THIRD PARTY RELIANCE ON YOUR OPINION LETTER

Michael Disney

Davies Ward Phillips & Vineberg LLP

Law Society of Upper Canada

Continuing Professional Development

5th Annual Business Law Summit

May 7, 2015

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Michael Disney[1]

1. Introduction

What is the title of this paper talking about? What is an "opinion letter" and how do third parties place reliance on it? A "legal opinion" may mean different things, depending on the context. When clients ask their lawyers for an "opinion" on something, what they mean is simply legal advice on the point at issue. However, when business lawyers refer to an "opinion", they usually mean something else, the practice of providing a legal opinion in the form of a letter to a third party on their client's behalf, typically at the closing of a transaction (more often than not a financing of some kind). Of course it's the third party, not the client, who wants and requests the opinion letter. In an ideal world, the client would prefer to avoid paying for an opinion that is of no benefit to it (other than in the sense that it must be provided in order to close the transaction).

A client who suffers loss as a result of their lawyer's negligent advice, whether expressed as a legal opinion or otherwise, has a cause of action against the lawyer in both contract and tort.[2] However, lawyers providing legal opinion letters on behalf of their clients to third parties generally believe that there is no contractual relationship between them and the recipients of such opinions.[3] Reasonable reliance on a representation that turns out to be wrong, as well as damage caused by such reliance, is a precondition to tort liability for negligent misrepresentation.[4] It seems self-evident that a third party legal opinion letter expressly invites reliance on it by the addressee. If such reliance was not contemplated, why would the addressee have requested the opinion and the lawyer providing it agreed to give it?[5]

So what is there to be said about third party reliance on opinion letters? Quite a bit, actually. Business lawyers are aware of, and try to prevent, the possibility of reliance on an opinion letter

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1 The author wishes to express particular gratitude to his partner Gerold Goldlist, to his other partners and colleagues and to the members of the Toronto Opinions Group for many stimulating discussions of opinion matters over the years, which have contributed immeasurably to the author's "opinions about opinions". However, the "opinions about opinions" expressed in this paper are solely those of the author.

2 *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147.

3 As will be seen later in this paper, this is not necessarily so obvious to judges.

4 *Hercules Managements Ltd.* v. *Ernst & Young*, [1997] 2 S.C.R. 165.

5 However, there is very little authority in Canada to date for this apparently simple proposition. The subject is discussed in detail in Wilfred M. Estey, *Legal Opinions in Commercial Transactions*, 3d ed. (Markham: LexisNexis, 2013), ch. 10. This text should be consulted by any reader wishing to pursue in greater depth any of the topics discussed in this paper.

by third parties other than the addressees (the "who" of third party reliance). A third party addressee might also claim that it relied on an opinion letter for purposes or in ways that that the lawyer giving it did not intend (the "how" or "what for" of third party reliance). For example, the recipient might allege that it relied on the opinion for assurance that the transaction was *bona fide*,[6] or that the transaction documents achieved the recipient's purposes in entering into the transaction[7] (neither of which the opinion explicitly says, but which the recipient might argue are implicit in it absent some express disclaimer). Yet another possibility is that third parties may claim to have relied on written advice given by lawyers to their own clients, which may seem far-fetched, but there are circumstances in which this is a definite danger. This paper first discusses the more familiar issues that often arise in practice of trying to define the permitted reliance on an opinion letter, before turning to wider issues of how third parties may try to assert reliance on a lawyer's legal advice regardless of what the lawyer may have intended.

It might be asked why business lawyers are so concerned about limiting the scope of reliance on their opinion letters. Are they always worried that their opinions may be wrong? While lawyers may try harder to negotiate narrow restrictions on reliance if an opinion is difficult to give, particularly if it is based on extensive factual assumptions that may not apply to another third party in different circumstances (so that inviting reliance by such another third party might be misleading), most of the time lawyers do not expect to be sued on their opinions. However, if the unexpected happens, it is better to be sued by one party, the addressee of an opinion letter who is at least known to the lawyer who gave the opinion, rather than by multiple unknown third parties who may claim to have relied on the opinion letter for purposes the lawyer never intended.

2. Express Reliance Limitations in Third Party Legal Opinions

Appendix A to this paper sets out the outer framework of a typical opinion letter, in which the firm providing the opinion letter tries to define the "who" and "how" of permitted third party reliance on the opinion letter. Since a third party legal opinion is always given in the form of a letter, the party to whom the letter is addressed would logically be the "who" that is entitled to rely on it.[8] However, it is standard practice also to include a paragraph at the end of a third

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[6] The *Dechert* case, discussed below at note 17, is an example of such purported reliance.

[7] Such as obtaining first ranking security for its loan, or that the transaction would be characterized in accordance with the parties' stated intentions, *e.g.*, as a sale rather than a financing.

[8] In certain cases, an opinion may be given to parties who are too numerous to be conveniently listed at the beginning of the opinion, so that the opinion might be addressed, *e.g.*, to "the Purchasers of Units (as respectively defined below) listed in Schedule A". In other cases, the identity of some of the parties intended to be able to rely on the opinion may not have been ascertained at the time it is given, so that the opinion might be addressed to, *e.g.*, "the Lenders, as defined in the Credit Agreement (as defined below)". Arguments often arise in giving opinions as to whether the opinion recipient's counsel should also be an addressee of the opinion letter. This is usually unnecessary, unless such counsel is giving an

party legal opinion letter expressly limiting who can rely on it, in order to protect against claims being made (whether on the basis of negligent misrepresentation or otherwise) from parties who are not addressees of the opinion but may have become aware of the opinion and allege that they have relied on it.

The opening paragraphs of an opinion letter, by describing the client or clients for whom the firm giving the opinion is acting, the transaction in respect of which the opinion is given and the firm's role in the transaction, are important in defining the "how" of reasonable third party reliance on the opinion letter. The reliance limitation paragraph at the end of the opinion also attempts to narrow the "how" scope of the addressees' permitted reliance on the opinion – reliance must be for purposes of the particular transaction in connection with which it was requested. For example, the addressee can't decide that it will also rely on the opinion in connection with a further transaction that it may enter into with the same party, or give the opinion to someone else and invite them to rely on it, unless the law firm that gave the opinion agrees to permit such further reliance.

Where a third party opinion letter is given, usually the lawyer has represented and advised the client in connection with the transaction and giving the opinion to the other party is merely part of the lawyer's services to the client. However, that is not always the case. Sometimes the firm is doing little or nothing in connection with the transaction other than to give an opinion. For example, the transaction may be occurring primarily in another jurisdiction – Ontario counsel may be asked to give an opinion on a guarantee given by a Canadian subsidiary in connection with a financing by its U.S. parent with a syndicate of U.S. lenders. Ontario counsel may have no input into the drafting of the loan documents and (for cost reasons) may be discouraged from reviewing the credit agreement, which will of course be governed by U.S. law in any event. In such circumstances it is advisable to make clear in the opinion letter the firm's limited role. That helps to discourage any subsequent purported "how" reliance on the opinion for purposes beyond its intended scope. An example of such alternative language is set out in Appendix A.

"Reliance" is also used in the context of opinion letters to refer to something quite different, the documents and examinations that the firm giving the opinion has relied on in reaching its conclusions. However, there is a connection between the scope of this reliance and the purposes for which third parties may claim that they have reasonably placed "how" reliance on the opinion letter. Absent any indication to the contrary in the opinion letter, it may be

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opinion to its own client which will rely on the opinion letter, and potentially may expose the firm giving the opinion letter to a third party claim if the recipient's counsel is sued by its own client. There is a practice in some types of multi-jurisdictional transactions (especially securities offerings) of "wrapping" the opinions of "local" counsel in one "global" opinion letter – of course the firm giving the latter must be able to rely on the "local" counsel opinions it is "wrapping" into its own. Whenever an opinion letter is addressed to or permits reliance by another law firm, it is reasonable for the firm giving the opinion to ask either that such reliance be very specific (limited, for example, to certain opinion paragraphs), or that it be allowed to review and approve the manner in which its opinion is being relied on.

presumed by the recipient that the firm giving it has an established relationship with the client and that its willingness to give the opinion provides some general comfort that there are unlikely to be problems unknown to the law firm that could undermine the correctness of its opinions.[9] Of course, in fact the firm giving the opinion may have no prior relationship with the client, know little about it and be instructed to limit its corporate due diligence on the client as much as possible, for cost reasons. Again, if that is the case, it helps to forestall inappropriate alleged "how" reliance on the opinion letter if the firm makes explicit the limited review of documents on which it has relied. Appendix A includes an example of alternative wording that a firm might use to make clear that it has conducted only such a limited review.

Appendix B sets out alternative examples of the express reliance limitation that is placed at the end of an opinion letter. One of the issues that often arises in negotiating such a limitation is that the opinion recipient may request that assignees be entitled to rely on the opinion as well. This is most common in the context of a loan transaction, where syndication or participation of portions of the credit facility to other lenders is often expressly provided for in the loan agreement. In this case, permitting reliance on the opinion by other financial institutions that may become lenders under the loan agreement is usually necessary and reasonable. However, should permitting reliance by assignees continue indefinitely? It is one thing to permit reliance by other lenders during a syndication period, quite another to extend it to a vulture fund that purchases the indebtedness after it goes into default.

In other types of transactions, unless there is some specific reason why an assignment by the opinion recipient of the benefit of the transaction on which the opinion is being given is contemplated or likely (*e.g.*, a purchase by a private equity firm that intends to sell the business after a few years), it would usually not be necessary or appropriate to provide for reliance on the opinion by assignees. If it is appropriate to permit reliance on the opinion by assignees, it is preferable to ensure that only assignees specifically contemplated by the transaction documents and who become assignees in accordance with the procedure provided for in such documents be permitted to rely on the opinion, rather than referring to assignees more generally. It may also be desirable to exclude expressly persons who become assignees after a default has occurred. The second alternative in Appendix B illustrates this approach.

Another issue that often arises in negotiating an opinion reliance limitation is whether it should specify parties to whom the opinion may be disclosed, even if they are not entitled to rely on it. The third alternative in Appendix B sets out a comprehensive list of such parties.

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9 For example, if the firm regularly assists the client in maintaining its corporate records and preparing resolutions, the firm may have good reason to be confident that a certified copy of a directors' resolution signed by an officer of the client accurately reflects a resolution that was in fact passed by a duly elected board of the client.

In some transactions, it may be necessary to provide a means for a party who is not an addressee of an opinion letter to rely on it. For example, a lender may request that it be able to rely on opinions given in connection with an acquisition financed by the lender, or a contemporaneous offering of equity securities by the borrower. In this case, the firm providing the opinion may furnish a "reliance letter" to the lender, an example of which is set out in Appendix C.

3. Do Courts Understand the Limitations on the Duties to the Opinion Recipient of a Firm Giving a Third Party Legal Opinion?

The time and effort that business lawyers put into negotiating the wording of reliance limitations in opinion letters reflect a faith that such limitations, if clearly expressed, will be effective. Is it clear that such faith is justified? Business lawyers believe that a firm giving a third party opinion on behalf of its client is not acting as counsel to the opinion recipient and therefore does not owe similar duties to the addressee as it owes to its client, although it will be liable to the opinion recipient for negligent misrepresentation if its opinion is wrong. However, judges may not always share this understanding of the relationship between opinion giver and recipient. The view from the benches is not necessarily the same as the view from the trenches.

In *National Bank of Canada* v. *Clifford Chance*,[10] Davies, Ward & Beck (as it then was) provided an opinion to lenders in an Olympia & York financing. Davies relied solely on a Clifford Chance opinion for certain matters of English law (which is typical in "wrapping" an opinion given by counsel in another jurisdiction). The Clifford Chance opinion (as repeated by Davies) incorrectly stated that an English O&Y subsidiary was a limited company, whereas in fact it was an unlimited liability company.[11] Since the subsidiary's shareholders thus were liable for its obligations, a pledge of their shares did not give the lenders the security they expected. Davies was held not to be liable for Clifford Chance's error, because it had expressly relied solely on Clifford Chance's opinion.

It is safe to assume that both Davies and Clifford Chance thought that they were acting solely for their client, O&Y, in giving the opinions to the lenders. One may suspect that the lenders' transaction counsel – as distinct from their litigation counsel – shared that understanding. However, Ground J. took the surprising view that there was a solicitor-client relationship between Clifford Chance and the lenders (and, by implication, between Davies and the lenders):

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10 (1996), 30 O.R. (3d) 746 (Gen. Div.).

11 The most serious errors in opinions often seem to arise not in making difficult legal judgments, but in getting simple "legal facts" right. The U.S. decisions in *Dean Foods Co.* v. *Pappathanasi* (2004), 18 Mass. L. Rep. 598 and *National Bank of Canada* v. *Hale & Dorr LLP* (2004), 17 Mass L. Rptr. 681 similarly involved a readily avoidable factual mistake in an opinion, failing to disclose litigation in which the firm was acting for the client.

"… Clifford Chance was retained by Davies to provide an opinion on [the English company] to Davies and [lenders' counsel] and to the plaintiff banks. By accepting the retainer, Clifford Chance agreed to undertake such work for each of the parties to whom the opinion was to be delivered. …

… the facts … constitute a retainer of Clifford Chance to provide legal services to the plaintiff banks as well as to Canadian counsel and accordingly a solicitor-client relationship is established. It was evident to Clifford Chance that the plaintiff banks were relying upon it for the opinion with respect to the validity and enforceability of the pledge of the shares of [the English company] and, in this situation, it is not untenable to conclude that the circumstances gave rise to a fiduciary relationship between the plaintiff banks and Clifford Chance."[12]

These *dicta* of Ground J. were never tested, because the procedural issue that he decided put an end to the litigation in Ontario.[13] However, the prospect that a firm giving a third party legal opinion might owe both solicitor-client and fiduciary duties to the recipient, even though the recipient is represented by its own sophisticated counsel, is far from reassuring. One would hope that on further reflection a court would recognize the inherent conflict that this would create[14] and, at the very least, would hold that any such duties are limited by the express terms of the opinion and the adversarial context in which the opinion is negotiated and provided.

It would be futile to speculate on why a judge's perspective on a third party legal opinion may be so different from that of the business lawyers who habitually give and ask for such opinions. However, third party legal opinions represent something of an anomaly in the broader legal world. Rarely in any other context do lawyers give what looks like legal advice not to their own clients, but to opposing parties. It is seldom asked, and may be difficult to answer, precisely what rationale underlies the practice of giving third party legal opinions.[15] Is it so surprising

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12 *Supra*, note 9, at 760.

13 As always, the factual context of the decision is important. The opinion given by Clifford Chance was obviously wrong, obviously negligent (even if it originated only in failing to catch a typographical error) and had obviously been relied on to the lenders' detriment. Therefore, that Clifford Chance owed duties to the opinion recipient, or that they had been breached, was not in issue. In a case where these matters were fully argued, a judge would probably have been less likely to go astray and Ground J.'s comments can be viewed as having been made *per incuriam*.

14 Such as to disclose to the recipient any facts about the client likely to be material to the recipient in connection with the transaction, which cannot be reconciled with a lawyer's duties of confidentiality to the client.

15 Third party legal opinions may be primarily representations made to the opposite party as to matters of law or mixed fact and law regarding the lawyer's client that are particularly within the lawyer's knowledge and expertise. Basic "corporate" opinions as to the client's existence and capacity, its due authorization and execution of the transaction documents, no breach of its constating documents or applicable laws by entering into the transaction and necessary governmental approvals having been obtained are of this kind. The opinion letter may also be seen as confirming to the opposite party the truth of the client's representations as to these matters. This need not be regarded as the lawyer assuming duties to the

that judges who in most cases have no personal experience of such practice, and no reason to uphold it or even to make efforts to understand it, may see a relationship between the lawyer giving a third party legal opinion and the recipient of the opinion that the lawyer did not intend? Judges are understandably sensitive to any possibility that they might be seen as protecting other lawyers. Some other decisions discussed later in this paper will further illustrate, in the author's view, that Canadian courts are on the whole not inclined to give the benefit of the doubt to fellow lawyers.

If counsel giving a third party legal opinion owed broader duties to the recipient, it would particularly call into question whether limitations on the purposes for which the recipient could rely on the opinion (the "how" aspects of reliance) would be effective. A particularly interesting example of an opinion recipient (unsuccessfully) arguing that it should be able to rely on the opinion for assurance about the transaction not explicitly conveyed by the opinion is the New York decision in *Fortress Credit Corp.* v. *Dechert LLP*. In that case, a law firm acting as "special corporate counsel"[16] to the borrower gave an opinion to the lender on loan documents which (unbeknownst to the law firm) were forged. However, the court rejected the claim that the firm had a duty to the opinion recipient to verify with its "client" the borrower the legitimacy of the transaction:

> "… the opinion, by its very terms, provided only legal conclusions upon which plaintiffs could rely. The opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts."[17]

Business lawyers would be inclined to view as outrageous the implicit claim in *Dechert* by a sophisticated lender (represented by its own equally sophisticated counsel) that it was entitled to rely on an opinion from a reputable law firm in respect of the borrower as a guarantee against fraud that excused it from shortcomings in its own due diligence. However, the claim made by Fortress in *Dechert* might not have been so absurd had the lender been able

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opposite party. A lawyer has duties to uphold the administration of justice by, among other things, not assisting a client to perpetrate a fraud or deception, and the opposite party obtains indirect comfort from the lawyer's involvement and the expectation that the lawyer will keep the client honest at least in matters the lawyer is aware of from the work done to provide the opinion letter.

16 The word "special" is sometimes used in third party legal opinions to signal to the recipient that the firm giving the opinion does not have an existing relationship with the client in respect of which the opinion is given. In *Dechert*, the firm was also indicating by the word "corporate" that it had not advised the borrower in connection with the loan transaction, but was addressing only the matters dealt with in the standard corporate opinions in the opinion letter. In any event, the firm had been retained to provide such opinions at the lender's insistence, so this limiting wording merely confirmed what the lender already knew.

17 89 A.D.3d 615 (N.Y. App. Div. 2011) at 617, aff'd. 19 N.Y.2d 805 (N.Y.C.A. 2012).

reasonably to assume that the law firm regularly represented the borrower and had advised it in respect of this particular transaction. The real basis for the court's decision, not articulated explicitly, may have been that a sophisticated lender represented by its own counsel should not be able to shift the risk of fraud to the firm giving an opinion purportedly on behalf of the borrower, where the lender and its counsel knew that the firm had no existing relationship with the borrower and had been retained solely to give the opinion.

Since the court in *Dechert* rested its conclusion on the standard express assumptions and limitations in opinion letters (often regarded as mere "boilerplate"), it provides some reassurance to business lawyers that clarifying explicitly the limitations on the scope of an opinion is not wasted effort, at least when negotiated with a sophisticated party represented by counsel and presumably fully capable of understanding the implications of what it has agreed to. However, the decision gives no reason to suppose that the court would have reached the same conclusion if these assumptions had not been made explicit in the opinion, but the law firm had instead argued that they were "customary opinion practice" that a sophisticated lender should have been aware of, or should have had explained to it by its own counsel. Business lawyers may assume that because they understand between themselves what opinions mean (and do not mean), that should be sufficient. Particularly in the U.S., this assumption has been expressed (by lawyers) as a concept of "customary practice", that limitations on the scope of opinions and the due diligence underlying them need not be made explicit in the opinion letter, since business lawyers all understand what they are. Although "customary practice" has been recognized in U.S. case law[18] as well as extensively discussed in commentary,[19] it has not been considered by Canadian courts in relation to legal opinions.

There are grounds for skepticism whether Canadian courts would necessarily accept an implied "customary practice" limitation in opinions. In determining whether a lawyer has failed to meet the relevant standard of care in advising a client, our courts have repeatedly held that following "customary practice" may not be enough to avoid liability.[20] While it can be argued that third party legal opinions are different, in that it should be the duty of the recipient's counsel to explain the opinion to its client, it is uncertain if that view would prevail. After all, an opinion is addressed directly to the client's counterparty, which is invited to rely on it. A court might expect an opinion to say explicitly what it means, in terms the recipient can understand – as did the U.S. court in *Dechert*.

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18 *Dean Foods*, *supra*, note 7.

19 See the overview in Estey, *supra* note 5, at pp. 3-8 and see also pp. 675-77 and 718.

20 See, *e.g.*, *King Lofts Toronto I Ltd.* v. *Emmons*, 2013 ONSC 6113 at para. 59: "if the standard of a reasonably competent solicitor is insufficient to respond to a known risk, then the law will require that the solicitor meet a higher standard and provide services that do respond to the risk".

4. The Reliance Limitation under Threat? – the Charitable Donation Tax Credit Class Actions

The largest and most recent body of Canadian case law on legal opinions has been generated by class actions against, among others, law firms that provided tax opinions on charitable donation tax credit schemes. These cases have provided an unpleasant reminder for lawyers that while claims based on legal opinions may usually fall into the recognized category of negligent misrepresentation, the potential categories of negligence claims for economic loss are not closed. Novel theories of how lawyers giving opinions may bring themselves into sufficient proximity with parties to whom the opinions were not addressed and who were not permitted by the terms of the opinions to rely on them, so as to create a duty of care to such parties, have been found sufficient by the courts for purposes of certification. Once certified, such actions are likely to be settled before trial, so these theories of liability may ultimately remain untested. Taken at face value, they might call into question the effectiveness of express reliance limitations in opinions, both as to "who" can rely on the opinions and "how" they may rely on them.[21]

The tax opinions given in most of these cases were not on their face third party legal opinions. That is, they were not opinions addressed to investors in the schemes, included in offering documents or otherwise provided to prospective investors, assuring them that the intended tax treatment should be recognized by the CRA. Rather, they were tax opinions provided to the law firms' own clients, the promoters of the schemes, containing express reliance limitations.[22] However, since the opinions addressed not only the tax effect of the transactions in regard to the addressees, but also in regard to the investors, they could be viewed as a kind of third party legal opinion. Because the promoters of the schemes generally made sure that investors were aware that positive tax opinions had been obtained, if the firms giving the opinions had hoped to preclude investor reliance on their opinions, they were to be disappointed.

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21 This discussion concentrates on Ontario decisions, but similar actions based on tax opinions have arisen elsewhere in Canada (*Schneider* v. *Royal Crown Gold Reserve Inc.*, 2012 SKQB 111, aff'd. 2013 SKCA 1) and in the U.S. (*Kline* v. *First Western Government Securities, Inc.*, 24 F.3d 480 (3d Cir., 1994)).

22 In *Lipson* v. *Cassels Brock & Blackwell LLP* (2011), 108 O.R. (3d) 681 (S.C.J.), rev'd. (2013), 114 O.R. (3d) 481 (C.A.), however, the opinion stated that it might be relied on "by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by this opinion." If such an opinion were adequately qualified, a firm might be less likely to be liable to investors who had actually read it or had the opportunity to read it, as compared with circumstances in which the opinion was given only to the promoter, but the promoter had represented (or misrepresented) it to investors as simply a positive tax opinion. Because none of these actions has yet proceeded to trial, the decisions also do not answer the ultimate question whether an opinion that the CRA should not ultimately succeed in challenging the desired tax characterization of the transaction misled the recipients merely because the CRA in fact did challenge it. It is an article of faith among business lawyers that an opinion is exactly that – not a guarantee that the lawyer's view will necessarily prevail. It may be doubtful whether a court would be persuaded that a retail investor's reliance on an opinion on a tax shelter should be limited by this understanding.

One such charitable donation tax credit scheme was succinctly described by Strathy J. in *Cannon* v. *Funds for Canada Foundation* in the following terms:

> "When Michael Cannon heard about the Donations for Canada Gift program – an opportunity to obtain a $10,000 charitable tax credit in return for a $2,500 donation – he thought it was 'too good to be true'.
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> It was.
>
> A few years later, his tax returns were reassessed by Canada Revenue Agency … and he had to repay his deductions, with interest. The only thing he received for his 'donation' was a tax bill."[23]

Typically, the donors like Mr. Cannon on whose behalf such class actions have been brought did not read or even receive the tax opinion, so that the reliance on the tax opinion necessary for a conventional negligent misrepresentation claim could not be established.

Plaintiffs' lawyers have been uniformly successful, at least at the certification stage, in making an "end run" around this problem by pleading that the law firms giving the tax opinions nonetheless owed the donors a duty of care in negligence based on other facts. If established, such a duty would not be negated by the express reliance limitations (and other express qualifications and limitations) in the tax opinions, since the donors never saw the opinions. The facts found to support the necessary "proximity" between law firm and donors to support such a duty of care in negligence were not identical in all these cases. In the *Cannon* case the court outlined them as follows:

> "The Lawyers rely on the bolded warning in the Opinion Letters stating, "**We assume no responsibility to Donors.**" As Cannon never saw the Opinion Letters and no donor was supposed to see them, this factor does not go to limit the scope of the representations made to the donor. By the same token, the fact that the Comfort Letters[24] contained statements that the donor's financial advisor was permitted to view the Opinion Letter 'without responsibility on our part, for his or her sole use in assessing the Program and in determining its suitability to a donor's specific circumstances' does not go to limitation of the Lawyers' responsibility to the donor … .
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> It was reasonably foreseeable that if Harris [the author of the tax opinion] was negligent in his advice to [the promoter], and the Gift Program did not comply with the *Income Tax Act*, donors such as Cannon would suffer harm. The evidence supports the conclusion that Harris knew, or ought to have known, that his Opinion Letters, and his

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23 2012 ONSC 399, at paras. 1-3, leave to appeal refused (2012), 112 O.R. (3d) 641 (Div. Ct.).

24 The "Comfort Letters" in question were not the actual tax opinions, but lawyers' letters assuring investors that tax opinions had been provided.

> Comfort Letters, were integral parts of the marketing of the Gift Program and that the whole purpose of his Comfort Letters was to assure donors that he had reviewed the Gift Program and that it was, in his words, *bona fide*.
>
> In providing the Comfort Letters, his photograph and his biography, and permitting them to be used in the marketing of the Gift Program, Harris allowed his name and reputation to be put on the line in support of the Gift Program and in so doing became an integral part of the sales pitch. He knew, or ought to have known that his favourable opinion concerning the Gift Program was being used to sell the Gift Program to donors. He could reasonably foresee that the donors would suffer a loss if he was negligent in the preparation of his opinion." [25]

Courts have also not been impressed by arguments raised by the defendant law firms that such a duty of care would "open the floodgates" to unlimited liability on their opinions. Strathy J. observed in the *Cannon* decision:

> "… are there residual policy considerations that would negative the duty of care? These may include such considerations as … whether recognizing a duty of care would create the spectre of unlimited liability to an unlimited class … .
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> The Lawyers rely primarily on the first consideration – they say that imposing legal obligations on lawyers in these circumstances will impact the ability of lawyers to freely advise their clients and the ability of clients to disclose the fact that advice has been received. They say that this is an indeterminate liability to an indeterminate class 'in circumstances where the Law Firms took active and reasonable steps to avoid any such potential exposure arising.' …
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> In this case, the concern is not that a tax opinion was provided to [the promoter]. The concern is that the opinion was provided with the knowledge that [the promoter] would advertise its existence to potential donors and would use its author as part of its marketing program. Imposing liability in these circumstances does not interfere with the ability of lawyers to freely advise clients. It may, however, cause lawyers to exercise caution or control when they give an opinion to a client with knowledge that the client proposes to distribute it to numerous third parties for the business purpose of selling the very product of the lawyer's advice. It seems to me that this is a policy reason that would support, rather than limit, the existence of a duty."[26]

Another of these class actions, *Robinson* v. *Rochester Financial*, is of particular interest, because it has been settled by the defendant law firm, Fraser Milner Casgrain LLP ("FMC")). In the certification decision, Lax J. commented that in a claim based on negligence rather than

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25 *Ibid*., at paras. 537-39.

26 *Ibid*, at paras. 543-45.

negligent misrepresentation, the reliance limitations in the tax opinion would not protect the opinion giver from liability to donors who did not even read, much less rely, on the opinion:

> "The claim is not pleaded on the basis that the plaintiffs read or relied upon the FMC letters, but on the basis that FMC issued the opinion letters with the expressed intention that they be relied upon by the gift program defendants and knowing that the gift program defendants would rely upon and publish the existence of the opinions in promoting the gift program.
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> FMC points out that the letters contained express qualifications on the opinion and authorized reliance by a very limited category of individuals and disclaimed reliance by any other person, without FMC's prior written consent. The letters state:
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>> 'The opinions expressed in this letter may be relied upon by you, and by a Donor who is provided a copy of this letter by you, or the Donor's authorized representative, and may not be relied on by anyone else without our written permission.'
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> …
>
> The allegation is not that FMC provided the letters intending that they be read and relied upon by the plaintiffs and proposed class members, although some may have done so, but rather that FMC provided the letters (1) with the intention that they be used by the gift program defendants in the manner the plaintiffs allege, namely to market the program as one in which proposed class members would receive a charitable tax receipt recognized by CRA; and (2) with the intention and knowledge that the existence of a tax opinion would inform the decision of class members about whether or not to participate in the gift program. …
>
> To put this in a different way, the reliance the plaintiffs allege is not on the tax opinion per se, but on there being a tax opinion that FMC intended and knew would be used by the gift program defendants to support the legitimacy of the gift program for income tax purposes and would be relied upon by the class members in deciding whether or not to participate. I would therefore not give effect to FMC's argument that this is a negligent misrepresentation claim 'dressed up' as a negligence claim. It is properly pleaded as a negligence claim and the essential elements of the cause of action – duty, foreseeability, proximity, breach, and damage – are present."[27]

In refusing leave to appeal from Lax J.'s granting of certification, Dambrot J. was not impressed by the paradox that law firms might have broader liability for their legal opinions to parties who were not permitted to rely on them than to the intended recipients:

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27 2010 ONSC 463, at paras. 21-22, 24-25.

> "Fraser raised the concern that this judgment is dismaying to lawyers. It signals to them that they may be in greater jeopardy of being sued by persons who are not their clients, and have not read their opinions, than by clients who have read their opinions. While I have some sympathy for this concern, I do not think that the mere decision to let this action stand, and to certify it as a class action should unduly trouble the profession."[28]

For obvious reasons, law firms are likely to be the defendants of both first and last resort in claims of this nature. In approving a settlement of the *Rochester Financial* action, Strathy J. referred to FMC as the "last party standing". As such, however tenuous in law its liability to the donors may have been, FMC and its insurers were the only defendants who could fund the settlement:

> "There is no realistic prospect of recovery from any of the parties directly responsible for the Gift Program. This leaves the defendant law firm … as the last party standing. It provided legal opinions that the Gift Program complied with the applicable tax legislation and that the tax receipts issued by the Banyan Tree Foundation should be recognized by C.R.A.
>
> As a result of mediation before a former judge of this Court, class counsel negotiated a settlement, subject to Court approval, of class members' claims against FMC for the total sum of $11 million.
>
> …
>
> The settlement is clearly a compromise, but liability of FMC was a very contentious issue. FMC would argue, if the matter proceeded to trial, that its opinions were consistent with the state of the law as it existed at the time and that the subsequent hardening of the position of C.R.A. and, it would appear, the appellate case law, was not something that could have been foreseen at the time. There were other issues that would also be brought into play by FMC, including whether class members relied on its opinions. A significant discount of the claim was warranted to reflect the real risk that the claim against FMC would not succeed."[29]

While it may be reassuring that the *Rochester Financial* settlement decision does not assume that the negligence theory on which the claim was based would ultimately have been tenable, this group of cases provides a very legible road map for claims to be made based on legal opinions that were not intended by the firms giving the opinions to be relied on by the parties making the claims, despite language in the opinions intended to exclude such extended reliance. While one might assume that a court would be more receptive to such claims when

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28 *Robinson* v. *Rochester Financial Limited* (2010), 262 O.A.C. 148 (Div. Ct.) at para. 26.

29 *Robinson* v. *Rochester Financial Limited*, 2012 ONSC 911 at paras. 9–10, 18.

made on behalf of naïve retail investors sold dubious tax gimmicks by sleazy promoters, the theories of liability advanced in these actions cannot be confined to such situations.

However, there are few other contexts in which, as a practical matter, a law firm is as likely as in the charitable donation tax credit cases to sail into a perfect storm of potential liability to large classes of persons who allegedly relied on the firm's legal opinion, or at least on the fact that it was given (where both the "who" and "how" of reliance on the opinion become difficult for the law firm to control, or even predict). While legal opinions are sometimes incorporated into prospectuses or otherwise intentionally provided to large groups of investors, they usually address less controversial matters. Because law firms giving opinions in securities offerings know that such opinions will be relied on broadly, they are unlikely intentionally to give "aggressive" opinions. It is difficult to imagine that investors could credibly allege any causal connection between a loss on their investments and reliance on such opinions. In the charitable donation tax credit cases, the firms providing the tax opinions may have assumed that they were protected both by the reliance limitations in the opinions and by the "reasoned" nature of their opinions, which did not guarantee that the schemes could not be successfully challenged by CRA. However, because the opinions directly addressed the tax benefits of the schemes to the investors, the firms automatically became a prime target once those tax benefits were denied by the CRA.

5. Opinions (and Other Assurances) Given to Unrepresented Parties

For most business lawyers, courts imposing on law firms giving opinions a broader duty of care in negligence to large groups of alleged victims, as in the charitable donation tax credit claims, may be less of a concern than the inclination of Canadian courts to find broader duties owed to the actual recipients of third party legal opinions than the lawyers giving them believe that they have. While the *dicta* of Ground J. in *Clifford Chance* may not be likely to find wide acceptance in other cases where sophisticated parties receiving legal opinions were represented by their own counsel, a court might not hesitate to impose such a broader duty on a firm that provides an opinion to a sophisticated but unrepresented party, based on decisions like those that will be discussed below. That is not an unusual occurrence. Financial institutions often try to save money in smaller transactions based on their standard-form documentation by not retaining their own outside counsel, but asking the borrower's counsel to provide an opinion.[30] Even though the lender is a sophisticated party that made a conscious decision not to retain its own counsel, might a court consider that in these circumstances the borrower's counsel has assumed a broader responsibility to the lender than merely to deliver a correct opinion? If so, hidden conflicts and risks may lie in wait for the borrower's counsel.

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30 Of course, borrower's counsel may try to resist giving an opinion in such circumstances. There have also been periodic attempts by lawyers' professional bodies to discourage this practice, or at least aspects of it (these are discussed by Estey at pp. 721-23). The problem, of course, is that a financial institution usually has more negotiating leverage than a borrower, and borrower's counsel has a duty to assist their client if they can reconcile providing the opinion with their professional obligations.

For example, the bank may provide a sample form of the opinion it wants, which may include inappropriate requests like an opinion on the priority of its security. It is tempting for borrower's counsel simply to deliver a more limited opinion to the bank, hoping that the bank will accept it without comment, rather than expressly refusing to give an opinion in the form requested, which is unlikely to advance the client's interest in completing the financing as smoothly as possible. It would be prudent for the borrower's counsel explicitly to draw to the bank's attention that the opinion is in a different form from that requested and that the bank should consult its own counsel for advice on the significance of the differences, but this would conflict with the client's interest in "not rocking the boat". If borrower's counsel stays silent, could the bank later complain that it should have been advised by such counsel that it might not have priority over other claims against the borrower? To the average practitioner, this might seem fanciful, yet the case law suggests that it would not be an impossible claim. Even more troubling, the case law suggests that if a lawyer acting for a borrower acquiesces to any request of the lender to assist it in any way, however trifling, the lawyer may be regarded by a court as acting for both parties and have assumed solicitor-client obligations to the lender as well.

It is unlikely that a court would be moved by the fact that the bank is a sophisticated party in the business of making similar loans on a daily basis, with ample access to its own in-house legal expertise even in a transaction that it decided did not justify retaining outside counsel. In the Supreme Court of Canada decision in *Central Trust Co.* v. *Rafuse*,[31] solicitors acting for a purchaser of shares certified in a reporting letter to the lender financing the purchase that a mortgage granted by the target company to secure the loan was a first charge on the company's property (this was not a third party legal opinion of the usual kind, but was functionally analogous to one). The loan later went into default, but the mortgagor company successfully argued that the mortgage was void because it contravened the prohibition in the Nova Scotia *Companies Act* on financial assistance in connection with a purchase of shares.[32] The solicitors were held to owe a duty of care to the lender and to have breached it. The court rejected an argument that the lender was contributorily negligent because several of its officers involved in approving the loan who were qualified lawyers had equally missed the issue.

A more troubling Supreme Court of Canada decision is *Granville Savings and Mortgage Corp.* v. *Slevin*, because both the alleged negligence of the law firm and the basis for finding that the firm was acting for the lender as well as the borrower were much more tenuous than in *Central Trust*. In *Granville Savings*, a law firm acted for the borrower, Smith, in connection with a mortgage loan from Granville. Granville did not retain its own counsel. However, Granville asked the law firm acting for Smith to provide at closing a certificate of the land titles registrar showing its mortgage as a first charge (not, as in *Central Trust*, a certificate or letter from the

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31 *Supra*, note 2.

32 This illustrates that giving a third party legal opinion may give rise to a conflict of interest if it is later in the client's interest to dispute the legality or enforceability of the transaction on which the opinion was given.

law firm). The law firm did so, but the certificate did not show certain prior judgments against Smith known to the lawyers, which the lawyers (in common with most other practitioners in Manitoba at the time) thought did not rank ahead of Granville's mortgage, but which a court later held had priority.[33]

Granville sued the lawyers and succeeded at trial, the court finding an "implied retainer" between Granville and the law firm.[34] On appeal, Huband J.A. (speaking for the majority of the court) rejected the "implied retainer" theory, as well as Granville's arguments that the law firm owed it a duty of care in negligence or a fiduciary duty:

> "Granville considered and rejected the idea of retaining its own solicitors to represent its interests. No legal fee was to be charged by the solicitors nor paid by Granville. The witness … who was the responsible employee of Granville … had a clear understanding that the … firm was representing Smith and not Granville, but he was content with that arrangement.
>
> …
>
> I do not think that there was any general duty of care owed by the solicitors to Granville. The duty not to injure one's neighbour … simply does not apply where there are two parties with conflicting interests represented by their own solicitors. The duty of the solicitor for 'A' is to act in the interests of his client, which may not correspond to the interests of 'B'. Even if the solicitor for 'A' is guilty of carelessness which could well affect 'B', no cause of action will arise. The kind of relationship which would give rise to a duty of care is negated by the duty to one's own client and the inherent clash of interests between 'A' and 'B'.
>
> …
>
> … Granville knew that the solicitors were employed to represent the interests of Smith, not those of Granville. Granville also knew that the interests might conflict in the very area where trouble did in fact develop. Smith was desperate to obtain a mortgage loan and the less Granville knew of the true extent of his financial woes the more likely the loan would be extended.
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> …

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33 If Granville had requested the certificate itself, it would have been none the wiser. However, the decision ultimately seems to suggest that once the lawyers agreed to obtain it for Granville, they owed a duty to Granville to disclose the judgments – which of course would have placed them in a clear conflict with their duty to their client Smith.

34 (1990), 50 B.L.R. 284 (Man. Q.B.). The basis for such implication is hard to find in the decision, unless the court was relying on an unstated assumption that there was an accepted practice of lawyers acting for both mortgagor and mortgagee.

… a special relationship may arise where the solicitors voluntarily make undertakings or agree to conditions requested by Granville, but a special relationship giving rise to a duty of care is not inherent in the relationship between the solicitors and Granville in the absence of undertakings or conditions.

…

In the present case there was no solicitor/client relationship between Granville and the solicitors. If that special relationship which would give rise to a duty of care in negligence law does not exist, then I cannot see how a special relationship giving rise to fiduciary responsibilities would arise."[35]

Huband J.A.'s analysis probably reflects how most business lawyers would view the law firm's role. However, on appeal to the Supreme Court of Canada, Cory J. accepted both the implied retainer and negligence theories of liability, with an approving nod to the additional possibility of a breach of fiduciary duty:

"We agree with the finding of the trial judge that the respondents were retained by the appellant to act on its behalf to obtain a first charge. There was ample evidence to properly support that finding.

There was clearly a special relationship existing between the appellant and respondents. Indeed this was conceded by the respondents.[36] It follows that the respondents were required to exercise their special skills on behalf of the appellant.

The respondents argue that the appellant did not rely upon them. This contention cannot be accepted. It is true that the appellant did not specifically request the respondents to protect their interest. Nevertheless, the correspondence makes it clear that the appellant was relying upon the respondents to ensure that their mortgage was a first charge on the property. The respondents did not do so. They were thus negligent and in breach of their duty to the appellant. …

In light of these conclusions it is not necessary for us to consider the issue of fiduciary duty although the trial judge may well have been correct in finding that there was as well a fiduciary duty owed by the respondents to the appellant."[37]

Granville Savings dealt with a remote risk that happened to materialize as a result of a change in law, the effect of which neither the defendant lawyers nor (apparently) most other

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35 (1992), 6 B.L.R. (2d) 192 (Man. C.A.) at paras. 39, 41, 44, 46, 48.

36 Possibly this was a concession made in argument before the Supreme Court of Canada. No such admission appears to have been made at trial.

37 [1993] 4 S.C.R. 279.

practitioners in Manitoba initially understood. One might ask why the Supreme Court of Canada so unhesitatingly decided that this risk should be borne by the lawyers. If the message being sent by the court was that in handling retainers like Mr. Smith's mortgage loan, lawyers should refuse to assist in any way a lender that has decided that the cost of retaining its own counsel would be unjustified, lest that create a "special relationship" with the lender, the likely practical effect would be to price borrowers like Mr. Smith out of the market. Would it have been so unreasonable to let the loss fall on Granville? It was in the business of mortgage lending and should have known perfectly well that not retaining its own counsel, in order to preserve its margin on a small transaction, might bring with it that inseparable companion of higher margins – higher risk.

It might be reasonable to infer that decisions such as *Central Trust* and *Granville Savings* can be explained by the fact that that the lender had no independent legal representation. Certainly, it would be difficult to find an "implied retainer" of the borrower's counsel to ensure that the lender had perfected first priority security, as was held to be the case in *Granville Savings*, if the lender had expressly retained its own counsel. However, that would not necessarily have precluded a court from still finding a duty of care in negligence or a fiduciary duty. Neither decision explicitly suggests that the duties the court found the borrower's counsel had assumed to the lender arose only because the lender was unrepresented. Nor is it clear that the result would necessarily have been different if the lawyers in either case had stated more clearly that they were acting solely for the borrower and were providing the lender with what it requested only in order to facilitate the transaction and assist their own clients. The lender's request and the lawyers' response to it might still have been interpreted as creating a "special relationship" giving rise to a duty of care.[38]

Even if lawyers in such circumstances avoid the trap of providing assistance to the lender that creates a "special relationship", may they have positive duties to warn the lender of the perils of having no independent legal representation, even though such a sophisticated unrepresented party should hardly need such reminders? The Law Society of Upper Canada *Rules of Professional Conduct* state:

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38 Lawyers may believe that they only have solicitor-client duties to the opposite party as well as their own client if their role is clearly "acting for both sides". However, the courts apply a much lower threshold. In *Tracy* v. *Atkins* (1979), 105 D.L.R. (3d) 632 (B.C.C.A.), the court observed:

> "In the circumstances of this case, the solicitor undertook to carry out all the conveyancing including work that would ordinarily be done by the vendor's solicitor, such as registration of the mortgage back. By undertaking to do so, he placed himself in the position of dealing with the plaintiffs' interests at a time when he knew or ought to have known that the plaintiffs were or might be relying on him to protect those interests. In the circumstances of this case, he placed himself in 'a sufficient relationship of proximity' that he incurred a duty of care towards the plaintiffs."

The flexible standard of "carry[ing] out … work that would ordinarily be done by" the other party's lawyer means that accommodating even a limited request from the other party, as in *Granville Savings*, may result in the lawyer assuming the same scope of duties to the other party as to the lawyer's own client.

"**Unrepresented Persons**

7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall

(a) [FLSC – not in use][39]

(b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer, and

(c) take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in these rules about joint retainers."

"Taking care " in the Rule would not seem to create a duty to warn, unless the lawyer has doubts whether the unrepresented person correctly understands the situation. In *Granville Savings*, Huband J.A. would have considered it obvious that Granville was not under the impression that the lawyers were protecting its interests, and that it understood perfectly well that they were acting solely in Smith's interests.[40]

Rules of professional conduct attempt to define with relative precision who is a "client". Lawyers owe extensive express duties under such rules to clients, far less so to "others"[41]. As

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39 This means that the corresponding provision of the Federation of Law Societies of Canada *Model Code of Professional Conduct*, on which the current Ontario Rules are based, has not been adopted. Such provision reads "urge the unrepresented person to obtain independent legal representation". Prior to October 1, 2014, the corresponding former Ontario Rule 2.04(14) contained identical wording, so that in the process of reviewing the Ontario Rules to conform them to the *Model Code*, the Law Society must have had second thoughts about this requirement. This may have been only for the reason that the Rule has a very broad application and if the unrepresented person in question is, for example, merely a potential witness being interviewed by a lawyer, to require the lawyer to "urge" that the person retain their own lawyer would be inappropriate in most cases.

40 However, in *Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377, LaForest J. suggested at pp. 423-24 that rules of professional conduct requiring lawyers to urge unrepresented parties to obtain legal representation supported the finding of breach of fiduciary duty in *Granville Savings*.

41 "Client" is defined in Section 1.1 of the Ontario Rules and Chapter 3 governs the "Relationship to Clients". Section 7.2 of the Ontario Rules is entitled "Responsibility to Lawyers and Others".

the commentary to Rule 7.2-9 suggests, whether an unrepresented "other" can also become a "client" will depend on the rules that expressly govern when it is permissible to "act for both sides", or more properly, accept a "joint retainer".[42]

However, lawyers' duties are not limited to those that rules of professional conduct recognize. Such rules say nothing about the practice of giving third party legal opinions, where lawyers assume, in order to assist their clients, what they hope are limited and clearly-defined duties and liabilities to the addressees of such opinions. At least in the eyes of most business lawyers, that does not make the addressees clients of the firm giving the opinion, although the *Clifford Chance* decision might suggest otherwise. However, there is reason to be concerned that providing a third party legal opinion may be viewed by a court as giving rise to a "special relationship" with the recipient that carries with it duties beyond merely giving a correct opinion. Otherwise assisting the recipient in any way may increase this danger and the scope of the duties to the recipient that a court may find. Lawyers may become victims of their desire to please the client by being helpful and cooperative to "get the deal done".

A hypothetical but realistic example may demonstrate the risk of potential liability opened up by the reasoning in decisions like *Granville Savings*. It is quite common for secured lenders or their counsel to ask the borrower's counsel to file a registration under the *Personal Property Security Act* in favour of the lender. This is probably done on the assumption that since borrower's counsel will be asked to give a perfection by registration opinion in its third party legal opinion delivered to the lender at closing, it is appropriate for borrower's counsel to make the registration. This practice is not normally problematic, although careful lawyers will ensure that they obtain explicit approval of the details of the registration from the lender or its counsel before it is filed, so that there can be no question that the precise registration particulars were authorized by the secured party.

However, suppose that the lender's registration instructions are not completely consistent with how borrower's counsel would advise a lender to make the registration, in some relatively minor respect that does not affect the validity of the registration or the ability of counsel to give its opinion to the lender at closing.[43] The natural reaction of borrower's counsel would be

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42 There are specific Ontario Rules 3.4–12 to 14 that deal with when it is permissible to act for both a borrower and a lender. In the real estate context, where there was a long-established practice of lawyers acting on both sides of transactions, courts readily concluded that lawyers had obligations to do precisely what the law firm in *Dechert* was found not to be liable for failing to do, to confirm the *bona fides* of a mortgagor: *Yamada* v. *Mock* (1996), 29 O.R. (3d) 731 (Gen. Div.).

43 For example, suppose that the standard practice of borrower's counsel when acting for a lender taking a general security agreement is always to check "motor vehicle included" on the PPSA financing statement, as well as all of the collateral classifications other than "consumer goods", regardless of whether the debtor has or is ever likely to have any of what are ordinarily regarded as motor vehicles (as recommended in *Central Guaranty Trust Co.* v. *Bruncor Leasing Inc.* (1992), 3 P.P.S.A.C. (2d) 298 (Ont. Ct. – Gen. Div.) at p. 304). However, because the borrower has indicated "none" in the motor vehicle schedule to the GSA, the lender's instructions are not to check this box on the financing statement.

simply to follow the instructions they were given: why should they waste their time and the client's money debating some arcane point of PPSA practice with the lender or its counsel? After all, it's the secured party's registration, not the borrower's. Yet suppose as a result of some "black swan" event (as in *Granville Savings*) the lender loses its priority to certain valuable after-acquired collateral of the borrower, whereas it would have retained such priority if the PPSA registration had been effected in the way that the borrower's counsel would normally have advised. Did the lender's request to borrower's counsel to make the registration on its behalf create a "special relationship" and a duty of care (even though such counsel gave no priority opinion in its closing opinion to the lender), such that the borrower's counsel is liable to the lender for this outcome? *Granville Savings* suggests that this is a possible analysis, though most business lawyers would likely regard it as a wrong, even outrageous result.

6. Conclusion

The primary theme of this paper has been that although business lawyers have a reasonably clear understanding of the reliance that they expect to be placed on third party legal opinions, both as regards the parties who can rely on such opinions and the purposes for which they can rely on them, if litigation arises over an opinion, litigators will argue, and courts may entertain, a more expansive view than practitioners of what is reasonable reliance on an opinion. It is not the author's intention to suggest that this will necessarily result in a flood of successful claims against law firms based on opinions, or that the practice in giving third party legal opinions needs to be radically changed. Third party legal opinions are by no means the most risky aspect of business law practice. To the extent that case law suggests that there may be unanticipated risks in giving opinions, some of these risks can be minimized by not allowing a client to use an opinion as a marketing tool, which inevitably invites "reliance" beyond the explicit scope of the opinion. Another danger zone is being too accommodating to requests from the opposing party in a transaction to assist them with tasks that are really their responsibility. Since such accommodations "help to get the deal done" and therefore go down well with one's own client, they are hard to avoid, but this too can be twisted into "reliance" by the other party that the lawyer did not intend.

APPENDIX A

Third Party Reliance Framework of Opinion Letter

[Letterhead of Twaddle, Cavell, Argue & Phibbs LLP]

May 7, 2015

Croesus Bank, N.A., Canada Branch
60th Floor, Lydian Plaza,
3½ Bay Street
Toronto, Ontario
M5Q 9Z7

Attention: Director, Risky Banking

Dear Sirs/Mesdames:

Re: Credit Agreement with Buried Treasure Inc.

We have acted as counsel to Buried Treasure Inc. (the "**Borrower**") in connection with an agreement dated of even date herewith (the "**Credit Agreement**") between the Borrower and Croesus Bank, N.A. (the "**Lender**"). In this capacity, we have participated in the preparation and settlement of the Credit Agreement.

This opinion letter is being delivered to you pursuant to Section 7¾(ɸ) of the Credit Agreement. Unless otherwise indicated, all terms used in this opinion letter that are defined in the Credit Agreement have the respective meanings given to them in the Credit Agreement.

[Alternative opening paragraph:]

[We have acted as Ontario counsel to Buried Treasure Inc. (the "**Guarantor**") in connection with a guarantee dated of even date herewith (the "**Guarantee**") made by the Guarantor in favour of Croesus Bank, N.A. (the "**Lender**") in respect of the obligations of Long John Silver, LLC (the "**Borrower**") to the Lender under a credit agreement dated of even date herewith (the "**Credit Agreement**") between the Borrower and the Lender. In this capacity, we have reviewed the Guarantee. We have not reviewed the Credit Agreement. Unless otherwise indicated, all terms used in this opinion letter that are defined in the Guarantee have the respective meanings given to them in the Guarantee.]

We have examined such corporate records of the Borrower, such certificates of officers of the Borrower and of public officials and such other documents as we have deemed necessary or advisable as a basis for the opinions expressed below.

[Alternative scope of review paragraph:]

[With your consent, we have not reviewed the minute books and corporate records of the Guarantor or any other documents in respect of the Guarantor, except the certificate of status referred to below and the documents attached to or expressly referred to in a certificate of an officer of the Guarantor, a copy of which has been provided to you.]

[body of opinion omitted]

The opinions expressed above are provided solely for the benefit of the Lender in connection with the transactions contemplated by the Credit Agreement and may not be used or relied on by any other person or for any other purpose, nor may such opinions be quoted in whole or in part or otherwise referred to, without our prior written consent.

Yours very truly,

APPENDIX B

Sample Alternative Reliance Limitation Paragraphs in Opinion Letters

Example 1 (Permitted Disclosure to Assignees)

The opinions expressed above are provided solely for the benefit of the addressees in connection with the transactions provided for in the Credit Agreement and may not be used or relied on by any other person or for any other purpose, nor may such opinions be quoted in whole or in part or otherwise referred to, without our prior written consent. **[Notwithstanding the foregoing, this opinion letter may be provided to (but not relied upon by) the respective successors, assigns and participants of the addressees hereof in connection with their analysis of the transactions provided for or described in the Credit Agreement.]**

Example 2 (Permitted Reliance by Assignees)

The opinions expressed above are provided solely for the benefit of the addressee**[s]** and any permitted assignees in accordance with section ■ of the Credit Agreement **[provided that there has not been an Event of Default that is continuing at the time of the assignment to such an assignee]**, in connection with the transactions provided for in the Credit Agreement, and may not be used or relied on by any other person or for any other purpose, nor may such opinions be quoted in whole or in part or otherwise referred to, without our prior written consent.

Example 3 (Permitted Disclosure)

The opinions expressed above are provided solely for the benefit of the addressees in connection with the transactions provided for in the Credit Agreement and may not be used or relied on by any other person or for any other purpose, nor may such opinions be quoted in whole or in part or otherwise referred to, without our prior written consent, but such opinions may be disclosed without such consent to:

(a) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings;

(b) the officers, employees and auditors or other professional advisers of any addressee;

(c) any affiliate of any addressee and the officers, employees and auditors or other professional advisers of such affiliate; and

(d) any person, not otherwise an addressee, who (i) becomes a Lender in accordance with the Credit Agreement, or (ii) is a potential transferee or assignee of any Lender, or (iii) is or becomes a Participant or is a potential Participant of any such Lender, or (iv) is an issuer in relation to a securitization of the Loans under the Credit Agreement, and the professional advisers of any such person,

on the basis that (i) such disclosure is made solely to enable any such person to be informed that such opinions have been given and to be made aware of their terms but not for the purposes of reliance, (ii) we do not assume any duty or liability to any person to whom such disclosure is made, and (iii) (other than in relation to disclosure under paragraph (a)) such person agrees not to further disclose such opinions in whole or in part to any other person, other than as permitted above, without our prior written consent.

APPENDIX C

Sample Reliance Letter

[Letterhead of Twaddle, Cavell, Argue & Phibbs LLP]

May 7, 2015

Croesus Bank, N.A., Canada Branch
60^{th} Floor, Lydian Plaza,
3½ Bay Street
Toronto, Ontario
M5Q 9Z7

Attention: Director, Risky Banking

Dear Sir/Madame:

Re: Credit Agreement dated as of May 7, 2015 regarding a revolving credit facility in favour of Doubloon Limited Partnership (the "Partnership") between Croesus Bank, N.A. (the "Bank") and the Partnership, by its general partner Pirate Resources Inc. (the "General Partner")

We have acted as counsel to the Partnership and the General Partner in connection with the issue and sale of limited partnership units of the Partnership (the "**Units**") pursuant to a (final) prospectus of the Partnership dated April 1, 2015.

Attached hereto as Schedule "A" is a copy of our opinion dated April 31, 2015 in connection with the first closing of the offering of Units of the Partnership (the "**Offering Opinion**"). Notwithstanding that the Bank is not an original addressee of the Offering Opinion, the Bank is hereby authorized to rely on our opinions expressed in paragraphs 13 through 29½, inclusive, of the Offering Opinion as of the date of the Offering Opinion as if the Bank were an original addressee thereof, subject to the terms of the Offering Opinion including, without limitation, the assumptions, reliances, qualifications and limitations expressed therein, and subject to the terms of this letter. For greater certainty, we have not updated, and we disclaim any responsibility to update, the Offering Opinion to take into account any changes to any facts and/or laws that may have occurred after the date of the Offering Opinion.

This letter and the Offering Opinion are intended solely for the use of the Bank and its successors, and only in connection with the Credit Agreement described above and the transactions provided for therein, and may not be used or relied on by any other person or for any other purpose, nor quoted in whole or in part or otherwise referred to, without our prior written consent.

Yours very truly,