

A Year in Review – December 2011

During the past six months, the Commercial List Users' Committee (the "**Users' Committee**") and sub-committees have continued to meet on a regular basis to advance and undertake various initiatives designed to improve the workings of the Court. We take this opportunity to update readers on the activities of the Users' Committee.

Message from Mr. Justice Morawetz

This newsletter provides the reader with an overview of the activities of the Commercial List Users' Committee. This has been a year of transition. The newsletter outlines the CLUC nomination process and lists the new members of the Committee. I would like to thank the retiring members of the Committee, each of whom has attended numerous meetings and contributed valuable time over the past few years to the initiatives of CLUC. The retiring members are Jeffrey Radnoff, Martin Rosenbaum, A. John Page, Fred Myers and Robert Russell.

This year has also been one of transition in the Commercial List Office and I would like to thank both management and staff for their hard work throughout the year. If you have the opportunity over the next few weeks to personally thank them, I am certain that your words would be appreciated. Kim Policelli serves as Manager of Court Operations, and Tara Stead as Manager of the Commercial/ Bankruptcy Office, and they are capably assisted by Joe DiPietro, Alsou Anissimova, Natasha Brown and Patrick McKenzie. In order to be effective, the Commercial List requires the cooperation of counsel and a hard working administrative group. The judges of the Commercial List recognize the contribution of both groups.

As we move forward into 2012, we anticipate that the Commercial List will remain busy, but with the continued cooperation of both counsel and their clients, we expect that matters will proceed in both an efficient and effective manner. With the exception of the summer months, six judges are scheduled to sit on the Commercial List. The scheduled judges are listed in the newsletter. However, with the recent appointment of Justice Alexandra Hoy to the Court of Appeal for Ontario, it is expected that there will be some adjustments to the schedule. The Commercial List judges wish Justice Hoy all the best in her new assignment.

In closing, we encourage ongoing communication with the users of the Commercial List and look forward to receiving further suggestions on how to improve the operation of the Commercial List.

All the best for 2012.

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CLUC Nomination Process

As indicated in the last issue of the Newsletter, the Users' Committee established a Nominations Committee, consisting of Justice Morawetz, Justice Brown, Ken Rosenberg, Pamela Huff and Peter Griffin, to consider applications from those wanting to serve as a member of the Users' Committee for the three-year term commencing in Fall 2011. The Nominations Committee received a number of applications for consideration. The recommendations of the Nominations Committee were approved by the Users' Committee at its meeting in September 2011. The Users' Committee thanks all those who expressed interest in becoming a member of CLUC and warmly welcomes their new colleagues on the Committee, whose names are noted with an asterisk in the attached list of Users' Committee members.

Report on Sub-Committees

Model Orders

The model orders sub-committee continues to solicit and receive comments on various model orders currently in use and to create new model orders for the assistance of the Court and counsel. The co-chairs of the Sub-committee are Tony Reyes and John Page. They have invited participation on their committee from non-CLUC members. Aubrey Kauffman, Jeremy Dacks and Ira Nishisato will sit on the Sub-committee.

The sub-committee has developed a model Initial Recognition Order and a supplemental order in respect of the recognition of a foreign main proceeding under the CCAA. The Users' Committee anticipates that the recognition orders will be finalized and available for use early next year.

The sub-committee has also made revisions to the model Receivership Order to incorporate changes discussed at prior User Committee meetings.

A sub-sub-committee has been formed to amend the service and notice provisions for incorporation into all model orders.

A reminder to readers that 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 is encouraged to provide same in writing to the sub-committee by contacting Tony Reyes (tony.reyes@nortonrose.com) or John Page (ajpage@ajohnpage.com).

Pre-filing Reports

A sub-committee of Harvey Chaiton, Pamela Huff and John Page was established to consider and make recommendations to the Users' Committee on the practice of pre-filing reports by proposed CCAA monitors and proposed receivers. The sub-committee consulted with various insolvency professionals and has presented its draft report to the Users' Committee for consideration. The report will be used to assist the Users' Committee to establish guidelines for pre-filing reports which are consistent with the required impartiality and independence of a proposed Court officer.

Court Canada e-Reservation System

We previously reported on the lack of the use of the OSCAR electronic portal to book Commercial List matters. The Users' Committee has been informed by Court administration that the Ministry of the Attorney General's contract with Court Canada expired on November 30, 2011, and will not be renewed. As a result, Commercial List matters will have to be booked solely through written request forms sent by facsimile or email to the Court.

Practice Direction

For those unaware, a new practice direction was released effective October 1, 2011 concerning the use and citation of judicial decisions obtained from approved electronic databases (ie Quicklaw, CanLII). A copy of the practice direction can be found on the Ontario Superior Court of Justice website at <http://www.ontariocourts.on.ca/scj/en/notices/pd/filing-judicial-decisions.htm>.

Education and Activities Day

This past June 2, 2011, the Users' Committee, in partnership with the Ontario Bar Association, Insolvency Law Section and the Ontario Association of Insolvency & Restructuring Professionals, hosted the 21st Annual Retreat and Dinner at the Richmond Hill Golf Club. The organizing committee established excellent panels of Commercial List judges and experienced practitioners that attracted more than 150 attendees to the event. Attendees were treated to interesting discussions on a variety of topics such as restructurings through the use of the CBCA or OBCA, use of the new Part IV of the CCAA for recognition of foreign insolvency proceedings, model orders used on the Commercial List and "best practices" on the Commercial List. The education program was followed by a very enjoyable day on the golf course and dinner.

The Users' Committee wishes to thank all participants on the educational panels for generously providing their time and sharing their breadth of knowledge and experience with their colleagues. The Users' Committee also wishes to thank the organizing committee, Alex MacFarlane and John Page, for yet another successful Education Activities Day, and special thanks to Graham Phoenix, for his hard work in organizing the golf tournament.

Best Practices of the Commercial List

Counsel appearing on Commercial List matters are reminded of the recommended “best practices” of the Court to ensure efficient management of cases. A panel including Justice Mesbur at the Education and Activities Day reviewed the following expectations:

- Rule 4.01 of the Rules of Practice permits the use of both sides of paper. Given the volume of the materials that is often filed in Commercial List cases, it is recommended that both sides of the paper be used to reduce the amount of paper filed with the Court. Affidavits and facta should be single sided, but exhibits/cases should be double-sided.
- Monitor and Receiver reports frequently refer to and attach previous reports filed with the Court. A good practice would be to create a compendium of reports that can be referred to, as necessary, without duplicating copies of the reports.
- In an effort to reduce the volume of materials filed with the Court, counsel are reminded that a bench brief of authorities has now been established and is located in each court room, which contains leading authorities regularly referred to by counsel. A copy of the memorandum of Justice Pepall listing the cases was included in the inaugural edition of the CLUC Newsletter, and is attached again to this Newsletter for ease of reference. Copies of these cases no longer need be included in the brief of authorities filed with the Court. Facta should now simply reference the case in the bench brief of authorities.
- Facta are required for all contested motions on the Commercial List and should be filed on any unopposed or uncontested motions that involve the application or interpretation of recent amendments to the CCAA or BIA.
- A practice adopted by the Users' Committee, but not yet included in a practice direction, is the requirement to establish and maintain an endorsements record for each continuing matter for which there is expected to be a number of appearances. A red binder is to be set aside in each court file that will be at least one inch thick to hold copies of all issued and entered orders, endorsements and reasons in a proceeding. The Commercial List file number is to be written clearly in black ink on the spine of the binder. Copies of the orders, reasons and endorsements are to be inserted in the binder. Where reasons or endorsements are handwritten, counsel are expected to prepare unofficial typed transcripts, which are to be included with a copy of the handwritten reasons or endorsement. The court will assign responsibility to maintain the endorsements record at the outset of a matter to counsel for one of the parties. It is expected to be, in most circumstances, counsel for the plaintiff/applicant or counsel for the monitor/receiver/trustee who is assigned such responsibility.

Message from Mr. Justice Newbould on Court Nomenclature

Is there a Dishonourable Court?

A number of years ago, a practice began of referring to a court in facta, reports and other documents filed with the court as “this Honourable Court”. It was not always thus when I practised at the bar. When it began and documents were drafted for me by colleagues that contained a reference to “this Honourable Court”, I always took out the word Honourable and said that to include the word was toadying to the judges who did not need or want that.

The practice has certainly continued unabated since I was appointed to the bench. It is alive and well and flourishing. It is commonplace to see a reference to “this Honourable Court” two or three times in once sentence and virtually every factum and report is replete with the phrase. It has now moved into orders in a big way.

A reasonably balanced person (such as most counsel who appear on the Commercial List!) might suggest that the word Honourable is unnecessary and, in fact, is a backwards way of telegraphing that some courts are not honourable! My wife refers to me as the dishonourable judge, but that is the exception.

I have discussed this in vain with the counsel and receivers who are frequent fliers with the Commercial List and suggested they simply refer to “this Court” in their material. They are reluctant to do so in case others do not follow and some judge becomes upset with them for the deletion of the word Honourable.

I have discussed this with other judges on the Commercial List who agree with me. This is a request, therefore, that material filed not refer to “this Honourable Court” but merely “this Court”. We will not think the less of you. To the contrary, we will think the better of you. In time, it will grow on you like an old pair of slippers.

The Eighth Annual Review of Insolvency Law

A reminder that the next ARIL will be held in Vancouver on February 10, 2012.

Sitting Judges for Winter Session

The judges sitting on the Commercial List for all of 2012 will be Justices Morawetz, Brown, Campbell, Cumming and Newbould. They will be joined in the winter session (January to March) by Justices Spence and Wilton-Seigel, in the spring session (April to June) by Justice Pattillo and in the fall session (September to December) by Justices Wilton-Seigel and Grace.

Users' Committee Members (to be revised)

- Justice Colin Campbell
- Justice Peter Cumming
- Registrar Andrew Diamond
- 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
- Mervyn D. Abramowitz*, Kronis Rotsztain Margles Cappel LLP
- Scott Bomhof, Torys LLP
- Christopher Brecht, Borden Ladner Gervais LLP
- Harvey Chaiton, Chaitons LLP
- Robin Dodokin, Garfinkle, Biderman LLP
- Catherine Francis, Minden Gross LLP
- Deborah Grieve*, Cassels Brock & Blackwell LLP
- Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP
- Geoff Hall, McCarthy Tetrault LLP
- Brett Harrison, McMillan LLP
- Jeff Hoffman*, Gowling Lafleur Henderson LLP
- Pamela Huff, Blakes, Cassels & Graydon LLP
- Bruce Leonard, Cassels Brock & Blackwell LLP
- Alex Macfarlane, Gowling Lafleur Henderson LLP
- Chris Matthews, Aird & Berlis LLP
- Elizabeth Pillon, Stikeman Elliott LLP
- Kim Policelli, Ministry of Attorney General
- Tony Reyes, Ogilvy Renault LLP
- Eileen Roehr, Ministry of Attorney General
- Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP
- Allan Sternberg*, Ricketts Harris LLP
- Sheldon Title*, MNP LLP

Editors:

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Appendix “A” – Memorandum



SUPERIOR COURT OF JUSTICE

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MEMORANDUM

From: Madam Justice Sarah Pepall
Commercial List Users' Committee

Date: November 30, 2010

Re: Commercial List Authorities Book

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. *Nanuff 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. (4th) 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. (4th) 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.