

A Year in Review – January 2019

The Commercial List Users' Committee (the "CLUC" or "Users' Committee") is pleased to provide the following updates to the Commercial List practitioners with respect to the activities of the Users' Committee and the Commercial Court.

Message from Justice Hainey

I am pleased to report that we have increased our complement of judges on the Commercial List. The judges who will be sitting on the Commercial List for the entire year in 2019 are RSJ Morawetz and Justices Chiappetta, Conway, Dietrich, McEwen, Pattillo, Penny and me. Our increased complement should shorten the average time outs for motions and trials and give us more capacity to handle urgent matters on short notice.

As reported in this issue of the newsletter, going forward we intend to case manage all commercial matters in a more aggressive fashion than we have in the past. This is to ensure that all cases on the Commercial List proceed in an expeditious and efficient manner. We also plan to utilize case conferences more frequently to resolve disputes rather than resorting to lengthy and costly contested motions. Our goal is to ensure that the Commercial List is a user friendly, efficient and time-sensitive court. As I have said before we are a business court always trying to resolve matters in a way that makes good business sense.

Our 9:30 am list continues to be readily accessible to counsel on very short notice. We often hear urgent matters on a same-day basis. However, we need your cooperation to ensure that our 9:30 am lists remain effective. There has been a recent trend for counsel to schedule contested matters for 9:30 am attendances that cannot be resolved within the 10-minute time limit. We strongly discourage this practice. We are asking for the Bar's cooperation in ensuring that you only schedule matters on our 9:30 am lists that can be dealt with in no more than 10 minutes.

To ensure that we only schedule summary judgment motions that are appropriate we will only schedule them after a case conference. If you wish to bring a summary judgment motion you should schedule a 30-minute case conference at 10 am. We will not schedule summary judgment motions at 9:30 am appointments.

There are two new exciting pilot projects that we will be involved with on the Commercial List. The first is the Digital Hearing Workspace which is scheduled to launch on February 4th and will be mandatory for all counsel on the Commercial List. Simply put, this is a website where counsel can file all documents online. Once uploaded to the website the documents will be available to all other parties in the matter and to the judge. This will replace the requirement of providing the court with USB keys. The Ministry of the Attorney General is testing this system with the Commercial List as part of its court modernization initiative.

The other new pilot project that the Commercial List will be participating in is the Civil Case Management Pilot - One Judge Model. A limited number of civil and commercial cases will be selected to participate in the project that will involve the same judge case-managing a matter from the start of the proceeding through to the trial. This will require the consent of the parties. The impetus for the project, which was initiated by Chief Justice Strathy and Associate Chief Justice Marrocco, was a report from the Judiciary Committee of the American College of Trial Lawyers dealing with case management in civil litigation titled "Working Smarter But Not Harder in Canada: the Development of a Unified Approach to Case Management in Civil Litigation".

I want to thank the members of the Commercial List Users' Committee for their commitment and hard work. CLUC is a very important component of the Commercial List providing valuable input from the Bar to the judiciary. We greatly appreciate the feedback we get from CLUC.

CLUC will soon be accepting nominations for new members. The new members will serve a three-year term beginning in the Fall of 2019. The Nomination Committee consists of Justices Conway, Penny and me, Ken Rosenberg, and Elizabeth Pillon. The committee will soon be requesting expressions of interest from the Bar. I encourage anyone interested to apply as I am certain you will find participating as a member of CLUC to be a most rewarding experience.

Finally, as you all know, the Commercial List is a unique court that we are very proud of. The judges on the Commercial List want your commercial work and we will do our utmost to resolve your clients' disputes in a fair and efficient manner.

We look forward to working with all of you in the future.

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Administration

Report from the Judiciary

There have been fewer judges assigned to the Commercial List over the spring and summer of 2018 as judicial resources were allocated to deal with criminal cases in response to the Supreme Court of Canada's decision in the *Jordan* case.

As noted by Justice Hainey in his message above, the Commercial List has increased its complement of judges for 2019. The following judges will be sitting on the Commercial List throughout 2019: RSJ Morawetz and Justices Hainey, McEwen, Penny, Pattillo, Conway, Chiappetta and Dietrich (an expert in estate matters).

As some of you are aware, Justice Ruth Mesbur will no longer be sitting on the Commercial List as she has decided to retire following a distinguished career on the bench. The Users' Committee thanks Justice Mesbur for her invaluable assistance and contribution over the years to the CLUC and the Commercial Court.

Over the past months, Commercial List judges have commented on the increasing length of daily case lists. In addition, on occasion, counsel are filing lengthy briefs in connection with matters scheduled for a 9:30 appointment. As a result, the Commercial List judges will be vigorously enforcing the 10-minute rule for 9:30 appointments. The judiciary urges counsel to speak with each other prior to Court to agree on scheduling, consent and other relatively non-contentious matters properly dealt with at 9:30 appointments. A brief 1 to 2 page chronology to assist the judge with background is appropriate, but not lengthy briefs.

If more time is required, counsel will have to request and the judges will be available for a short case conference of 20-30 minutes to move matters forward.

As reported in the last Newsletter, summary judgment motions are to be scheduled as a case conference and not to be scheduled at a 9:30 appointment. The presiding judge will examine the case carefully to determine if a summary judgment motion is appropriate.

There will be increased case management of Commercial List cases to ensure that matters move along efficiently. The profession is encouraged to schedule case conferences to deal with pre-hearing motions such as productions and refusals.

The Commercial List judges remind counsel that pre-trial briefs should be no longer than 25 pages.

Court Call

As most of you are aware, Court Call has been running on the Commercial List since April 2017, however, its uptake by counsel has been disappointingly slow. The judiciary strongly urge counsel to use Court Call for consent, unopposed and scheduling matters and have indicated that 9:30 matters being heard via Court Call will be given priority.

Renovations at 330 and 393 University

As you will have noticed, the renovations to 330 University Avenue have progressed and appear to be on track for completion this summer.

Best Practices

Approval of Court Reports

The language used by Justice Morawetz in *Target Canada Co., Re*, 2015 ONSC 7574 (“*Target*”) contains the suggested language to be used for orders approving the reports of CCAA Monitors and the activities described therein. In *Target*, Justice Morawetz granted approval of the Monitor’s reports and activities, but ordered that the following language be included in the Order: “provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval”. It is expected that similar language will be required in Orders approving the reports and activities of other court officers.

It has been observed that counsel have been filing facta longer than the maximum permitted length of 25 pages. The Commercial List office has been instructed to enforce the 25 page limit for facta. In the exceptional circumstance where an increase is required, it will be necessary to obtain advance approval from a Commercial List judge at a 9:30 appointment. Approval will only be given in extraordinary circumstances.

Mag Modernization – Digital Pilot Project

The Ministry of the Attorney General made a presentation to the Users’ Committee on the e-filing project which will permit court documents to be filed online. Web based demonstration/training sessions commenced in November 2018. It is important to note that the new digital hearing work space is not a tool for “serving documents”. It is meant, for now, to remove the need to deliver a USB key to the presiding Judge, enhance communication about materials filed with the Court and notify parties to the proceeding of motions and other steps in the proceedings. For now, only parties to the proceeding will be able to log in and view the court filings. Support will be available at MAGInnovation@ontario.ca.

Model Orders

CBCA/OBCA Plan of Arrangement Model Orders

The Model Order Committee was asked to review and update the CBCA/OBCA Plan Model Orders. A subcommittee was established with Justice Wilton-Siegel acting as liaison with the Court. Following numerous meetings, and an extensive review of plans of arrangement and orders made over the past two years, discussions with Commercial List judges and counsel frequently involved in CBCA/OBCA plan of arrangement applications, the subcommittee has proposed revisions to update the CBCA/OBCA Plan Model Orders. A draft of the revised Orders is currently being reviewed by the Users’ Committee and will be presented for approval once comments have been provided and the draft Orders are finalized.

National Model CCAA Initial Order

A number of judges across the country who supervise insolvency matters met at the last conference of the Insolvency Institute of Canada ("IIC") and recommended that the IIC develop a form of National Model CCAA Initial Order to promote more consistency in the use of CCAA Initial Orders across the country. Following this recommendation, the IIC established a committee, consisting of IIC members involved in provincial Model Order Committees, to prepare a draft National Model CCAA Initial Order. An initial draft form of National Model CCAA Initial Order has been circulated among the national committee members, with the goal of having each member seek comments from their respective provincial Model Order Committee and the Commercial Court judges in their jurisdiction and have the order finalized and available for use as soon as possible.

Claims Procedure Order

A subcommittee was struck to prepare a Model Claims Procedure Order to promote consistency in the form of such Orders approved by the Court. The subcommittee has reported that the Claims Procedure Order is a difficult model order to draft given the complexity of large CCAA files and the variety of claims and different circumstances that have to be dealt with in each particular case. The core provisions of a Model Claims Procedure Order remain under discussion.

Diversity

The Users' Committee discussed the issue of how to promote diversity and inclusion on the Commercial List and the Users' Committee. The Users' Committee agreed to establish a subcommittee to consult with the judiciary and bar, research issues of inclusion and diversity before the Court, and then make recommendations to the Users' Committee on how to better promote inclusion and diversity before the Commercial Court. The subcommittee's first report will be presented at the CLUC Annual Education and Golf Retreat. The commitment to diversity and inclusion on the Commercial List is expressed as: "Where the bench and bar promote an environment at the Commercial List that advances the participation by advocates irrespective of race, gender, indigeneity, ethnicity, religion, age, sexual identity or orientation, (dis)ability or any other characteristic not relevant to advocacy, in a civil and inclusive manner."

The subcommittee consists of members of the User's Committee and ad hoc members:

- Shara Roy (Head), Lenczner Slaght LLP
- Pam Huff, Blake, Cassels & Graydon LLP
- Robin Dodokin, Dodokin Law & Conflict Resolution
- Monique Jilesen, Lenczner Slaght LLP
- Eric Block, McCarthy Tetrault LLP
- Shaun Laubman, Lax O'Sullivan Lissus Gottlieb LLP
- Michael Fenrick, Paliare Roland LLP
- Atrisha Lewis, McCarthy Tetrault LLP
- Mariam Moktar, Lenczner Slaght LLP
- Breanna Needham, Lax O'Sullivan Lissus Gottlieb LLP

Murray Klein Award

The award was created to recognize Ontario insolvency and restructuring lawyers for their combined and consistently demonstrated integrity, decency and selflessness in their approach to professional practice – qualities that our friend and colleague, Murray Klein, was himself well recognized for by those who engaged with him both in and outside of professional practice.

Congratulations to Joseph Marin who was selected the 2018 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award was presented to Joseph Marin on June 12, 2018 at The Royal Canadian Military Institute.

Nominations for the 2019 recipient are due by 5:00 p.m. on March 1, 2019. Details about eligibility, selection and the nomination process can be found at

<https://www.oba.org/AboutUS/AboutUs/Awards/SectionAwards/AwardInsolvency>

CLUC Annual Education And Golf Retreat

The Users' Committee, in partnership with the Ontario Bar Association, Insolvency Law Section and the Ontario Association of Insolvency & Restructuring Professionals, will once again be hosting the annual Education Program and Golf Retreat on **Wednesday, June 5, 2019** at the **Richmond Hill Golf & Country Club**. Registration for the event will be open in the near future. Space will be limited, so register early.

Posting Of Newsletters

This is Issue #11 of the Commercial List Users' Committee Newsletter. The first issue was launched in 2010. 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, the Commercial List, and best practices expectations. Practitioners are given the opportunity to reach out to Users' Committee members and make recommendations for the continued improvement of the operation and administration of that Court.

Copies of this Issue and all previous issues of the Newsletter may be found on the following websites

Ontario Bar Association: <http://oba.org/Sections/Insolvency-Law/Articles>, CAIRP:

<http://www.oairp.com/court matters.htm>, and Toronto Lawyers Association:

<http://www.tlaonline.ca/?page=CommercialListUsers>.

CLUC Nomination Committee

A CLUC Nomination Committee has been struck to consider applications for upcoming vacancies on the Users' Committee. An invitation for applications and information on the application process will be announced soon. Anyone who is a regular user of the Commercial List and has interest in participating on the Users' Committee is encouraged to apply.

Users' Committee Members

- Mervyn D. Abramowitz, Blaney McMurtry LLP
- Derek J. Bell, DLA Piper LLP
- Brendan Bissell, Goldman Sloan Nash and Haber LLP
- Eric Block, McCarthy Tetrault LLP
- Scott Bomhof, Torys LLP
- Harvey Chaiton, Chaitons LLP
- Robin Dodokin, Dodokin Law & Conflict Resolution
- Brian Empey, Goodmans LLP
- Sharon Hamilton, Ernst & Young LLP
- Brett Harrison, McMillan LLP
- Jeffrey Hoffman, Dale & Lessmann LLP
- Pamela Huff, Blake Cassels & Graydon LLP
- Roger Jaipargas, Borden Ladner Gervais LLP
- Monique Jilesen, Lenczner Slaght Royce Smith Griffen LLP
- Shayne Kukulowicz, Cassels Brock & Blackwell LLP
- Shaun Laubman, Lax O'Sullivan Lisus Gottlieb LLP
- Deborah Palter, Thornton Grout Finnigan LLP
- Elizabeth Pillon, Stikeman Elliott LLP
- Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP
- Allan Sternberg, Ricketts Harris LLP
- Sheldon Title, MNP LLP

Editors:

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