

Jun 16, 2019

Effective Pre-Trial Hearings and Judge-led Mediations

The first thing to remember about the Commercial List is that it is a List, not a court. In other words, all proceedings (applications, actions and interlocutory steps) on the Commercial List are proceedings before the Ontario Superior Court of Justice, and not a different court. The Commercial List was established in 1991, as noted in the *Consolidated Practice Direction concerning the Commercial List effective July 1, 2014* (the “Practice Direction”), for the hearing of certain actions, applications and motions in the Toronto Region involving issues of commercial law. Accordingly, the starting point when thinking about any steps in a proceeding before the Commercial List is that all Commercial List matters are, by definition, Superior Court matters.

The Practice Direction should be your next stop. It is a consolidated direction that is critical reading for any lawyer practising on the Commercial List. It deals with eligibility, general procedures, originating process, place of hearing, applications for transfer to/from the Commercial List, documents, dates for applications, motions and trials, estimates of required time, chambers matters, case management, summary judgment and various other matters, all of which are critical reading for any counsel preparing for a pre-trial, hearing and/or judge-led mediation.

But the most important section of the Practice Direction relevant to pre-trial hearings and judge led mediations is Part XVII: *Alternative Dispute Resolution and Pre-Trials*, beginning at paragraph 43 of the Practice Direction.

As a general matter, Part XVII of the Practice Direction reflects the principles applicable to all Commercial List matters. Counsel with carriage of pre-trial hearings and judge-led mediations should be two things above others: (i) informed about the matter of which they have carriage; and (ii) authorized to speak on behalf of the party they represent at that hearing or mediation. In short, counsel must be informed decision makers. Information without authority, authority without information, or worst of all, neither of those two, is

unacceptable and will not be tolerated at the Commercial List.

The Practice Direction makes it the mandatory duty of the case management judge and the obligation of counsel to explore methods to resolve the contested issues, including the resort to ADR, at the case conferences and on whatever other occasions it may be fitting to do so (paragraph 44). What counsel will realize is that case management is the default on the Commercial List, the judges are knowledgeable and informed, there is consistency of judicial oversight and therefore accumulating aggregate knowledge, and the court expects the same of counsel.

The Commercial List expects, again for all matters, but particularly pre-trial hearings and judge led mediations, that a significant degree of the efficiency enjoyed (and expected) by the court and its stakeholders derives from the fact that preparation has been undertaken by counsel to make the job of the presiding judge easier, and therefore more efficient and more effective. That means materials should be prepared and shared well in advance and collectively constitute a road map through the matter to the issues to be determined or resolved.

Typically, pre-trial hearings and mediations should be supported by, in addition to a full record prepared and delivered in accordance with the *Rules*, the following documents:

- Cast of characters – a list of the key parties/players including witnesses, the identity of which will be important for the judge to understand;
- Chronology – a brief chronology, two pages maximum, ideally annotated with document and page references, to the key events. Note, this is not an argument, but rather is an objective chronological summary of the key dates relevant to the issue to be resolved or determined;
- Compendium – give the judge a brief (electronic or hard copy form) of the 10 key documents. Where the documents are lengthy but only a few paragraphs are relevant, include only those relevant excerpts; and
- Where applicable, a draft order (following the CLUC template/precedent where applicable).

Commercial List judges have limited time and resources, but deal with complicated and often time-sensitive matters. Accordingly, they are entitled to expect, and do expect, that

counsel are knowledgeable and authorized, as noted above, and have thought through in advance the issues to be addressed at the hearing or mediation. The emphasis is on practicality, not formality.

In short, in conducting any pre-trial hearing or judge-led mediation on the Commercial List:

- Give the judge the materials she or he needs to be informed about the issue;
- Give the judge those materials in a useable, concise and summary format;
- Take reasonable positions (only) and be prepared to defend those positions; and
- Be prepared (and therefore instructed and authorized) to compromise on those matters in respect of which it is in your client's interest to do so to resolve or narrow the issues. Failing that, a result will be imposed; it is virtually always better that your client have some input into that result.