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Tips from Toronto's Business Court – Takeaways from CLUC Education Day 2023

The Commercial List Users' Committee (CLUC) held its annual Education Day on June 7. The annual event offers an opportunity for members of the bar to gather with the Judges of the Commercial List to discuss current issues and best practices.

This year's session was opened by the head of the Commercial List, Justice Thomas McEwen, who will retire from the bench later this summer. Justice McEwen noted that the Commercial List continues to see an increasing case load. In that environment, more careful reviews are being done to assess whether matters will be managed at the Commercial List, remembering the List's identity as a Business Court requiring the resources to provide timely adjudication of business matters. Counsel should expect that fraud matters and family disputes with a shareholder oppression component will not generally be accepted on to the List.

Justice McEwen also noted that counsel can expect an updated practice direction to be issued, which will address best practices to ensure smooth hearings, particularly in the new era of paperless litigation. As always counsel practicing on the List are expected to apply the "three C's" of the Commercial List: communication, cooperation and common-sense.

The session panels, including senior counsel and moderated by sitting Judges of the Commercial List, discussed the following topics:

ADR in Restructuring and Insolvency Proceedings:

- A discussion on the evolution of mediation as a tool in complex insolvency matters, including the Court's jurisdiction to direct mediation, and its use in past notable cases;
- The recent Supreme Court case of *Peace River Hydro Partners v Petrowest Corp.*, which held that an otherwise valid arbitration agreement may become inoperative if enforcing it would compromise the integrity of court?ordered receivership proceedings;
- Some considerations in pursuing arbitrations and

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choosing arbitrators (e.g. are they facts first vs. law first, compassionate vs. an absolutist, an optimizer vs. a maximizer);

- Some of the uncertainty around strict disclosure requirements arising from partial settlements as a result of *Handley Estate v DTE Industries Limited*, and the potential for articulation of these disclosure requirements as part of the Rules of Civil Procedure.

Third Party Releases in Restructuring and Insolvency Proceedings:

- The expectations of parties involved in an insolvency to receive a release (directors and officers, DIP lenders, plan sponsors, and financial and legal advisors);
- The role of releases in encouraging participation in the CCAA process and to encourage ongoing concern outcomes;
- Carve-outs from such releases for wrongful conduct (per s. 5.1(2) of the CCAA);
- Releases for restructurings performed within corporate plans of arrangement (and the divided views on whether the extent of releases are available under the corporate statutes are the same as the CCAA);
- Cross-border experiences with third party releases in the United States, the division in US Courts on the extent to which third party releases, and that based on the experience to date Canadian third party releases will be recognized by U.S. Courts; and
- Guidance for counsel seeking Third Party Releases to take care to set out in their facta the applicable legal test and the evidentiary record supporting the release.

Litigation Funding and Alternative Billing Practices

- Rises in the costs of litigation are spurring innovations in funding arrangements;
- Litigation funding as a means for clients to hedge risks, and provide law firms more stability in incomes;
- The considerations that funders apply when reviewing and taking on a case, and the options for funding arrangements including adverse cost indemnities, and disbursement funding, in addition to fee funding.

The attendees were grateful for the helpful presentations, and the participation of the Commercial List judges at this annual event.

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