

TWO SIMPLE CROSS-BORDER OPINIONS

[LETTERHEAD OF GUARANTOR'S COUNSEL]¹

[Sample Opinion A – Ontario Guarantor;
Foreign Credit Agreement]

[Date]

[Bank]

- and -

[Counsel]²

Dear Mesdames/Sirs:

Re: Credit Agreement (the “Credit Agreement”) dated [date], between [Bank] as arranger, original lender and agent (the “Lender”) and [Borrower] as borrower (the “Borrower”)³

We have acted as special Ontario counsel⁴ to [Subco] (the “Guarantor”) for the purpose of providing this opinion in connection with the Credit Agreement to which the Guarantor is a party.

Materials Reviewed

We have examined originals, or copies certified or otherwise identified to our satisfaction, of:

- (i) the Credit Agreement;
- (ii) the Articles and by-laws of the Guarantor; and

¹ Sample prepared for discussion purposes only by Susan Zimmerman, Goodmans LLP.

² It is not necessary to address the opinion to the Bank's counsel, although this practice remains common. I do not refuse if asked to address to the Bank's counsel.

³ In this sample opinion, the Credit Agreement (which includes the guarantee) is governed by English law.

⁴ This version of an opening sentence reflects the limited role of opining counsel.

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(iii) a resolution of the directors of the Guarantor.⁵

We have also examined originals or copies, certified or otherwise identified to our satisfaction, of such public and corporate records, certificates, instruments and other documents and have considered such questions of law as we have considered relevant and necessary as a basis for the opinions hereinafter expressed.⁶

Assumptions and Reliance

In our examination of the materials reviewed, we have:

- (a) assumed the genuineness of all signatures, the capacity of individuals executing 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 copies, whether facsimile, photostatic, certified or otherwise;
- (b) relied upon a certificate of an officer of the Guarantor, a copy of which has been delivered to you, with respect to the accuracy of the factual matters contained therein, which factual matters have not been independently investigated or verified by us; and
- (c) for the purposes of our opinion in paragraph 1 below, relied exclusively upon a certificate of status dated [date] issued by the Ministry of Government Services (Ontario)⁷ in respect of the Guarantor[, **which certificate we assume continues to be accurate as at the date hereof.**]⁸

Laws Addressed

The opinions hereinafter expressed are limited to the laws of Ontario and the laws of Canada applicable therein (“Ontario Law”).⁹

Opinions

Based and relying upon the foregoing, and subject to the qualifications hereinafter expressed, we are of the opinion that:

⁵ The opinions in this sample do not require a minute book review.

⁶ Consider omitting or truncating this statement to more accurately reflect actual examinations.

⁷ For a CBCA corporation: certificate of compliance dated [date] issued by the Director appointed under the *Canada Business Corporations Act*.

⁸ If not the same date as the closing date.

⁹ An extended form of the “Laws” section is normally used in secured financing opinions.

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1. The Guarantor is incorporated under the laws of Ontario and has not been dissolved.
2. The Guarantor has the corporate power and corporate capacity necessary to execute and deliver the Credit Agreement and to perform its obligations under the Credit Agreement. The execution, delivery and performance of the Credit Agreement have been duly authorized by all necessary corporate action on the part of the Guarantor and, to the extent that the matter is governed by Ontario Law,¹⁰ the Credit Agreement has been duly executed and delivered by the Guarantor.
3. The execution and delivery by the Guarantor of the Credit Agreement and the performance of its obligations thereunder do not contravene or result in a breach of or constitute a default under its Articles or by-laws [**or unanimous shareholder declaration/agreement**] or contravene any statute or regulation¹¹ of general application of the Province of Ontario or of Canada applicable therein binding on or applicable to it.
4. In any proceeding in a court of competent jurisdiction in the Province of Ontario (an “Ontario Court”) for the enforcement of the Credit Agreement, the Ontario Court would apply the laws of England, in accordance with the parties’ choice of English law in the Credit Agreement, to all issues which under Ontario Law are to be determined in accordance with the chosen law of the contract, provided that:
 - (a) the parties’ choice of English law is *bona fide* and legal and there is no reason for avoiding the choice on the grounds of public policy, as such term is interpreted under Ontario Law (“Public Policy”); and
 - (b) in any such proceeding, and notwithstanding the parties’ choice of law, the Ontario Court:
 - (i) will not take judicial notice of the provisions of English law but will only apply such provisions if they are pleaded and proven by expert testimony;
 - (ii) will not apply English law but rather will apply Ontario Law to matters which would be characterized under Ontario Law as procedural;

¹⁰ This formulation is commonly used as a shorthand (but not particularly informative) way to deal with the fact that execution has two aspects: corporate (governed by Ontario law in our example) and contractual (probably governed by the law of “the place of contracting”). Counsel in the place where the Credit Agreement will be executed by the Guarantor (which may not be Ontario) would need to opine on the contractual aspects of execution. See Estey, *Legal Opinions in Commercial Transactions*, 2nd ed. (Toronto: Butterworths, 1997) at 399-400. At footnote 116 on 400, Estey adverts to the argument that compliance with the formal requirements of the proper law will suffice. It is in fact customary for opinion givers and recipients to accept an execution opinion from counsel in the jurisdiction of the proper law.

¹¹ The words “statute or regulation” clarify the scope of this opinion (as opposed to the more general word “law”).

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- (iii) will apply provisions of Ontario Law that have overriding effect;
 - (iv) will not apply any English law if its application would be characterized under Ontario Law as the direct or indirect enforcement of a foreign revenue, expropriatory, penal or other public law or if its application would be contrary to Public Policy; and
 - (v) will not enforce the performance of any obligation that is illegal under the laws of any jurisdiction in which the obligation is to be performed.¹²
5. An Ontario Court would give a judgment based upon a final and conclusive *in personam* judgment of a court exercising jurisdiction in England (an “English Court”) for a sum certain, obtained against the Guarantor with respect to a claim arising out of the Credit Agreement (an “English Judgment”), without reconsideration of the merits:
- (a) provided that:
 - (i) an action to enforce the English Judgment must be commenced in the Ontario Court within any applicable limitation period;
 - (ii) the Ontario Court has discretion to stay or decline to hear an action on the English Judgment if the English Judgment is under appeal or there is another subsisting judgment in any jurisdiction relating to the same cause of action;
 - (iii) the Ontario Court will render judgment only in Canadian dollars; and
 - (iv) an action in the Ontario Court on the English Judgment may be affected by bankruptcy, insolvency or other similar laws affecting the enforcement of creditors’ rights generally; and
 - (b) subject to the following defences:
 - (i) the English Judgment was obtained by fraud or in a manner contrary to the principles of natural justice;
 - (ii) the English Judgment is for a claim which under Ontario Law would be characterized as based on a foreign revenue, expropriatory, penal or other public law;

¹² Opinions 4 and 5 use the opinion forms prepared by the Toronto Opinions Group and posted on SLAW (<http://www.slaw.ca/torogmemos/>).

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- (iii) the English Judgment is contrary to Public Policy or to an order made by the Attorney General of Canada under the *Foreign Extraterritorial Measures Act* (Canada) or by the Competition Tribunal under the *Competition Act* (Canada) in respect of certain judgments referred to in these statutes; and
 - (iv) the English Judgment has been satisfied or is void or voidable under English law.¹³
6. No authorizations, consents, licenses, approvals, filings, registrations or undertakings by or with any federal or Ontario governmental authority or administrative body are required in connection with the execution and delivery by the Guarantor of the Credit Agreement and the performance of its obligations thereunder.
 7. No stamp, registration, documentary or similar tax is payable in Canada or the Province of Ontario in respect of the execution and delivery of the Credit Agreement by the Guarantor.¹⁴
 8. The Guarantor is generally subject to suit and neither the Guarantor nor any of its properties has any right of immunity from suit or from execution on a judgment.¹⁵

Limitation

This opinion is furnished solely for the benefit of the Lender and its [permitted]¹⁶ assigns under the Credit Agreement in connection with the transactions referred to herein and may not be shown or circulated to, or relied upon by, any other person or used for any other purpose without our prior written consent.¹⁷

Yours very truly,

¹³ *Ibid.*

¹⁴ These opinions are sometimes requested by counsel in foreign jurisdictions.

¹⁵ *Ibid.*

¹⁶ If the Lender can freely assign interests under the Credit Agreement, leave out the word “permitted.”

¹⁷ Reliance provisions should not be considered standard-form “boilerplate.” There is often prolonged negotiation of these provisions, and carve-outs may be added for legally required disclosure, disclosure without reliance, etc.

[LETTERHEAD OF GUARANTOR'S COUNSEL]

[Sample Opinion B – Foreign Guarantor; Ontario Guarantee]¹⁸

[Date]

[Bank]

- and –

[Counsel]

Dear Mesdames/Sirs:

**Re: Guarantee (the “Guarantee”) dated [date], granted by [Subco]
(the “Guarantor”) in favour of [Bank] as arranger, original lender and
agent (the “Lender”)**

We have acted as special Ontario counsel to the Guarantor for the purpose of providing this opinion in connection with the Guarantee.¹⁹

In connection with this opinion, we have examined an original, or copy certified or otherwise identified to our satisfaction, of the Guarantee.

Assumptions

In giving this opinion, we have assumed:

- (a) the genuineness of all signatures, the capacity of individuals executing 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 copies, whether facsimile, photostatic, certified or otherwise;
- (b) that the Guarantor:

¹⁸ Sample prepared for discussion purposes only by Susan Zimmerman, Goodmans LLP. In this sample opinion, the opinion of foreign counsel is not relied on. Rather, Ontario counsel makes all necessary assumptions.

¹⁹ This paragraph reflects the extremely limited role of counsel in this case.

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- (i) is formed and existing under the laws of its jurisdiction of formation,
 - (ii) has the corporate power and capacity necessary to execute and deliver the Guarantee and to perform its obligations thereunder, and
 - (iii) has duly authorized by all necessary corporate action and has duly executed and delivered the Guarantee;
- (c) that the obligations guaranteed by the Guarantor pursuant to the Guarantee constitute legal, valid, binding and enforceable obligations of the obligors; and
- (d) that, if the Guarantee contemplates performance in any jurisdiction other than Ontario, such performance would not be illegal under the laws of that jurisdiction.

Laws Addressed

The opinions hereinafter expressed are limited to the laws of Ontario and the laws of Canada applicable therein.

Opinion

Based and relying upon the foregoing, and subject to the qualifications hereinafter expressed, we are of the opinion that the Guarantee constitutes legal, valid and binding obligations of the Guarantor, enforceable against the Guarantor in accordance with its terms.

Qualifications²⁰

The opinions expressed above are subject to the following qualifications:

- (a) The validity, enforceability and binding nature of the Guarantee may be limited by bankruptcy, insolvency, winding-up, reorganization, arrangement or other similar laws affecting creditors' rights, remedies and obligations generally and the equitable or statutory power of the courts to stay proceedings before them, to stay the execution of judgments and to grant relief against forfeiture.
- (b) The enforceability of the Guarantee is subject to general equitable principles, including the fact that the availability of equitable remedies, such as injunctive relief and specific performance, is in the discretion of the court.
- (c) The Lender may be required to give the Guarantor a reasonable time to pay following a demand for payment before exercising any of the rights and remedies expressed to be exercisable by the Lender in the Guarantee.

²⁰ Additional or different qualifications may be needed, depending on the terms of the actual document being opined on.

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- (d) The provisions for the payment of interest under the Guarantee may not be enforceable if those provisions provide for the receipt of interest by the Lender at a “criminal rate” within the meaning of section 347 of the *Criminal Code* (Canada).
- (e) A court will require that a party exercise discretionary powers reasonably and in good faith.
- (f) The court has the discretion to determine by whom and to what extent costs and expenses incidental to court proceedings shall be paid.
- (g) We express no opinion as to the enforceability of any provision of any of the Guarantee:
 - (i) which purports to waive all defences which might be available to, or constitute a discharge of the liability of, the Guarantor;²¹
 - (ii) to the extent it purports to exculpate the Lender from liability in respect of acts or omissions which may be illegal, fraudulent or involve wilful misconduct;
 - (iii) which states that modifications, amendments or waivers are not effective unless in writing; or
 - (iv) which purports to sever from the Guarantee any provision that is prohibited or unenforceable under applicable law without affecting the enforceability or validity of the remainder of the Guarantee.
- (h) A judgment of an Ontario court may only be awarded in Canadian currency. That judgment may be based on a rate of exchange determined in accordance with section 121 of the *Courts of Justice Act* (Ontario), which rate of exchange may be the rate in existence on a day other than the day of payment of such judgment. However, a provision in the Guarantee with respect to currency conversion will be given effect by the courts in the Province of Ontario.

²¹ This is not a qualification for waivers generally but only for a “waiver of all defences” by a guarantor. It is suggested by Estey that a waiver of all defences might be void for vagueness. Specific waivers of defences are enforceable.

This opinion is furnished solely for the benefit of the Lender and its assignees in connection with the transactions referred to herein and may not be shown or circulated to, or relied upon by, any other person or used for any other purpose without our prior written consent.

Yours very truly,