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A Practical Guide to Managing Complex Multi-Party Litigation on the Commercial List

Commercial List proceedings, including receivership proceedings and those under the CCAA or BIA, often involve many parties and require counsel to balance the Court's expectations for expeditious proceedings with the inherent difficulties of advancing your client's interests and coordinating with counsel who are advancing those of their own clients. This brief guide sets out some high-level points to assist counsel in complex multi-party litigation to move matters forward in an effective and efficient manner including the importance of:

- Complying with the Commercial List's Three Cs
- Familiarity with the Commercial List's Practice Direction

The Commercial List's Three Cs

The Court expects counsel to abide by the Three Cs, particularly in multi-party cases:

- **Cooperation:** Cooperation reflects the notion that counsel are expected to try to resolve matters amicably and not bring unnecessary disputes before the Court. The Court's expectation in this regard is particularly true in matters such as setting timetables, agreeing on forms of draft orders, and addressing scheduling issues. If one party or lawyer is not taking the lead in coordinating steps, consider if you should, particularly if you are the plaintiff or applicant.
- **Communication:** Communication reflects the idea that counsel should maintain open dialogue with one another to ensure efficient litigation. Commercial List judges expect counsel to discuss matters before appearing before the Court so they can narrow the issues in dispute and clearly understand each party's position. In multi-party cases, give yourself enough time to address these issues sufficiently, and be prepared to communicate outside of ordinary business hours to address these issues.
- **Common Sense:** Common sense reflects that

Commercial List judges take a practical approach and expect the same of parties and counsel. Counsel should avoid conflict about irrelevant and immaterial matters that add unnecessary time and expense.

The Commercial List's Practice Direction

All those appearing before the Commercial List must know and follow the Commercial List's Practice Direction, which has recently been integrated into the general Toronto Region Practice Direction. Counsel should know the Court's unique procedures, including as to:

- Commencement or transfer of a matter to the Commercial List
- Scheduling motions and other hearings
- The requirements for materials filed with the Court
- Trial scheduling forms and procedures

Case Management

The Commercial List procedures contemplate significant case management including, in many CCAA and other multi-party cases, a single judge being formally seized of all matters in the proceeding:

- The Commercial List routinely schedules chambers attendances, called 9:30s, to address scheduling and less significant issues. These attendances can be an invaluable tool to keep litigation on time and on track and to update the Court on key developments in the litigation.
- For larger issues that do not merit a full motion, the Court schedules longer case conferences. Case conferences can be a powerful tool to avoid formal motions, when appropriate. Rule 50.13(6) of the Rules of Civil Procedure empowers the Court to grant substantive relief, even on a contested basis, at a conference.

Ahead of these appearances, the Commercial List expects counsel to deliver brief Aide Memoires, typically no longer than three pages, that frame the issues counsel seek to address and identify any orders sought. If evidence is required, counsel should also deliver affidavits sufficient to establish entitlement to the order. However, the Commercial List has asked counsel to dispense with Aide Memoires for scheduling appearances. Instead, counsel should file a proposed schedule after discussions between all counsel.

Hearings

When scheduling and proceeding to a hearing, parties should

be mindful of the following features of the Commercial List:

- Schedule a 9:30 early in the process. These appearances are an invaluable opportunity to narrow the issues in dispute and to fix an appropriate schedule.
- Always consider whether a formal motion is required, or whether a case conference will do. Commercial List judges can often grant interlocutory relief on a conference.
- Commercial List judges have a lot to read. That reading increases exponentially with the number of parties to the litigation. Therefore, counsel should make every effort to ensure only the necessary material is before the Court by, for example, filing joint compendiums or restricting affidavits to only the evidence required for the order sought.
- The Commercial List expects matters to proceed on the date agreed to or set by the Court. Adjournments are granted only in “exceptional circumstances.” Counsel should ensure that all parties are prepared to proceed on the scheduled date. If a request for adjournment is necessary, make the request at the earliest opportunity.
- The Commercial List expects counsel to make realistic estimates of time required for hearings. Parties should coordinate to allocate the estimated hearing time amongst themselves, failing which the Court shall assume that counsel have agreed to an equal division of time. In multi-party litigation, where certain parties align on certain issues, designating one party or lawyer to lead an argument will avoid repetition and conserve judicial resources.
- Be familiar with the Practice Direction requirements for court material. Among other things, the Court expects factums on contested motions and an outline of argument or Aide Memoire in uncontested motions or applications. Compendiums are similarly required. In multi-party litigation, counsel should coordinate to avoid filing duplicative materials.