

## A Year in Review – May 2011

This is the second issue of the Newsletter of the Commercial List Users' Committee (the "**Users' Committee**"). The inaugural edition of the newsletter was released in December 2010, and distributed by email through the Ontario Bar Association – Insolvency and Civil Litigation Sections, and through the Ontario Association of Insolvency and Restructuring Professionals. Since that time, the Users Committee and sub-committees have continued to meet on a regular basis to advance various initiatives. In this newsletter, we take the opportunity to update readers on the recent activities of the Users Committee.

If you are interested in becoming a member of the Users Committee for the next term commencing September 2011, the nominations process is described in this newsletter.

### Team Leader

As indicated in the last newsletter, Madam Justice Sarah Pepall completed her term as team leader of the Commercial List and now sits on the Long Trial Team. The Turnaround Management Association, Toronto Chapter, is recognizing her role in commercial restructuring with a Lifetime Achievement Award at the Spring Gala on Tuesday, May 31, 2011. Congratulations to Madam Justice Pepall and our gratitude for her efforts on the Commercial List and the Users' Committee.

Effective January 1, 2011, Mr. Justice Geoffrey Morawetz has taken over the position of team leader and will undoubtedly put his imprimatur on the workings of the Court. We all look forward to working with Mr. Justice Morawetz in this challenging role.

### Message from Mr. Justice Geoffrey Morawetz

It is my pleasure to write a short note for the Newsletter. As noted above, I have assumed the position of team leader of the Commercial List. You will not see any significant changes in the operation of the Court. This is not surprising given the refinements that have evolved over the years, implemented first by the Hon. James Farley and for the last five years by Madam Justice Pepall.

The most common question that I have received in the last few months revolves around the function of the team leader. For the most part, the position is administrative in nature. Judicial schedules have to be set, taking into account judgment writing weeks and trial scheduling. We generally have five to six judges hearing matters on a weekly basis. The majority of matters proceed as applications or motions. We also schedule trials (generally no longer than three weeks) and an ever increasing number of case conferences. In addition, we schedule a number of pretrial case management conferences, usually with Mr. Justice Colin Campbell. The purpose of pretrial case management conferences is to ensure that the trials proceed in an organized manner and on schedule.

I also attend weekly meetings with the other team leaders and Regional Senior Justice Then. These meetings address scheduling issues across the Court for the Toronto Region. To the extent that one area requires additional judicial resources at any time, it is expected that the other teams will provide assistance, whenever possible. This underscores the importance of adhering to the schedules on the Commercial List and we appreciate your co-operation in notifying the administrative staff at the Commercial List Office of any change in status for your matters.

In an effort to improve efficiency on larger files, we have also implemented a practice of having an order and endorsement binder available for the presiding judge. A direction is provided by the presiding judge, at an early stage of the proceeding, which outlines who is responsible for keeping the binder up to day.

Over the summer months you will note that we will not be scheduling trials. Two judges will be sitting each week during July and August. Our objective is to ensure that there is sufficient flexibility to hear ongoing and urgent matters, yet at the same time accommodate long matters. Any efforts that counsel can make to book their matters on a timely basis will be greatly appreciated.

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## Report on Sub-Committees

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### Model Orders

Comments were received by the sub-committee following the last revisions to the template CCAA, Receivership, Approval and Vesting, and Discharge Model Orders to take into account the amendments to the *Bankruptcy and Insolvency Act* ("BIA") and the *Companies' Creditors Arrangement Act* ("CCAA") in September 2009.

Further revisions have been made to the Receivership Model Order that were reviewed at the last Users Committee meeting, but had not yet been finalized. Of particular note to practitioners is the proposed amendment to paragraph 17 of the Model Order which provides that the receiver and counsel to the receiver shall be paid their reasonable fees and disbursements incurred at their standard rates and charges "unless otherwise ordered by the Court on the passing of accounts". This amendment was made to confirm that receivers will be entitled to charge their reasonable fees and disbursements at their standard rates and charges, but the actual amount to be paid will be in the discretion of the Court.

Work on model orders recognizing foreign insolvency proceedings continues to progress. The sub-committee hopes to have draft orders available for the Users' Committees consideration at the next meeting or immediately following the summer break.

The sub-committee has also developed a model final order for a plan of arrangement under the CBCA or OBCA, which is in the final stages of approval before posting by the Superior Court of Justice on its website.

The model orders currently in use 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@ogilvyrenault.com](mailto:treyes@ogilvyrenault.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)).

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## Pre-Filing Reports

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A sub-committee has been established to consider and report to the Users Committee on the practice of pre-filing reports by CCAA monitors and receivers and, if considered appropriate, guidelines for the purposes, circumstances and contents of such a pre-filing report. The sub-committee is looking to develop a credible approach which is consistent with the independence of a putative court officer.

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## Electronic Booking and Filing Projects

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Court administration reports that a disappointing 1% of all Commercial List cases appear to be booked through the OSCAR electronic portal. The electronic document exchange and filing pilot project that commenced last year has now been terminated due to lack of interest.

A court information management system team has been looking at expanding electronic services for the Commercial List over the next five to seven years. Ontario trails other jurisdictions in the establishment of electronic support services for the courts and its users. Unless lawyers and their staff take advantage of electronic services made available through these pilot projects, the Ministry of the Attorney General will find other uses for scarce financial resources which will inevitably delay technological advancement for the Ontario Courts and we will continue to labour under an inefficient system.

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## CLUC Nomination Process

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As indicated in the last newsletter, the term of office for a member of the Users Committee is 3 years, with the opportunity of a one term renewal for a maximum term of 6 years. The Users' Committee has established a Nominations Committee, consisting of Justice Morawetz, Justice Brown, Ken Rosenberg, Pamela Huff and Peter Griffin. The Nominations Committee is looking for expressions of interest from those who would like to serve as a member of the Users Committee for the 3 year term commencing in the Fall 2011.

Of the current 19 members of the Users Committee, plus the judges/registrar and a representative of the Ministry of the Attorney General, 9 members are drawn from the following associations:

- The Advocates' Society
- Ontario Bar Association (Civil)
- Ontario Bar Association (Insolvency)
- International Insolvency Institute
- Toronto Lawyers' Association
- Ontario Association of Insolvency and Restructuring Professionals
- Insolvency Institute of Canada

Anyone interested in becoming a member of the Users Committee should submit a written application to the Nominations Committee. There is no specific application form. A brief letter setting out your interest, your interaction with the Commercial List, and some brief background information is sufficient. If interested, please forward your application on or before June 24th to the Secretary of the Users Committee:

Ken Rosenberg  
Paliare Roland Rosenberg Rothstein LLP  
250 University Ave, Suite 501  
Toronto, Ont. M5H 3E5  
T: 416 646 4304  
F: 416 646 4305  
E: ken.rosenberg@paliareroland.com

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## The Annual Commercial List Users Retreat

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The Users Committee, in partnership with the Ontario Bar Association, Insolvency Law Section, and the Ontario Association of Insolvency and Restructuring Professionals, will be hosting the next annual education program, retreat and dinner on June 2, 2011 at the Richmond Hill Golf Club. The programme developed by the Organization Committee promises to make this year yet another exceptional education and activities day, rain or shine.

The Organization Committee has arranged excellent panels of Commercial List judges and experienced practitioners who will discuss a variety of current topics of interest, including a panel designed for commercial litigators. All users of the Commercial List are encouraged to register for this program and to spend what should prove to be a very informative and enjoyable day with your friends and colleagues. A copy of the program agenda and a registration form are attached.

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## Bench Book of Authorities

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In the last newsletter, we reported that a bench brief of authorities has been compiled, containing leading and other authorities regularly referred to by counsel appearing on the Commercial List. The list of authorities in the bench book of authorities is now posted on the Superior Court of Justice website at [http://www.ontariocourts.on.ca/scj/en/commerciallist/authorities\\_book.ht](http://www.ontariocourts.on.ca/scj/en/commerciallist/authorities_book.ht). Facta and books of authorities filed with the Court by counsel should not include copies of the listed authorities, but should simply reference the case contained in the bench brief of authorities.

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## Endorsements Record

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A new practice has been instituted regarding the establishment and maintenance of an indexed, endorsements record for the use of judges sitting on the Commercial List.

Effective May 1, 2011, all cases on the Commercial List will require counsel on an ongoing matter to establish and maintain a binder, to be kept in the Court file, containing in chronological order, copies of all endorsements, unofficial transcripts of written endorsements, and orders made in the proceeding. The judge hearing the initial application or motion will assign to a lawyer for one of the lead parties the task of maintaining the binder and keeping the binder index current. Those attending the Commercial List Users Retreat will have an opportunity to hear more about the endorsements record and the Court's expectation of counsel concerning the establishment and maintenance of the endorsements record and index for ongoing matters.

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## Sitting Judges for Fall Session

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The judges sitting on the Commercial List from September through December 2011 will be Justices Campbell, Cumming, Morawetz, Newbould, Mesbur, Siegel and Brown.

There will be no trials on the Commercial List during the summer. The Commercial List is currently booking trials for the Fall session. Trials estimated to take 3 weeks or longer are generally transferred to the long trial list.

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## New Deputy Registrar

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We warmly welcome to the Bankruptcy Court Laura Donaldson, who has been appointed Deputy Registrar, and will be sitting in Toronto effective June 13, 2011.

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## Murray Klein Award

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Congratulations to Daniel R. Dowdell of Fraser Milner Casgrain LLP who was selected the 2011 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award was presented to Dan on May 25, 2011 at the Albany Club, 91 King Street East, Toronto, ON.

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## Users' Committee Members

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- Justice Colin Campbell
- Justice Peter Cumming
- Registrar Andrew Diamond
- Justice Alexandra Hoy
- Justice Frank Marrocco
- Justice Ruth Mesbur
- Registrar Janet Mills
- Justice Geoffrey Morawetz
- Registrar Scott Nettie
- Justice Frank Newbould
- Justice Herman Wilton-Siegel
- Registrar Laura Donaldson
- 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, Blakes, Cassels & Graydon LLP
- Bruce Leonard, Cassels Brock & Blackwell LLP
- Alex Macfarlane, Gowling Lafleur Henderson LLP
- Chris Matthews, Aird & Berlis LLP
- Fred Myers, Goodmans LLP
- Ira Nishisato, Borden Ladner Gervais LLP
- A. John Page, A. John Page & Associates
- Elizabeth Pillon, Stikeman Elliott LLP
- Kim Policelli, Ministry of Attorney General
- Jeffrey Radnoff, Radnoff Law 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