforded to a party be exercised reasonably and in good faith and may not treat as conclusive those certificates and determinations which the Documents state are to be so treated.
- (p) The Lender may be required to give the Borrower a reasonable time to repay following a demand for payment before exercising any of the rights and remedies expressed to be exercisable by the Lender in the Security Documents.
- (q) Enforceability of the Documents is subject to the *Limitations Act, 2002*.
- (r) The board of directors of Subsidiary has passed a resolution approving, among other things, the transfer of the Certificated Pledged Shares to the Lender pursuant to the Pledge Agreement and also approving any subsequent transfer of the Certificated Pledged Shares by the Lender pursuant to the Pledge Agreement. There is some doubt about the directors' power to irrevocably bind themselves to the approval of any such transfer by the Lender.

#### **VI. Limitation**

This opinion is solely for the benefit of the addressees and not for the benefit of any other person. It is rendered solely in connection with the transaction to which it relates. It may not be quoted, in whole or in part, or otherwise referred to or used for any other purpose without our prior written consent.

Yours very truly,

**SCHEDULE "A"**

**REGISTRATION PARTICULARS**

***PERSONAL PROPERTY SECURITY ACT (Ontario) ("PPSA")***



## SCHEDULE "B"

### ADVISORY

1. Further actions may be required to maintain perfection of the security interests created by the Security Documents, including in the following circumstances:

- (a) The registration period of the Financing Statement referred to in Schedule "A" will expire, and the security interests perfected thereby will become unperfected in accordance with the expiration date of such registration as set out in Schedule "A" unless the registration period is extended prior to expiry by registration under the PPSA of a financing change statement designated as a renewal. *We assume no responsibility for registering any such financing change statement or for reminding you of the date by which it must be registered.*
- (b) Any change in the name of the debtor and any transfer by the debtor of any or all of the collateral charged by the Security Documents will require the filing of a financing change statement under the PPSA:
  - (i) within 15 days of the transfer if the debtor transfers the collateral with the prior consent of the secured party, or
  - (ii) within 30 days after (A) the later of (1) the transfer, if the secured party had prior knowledge of the transfer and had, at the time of the transfer, the information required to register the financing change statement and (2) the day the secured party learns of such information if the transfer was made without the prior consent of the secured party or (B) after the secured party learns of the change of name and the new name.

*We assume no responsibility for making this type of registration or for notifying you if circumstances arise which necessitate this type of registration.*

2. If the debtor relocates to a jurisdiction other than Ontario, the secured party's security interest in (a) an intangible, (b) goods of a type normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others, (c) a non-possessory security interest in an instrument, a negotiable document of title, money, or chattel paper, or (d) investment property perfected by registration continues perfected until the earliest of:

- (a) 60 days after the relocation;
- (b) 15 days after the day the secured party receives notice of the relocation; and
- (c) the day that perfection ceases under the laws of the Province of Ontario.

*We assume no responsibility for notifying you of any change of location of the debtor or for the perfection or reperfection of any security interests in any collateral as a result of a change in the location of the debtor.*

3. The law governing the perfection and priority of the Lender's security interest in the Certificated Pledged Shares will cease to be Ontario law if the Certificated Pledged Shares are no longer located in the Province of Ontario. *We assume no responsibility for notifying you of any change in location of the Certificated Pledged Shares or for advising you on steps to be taken to maintain perfection.*