

A Year in Review – February 2020

The Users' Committee is pleased to provide the following updates to the Commercial List Bar with respect to the activities of the Users' Committee and the Commercial List.

Message from Justice Hainey

I am pleased to report that we now have our regular complement of six full-time judges on the Commercial List. The judges who will be sitting on the Commercial List for 2020 are Chief Justice Morawetz (on a part-time basis) and Justices Conway, Dietrich, Gilmore, Koehnen, McEwen and me. We are hopeful that our increased complement will shorten the average timeouts for motions, applications and trials.

Our key statistics for the period August 1, 2018 to August 1, 2019 are as follows:

1. Total commercial matters booked: 3,071
2. Total estates matters booked: 2,356
3. Total commercial and estates matters heard: 5427 (approximately 1,000 per judge)
4. Trials scheduled: 35
5. Trials heard: 6
6. Trials settled: 25
7. Trials adjourned: 4

The total number of matters booked on the Commercial and Estates Lists increased by 9%. Estates matters are approximately 35% of our work.

The number of trials heard is significantly down from previous years due primarily to more active and hands-on case management. The timeouts for long and short trials are shorter than in previous years because of this case management.

Late filing of material continues to pose a major problem for all judges on the Commercial List. In some cases, late-breaking events make it necessary to file supplementary material at the last minute before a matter is heard. However, in most cases there is no good reason for the late filing of material. Late filing makes it very difficult for judges to adequately prepare for hearings. In future we may decline to hear a matter on the scheduled date if a significant amount of material is filed late by the parties. We urge all counsel to file all material on time so that unnecessary adjournments do not occur.

I am pleased to report that thanks to the efforts of Jeremy Opolsky and Daniel Schwartz we are establishing an amicus program to assist the court in matters with self-represented litigants. The program is modelled on successful amicus programs at the Divisional Court and the Court of Appeal. Having pro-bono duty counsel assist the court with self-represented litigants is a welcome development for our court. If you would like to participate in this new initiative please email Jeremy Opolsky, Daniel Schwartz and Alex Shelly at clprobono@gmail.com.

We have now held two meetings with our newly-constituted Commercial List Users Committee and I am pleased that the new committee is functioning very effectively. I want to thank the members of CLUC for their commitment and hard work. CLUC is an important component of the Commercial List that provides valuable input to the judiciary from the professionals who regularly use the Commercial List. We greatly appreciate the assistance and feedback we get from CLUC.

Finally, our Commercial List is a unique court that we are all very proud of. As I have said before, we are a business court and we want your commercial work. We will do our utmost as judges 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

The Users' Committee was advised that the current waiting time for scheduling a motion for less than 2 hours is approximately four weeks and for a motion 2 hours or longer is six to eight weeks (although urgent matters can be scheduled more expeditiously at a 9:30 appointment). The current waiting time for scheduling a short trial of less than 2 weeks is thirty weeks and for trials longer than 2 weeks is approximately one year. Dates are still available in June and the Fall for short trials. Long trials are being scheduled for next year.

The judiciary reminds counsel that it will strictly enforce the 10-minute rule for 9:30 appointments as these matters should be for scheduling or uncontested matters. If counsel expects that an appointment will go longer than 10 minutes, a case conference at 10 a.m. should be scheduled for 30 or 60 minutes.

Counsel are discouraged from submitting documents at a 9:30 attendance, although chronologies of dates and briefs of orders and/or endorsements may be helpful in appropriate circumstances. Counsel are encouraged to use Court Call for 9:30 scheduling appointments to avoid the need to attend in person. Those using Court Call will be given priority and heard first.

There will be increased case management of all Commercial List cases. Trial judges will be assigned well before the scheduled trial, so that trial management will be conducted early on by the judge who will hear the matter, and not by the pre-trial judge much later in the process.

This trial management process will have as a priority the preparation of an efficient and streamlined case, including agreed statements of facts and joint document briefs so that the trial can focus on the contentious points. Where there are issues of credibility, viva voce evidence from witnesses will be required in most circumstances. Filing affidavits for examinations in chief will only be permitted for minor or non-contentious witnesses.

The judiciary expects counsel to strictly adhere to agreed-upon timetables. Summary judgment motions will not be scheduled at a 9:30 appointment but at a case conference on the 10:00 a.m. list. Partial summary judgment motions will only rarely be scheduled.

When counsel bring a matter forward for consideration for inclusion on the Commercial List, an email with a brief background should be provided to the Commercial List Office explaining why it is an appropriate case for the Commercial List.

Renovations at 330 and 393 University

The construction at 330 University is now completed. There are new robing rooms located on the 9th floor, as well as new court rooms on the 5th floor.

There is a separate elevator that is dedicated for the judiciary and for security purposes.

Best Practices

Page Limits

The judiciary continue to remind the bar of the 25 page limit on facts, which page limit also applies to pre-trial and settlement briefs. Leave for longer submissions will rarely be granted.

MAG Modernization – Digital Pilot Project

The new digital website is in process and there are still some bugs that need to be worked out. It is expected that full functionality may not be achieved for some time. As a result, the judiciary is still asking for USB keys for the time being.

If there is a particular problem with the website, the Users' Committee urges that you please take a photo/screenshot of the problem and send it to the MAG Website Team.

Model Orders

CBCA/OBCA Plan of Arrangement Model Orders

The CBCA/OBCA Plan of Arrangement Model Order has been finalized and approved by the Users' Committee.

National Model CCAA Initial Order

The sub-committee is continuing to work on a National Model CCAA Initial Order with the Insolvency Institute of Canada. It is hoped that a near final draft will be available in February for final review and discussions.

Claims Procedure Order

A sub-committee is working to prepare a Model Claims Procedure Order to promote consistency in the form of such Orders approved by the Court.

Diversity and Inclusion

The Users' Committee continues to encourage and promote advocacy by younger counsel. The sub-committee has provided reports to the Users' Committee regarding what can be done in support of the diversity initiative and continues to work on providing further information. The judiciary encourages lead counsel to bring students, young counsel and accountants working with them on a matter into any chambers hearing and to introduce them to the presiding Judge.

ARIL

The 17th Annual Review of Insolvency Law Conference is taking place February 6-7 in Vancouver.

Canadian Anti-Spam Legislation (CASL) Sub-Committee

The Users' Committee would like to remind all to use the following language to deal with concerns with CASL, which the CASL Sub-Committee approved for inclusion in CCAA Initial Orders and Receivership Appointment Orders in January 2015:

THIS COURT ORDERS that the [debtor and the monitor/receiver/financial advisor and their counsel] are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicant's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS).

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 Aubrey Kauffman who was selected the 2019 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award was presented to Aubrey Kauffman on June 19, 2019 at The Royal Canadian Military Institute.

Nominations for the 2020 recipient are due by 5:00 p.m. on March 1, 2020. Details about eligibility, selection and the nomination process can be found at <https://www.oba.org/About-US/About-s/Awards/SectionAwards/AwardInsolvency>.

CLUC Annual Education and Golf Retreat

Brendan Bissell and Ken Pearl are the new chairs of the CLUC 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 3, 2020** at the **Richmond Hill Golf & Country Club**. Further particulars of the education program, golf and other recreational activities along with registration for the event will be provided in the near future. Space will be limited, so register early.

Posting of Newsletters

This is Issue #12 of the Commercial List Users' Committee Newsletter. 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.

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>.

Users' Committee Members

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- Brendan Bissell, Goldman Sloan Nash and Haber LLP
- Eric Block, McCarthy Tetrault LLP
- Andrea Burke, Davies Ward Phillips & Vineberg LLP
- Harvey Chaiton, Chaitons LLP
- Delna Contractor, Lenczner Slaght Royce Smith Griffin LLP
- Chantelle Cseh, Davies Ward Phillips & Vineberg LLP
- Arif Dhanani, RSM Canada
- Brian Empey, Goodmans LLP
- Emily Fan, Lerner LLP
- Caitlin Fell, Brauti Thorning LLP
- Andrew Gray, Torys LLP
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