

## A Year in Review –December 2010

### The Commercial List Users' Committee

The Commercial List is a specialized commercial court within the Ontario Superior Court of Justice established for the hearing of certain matters in the Toronto region involving issues of insolvency, corporate and commercial law. The Commercial List Users' Committee (the "**Users Committee**") is a committee comprised of members of the bench who sit on the Commercial List from time to time, members of large and small law firms who practice regularly before that Court, representatives of professional organizations such as the Ontario Bar Association, Advocates' Society, Canadian Association of Insolvency and Restructuring Professionals ("CAIRP"), and representatives of the Court Administration. Madam Justice Pepall of the Ontario Superior Court of Justice currently heads the Commercial List and the Users Committee. Attached is a list of the members of the Committee for the term ending January 31, 2011.

The Users Committee meets on a regular basis (at least bi-monthly) to discuss and consider recommendations for improvement to the operation of the Commercial List. The Users Committee has established sub-committees whose members contribute to the development of educational programs, model orders and other initiatives designed to enhance the workings of the Court that has gained an enviable international reputation since it was established approximately 20 years ago. The creation of a newsletter was felt important so that members of the Bar and other organizations who use the Commercial List are informed of the workings of the Users Committee and given the opportunity to make recommendations for the continued improvement of the operation and administration of that Court. The practitioners on the Users Committee are open and accessible to other practitioners who wish to express their views to the Users Committee.

This is the inaugural edition of the Users Committee Newsletter which we hope you will find informative, and which we plan to issue semi-annually to update practitioners on the activities of the Committee. The Newsletter will be distributed by email through the Ontario Bar Association – Insolvency and Civil Litigation Sections, and through CAIRP.

### Message from Madam Justice Sarah Pepall

In the spring of 2006, Regional Senior Justice Winkler (as he then was) asked me whether I would be prepared to serve as the Team Leader for the Commercial List. Farley J. had announced his retirement from the bench and Ground J. was fast approaching his retirement date. I had some reservations about the prospect but R.S.J. Winkler, in his usual persuasive manner, and others convinced me that I should take on the responsibility. It was somewhat of a daunting task. The Commercial List had been well served from its inception with judges such as the Honourable Ed Saunders, and later with Justices Blair, Farley and Ground. Four and a half years later, I have decided to complete my term as Team Leader of the Commercial List and move on to the Long Trial Team. The experience has been a most rewarding one, intellectually stimulating but with an unrelenting pace.

In this, the first edition of the Commercial List Users' Committee Newsletter, I would like to make some parting observations about the Commercial List. Firstly, the Commercial List is not a closed shop. Lawyers should not feel excluded from appearing before the Commercial List just because they do not know everyone in the court room and feel that they are not one of the "in crowd". To assist in ensuring that a perception of exclusivity does not exist, with the assistance of the Nominations Committee of the Commercial List Users' Committee, there is now a process in place for nomination to the Committee. The term of office is three years with renewal for an additional three years for a maximum term of six years.

Two distinct but sometimes overlapping bars appear before the Commercial List - the commercial litigation bar and the insolvency bar. Not that long ago, they were both seen as "old boys' clubs". That would not hold true today particularly with respect to the commercial litigation bar which is populated with very qualified women of every age and stage. The insolvency bar similarly has many qualified women although the number of women in the insolvency bar is not as large.

Although the Commercial List is not a closed shop or an exclusive club, it does demand high standards of performance. I view this as a key objective for our system of justice in general and the Commercial List in particular.

One of the key and abiding strengths of the Commercial List is the quality of counsel who appear before the Court. To encourage high performance standards, we have worked on upgrading and expanding the Commercial List Education Day to include topics of appeal to a broad range of commercial litigators and insolvency practitioners. We are also in the process of arranging a visit from one of our American judicial colleagues to discuss experiences south of the border. There are other things we have done on the Commercial List that have also contributed to efficiency, high standards and cost savings. The model orders described in the article written by the editors of this newsletter and the Bench Book of Commercial Decisions are two such examples. The pilot documentary exchange project should also be of assistance in the future.

Efficient, dedicated and hard working Commercial List staff are an integral component of the effective operation of the Commercial List. This sounds like a simple proposition but given the division of responsibility between the court bureaucracy and the judiciary, this is a very challenging aspect of the Commercial List. In my opinion, court administration would be well served by the infusion of some elements of a private sector culture. With some degree of effort on the part of a number of people, for the past few years we have had a superb team led by Kim Policelli of the Ministry of the Attorney General. Absent good staff, the system is in tatters.

This reality cannot be overestimated.

Of course, to be effective, it is also important for the Commercial List to have a specialized court of judges. With the increased specialization of the Bar, this is a challenge. The Bar has practitioners who devote their entire careers to such areas as pension law, securities or insolvency. There are even narrower subsections of professional expertise such as excise and sales tax and derivatives. For those of you in large firms, look around you. Is it realistic to expect that the judges on the Commercial List will have a commanding and intimate knowledge of all of these areas and additionally be fully conversant with the rules of civil procedure and the law of evidence? During the last decade, the sophistication of practice areas has increased dramatically. To be responsive to the Bar and the clients it serves, we do attempt to have some consistency in judges sitting on the Commercial List and some depth of expertise albeit not in all areas of commercial practice.

This brings me to my next observation. The skill of advocacy should not be overlooked. Counsel may be the most knowledgeable lawyer in his or her field but if he or she lacks an advocate's skill set, clients and the court are not well served. Given the sophistication of subject matter and law, it is elemental for counsel to be able to present, explain and persuade. Advocacy training is time well spent.

What is the nature of our work? The Commercial List is no more a dedicated insolvency court than it is a court solely committed to righting the wrongs of oppression. As the economy changes, so too does the nature of the workload of the Commercial List. There are ebbs and flows. For the last two years, we have been squarely in an insolvency storm. This seems to have abated; currently we are seeing more commercial trials and more general commercial litigation activity. Prediction of work load is not an easy exercise. The Commercial List, as with other areas of the Superior Court in Toronto, is chronically short of judges. Typically we spend more time preparing for court, reading, writing and attending case conferences and settlements than we actually sit in court. This reality is exacerbated with the new summary judgment rule and the presentation of evidence in chief by affidavit. These reforms are designed to provide greater accessibility to justice and are desirable but there is an associated judicial burden. On the Commercial List, we try to adopt procedures to meet the needs of a case. Too much time can be spent in unnecessary procedural motions and minor evidentiary disputes. These sorts of issues typically (although not invariably) are ironed out at the Commercial List 9:30's or settlement conferences. A disciplined approach to court time and trial management is one of the hall marks of the Commercial List.

Another characteristic that defines the Commercial List and which in my view contributes to its effectiveness is the absence of a culture of adjournments. This culture permeates many other areas of the Superior Court. Unless there is a real emergency or an imminent settlement, parties on the Commercial List expect and plan to proceed on their reserved date. This is not only efficient, it also saves the clients money which in turn has an impact on accessibility. As Team Leader, approximately every other day I receive a request to transfer a non-Commercial List matter on to the Commercial List. The cases emanate from all over the province including the civil list in Toronto and often do not fall within any of the enumerated Commercial List categories except the basket clause. Invariably the argument advanced focuses on the efficiency and expertise of the Commercial List.

In closing, I would like to thank the judges who have sat regularly on the Commercial List during my tenure --- Justices Campbell, Morawetz, Cumming, Cameron, Spence, Hoy, Wilton- Siegel, Lax, Mesbur, Newbould and Marrocco. They have been collegial, helpful and hardworking. Happily, Justice Morawetz has agreed to take on the position of Commercial Team Leader and no doubt he will do an excellent job. I wish him all the best.

Lastly, I would like to thank the members of the Commercial List Users' Committee and its secretary, Ken Rosenberg, for all of their assistance and support during my tenure as Commercial List Team Leader. It is a wonderful and capable Committee. I look forward to reading all about you in the next edition of the Newsletter!

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## Report on Sub-Committees

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### Model Orders

The sub-committee has recently completed revisions to the template CCAA, Receivership, Approval and Vesting, and Discharge model orders which take into consideration the recent amendments to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

With respect to model insolvency orders, the sub-committee is exploring the possibility of developing a form of order recognizing foreign insolvency proceedings. The prospect of a model order for claims procedures in CCAA matters is also under consideration.

The sub-committee has also developed a model interim order for a plan of arrangement under the CBCA or OBCA, a Mareva Injunction order and a separate Anton Piller order.

The model orders are available on the Superior Court of Justice website at <http://www.ontariocourts.on.ca/scj/en/commercialist>. Anyone with comments on model orders are encouraged to provide same in writing to the sub-committee by contacting any of Tony Reyes ([treyes@ogilyyrenault.com](mailto:treyes@ogilyyrenault.com)), Scott Bomhof ([sbomhof@torys.com](mailto:sbomhof@torys.com)) or, for civil litigation model orders, Chris Matthews ([chris.matthews@fmc-law.com](mailto:chris.matthews@fmc-law.com)).

### Electronic Filing

A pilot project has been commenced for the electronic exchange of court documents for the Commercial List.

The objective of the pilot project is to increase the efficiency of serving and filing materials, to decrease costs and to provide remote access to filed materials. The pilot project will be governed by the Users Committee with the Ontario Ministry of the Attorney General's knowledge. This is a voluntary pilot project which will operate parallel to the existing paper filing system.

CourtCanada is providing the technology, server and support services. CourtCanada will also be available via telephone every day at any time to support users.

Ideally, the Commercial List would like to have 50 commercial litigation cases participate in the pilot project. Large insolvency or commercial cases will not be considered for the pilot project.

The sub-committee is also open to consideration of a second provider of technology and related services to operate a second online document exchange pilot project. We have been contacting and meeting potential second providers. A number of potential technology providers have been identified.

It is the Committee's hope that at the end of the pilot project period, it will be in a position to demonstrate to the Attorney-General that the operation of an online document exchange system is cost effective, efficient and will bring the Ontario Courts into the technological reality in which we practice.

Should you have any questions or concerns regarding the pilot project please feel free to contact the sub-committee by contacting Ken Rosenberg ([ken.rosenberg@paliareroland.com](mailto:ken.rosenberg@paliareroland.com)).

## Practice Direction

The Commercial List Practice Direction establishes special procedures for the hearing of matters on the Commercial List: to identify those matters suitable for the Commercial List and to expedite the hearing and determination of those matters. The Practice Direction from

February 18, 2002 has recently been revised as of June 10, 2010 and can be found on the website of the Superior Court of Justice ([www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)).

The sub-committee of the Users Committee prepared the revised Practice Direction implementing the recommendations of the Civil Justice Reform Project led by the Honourable Coulter A. Osborne, Q.C. and the resulting amendments to the *Rules of Civil Procedure*. The revised Practice Direction was reviewed by the Users Committee and approved by the Regional Senior Judge and the Chief Justice.

A continuous re-evaluation process by the Court and the Users Committee determines whether

- (i) other matters should be added to those matters which may be listed on the Commercial List or
- (ii) its procedures should be further modified or continued.

The Practice Direction governs the conduct of matters on the Commercial List, subject to further amendments as required.

## Education and Activities Day

This past June 2, 2010 the Users Committee, in partnership with the Ontario Bar Association, Insolvency Law Section and The Ontario Association of Insolvency and Restructuring Professionals, hosted the Annual Retreat, Education Program, Golf Tournament and Dinner at the Richmond Hill Golf & Country Club. Although the weather deteriorated throughout the day and eventually forced many enthusiastic golfers to return early to the clubhouse, the Retreat was still a resounding success, especially on account of the dinner guests being afforded the opportunity to witness a "spirited" debate between Messrs. Dowdall and Rosenberg in respect of the recent bankruptcy proceeding involving the Phoenix Coyotes.

As always, the educational panels were exceptionally interesting and topical. CLUC especially thanks all panelists, including Justice Pepall, Justice Morawetz and Justice Campbell for graciously volunteering their time to participate on the educational panels and provide the bar and insolvency practitioners with an up-date review and discussion of the most germane insolvency and restructuring issues of the day.

Special thanks also goes out to Graham Phoenix and the Faskens team for carrying on the tradition of being the lead organizers of the annual golf tournament. All said it was a great event for all those who were able to attend and in keeping with the longstanding tradition of the Commercial List to ensure that the judiciary, the bar and the insolvency professionals continue to work cooperatively in making the Commercial List one of the preeminent commercial Courts in Canada.

Please save **June 2, 2011** for next year's event at Richmond Hill Golf & Country Club.

## Bench Book of Authorities

In an effort to reduce the volume of authorities being served and filed with the Court, counsel are encouraged to use both sides of the paper in reproducing case authorities. A sub-committee was established to consider the preparation of a bench brief of authorities for use by the judges sitting on the Commercial List, containing leading and other authorities regularly referred to by counsel, which would obviate the need for counsel to include copies of such authorities in their brief of authorities filed with the Court. Facta and Books of Authorities would simply reference the case contained in the bench brief of authorities. Attached is a copy of the Memorandum from Madam Justice Pepall dated November 30, 2010, listing the cases in the Commercial List Authorities Book.

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## The Eighth Annual Review Insolvency Law

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A reminder that the next ARIL will be held in Toronto on February 4, 2011.

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## Sitting Judges for Winter Session

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The judges sitting on the Commercial List in January will be Justices Campbell, Cumming, Morawetz, Newbould, Mesbur, Marrocco and Brown.

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## Commerical List Users' Committee Members

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- ▶ Justice Donald Cameron
- ▶ Justice Colin Campbell
- ▶ Justice Peter Cumming
- ▶ Registrar Andrew Diamond
- ▶ Justice Alexandra Hoy
- ▶ Justice Joan Lax
- ▶ Justice Sidney Lederman
- ▶ Justice Frank Marrocco
- ▶ Justice Ruth Mesbur
- ▶ Registrar Janet Mills
- ▶ Justice Geoffrey Morawetz
- ▶ Registrar Scott Nettie
- ▶ Justice Frank Newbould
- ▶ Justice Sarah Pepall
- ▶ Justice Herman Wilton-Siegel
- ▶ Scott Bomhof, Torys LLP
- ▶ Christopher Bredt, Borden Ladner Gervais LLP
- ▶ Harvey Chaiton, Chaitons LLP
- ▶ Robin Dodokin, Garfinkle, Biderman LLP
- ▶ Catherine Francis, Minden Gross LLP
- ▶ Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP
- ▶ Geoff Hall, McCarthy Tetrault LLP
- ▶ Pamela Huff, Blake, Cassels & Graydon LLP
- ▶ Bruce Leonard, Cassels Brock & Blackwell LLP
- ▶ Alex MacFarlane, Fraser Milner Casgrain LLP
- ▶ Chris Matthews, Fraser Milner Casgrain LLP
- ▶ Fred Myers, Goodmans LLP
- ▶ Ira Nishisato, Borden Ladner Gervais LLP
- ▶ A. John Page, A. John Page & Associates
- ▶ Elizabeth Pillon, Stikeman Elliott LLP
- ▶ Elizabeth Kim Policelli, Ministry of Attorney General
- ▶ Jeffrey Radnoff, RadnoffLaw Offices
- ▶ Tony Reyes, Ogilvy Renault LLP
- ▶ Eileen Roehr, Ministry of Attorney General
- ▶ Martin Rosenbaum, Rosenbaum & Frank LLP
- ▶ Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP
- ▶ Robert Russell, Borden Ladner Gervais LLP

Editors:

Pamela L. J. Huff, Partner, Blake, Cassels & Graydon LLP & Harvey G. Chaiton, Partner, Chaitons LLP

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## Appendix "A" – Memorandum

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**SUPERIOR COURT OF JUSTICE**

COURT HOUSE  
361 UNIVERSITY AVENUE  
TORONTO, ONTARIO M5G 1T3

# MEMORANDUM

**From:** Madam Justice Sarah Pepall  
Commercial List Users' Committee

**Date:** November 30, 2010

**Re:** Commercial List Authorities Book

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The Commercial List Users' Committee has developed a Commercial List Authorities Book. It contains case law that is repeatedly reproduced on motions and applications heard on the Commercial List. The Authorities Book will be available electronically on the Superior Court Commercial List website and a hard copy of the Authorities Book will be in each Commercial List courtroom. If you are relying on an authority that is contained in the Authorities Book, it need not be reproduced as part of the materials filed at court.

The Commercial List Users' Committee will update the Authorities Book annually commencing January 1 of each year. The Committee hopes that this Authorities Book will save time and expense for those who appear on the Commercial List.



## Commercial List Authorities Book

### Oppression / Just and Equitable Winding-Up

- A. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560.
- B. *Nanef v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.), 1995 CanLII 959 (ON C.A.).

### Interim Relief

- C. *Le Maitre v. Segeren* (2009), 55 B.L.R. (4<sup>th</sup>) 123, 2009 CanLII 6419 (ON S.C.).

### Liability of Corporate Officers

- D. *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.), 1999 CanLII 1527 (ON C.A.).
- E. *Meditrust Healthcare Inc. v. Shoppers Drug Mart, a division of Imasco Retail Inc.*, 124 O.A.C. 137, [1999] O.J. No. 3243 (C.A.), 1999 CanLII 2316 (ON C.A.).
- F. *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*, 26 O.R. (3d) 481, [1995] O.J. No. 3556 (C.A.), 1995 CanLII 1301 (ON C.A.).

### Receiverships

- G. *Royal Bank v. Soundair Corp.* (1991) 4 O.R. (3d) 1 (C.A.), 1991 CanLII 2727 (ON C.A.).

### CCAA as Amended

#### Initial Order

- H. *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, [2010] C.C.S. No. 2083, [2010] O.J. No. 188, 2010 ONSC 222 (CanLII).

### Injunctive Proceedings

#### Interlocutory Injunctions

- I. *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311.

#### Anton Piller Orders

- J. *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189.

### **Norwich Pharmacal Orders**

- K. *Norwich Pharmacal Co. v. Customs and Excise Commissioners*. [1974] A.C. 133, [1973] 3 W.L.R. 164, [1973] 2 All E.R. 943 (H.L.).
- L. *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619, 96 O.R. (3d) 481, 2009 ONCA 619 (CanLII).

### **Valuation**

- M. *Brant Investments Ltd. v. KeepRite Inc.*, [1991] O.J. No. 683, 3 O.R. (3d) 289, (C.A.), 1991 CanLII 2705 (ON C.A.).

### **Business Judgment**

- N. *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412, 214 D.L.R. (4<sup>th</sup>) 496, (Sup. Ct.), 2002 CanLII 49507 (ON S.C.).

### **Sealing Orders**

- O. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.