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TORONTO OPINIONS GROUP

Limited Partnership Opinion Paragraphs

1. Formation and Existence of Partnership

Estey Version:

- The Limited Partnership has been formed and is existing under the *Limited Partnerships Act* (Ontario).

Other Acceptable Variations:

- The Limited Partnership is a limited partnership formed under the *Limited Partnerships Act* (Ontario) and has not been dissolved.
- The Limited Partnership has been formed and is existing as a limited partnership under the laws of the Province of Ontario. [**Note:** This paragraph may be appropriate to provide to foreign counsel.]

Due Diligence Steps and Notes:

- (i) Review Limited Partnership Agreement and ensure that it is executed.
- (ii) Obtain and review a true copy of the record for the Limited Partnership as reported on the Ontario Business Information System at Companies Branch of the Ministry of Consumer and Commercial Relations and certified by the Registrar confirming the date of the filing of the declaration for the Limited Partnership and that no declaration of dissolution has been filed [**Note:** Declaration must be filed before opinion can be given since a limited partnership is formed when a declaration containing prescribed information is filed with the Registrar.]

- (iii) Obtain appropriate officer's certificate from General Partner regarding Limited Partnership.
- (iv) Not normally appropriate to give or request "duly" opinions on partnerships – as it is unclear what this means and it does not seem to add anything.
- (v) In light of the legal definition of a limited partnership, review Limited Partnership Agreement to confirm partnership "carrying on business in common with a view to profit" and confirm that there is at least one general partner and one limited partner.

2. ***Existence of General Partner***

Estey Version:

- The General Partner is incorporated and existing under the [***Business Corporations Act (Ontario)/Canada Business Corporations Act***].

Other Acceptable Variations:

- The General Partner is a corporation existing under the [***Business Corporations Act (Ontario) / Canada Business Corporations Act***].
- The General Partner is a corporation existing under the laws of the Province of Ontario.

Due Diligence Steps and Notes:

- (i) Obtain Certificate of Status/Certificate of Compliance.
- (ii) Obtain appropriate Officer's Certificate from General Partner.

3. ***General Partner Corporate Power and Capacity***

Estey Version:

- The General Partner has the corporate power and capacity to own its property and assets, to conduct its business as presently conducted, including the business of the Limited Partnership, and to enter into and perform its obligations under the Limited Partnership Agreement and under the Agreement.

Other Acceptable Variation:

- The General Partner has the corporate power and capacity to own property and assets, to carry on business, to act as the general partner of the Limited Partnership and to enter into and perform its obligations under the Limited Partnership Agreement and the Agreement.

Acceptable Addition:

- The General Partner is the sole general partner of the Limited Partnership. [*optional*]

Due Diligence Steps and Notes:

- (i) Review governing statute, articles, by-laws and any unanimous shareholder agreement of General Partner.
- (ii) Review Limited Partnership Agreement to determine whether the General Partner has the corporate power to carry on the business of the Limited Partnership.
- (iii) The acceptable variation of this opinion paragraph refers to the corporate power "to carry on business" rather than "to carry on **its** business **as presently conducted**". In both instances, this opinion addresses only "corporate power and capacity" issues and therefore it is not necessary to consider issues such as whether appropriate licences have been obtained. If the General Partner is governed by the *Canada Business Corporations Act* it will be necessary to ensure that the General Partner does not carry on one of the prohibited businesses set out in subsections 3(4) and (5) of that Act (i.e., the business of a bank, a company to which the *Insurance Companies Act* applies, or a company to which the Trust and Loan Companies Act applies).

4. Corporate and Partnership Action and Authorization

Estey Version:

- All necessary corporate action by the General Partner and all necessary action in accordance with the provisions of the Limited Partnership Agreement have been taken to authorize the execution, delivery and performance by the General Partner of the Agreement **by or on behalf of** the Limited Partnership.

Other Acceptable Variations:

- All necessary corporate action by the General Partner and all necessary action in accordance with the provisions of the Limited Partnership Agreement have been taken to authorize the execution, delivery and performance of the Agreement by the General Partner **in its capacity as general partner of** the Limited Partnership. [**Note:** This paragraph may be appropriate if the cover and execution pages refer to the General Partner **in its capacity** as general partner of the Limited Partnership.]
- All necessary corporate action by the General Partner for, on behalf of **and in the name of** the Limited Partnership and all necessary action in accordance with the Limited Partnership Agreement have been taken to authorize the execution and delivery of the Agreement by the General Partner for, on behalf of **and in the name of** the Limited Partnership and the performance by the Limited Partnership of its obligations thereunder.

- All necessary corporate action has been taken by the General Partner to authorize the execution, delivery and performance by it of the Agreement. All necessary action has been taken in accordance with the provisions of the Limited Partnership Agreement to authorize the execution, delivery and performance by or on behalf of the Limited Partnership of the Agreement.

Due Diligence Steps and Notes:

- (i) Review governing statute, articles, by-laws, unanimous shareholder agreement to confirm the necessary corporate steps that must be taken.
- (ii) Review form of corporate resolution that needs to be passed.
- (iii) Review Limited Partnership Agreement to identify any steps or approvals required and manner in which agreements can be executed on behalf of the Limited Partnership. Are there any restrictions as to the authority of the General Partner? Are there any restrictions as to the business of the Limited Partnership?

5. *Execution and Delivery*

Estey Version:

- The General Partner has executed and delivered the Agreement **on behalf of** the Limited Partnership.

Other Acceptable Variations:

- The General Partner has executed and delivered the Agreement **in its capacity as general partner of** the Limited Partnership.
- The General Partner for, on behalf of **and in the name of** the Limited Partnership, has executed and delivered the Agreement.

Due Diligence Steps and Notes:

- Review resolution to confirm signing authorities.
- Review form of signing lines to ensure proper set-up.
- Review Limited Partnership Agreement to determine if there are any special signing procedures/conditions.

6. *Enforceability*

Estey Version:

- The Agreement is a legal, valid and binding obligation of the Limited Partnership and of the General Partner, enforceable against each of them in accordance with its terms.

Other Acceptable Variation:

- The Agreement is a legal, valid and binding obligation of the Limited Partnership and of the General Partner **in its capacity as general partner of the Limited Partnership**, enforceable against each of them in accordance with its terms.

Not Recommended:

- The Agreement is a legal, valid and binding obligation, enforceable in accordance with its terms against all of the Partners of the Limited Partnership, subject to the terms of the *Limited Partnerships Act* (Ontario). [**Note:** This version would be misleading since the obligations of a Limited Partnership are not generally enforceable against the Limited Partners. This variation assumes the recipient is familiar with the terms of the *Limited Partnerships Act* (Ontario).]

Due Diligence Steps and Notes:

- Conduct clause-by-clause analysis of Agreement to determine which provisions require qualification.

Comments:

1. A limited partnership is not a legal entity.¹ However, as recently explained by the Court of Appeal, Rule 8.01(1) of the Rules of Practice (Ontario) "recognizes a partnership as a legal entity for the procedural purpose of suing or being sued in the firm name of the partnership. Although the choice remains whether a proceeding will be brought in the name of the partnership or in the name of the individual partners, it is improper to do both".²
2. The meaning and effect of the enforceability opinion is discussed by Estey on pages 140-144 of his book. One aspect of the enforceability opinion is that some remedy would be available to enforce the agreement in question. Although not part of an enforceability opinion, a judgment against a Limited Partnership may be enforced against:
 - (i) the property and assets beneficially held on behalf of the Limited Partnership (no matter who holds registered title);
 - (ii) the property and assets of the General Partner whether or not such property or assets are held on behalf of the Limited Partnership; and
 - (iii) the property and assets of a Limited Partner if it is determined that such Limited Partner is liable as a general partner.

¹ *Kucor Construction & Developments & Associates v. The Canada Life Assurance Company* (1998), 41 O.R. (3d) 577 at 588 (C.A.); *Re: Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at 39 (Ont. Gen. Div.).

² *Kucor, supra* at 593.

3. Some counsel insist that the Agreement be executed and delivered by the General Partner **in its own capacity** as well as in its capacity as general partner of the Limited Partnership. See Estey page 333 – "It would not be objectionable for it to do so", but it appears that it is unnecessary. The addition of these words would not affect or limit the enforceability opinion.
4. General view is that for third party legal opinions, counsel should not be providing limited liability opinions. These types of opinions are very fact oriented usually of a forward looking nature. Provisions of the *Limited Partnerships Act* (Ontario) setting out the liability of a limited partner (whether to the limited partnership or to the creditors of the limited partnership) are as follows:
 - (i) Section 16(1) of the Act states a limited partner is liable to the limited partnership for the difference, if any, between the value of money or other property actually contributed by the limited partner to the limited partnership and the value of money or other property stated in the record of limited partners as being contributed or to be contributed by the limited partner to the limited partnership. Also Section 9 of the Act provides that, subject to the Act, a limited partner is not liable for the obligations of the limited partnership except in respect of the value of money and other property the limited partner contributes or agrees to contribute to the limited partnership, as stated in the records of the limited partners;
 - (ii) Section 16(2) of the Act provides that a limited partner holds as trustee for the limited partnership:
 - (A) specific property stated in the Limited Partnership Agreement as contributed by the Limited Partnership but which has not in fact been contributed or which has been returned contrary to the Act; and
 - (B) money or other property paid or conveyed to the limited partner on account of the limited partner's contribution contrary to the Act;
 - (iii) Section 16(3) of the Act provides that where the limited partner has received the return of all or part of the limited partner's contribution, the limited partner is liable to the limited partnership or where the limited partnership is dissolved, to the creditors for any amount, not in excess of the amount returned with interest, necessary to discharge the liability of the limited partnership to all creditors who extended credit or whose claims otherwise arose before the return of the contribution;
 - (iv) Section 13(1) states a limited partner is liable as a general partner if, in addition to exercising rights and powers as a limited partner, the limited partner takes part in the control of the business; and
 - (v) Section 6(2) provides where the surname or a distinctive part of the corporate name of the limited partner appears in the firm name (unless it is

also the surname or a distinctive part of the corporate name of a general partner) the limited partner is liable as a general partner to any creditor of the limited partnership who has extended credit without actual knowledge that the limited partner is not a general partner.

5. Counsel needs to address deeds under seal and whether qualification is appropriate (express authority issue for General Partner). [**Note:** This issue is currently being reviewed.]