

## A Year in Review – December 2023

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

### Message from Justices Conway and Penny

Greetings from the new Co-Team Leads of the Commercial List. We extend our thanks to our predecessor, the Honourable Thomas McEwen, for his leadership over the last year and a half and wish him well in his future endeavours.

Our initial focus has been on providing stability in the Commercial List operations. To this end, the current judges of the Commercial List will remain on the team for 2024. The transition appears to have been seamless largely due to the efforts of the hardworking Commercial List judges and the cooperative bar that appears before us.

The workload on the Commercial List is heavy. In January 2024, we will have another judge joining our team, Justice William Black. This will bring us up to a total of eight Commercial List judges on the team: Justices Conway, Penny, Wilton-Siegel, Cavanagh, Kimmel, Steele, Osborne, and Black.

Paragraph 12 of the Commercial List Practice Direction provides that only Toronto matters can be listed on the Commercial List unless, for special reasons, authorization is given by the Commercial List Team Lead(s). One of the ways we have of managing the heavy workload is through judicious application of this proviso.

We wanted to take this opportunity to highlight two other areas where the Commercial List bar can increase efficiency in booking and using valuable time on the Commercial List.

The first is booking hearing dates. We have found an increasing trend to applicants booking time for "urgent" matters which, for various reasons, are not ready to proceed on the assigned date. Please be careful when booking time – you should have a fair degree of confidence that the application will be ready to go on the assigned day. Please also ensure that the amount of time booked for the hearing is realistic.

The second matter has to do with the hearings themselves. CaseLines is here to stay. You need to be prepared to direct the presiding judge to the relevant material in CaseLines, using CaseLines page numbers and the like. We have found that one of the most effective ways to do this is through hyperlinking in the factums and the compendia for oral argument. Please use these tools as they vastly improve our ability to navigate through the material in digital form and assist us when writing our decisions.

We continue to actively case manage matters to ensure continuity and efficiency in moving them forward towards a practical resolution or a final hearing on the merits. We also schedule time sensitive and urgent matters as needed. The ability of the Commercial List judges to provide this efficient service rests on counsel following the three Cs of the Commercial List: cooperation, communication and common sense.

On June 15, 2023, the new **Consolidated Practice Direction Concerning the Commercial List was** published on the court's website. It updates and consolidates the previous Practice Directions and reflects our current practices, including for in-person and virtual hearings, CaseLines, and scheduling. Counsel appearing before the Commercial List must be familiar with the new Practice Direction. A special thanks to Justices Kimmel and Osborne for all of their time and effort in completing this project.

We are conducting scheduling appointments, case conferences, motions and applications in-person or by Zoom as set out in the Practice Direction. We are conducting trials in-person, with the ability to accommodate counsel and witnesses by Zoom as appropriate. All modes appear to be working well but we welcome your feedback on any matter concerning Commercial List operations.

The regular meetings of the Commercial List Users' Committee are an excellent opportunity to raise issues with respect to the operation of the Commercial List. We encourage your input and ask that you direct any comments or suggestions to the CLUC Secretary, Cliff Prophet.

We look forward to continuing to work with you.

Justices Conway and Penny

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## Retirement Tribute to the Honourable Justice Thomas McEwen

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The retirement of Justice McEwen this year has left with us an influential legacy of creativity, pragmatism, and humour. We are incredibly appreciative of his dedication to the many complex cases he managed and the people he served.

Justice McEwen began his legal career after graduating with an LLB from the University of Western Ontario in 1984, followed by his call to the Ontario Bar in 1986. Justice McEwen was a well-respected litigator for 24 years. His practice was wide-ranging, and included insurance-related matters, professional liability, product liability, and class actions.

In 2009, Justice McEwen was appointed to the Ontario Superior Court where he presided over a broad range of civil litigation cases, including serving as the head of the Estates List and Civil List in the Toronto Region. His Honour's most recent role was as head of the Commercial List for over 1.5 years, during which he oversaw some of Canada's most publicized and high-stakes cases.

His Honour was well-known for cutting to the heart of an issue and persuading the parties to consider more nuanced and practical resolutions before resorting to hard-fought hearings and litigation. Justice McEwen was tireless in his devotion to reaching the right result, whether in relation to a hearing or a negotiated outcome.

Justice McEwen was also highly attuned to the big-picture and far-reaching implications of commercial matters. He did all of this with his signature dry sense of wit that often helped to cut the tension between even the most adverse parties.

With Justice McEwen's retirement, he has been spending more time with his family, including his wife and grandchildren. Just in case retirement gets too comfortable, His Honour has also started his own mediation/arbitration practice, since he has some experience settling a case or two! Justice McEwen, we thank you for your service and wish you all the best on this new journey.

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## Administration

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### Commercial List Judges

Current judges sitting on the Commercial List include Justices Cavanagh, Conway, Kimmel, Osborne, Penny, Steele, and Wilton-Siegel.

Justice Black will join the team beginning January 2024.

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## Practice Notes

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### Guidelines

General practice tips from the Court:

- Be familiar with the **updated Commercial List Practice Direction** as of June 2023.
- Be realistic when booking hearing time on the Commercial List. Do not try to squeeze in a two-hour hearing into one hour, just to get your matter on sooner. Likewise, counsel are expected to be in a position to proceed on the appointed day; no placeholders!
- The Court welcomes the use of Aide Memoires for Case Conferences in appropriate cases. Where employed, the Aide Memoire should *briefly* (maximum two pages) state the purpose of the appearance, what the issue(s) is (are) and whether it is on consent.
- The Commercial List is for Toronto matters, subject to discretion in appropriate cases. This is one of the means by which the Commercial List regulates workload and preserves the ability of the Court to provide real-time services where necessary.
- Hyperlinking in factums and compendiums is the best way for the Court to navigate the large records typically filed in Commercial List matters. The hyperlinking does not always interact seamlessly when uploaded to CaseLines. Please triple check links before the hearing. Be prepared to provide CaseLines page numbers for all references, taken from the appropriate hearing bundle.
- Zoom Court is real court. Appropriate attire, surroundings and decorum must be observed. Counsel must gown for all motions, applications and trials. For scheduling appointments, case conferences and judicial pretrials, business attire is required.

### Current Time Outs

| APPEARANCE                     | TIME OUT                            |
|--------------------------------|-------------------------------------|
| Chambers Appointment           | 2 weeks                             |
| Short Motion                   | 7-8 weeks                           |
| Long Motion                    | 9-10 weeks                          |
| Trial                          | Approx. 1.5 - 2 years               |
| Urgent Trial (10 days or less) | The court will book as appropriate. |

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## The 2023 Inaugural Justice Glenn Hainey Memorial Award

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This inaugural award in honour of the late Justice Hainey was presented to **Monica Faheim** of Miller Thomson LLP.

This award is presented to a lawyer in their first five years of practice who embodies the characteristics and values that Justice Hainey fostered as a judge and lawyer. Monica demonstrates these traits through her legal practice and accomplishments. She is a 2020 law graduate of the University of Western Ontario and currently an associate at Miller Thomson LLP in Toronto. Her practice is focused on insolvency and restructuring matters, and she has experience working with a wide range of stakeholders in such proceedings.

Congratulations again, Monica, on this very well-deserved award.



Thank you to Gowlings WLG for hosting the awards ceremony at its office, which was attended by Justice Hainey's family, some of whom flew in for the event, as well as users of the Commercial List.



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## Posting of Newsletters

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The creation of a newsletter was important for two main reasons. First, so that members of the Bar and other organizations who use the Commercial List are informed of the workings of the Users' Committee. And second, so that users of the Commercial List are given the opportunity to make recommendations for the continued improvement of the operation and administration of the court.

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

- [Commerciallist.com](http://Commerciallist.com)
- [Toronto Lawyers Association](http://Toronto Lawyers Association)

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## Users' Committee Members

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### Commercial List Judges

- Chief Justice Morawetz
- Justice Cavanagh
- Justice Conway
- Justice Kimmel
- Justice Osborne
- Justice Penny
- Justice Steele
- Justice Wilton-Siegel

### Committee Members

- Associate Justice Ilchenko
- Andrew Gray, Torys LLP
- Arif Dhanani, RSM Canada
- Brendan Bissell, Reconstruct LLP
- Brian Empey, Goodmans LLP
- Caitlin Fell, Reconstruct LLP
- Chantelle Cseh, Davies Ward Phillips & Vineberg LLP
- Clifton Prophet, Gowling WLG (Canada) LLP
- Debbie Dykstra, Supervisor, Court Operations, Ontario Ministry of the Attorney General
- Delna Contractor, Lenczner Slaght LLP
- Denise Cooney, Paliare Roland Rosenberg Rothstein LLP
- Derek J. Bell, DLA Piper LLP
- Emily Y. Fan, Lerner's LLP
- Eric Block, Ross Nasser LLP
- George Benchetrit, Chaitons LLP
- Jeffrey Larry, Paliare Roland Rosenberg Rothstein LLP
- Jennifer Stam, Norton Rose Fulbright Canada LLP
- Ken Pearl, Fuller Landau LLP
- Maria Konyukhova, Stikeman Elliott LLP
- Miranda Spence, Aird & Berlis LLP
- Monica Simion, Manager of Court Operations, Ontario Ministry of the Attorney General
- Monique Jilesen, Lenczner Slaght LLP
- Sharon Hamilton, Ernst & Young LLP
- Shayne Kukulowicz, Cassels Brock & Blackwell LLP
- Shaun Laubman, Lax O'Sullivan Lissus Gottlieb LLP