

2020 Year in Review



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Introduction

Although the impact of COVID-19 on the work of the legal profession cannot be overstated, a review of the 2020 Commercial List data demonstrates that even a global pandemic and a province-wide shutdown does not slow down the Commercial List.

On March 16, 2020, the day before Ontario declared an emergency due to COVID-19 and a day after the Chief Justice issued a [Notice to the Profession](#) suspending regular operations, the Commercial List kicked into gear and released [guidance](#) that the Commercial List would continue to hear and decide urgent matters by teleconference or in writing.

Between March 17, 2020 and April 28, 2020, the Commercial List heard 353 matters – over 12 matters every business day. The Court began to use Zoom shortly after the suspension with 41 of the 353 matters being heard by video in the first part of the lockdown (with the rest of the cases heard by phone or in writing). By May 5, 2020, the Commercial List issued an [Update on Changes to Commercial List Operations](#) which reported that almost all requests for matters to be heard had been granted.

By the end of 2020, the Commercial List was busier than ever with Zoom hearings as standard practice. Between March 17, 2020 and January 19, 2021, 5,605 matters were heard by the Commercial List, an astounding 26 matters per business day (although we know that the Court convenes on weekends on occasion as well). Each Commercial List judge heard approximately four matters every business day for the first 10 months of the lockdown.

This daily case list represents a marked increase from the prior available reporting period. From August 1, 2018 to August 1, 2019, 5,427 matters were heard representing approximately 21 matters per business day.

In the 12-month period between August 2018 and August 2019, 35 trials were scheduled but only six were heard. Incredibly, in the 10-month period between March 17, 2020 and January 19, 2021, 43 trials were scheduled, and 14 trials were heard. Of the four trial decisions released in 2020, all were heard prior to the pandemic.

Although the vast majority of endorsements and orders made on the Commercial List are not reported on CanLII, the reported decisions reflect those cases which involve significant factual or legal disputes and therefore reflect an important part of the work of the Court. In 2020, there was no material difference in the number of reported decisions. Of the approximately 6,000+ commercial matters heard by the Court in 2020, 88 resulted in decisions reported on CanLII. In 2019, 89 decisions were reported on CanLII.

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

Methods and Qualifications

Our methods of review in 2020 duplicate those undertaken in 2019 to allow for consistency in comparison of the data. We reviewed a dataset consisting of decisions of the Commercial List that are posted on [CanLII](#). The data was compiled by conducting a search on CanLII for all the decisions released in 2020 that contained either (i) a Court file number that contained “CL”; or (ii) the phrase “Commercial List” in the header of the decision.

The data and the analysis we provide below reflects the published decisions of the Commercial List and is therefore a subset of the matters before the Commercial List. Because a significant portion of the Commercial List’s business is transacted at 9:30 appointments, case conferences, or are otherwise decided by handwritten endorsements, they do not appear on CanLII and are not included in the dataset.

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

Data Commentary

The Caseload of the Commercial List

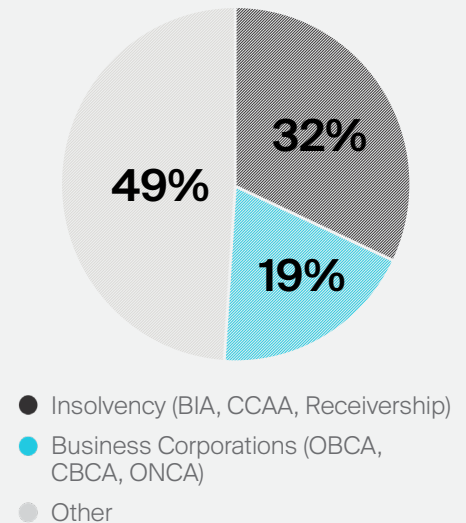
Although the largest categories of reported cases on the Commercial List remained insolvency and oppression remedy matters, each group declined slightly, resulting in more diversity of decisions reported in 2020 than in 2019:

1. Decisions in insolvency cases under the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangements Act*, or some other form of receivership make up 32% of reported decisions in our dataset in 2020 compared to 39% in 2019.
2. The oppression remedy and derivative action decisions under the various business corporations acts comprised approximately 19% of reported decisions in our dataset in 2020 compared to 27% in 2019.
3. This leaves 49% of reported decisions in 2020, compared to 34% in 2019, falling into other categories, including breach of contract disputes, breach of fiduciary duty cases, appeals, and other miscellaneous categories. It remained the case in 2020 that although a case may not fall within the presumptive category of Commercial List cases under the practice direction, appropriate commercial cases were permitted to proceed on the Commercial List through the exercise of judicial discretion. Given the volume of work currently on the Commercial List, we may expect to see this number decrease in 2021.

Like in 2019, the 2020 industry data suggests that the Commercial List addresses disputes in a wide range of industries, with no single industry predominating. The largest industries at issue in the reported Commercial List decisions in 2020 were Finance and Insurance (20%), Real Estate and Leasing (15%) and Professional, Scientific, and Technical Services (11%). In 2019, the top three also started with Finance and Insurance (20%), which tied with Manufacturing (20%), and included Real Estate (17%). Manufacturing decisions decreased significantly in 2020 representing only 7% of reported decisions.

The hearing types of the reported decisions in 2020 are almost a mirror image of those in 2019. In both years, there were four trial decisions and 26 application decisions reported. In both years, just over half of the decisions arose from motions, with 45 motion decisions in both 2019 and 2020. The remaining approximately 15% of decisions fell into other categories, such as decisions on costs or clarifications of earlier rulings.

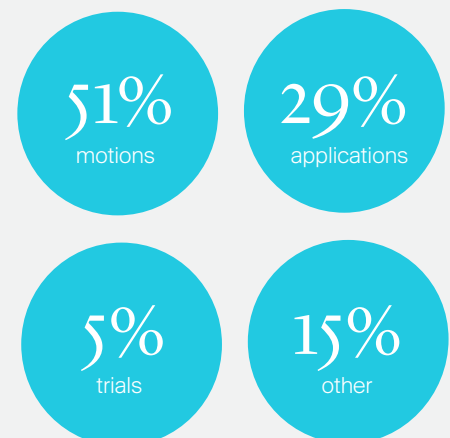
CATEGORIES OF COMMERCIAL LIST DECISIONS



TOP INDUSTRIES



NATURE OF PROCEEDINGS



Speed, Accessibility, and Complexity

Although one might have predicted that the pandemic would result in a decrease in the number of hearings or the release of decisions, the data demonstrates no such effect beyond the initial month. Notwithstanding in April, where there was only one hearing which resulted in a reported decision, there is a remarkable consistency of hearings per month resulting in reported decisions for the balance of the year.

In both 2019 and 2020, the activity of the Commercial List (both as to hearing matters and releasing decisions) was relatively steady month-over-month. The Commercial List released decisions more promptly in 2020 than in 2019:

- 27% of published decisions were released within one week of the date they were argued (compared to 20% in 2019);
- 59% of published decisions were released within one month (compared to 46% in 2019); and
- Only 11% of published decisions took more than three months to release (compared to 11% in 2019).

Given that the great majority of hearings do not result in published decisions, our expectation and experience is that the results of those hearings are released the same day or within a few short days.

AVERAGE TIME TO REPORTED DECISION

27%

released within one week

59%

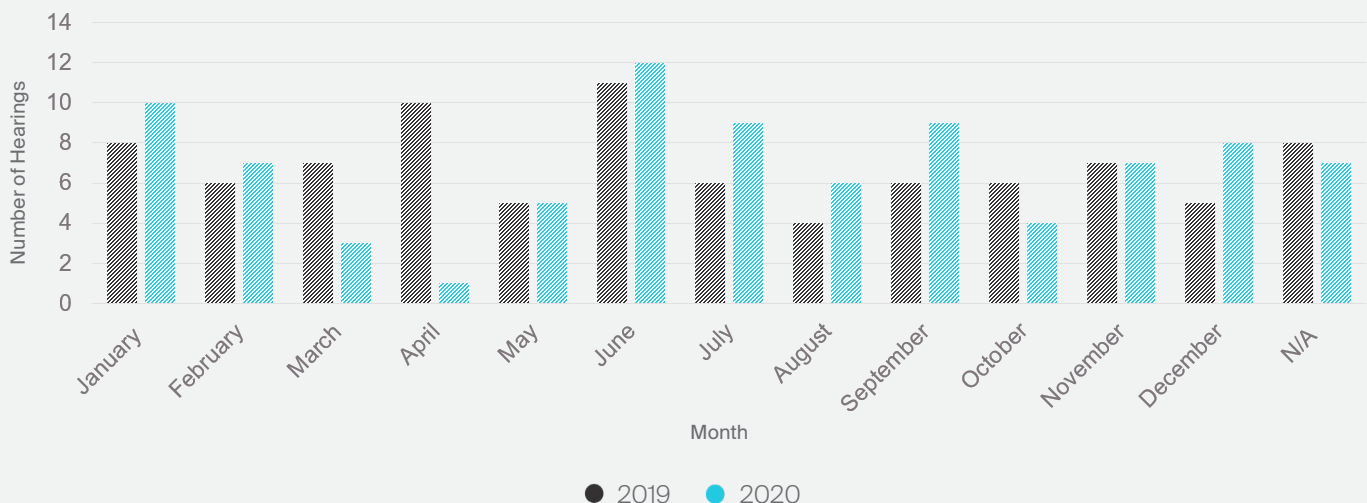
released within one month

11%

released more than three months later*

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

HEARING START MONTH

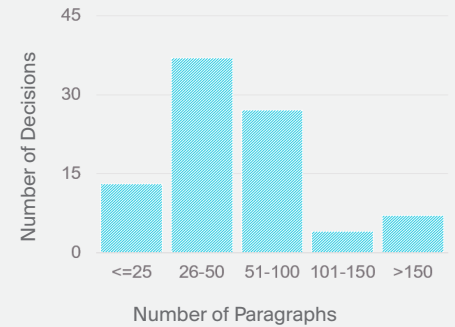


In 2019 and 2020, we considered two proxies for the complexity of a matter: the number of sets of lawyers who appear before the Court on a matter and the length of the Court's decision. The presumption is that all else being equal, one would expect that a matter involving three or more sets of counsel would be more complex than a matter with two sets of counsel. Similarly, the expectation is that the more complex the factual or legal issues, the longer a decision will have to be to explain the Court's reasons.

There is remarkable consistency in the data between 2019 and 2020:

- In both 2019 and 2020, approximately half of the decisions had one or two counsel sets. In 2020 just under half of the decisions had three or more counsel sets.
- In both 2019 and 2020, approximately 60% of the decisions were 50 paragraphs or shorter with the remaining 40% over 50 paragraphs. One notable difference is that in 2020 seven decisions were extremely complex, with over 150 paragraph decisions. Only two decisions in 2019 were over 150 paragraphs.

AVERAGE LENGTH OF DECISION IN 2020



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. 2020 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

There were 18 new CCAA filings on the Commercial List in 2020, seven of which reported COVID-19 related factors for filing. Only one of the 18 new CCAA cases resulted in a reported decision. In [Re Green Growth Brands Inc.](#), a debenture holder objected to the Applicant's proposed sales process and stalking horse agreement. Justice McEwen issued a relatively lengthy decision addressing each of the complaints raised by the debenture holder and found none to be persuasive.

Although the remaining new CCAA filings involved sales processes and other material steps, most orders sought were unopposed resulting in handwritten or email endorsements not reported on CanLII which are not reflected in our dataset.

Of the 10 insolvency decisions reported in the dataset, four arose out of the [Lydian International Limited](#) matter. *Lydian* gave rise to both one of the last decisions of 2019 and one of the first decisions of 2020. In a decision released on Christmas Eve 2019, Chief Justice Morawetz considered the amendments to the CCAA which came into force in 2019 related to the initial stay period being reduced to 10 days from 30 days. In *Lydian*, this 10-day initial stay period was set to expire on January 2, 2020. Given the intervening holiday season, Chief Justice Morawetz addressed the matter practically by providing that the Applicants could file a motion (instead of attending in person) on January 2, 2020 for an extension of the stay. On January 2, 2020, Chief Justice Morawetz released an [endorsement](#) on the motion in writing noting that by deferring consideration of the motion, stakeholders had the opportunity to consider their respective position, none of whom opposed the stay. Having found that the Applicants met the requirements for extending the stay period, Justice Morawetz held that the stay extension should be granted.

Another decision of interest to those who practice on the Commercial List was issued in the over eight-year-old Crystallex CCAA proceedings. In [Crystallex International Corporation \(Re\)](#), on a motion for a further extension of the stay of proceedings, the Applicant sought a sealing order in respect of its (i) cash balance, (ii) cash-flow statement, and (iii) cash-flow forecast on the basis that the information would reveal the Company's enforcement and monetization strategy and financial position. The sealing order was not fully supported by the Monitor and opposed by the Ad Hoc Committee

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and the Trustee for the holders of the senior notes. In considering whether to grant the order, Justice Hainey applied the Supreme Court of Canada's [Sierra Club](#) test. He concluded that the evidence led by the Applicant about the risk and consequences of disclosure was not sufficiently detailed or compelling to grant a sealing order. The case serves as a reminder that, even on the Commercial List, the test for a sealing order must be met and must be supported by evidence prior to a sealing order being granted.

Other Insolvency Cases

In one of the earliest cases heard after the suspension of normal operations, the Commercial List considered competing CCAA and receivership applications in the context of a residential condominium project. In [BCIMC Construction Fund Corporation v The Clover on Yonge Inc.](#), the Court concluded that there was no reason to restrain the Receivership Applicant's contractual rights to a receivership given that there were no material employment concerns, the breakdown in the relationship with the debtor was caused by persistent and deliberate wrongdoing by the debtor, and there were no significant differences to the outcome for other stakeholders between a receivership and a CCAA proceeding.

In [Duca v 2203824 Ontario Inc.](#), the Court considered the impact of the *Limitations Act* on unsecured creditors' claims in the Receivership. In *Duca*, the Receiver raised sufficient funds to pay the claim of the secured creditor and all the proven claims of the unsecured creditors. The debtor and its principal objected to the Receiver's proposal to pay the claims of the unsecured creditors on the basis that they were statute barred under the *Limitations Act*. The limitation period expired during the Receivership. The Court ordered the unsecured creditors' claims to be paid. The Court held that it was not in the interest of fairness, or in keeping with the integrity of an efficient and effective management of a receivership, that unsecured creditors be compelled to take action to have the stay created by a receivership order lifted and to commence a proceeding to protect a limitation period. Noting that the right to be paid is not extinguished by the *Limitations Act*, the Court held that it is reasonable for an unsecured creditor, having its claim for approval in a court-sanctioned process, to expect that if the Receiver accepts its claim, it will be paid.

COVID-19 Cases

Not surprisingly, a few of the reported decisions in 2020 relate directly to the pandemic. In [Cerberus Business Financial, LLC v B & W Heat Treating Canada](#), Justice McEwen considered the impact of a [suspension order](#) made under the [Emergency Management and Civil Protection Act](#) on the three-month limitation period in the [Commercial Tenancies Act](#) which provides that a trustee in bankruptcy must elect to disclaim, retain or assign a lease within that time period. The Court held that the three-month period was not a true limitation period and therefore the suspension of limitation periods under the suspension order did not apply. By contrast, a bankruptcy was held to be a "proceeding" for the purposes of the suspension order and the three-month period was, therefore, suspended, subject to the discretion of the Court. The Court exercised its discretion and

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granted a three-month extension to consider how to address the lease.

In the longest decision of the year (at 379 paragraphs), the Court considered the impact of the pandemic on a share purchase agreement. In [Fairstone Financial Holdings Inc v Duo Bank of Canada](#), the Applicant sought specific performance of the agreement, seeking an order that the Respondent close the transaction. In an application heard over four days, the Court considered whether the events resulting from the pandemic entitled the Respondent to rely upon a material adverse event and other covenants. The agreement in this case provided that if a material adverse effect is caused by an emergency, the Respondent is required *prima facie* to complete the purchase, unless the material adverse effect or market change has had a materially disproportionate adverse impact on the vendor compared to others in the market or industry. The case required the Court to determine the burden of proof, interpret the term “material adverse effect”, and the related carve outs. Relying upon expert evidence called by the parties, the Court held that Fairstone was not, and was not reasonably expected to be, disproportionately affected by the pandemic relative to others in the market or industry. As a result, there was no material adverse event. The Court ultimately ordered specific performance of the share purchase agreement and required the Respondent to perform the transaction.

Specific performance was similarly sought and obtained in [FSC \(Annex\) Limited Partnership v ADI 64 Prince Arthur L.P.](#), a case in which the Respondent sought to avoid a shotgun purchase on the basis that it had been frustrated by the pandemic. The Court rejected the Respondent’s position that because the pandemic was an extraordinary event, the resulting economic downturn was completely unforeseeable.

Mareva Injunctions

In 2020, the Court was busy with *Mareva* injunctions and disputes arising out of injunctions previously granted. See for example [Associated Foreign Exchange Inc v MBM Trading](#) (motion granted) and [1839392 Ontario Limited v 1839314 Ontario Inc](#) (motion dismissed).

The most high-profile of these cases is an alleged fraud directly related to the COVID-19 pandemic. In [HMQ v Madan](#), the Ontario Crown alleges that the Defendant family diverted at least \$11 million from a government program aimed at defraying costs of remote learning. The Defendants brought a motion to vary the *Mareva* injunction to pay for legal costs and living expenses. Although this step in a *Mareva* often occurs on consent, the patriarch refused to answer questions about his ability to finance legal and living expenses from other sources. Accordingly, the Crown opposed a variation of the *Mareva* (which applied only to assets in Ontario). Justice Dietrich did not grant a variation of the *Mareva*, drawing an adverse inference from the failure to answer questions and found that the Defendants did not discharge their onus of proving that they had no other assets available for legal fees or living expenses.

LONGEST DECISION OF 2020



At [379 paragraphs](#), *Fairstone Financial Holdings Inc v Duo Bank of Canada* considered the impact of the pandemic on a share purchase agreement.

Contempt

In 2020, there were four reported cases with allegations of contempt. In three of the four cases, the Court made findings of contempt. In [Thrive Capital Management](#), in the context of a *Mareva* injunction, the Defendants failed to comply with orders requiring disclosure and an accounting among other breaches. In [Citti v Klein](#), the Defendants were found in contempt for breaching a *Mareva* order preventing them from dissipating or dealing with any assets. In [Ting v Borelli](#), the son of the bankrupt was found to be in contempt of an order requiring attendance at an examination in the context of the bankruptcy. Justice Dietrich held that the son had not acted in good faith in taking reasonable steps to comply with the order. In [Atlas Copco](#), where there was no finding of contempt, the allegation was that the Defendants had breached a 10-year-old order to not dispose of property. The Court held that no finding of contempt could be made because the plaintiff itself was in breach of its obligations under the orders to draft and send an undertaking to the Defendant, and the Court could not find, beyond a reasonable doubt, that the Respondents intentionally breached the orders.

The Court in each decision reviews and applies the requirements for a finding of contempt set out by the Supreme Court of Canada in [Carey v Laiken](#). In each case the Court found that the language in the orders were clear and unequivocal and that the parties had knowledge of the order. The cases turn on whether the party intentionally did the act which the order prohibited or failed to do the act the order compelled. Where a party disregards and deliberately acts in breach of a Court order, judges of the Commercial List will carefully review the evidence and make a finding of contempt where appropriate.

Oppression Remedy Cases

Oppression remedy cases continue to be a significant portion of the hard-fought disputes before the Commercial List. Four oppression remedy proceedings were decided on their merits in 2020, which together with 12 additional decisions (injunctions, addenda to merits, motions to dismiss and costs), make up 18% of all reported Commercial List decisions.

In one of the decisions, [Emilio Manzo v Poetry Living](#), the Court considered the circumstances in which an Inspector should be appointed under section 248(3) of the *Ontario Business Corporations Act*. Justice Gilmore confirmed that a *prima facie* case of oppression must be made out to obtain the appointment of an Inspector. The Court held that a plaintiff who has established a *prima facie* case of oppression should not have to wait until discovery to gain access to documents they are entitled to and to which they have been denied. It is appropriate and necessary to appoint an Inspector in such circumstances.

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Looking Forward

In 2021, we expect to see much of the same sort of activity in the reported decisions of the Commercial List as we did in 2020 with some variation due to the ongoing pandemic. Many commentators have suggested we will see an uptick in insolvency proceedings in 2021. We predict more initial CCAA orders in 2021 with more reported decisions arising out of existing and new cases.

We can also expect to see additional frustration or material adverse event cases in which parties to agreements seek to vary or end the bargain as a result of the consequences of the pandemic.

We also predict more reported decisions as a whole and more reported trial decisions in 2021 than in 2020. Anecdotally, one impact of the pandemic is that counsel do not get together formally or informally to discuss and settle cases. To the extent these discussions do occur, they occur remotely which may not result in as many successful negotiations. If motions or trials are not settled as a result, they inevitably must be heard and decided by the Court. An already very busy Court appears to be poised to be busier than ever in 2021.

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.

75+

Expert commercial litigators

25+

Years representing our clients in commercial litigation disputes

Band 1

Chambers Canada 2021, Dispute Resolution: Ontario

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Chambers Global

“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.”

Chambers Canada

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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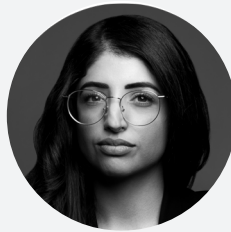


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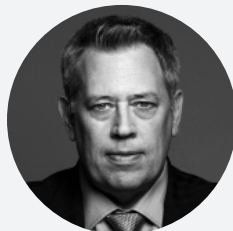


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