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Commercial Considerations as Ontario Reopens: Key Takeaways from CLUC Education Day 2021

As vaccine rollouts quicken and Ontario looks forward to a loosening of COVID-19 restrictions, the Ontario Bar Association and the Commercial List Users' Committee (CLUC) convened its annual Education Day on June 2, 2021.

Co-chaired by Brendan Bissell of Goldman Sloan Nash & Haber LLP and Ken Pearl of Fuller Landau LLP, this virtual seminar was moderated by the Honourable Geoffrey B. Morawetz, Chief Justice of the Superior Court, and Commercial List judges Justice Barbara Conway, Justice Cory Gilmore, and Justice Thomas McEwen.

The CLUC is hopeful that fall 2021 will see a gradual increase to the total hearing volume, with an increase in in-person hearings combined with the now-familiar virtual proceedings.

Despite the unforeseen challenges posed by the pandemic, the rapid adoption of virtual tools like Zoom hearings and electronic filing through the Court's CaseLines platform has resulted in over 130,000 virtual hearings since March 2020. The Commercial List remains the gold standard for the conduct of virtual proceedings.

The economic impact of the COVID-19 pandemic has highlighted the importance of the Commercial List as a specialized venue for complex commercial matters and the Chief Justice stressed the importance of meaningful and timely access to the Commercial List during Ontario's economic recovery.

Benjamin Tal, Deputy Chief Economist for CIBC World Markets Inc., illustrated the cautiously optimistic view for a speedy economic recovery. While economists are quick to remind us that there is "no free lunch", there is ample reason to believe that the economic impact of COVID-19 will be a short-term event rather than a chronic condition.

Hopeful that a familiar post-pandemic economy will soon greet Canadians as pandemic restrictions ease, the OBA and the CLUC highlighted areas of commercial practice where clients and their counsel are likely to face pandemic-related challenges as the economy reopens. The ongoing focus on diversity and inclusion in the profession was also highlighted.

Current Issues in M&A Transactions

Panellists highlighted key considerations for assessing who owns the post-closing deal advice privilege in an increasing wave of M&A litigation as well as important changes to the model orders under the *Canada Business Corporations Act* and Ontario *Business Corporations Act*.

Within the shifting matrix of parties and legal representation inherent to commercial acquisitions, the question of privilege is a critical issue.

In navigating the relationships between buyer, seller, target, and management both pre-and-post closing, counsel should continuously assess what communications and advice are privileged, when that privilege may be waived, which parties to a deal might share a common interest, and the fiduciary duties owed to the target.

The question of privilege over deal advice and who controls it has not been squarely dealt with by the Ontario courts, but guidance may be found in recent cases arising from the Alberta Court of Queen's Bench and appellate courts throughout the United States.

When the question is eventually addressed in Ontario, courts will surely be guided by Section 179(b) of the OBCA which provides amalgamated corporations with all the property, rights, privileges, and franchises of the amalgamating corporations.

Commercial parties and their counsel should consider the following:

- Jurisdiction of potential future litigation. Rules of privilege will vary particularly where cross-border transactions are at issue; and
- Mitigating litigation risk by negotiating at the outset who will possess the privilege post-transaction.

The model interim order for proceedings under the CBCA and OBCA was refreshed to better accommodate near-insolvency proceedings. Notably, preliminary orders for a stay of proceedings should be limited to 30 days and may be extended further by order of the Court and sought on notice to the parties.

Third-party releases remain the exception rather than the rule, but recommended language is now incorporated into the schedule to the model order and guidance on this issue (and others) has come from recent decisions of the Alberta courts:

- The *Canada Business Corporations Act*, *Companies' Creditors Arrangement Act* and the *Bankruptcy and Insolvency Act* share the common purpose of facilitating restructuring in a manner that is fair and with regard to the broader goal of restructuring a company to the benefit of all stakeholders;
- Courts will retain jurisdiction under s 192 of the CBCA to order a waiver or a release if the absence of a waiver would frustrate the restructuring efforts or give rise to the potential for a collateral attack on the arrangement; and
- Concepts from the anti-deprivation rule – allowing clauses intended to remove value from an insolvent company to be found void and unenforceable – can be read into CBCA plans of arrangement where this is an expectation by the parties of debt compromise.

Real Estate Concerns in Restructuring

Panellists provided an overview of key issues facing commercial landlords and their tenants arising from the impact of COVID-19 on the use of commercial properties.

Government programs (like the Canada Emergency Commercial Rent Assistance program) will eventually expire and the obligations of both landlords and tenants under commercial leases will be the subject of much litigation as the lasting impact of COVID-19 on consumer behaviour asserts itself. Many leases will not contain express provisions allocating the risk of events like a pandemic.

Unlike prior disruptive events (e.g., SARS and the 2008 mortgage crisis), COVID-19 has been unique in both its scope and duration. As a result, courts will look to sophisticated parties and their counsel to exhaust every alternative to dramatic legal remedies like tenant lockouts or urgent proceedings for injunctive relief.

Counsel to both landlords and tenants should give due consideration to section 20 of the Ontario *Commercial Tenancies Act* which permits lessees, either on an action or application, or within an action brought by the lessor, to seek equitable relief against landlords seeking to enforce rights of re-entry or forfeiture.

This section has not been extensively litigated in Ontario's

courts, but this powerful tool is sure to receive increased judicial consideration as COVID-era tenancy disputes play out.

Counsel should also be mindful of lease provisions imparting positive obligations on landlords to provide access to and exclusive use of first-class premises in the face of government closure orders.

Recent cases suggest that “use” of a leased premises may not arise if a tenant is deprived of the economic benefit that they intended to receive under the lease. Tenants who have not disclaimed a lease, however, may be deemed to have obtained value from the premises and the timely payment of rent is likely to be a precondition for any entitlement to quiet enjoyment.

Diversity in the Practise of Law

Shara Roy of Lenczner Slaght along with her fellow panellists discussed industry-leading diversity initiatives and shared best practices as the profession continues to implement the recommendations of the CLUC D&I Subcommittee:

- D&I initiatives must be proactive and deliberate, reflecting intentional effort and a will to improve;
- Individuals can make a difference, but sustainability requires broader institutional support;
- Unconscious bias must be addressed during the initial hiring and recruitment process; and
- Once a diverse pool of applicants has been recruited, an increased focus on retention is required to support and empower those members of the profession.

When members feel that they belong and their contributions are valued, they grow into more engaged and productive advocates. The Commercial List also continues to work towards providing advocacy opportunities for the participation of younger counsel.