



Lenczner
Slaght

Commercial
List

2019 Year in Review



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Introduction

The Commercial List is an incredibly busy Court. It deals with every imaginable type of commercial, estate, and insolvency dispute. The [Commercial List Users' Committee newsletter](#) recently released its key statistics for the period August 1, 2018 to August 1, 2019. Some of the highlights are as follows:

- The Court heard 5,427 matters in the 12-month period (approximately 1,000 per judge).
- Of those 5,427 matters, 3,071 (57%) were commercial matters.
- 35 trials (0.6%) were scheduled, but only six (0.1%) were heard.
- A significant part of the Commercial List practice consists of 9:30 appointments and case conferences in which the Court efficiently addresses procedural and other issues.
- In insolvency and commercial cases, motions are often heard and decided (or resolved) on the same day with a handwritten endorsement in order to provide the parties with certainty and move the case forward promptly.
- Only a small proportion of the work of the Court results in a reported decision.

The reported decisions are an important part of the work of the Court for the benefit of all the participants in the judicial system. To better understand the work of this Court, we have undertaken a data analysis on the Commercial List cases released on CanLII in 2019. Of the approximately 3,000 commercial matters heard by the Court in 2019, only 89 (3%) resulted in decisions released on CanLII identifiable as Commercial List matters.

This report describes our data collection method, the analysis of the results, and a review of particular cases.

Methods and Qualifications

We reviewed a data set consisting of decisions of the Commercial List that are posted on [CanLII](#). The data was compiled by conducting a search on CanLII for all decisions released in 2019 that contained either (i) a Court file number that contained “CL”; or (ii) the phrase “Commercial List” in the header of the decision.

Because a significant portion of the Commercial List’s business is transacted at 9:30 appointments and case conferences, or are otherwise decided by handwritten endorsements, they do not appear on CanLII and are not included in the data set.

It should be noted also that where a decision does result in a typed endorsement, such decisions are not uniformly published to CanLII or are otherwise published on electronic research databases and as a result are not included in the data set. The data set also does not include many matters that were commenced on the regular list but were subsequently transferred to the Commercial List, given that these matters are often reported without a CL file number and without the words “Commercial List” in the header of the decision. Our data set and analysis should be viewed in light of these limitations.

The data and the analysis we provide below reflects the published decisions of the Commercial List, rather than all of the work that the Commercial List does. This data remains interesting and useful because it reflects what the parties have decided to litigate and what the Court has decided to publish. Whether the published decisions are representative of the Commercial List’s general practice is certainly an area for further investigation and debate as more data becomes available in the future.

Data Commentary

The Caseload of the Commercial List

The Commercial List practice direction sets out the types of cases that can appear on the Commercial List. Certain categories of cases are presumptively allowed to be started on the Commercial List, while others may only be commenced if a judge concludes that they are suitable for the Commercial List.

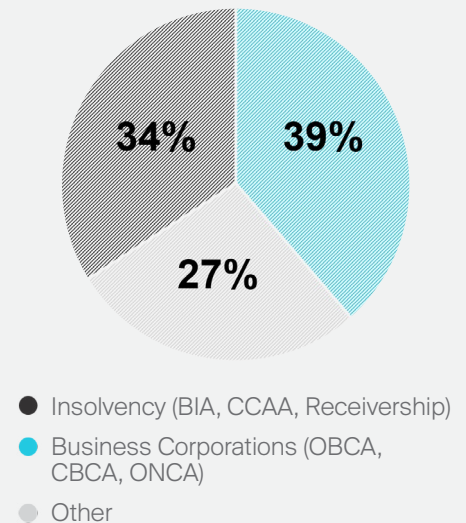
Our data shows that the cases decided by the Commercial List fall into three categories of roughly equal size:

1. The largest category of Commercial List matters in our data set are what can broadly be characterized as insolvency cases. These include cases under the *Bankruptcy and Insolvency Act*, the *Companies Creditors Arrangements Act*, or some other form of receivership. Decisions arising out of cases under those statutes make up 39% of reported decisions in our data set.
2. The second category of cases on the Commercial List are matters arising under the various business corporations acts. These matters are largely oppression remedy and derivative action cases and comprise approximately 27% of reported decisions in our data set.
3. The final category takes up 34% of reported decisions on the Commercial List in our data set. These cases are a more heterogeneous group, which include breach of contract disputes, breach of fiduciary duty cases, and appeals and enforcement proceedings relating to arbitral awards, among others. This heterogeneous category reflects the fact that even though a case may not fall within the presumptive category of Commercial List cases under the practice direction, appropriate commercial cases will be permitted to proceed on the Commercial List through the exercise of judicial discretion.

In order to get a sense of the relevance of the Commercial List to different sectors of the Canadian economy, we attempted to code the disputes in our data set with respect to the principal industry in which the parties were involved. Cases were coded using North American Industry Classification System (NAICS) codes. That data suggests that the Commercial List appears to be used to address disputes in a wide range of industries, with no single industry predominating. The largest industries at issue in the reported Commercial List decisions were Finance and Insurance, and Manufacturing, each with 20% of reported cases. Real Estate cases were close behind, with 17% of reported cases.

Finally, we coded the decisions to determine the nature of the proceeding before the Court. Of the 89 matters in our data set, 45 (51%) were decisions from motions. Four of the 45 motions were summary judgment motions. 26 (29%) were decisions from applications, and four (4%) were decisions from trials. The remaining 14 decisions (16%) fell into other categories, such as decisions on costs or clarifications of earlier rulings.

CATEGORIES OF COMMERCIAL LIST DECISIONS



TOP INDUSTRIES



NATURE OF PROCEEDINGS



Speed, Accessibility, and Complexity

One of the goals of the Commercial List is to provide a forum to which parties can turn for an efficient and accessible resolution of commercial disputes. Such disputes can often be time-sensitive, so it will be important that parties can have their cases both heard and decided quickly.

[The most recent Commercial List newsletter](#) reports that the current waiting time for scheduling a short motion is approximately four weeks, while a longer motion requires approximately six to eight weeks. However, urgent matters can always be scheduled more expeditiously. Our analysis of the reported decisions shows that the Court never slows down – the activity of the Commercial List (both as to hearing matters and releasing decisions) was relatively steady month-over-month. We did not identify any significant periods of lower activity, even during holidays.

Furthermore, the data appears to confirm that the Commercial List renders decisions relatively quickly. To investigate the speed of decision-making, we coded the time it took from the last date on which a matter was argued until the date when the decision was released. Our analysis showed that:

- Just under 20% of published decisions were released within one week of the date they were argued.
- 46% of decisions were released within one month.
- Only 12% of decisions took more than three months to release. As we describe below, these tend to be cases that the Court viewed as more complex.

There are likely many decisions, even on contested matters, that were released in less than a week, but were not captured in our data set given that they were released by handwritten endorsement. For example, when the Court deals with an injunction, the decision may well be released by detailed handwritten endorsement in order to ensure that the urgent issue is dealt with clearly and promptly. As discussed in greater detail below, we hope to capture some of these handwritten endorsements in our data set in the future, in order to better capture the full breadth of decisions rendered by the Court.

The Commercial List's success in turning out reasoned decisions quickly is made all the more impressive given the complexity of the matters before it. Complexity is a multifaceted concept that cannot be perfectly represented by a single variable. However, we explored two different variables as proxies for complexity.

First, one rough proxy for the complexity of a matter was the number of sets of lawyers who appear before the Court on that matter. Under this model, each additional set of lawyers who appears is presumed to advocate for a different party who will have divergent interests from the others. Consequently, all else being equal, one would expect that a matter involving three sets of counsel would be more complex than a matter with two sets of counsel.

AVERAGE TIME TO REPORTED DECISION

20%

released within one week

46%

released within one month

12%

released more than three months later*

*These tend to be cases that the Court viewed as more complex.

“The Commercial List’s success in turning out reasoned decisions quickly is made all the more impressive given the complexity of the matters before it.”

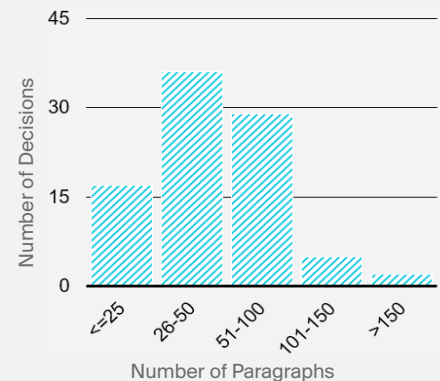
Our data set shows that a large percentage of Commercial List matters are complicated by the presence of multiple counsel sets. Roughly half of the reported decisions in our data set had just one or two sets of lawyers appearing for the parties, while approximately half had three or more. In fact, 19% of matters had five or more sets of counsel present.

The second proxy for the complexity of a matter that we analyzed was the length of the Court's decisions. The theory here being that if a dispute is relatively straightforward, the Court may not write as much to justify its decision. By contrast, if the case involves complex factual or legal issues, the Court will typically write longer decisions in order to explain its reasons to the parties.

One would intuitively expect that there is some trade-off between complexity and speed of decision-making. Our analysis suggests that this is the case: on average, longer decisions take longer to write. Indeed, the complexity of the matters, as reflected in decision length, appears to explain why it may occasionally take three months to render a decision. For decisions that took longer than three months to be released, the average paragraph length was 85.7 paragraphs. By contrast, the average paragraph length for all decisions in our data set was 53 paragraphs.

Overall, our data suggests that the speed of the Commercial List's decision-making in reported judgments is not correlated with shorter decisions. Only 17 decisions (19%) are 25 or fewer paragraphs. The bulk of the decisions (73%) are between 26 and 100 paragraphs, while seven decisions (8%) are over 100 paragraphs in length. These figures suggest that the Commercial List is meeting an appropriate balance in its decisions between releasing decisions quickly and producing sufficiently detailed reasons.

AVERAGE LENGTH OF DECISION



“... the Commercial List is meeting an appropriate balance in its decisions between releasing decisions quickly and producing sufficiently detailed reasons.”

Case Commentary

The benefit of the reported decisions of the Commercial List is that they provide commercial parties guidance and direction about the rules which govern commercial relationships and how the Courts will apply those rules in Ontario. 2019 was a fruitful year in this respect. As noted in the data, decisions were released in a wide variety of commercial dealings. Here, we review some of those decisions and discuss why they are significant to commercial parties, litigants, and counsel on the Commercial List.

CCAA Proceedings

As usual, the Commercial List had a busy year with initial orders in CCAA proceedings including [Vari-Form](#), [Payless Shoes](#), [ITI MacDonald](#), [Imperial Tobacco Canada Limited](#), [Rothmans, Benson & Hedges Inc](#) and [Bondfield](#). At least one new CCAA proceeding, [North Amercian Fur](#), which obtained its Initial Order on October 31, 2019, is not captured in our data because there are no written reasons on CanLII.

Substantive CCAA issues were addressed throughout the year in 2019. In [ITI MacDonald](#), the Court considered whether the CCAA stay of proceedings should be lifted in order to allow the plaintiffs to continue civil proceedings against the Applicants. In two ongoing CCAA cases, [Hollander Sleep Productions](#) and [Syncreon Group](#), the Court issued reasons recognizing foreign proceedings in the U.S. and the U.K. respectively. Because of the nature of the CCAA proceedings, other ongoing CCAA proceedings do not necessarily appear in our data, given that decisions are often made by short endorsements or unopposed orders. In [Carillion](#) for example, there were 21 orders or endorsements in 2019, but no reported CanLII decisions. The same is true for bankruptcy proceedings, such as [Quadriga](#), where there were two attendances in 2019 after the transfer of proceedings from Nova Scotia in September 2019, but no reported CanLII decisions.

Contractual Interpretation

In the trial decision of [Montrose Hammond & Co v CIBC World Markets Inc](#), the Court considered the enforceability of the defendant's exclusion and limitation of liability clauses, ultimately holding that the limitation of liability clause excluded the defendant's liability for lost profits. Both *Montrose* and [Reddy v 1945086 Ontario Inc](#) apply the principles of the Ontario Court of Appeal in *Ventas Inc v Sunrise Senior Living Real Estate Investment Trust* and *Sattva Capital Corp v Creston Moly Corp* that a contract must be interpreted as a whole to determine the intent of the parties, taking into account the surrounding circumstances, but not the subjective intention, of the parties.



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Allegations of Breach of Fiduciary Duty

Two of the four trial decisions involved allegations of breaches of fiduciary duty. In the longest trial of the year (28 days), [Extreme Venture Partners Fund I LP v Varma](#), Justice Conway concluded that a purchaser had conspired with the fiduciaries of a company to acquire a business and, in doing so, breached both fiduciary and contractual duties.

Oppression Remedy Cases

Many cases qualify for the Commercial List on the basis of allegations of oppression under the OBCA or CBCA, so it is no surprise that these cases also feature prominently. In the trial decision of [Crescent \(1952\) Limited v Safety Insurance \(1959\) Limited](#), allegations of both breach of fiduciary and oppression were made. The issue in the case was whether the company whose shares were sold under a Share Purchaser Agreement met certain targets during the “Warranty Period,” which would result in an increased payment for the preferred shares if the targets were met. Justice McEwen held that the constructive dismissal of a key salesperson by the purchaser amounted to oppression and awarded the vendor the remedy provided for in the SPA.

[Corber v Henry](#) involved two shareholders: one who did not wish to sell a property owned by the company (presumably because they also owned the restaurant which was a tenant in the property), and one who wanted to sell. Notwithstanding the deadlock, Justice Chiappetta held that the evidentiary record failed to demonstrate oppressive or unfair conduct. Instead, the evidence simply reflected that the parties disagreed on the way forward for the business of the corporation. Those circumstances did not amount to oppression or justify a winding up of the company.

Procedural Decisions

In addition to substantive decisions, various motions on the Commercial List addressed procedural issues, presumably those that were unable to be resolved through a 9:30 appointment or case conference. In [Domfoam International Inc.](#), Justice Wilton-Siegel considered the right under Rule 39.02(2) to examine a witness on a pending motion after already having conducted cross-examinations. Applying the applicable four-part test, he held that leave to examine one of the proposed witnesses would be granted, while the other was denied. In [Deutsche Postbank AG v Kosmayer](#), Justice Dietrich dismissed an action for delay pursuant to Rule 24.01, finding that the delay in the plaintiff’s prosecution could mean a fair trial was not possible. In doing so, Justice Dietrich relied, in part, on the Practice Direction, which provides that the very purpose of the Commercial List is to “expedite the hearing and determination of matters involving issues of commercial law.”

Summary Judgement Decisions

Two of the four summary judgment decisions decided in 2019 were brought on the basis that there was no genuine issue requiring a trial as a result of an expired limitation period. In [Habibi v Barghian](#), the issue was discoverability.



Extreme Venture Partners Fund I LP v Varma was the longest trial of the year in 2019, lasting 28 days.

“Two of the four summary judgment decisions decided in 2019 were brought on the basis that there was no genuine issue requiring a trial as a result of an expired limitation period.”

Justice Penny held that “the factual issues necessary to resolve the discoverability issues that have been raised require live testimony from the witnesses themselves in the context of a full record, not limited affidavits drafted by the lawyers and a paper copy of the cross examination transcripts.” In [1511419 Ontario Inc v KPMG](#), also a discoverability case, Justice McEwen similarly held that a full record was necessary in order to achieve a fair and just result. Both cases are a good reminder that given the time and cost associated with a summary judgment motion, coupled with the Commercial List’s ability to schedule prompt trials, the parties may be better served by just getting the case on to trial.

The Last Decision of 2019

One of the last decisions of the year is of particular interest to insolvency lawyers. In [Re Lydian International Limited](#), Chief Justice Morawetz considered the amendments to the CCAA which came into force in 2019 further to the [Budget Implementation Act, 2019, No. 1](#). The amendments provide that the relief to be granted in the initial hearing “shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period” and that the period should be no more than 10 days. Chief Justice Morawetz noted that “the practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments,” and that “the intent of the amendments is to limit the relief granted on the first day.” The 10-day period to follow allows for a stabilization of operations and a negotiating window, followed by a comeback hearing. In *Lydian*, this 10-day period was set to expire on January 2, 2020. However, given the intervening holiday season, Chief Justice Morawetz addressed the matter practically by providing that the applicants could file a motion on January 2 for an extension of the stay until January 23, 2020. He held that if anyone opposed the stay extension, they were to notify the Commercial List Office of their intention to do so by December 30, 2019, but if there was no opposition, he held that it was unnecessary for counsel to attend on the return of the motion. The *Lydian* case was one of the first of many cases under the amendments which will guide counsel on the new CCAA provisions.

Final Thoughts/Looking Forward

A review of both the data and reported cases from 2019 reinforces what we already knew about the breadth and depth of the Commercial List. We commend the Court for collecting data about the numbers of cases heard and the numbers of trials scheduled, heard and adjourned. We are hopeful that in the future additional data can be collected and reported about endorsements and orders made. We note that the [Practice Direction](#) provides that if an endorsement or decision is handwritten, counsel for the plaintiff or moving party shall assist the Court in preparing a typed draft. If more substantive handwritten endorsements were transcribed and ultimately submitted by the Court to CanLII, the public would benefit from the knowledge of these additional decisions. From our experience at the Court, we can confidently say that 2020 is off to a busy start. We look forward to developing our next “Year in Review” and comparing it to 2019.

“The decisions in *Habibi v Barghian* and *1511419 Ontario Inc v KPMG* are a good reminder that given the time and cost associated with a summary judgement motion, coupled with the Commercial List’s ability to schedule prompt trials, the parties may be better served by just getting the case on to trial.”

Our Commercial Litigation Practice

Commercial litigation represents the heart of our practice. We have a wealth of experience in pursuing complex, high-profile and often highly confidential cases across the spectrum of business-related legal matters.

We pursue our clients' goals with creativity and determination, tackling the most complex challenges with a disciplined focus sharpened through years of hands-on experience. We continue working every day to ensure that we live up to our reputation: one of excellence.

Our well-honed courtroom skills have won the respect of judges and fellow counsel at all levels of the courts.

65+

Expert commercial litigators

25+

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Band 1

Chambers Canada 2020, Dispute Resolution: Ontario

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“They continue to have a reputation as being Canada’s number one litigation firm. I believe it to be well deserved. Their performance is excellent.”

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About the Author

With over 20 years of experience practicing on the Commercial List, Monique Jilesen has acted as lead counsel in highly complex proceedings from inception through to trial. Monique's clients include major financial institutions, pharmaceutical companies, technology companies, and other multinational corporations who routinely face challenging, cross-border disputes. She has a record of success at trial in bet-the-company disputes. Monique is a member of the Toronto Commercial List Users' Committee, Fellow of the International Academy of Trial Lawyers and is a recipient of the prestigious Laidlaw Medal for Excellence in Advocacy.



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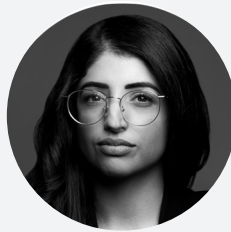


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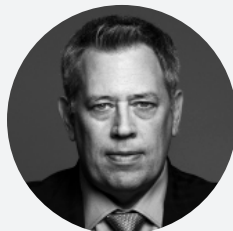


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