

# KEEPING CURRENT

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## What is an Enforceability Opinion and do I need one?

By Zev Zlotnick

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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An enforceability opinion is an opinion that the transaction documents constituting legal, valid, and binding obligations of the underlying entities, enforceable against them in accordance with their terms. The purpose of an enforceability opinion is to allow the lender to enforce the provisions contained in the transaction documents against the entities that have executed such documents. The enforceability opinion demonstrates that a contractual agreement has been formed with a remedy to enforce it and allows the lender to defend the rights given by the documents in court.

The opinion gives affirmation of the following:

1. the parties to the agreement have the power and capacity to enter into it and it has been duly authorized;
2. the agreement complies with all legal prerequisites pertaining to the creation of an effective contract in both form and substance;
3. the agreement is not illegal, invalid or void in its entirety, including on public policy grounds;
4. certain defences in the applicable law of contracts that render void or unenforceable the entire agreement are not available; and
5. some remedy is available to enforce the agreement, although it does not necessarily mean that specific performance will be available in any particular circumstance or that every provision in the agreement will be specifically enforced by a court.

The rationale behind an enforceability opinion is that the opinion giver has reviewed the transaction documents and can opine to

the lender, among other things, as to the enforceability of such documents.

It is important to remember that an enforceability opinion is not a guaranty of the transaction or a warranty that the conclusions of the opinion are correct. An opinion only amounts to a professional judgment of the legal matters addressed in the transaction and of the conclusion a court should reach on the matter. Unless negligence is proven, the opinion recipient cannot recover against the opinion giver.

Enforceability opinions are a common pre-condition to commercial mortgage loans. The opinion should relate to all borrower-side entities involved in the transaction, including the borrower, beneficial owner and guarantors. Common practise is to obtain the opinion from borrower's counsel. Notwithstanding that borrower's counsel did not draft the loan transaction documents, in conjunction with the transaction borrower's counsel would have reviewed the documents on behalf of their client and should therefore be in a position to provide the enforceability opinion. If a lender agrees that the enforceability opinion does not have to be provided by the borrower's counsel, lender's counsel can do so although that may cause additional legal fees to the borrower.

### Contact Us

If you are in need of legal advice, please do not hesitate to contact [Zev Zlotnick](mailto:Zev.Zlotnick@grllp.com), at 416.865.6601 or [zzlotnick@grllp.com](mailto:zzlotnick@grllp.com).

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