

A Year in Review – January 2015

A year has passed since the last edition of the Commercial List Users' Committee (**Users' Committee**) Newsletter. This Issue #7 of the Newsletter looks back at the experience of the Commercial List in 2014, and provides information and practice notes for the coming year.

First, a message from Mr. Justice Newbould, Team Leader of the Commercial List, reflecting on his first anniversary in that role.

Message from Mr. Justice Frank Newbould

I am pleased to report that the past year has gone smoothly in the Commercial List and that the Estates Court work that we have taken on at the direction of Regional Senior Justice Morawetz has worked to the benefit of the Estates bar and without compromising the work of the Commercial List. This is due in no short measure to the efforts and skills of Mr. Joe DiPietro. We are grateful to have him available to “run the place”, and I know that the bar appreciates him as much as the judges do.

One thing I would ask of counsel is to ensure that the material necessary for a hearing is filed on time and is pulled from the court files and put before the judge hearing the matter. Too often this is not done and the staff does not know what should be provided. In matters that are continuing, this often leads to a large number of records and other papers sent to the judge that are not relevant. In these cases, counsel should have someone attend at the court office ahead of time to assist the staff in having the right material pulled from the court files. In all cases, written direction, by way of a covering letter to the Commercial List office, should be provided as to the material to be put before the judge.

I am grateful for the support and assistance of Regional Senior Justice Morawetz. He has been heavily involved in efforts to make the civil side of our court more efficient, and this has taken a great deal of his time. Yet he has spent a great deal of time sitting on the Commercial List, which I know is where his heart is. I hope that this can continue.

The Users' Committee is indispensable to the working of our court and its members are knowledgeable and dedicated. You will see in this newsletter that now is the time for some new

members to come on board. For those of you who have not served on the Users' Committee, I encourage you to put your name forward. I know if you become a member, you will enjoy it.

I thank everyone for the support given to me this past year. It has been a heavy year, particularly with Nortel, and the support of counsel, staff and the other judges is very much appreciated. I look forward to another successful year.

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Practice Notes

9:30 Appointments

9:30 appointments continue to run too long and delay matters scheduled for 10:00 a.m. The Commercial List reminds its users that 9:30 appointments are to be used purely for scheduling matters and should require no more than 10 minutes. If parties require more time, they can seek a 15 or 30 minute conference, for example, at 8:30 a.m. or 9:00 a.m. If a longer case conference is required or the matter necessitates the Judge reviewing detailed material, the parties should schedule an afternoon conference.

Time Estimates for Hearing

It has become apparent that counsel are more prone to over-estimating rather than under-estimating the time required for a hearing. Counsel are encouraged to be realistic, so access to the Commercial List is not restricted by matters requiring much less than the time scheduled for hearing. The Commercial List judges understand that some matters may go beyond the best estimates of counsel and that they will be accommodating to these situations as they occur.

Trial List

Commercial List cases have been settling at a good pace prior to trial or hearing date. In addition, there continued to be a lower volume of insolvency filings in 2014 than in prior years. These two factors have led to increased availability on the Commercial List for trial scheduling. A number of trials have been set for the winter/spring sittings, with some remaining time available, and considerably more availability for trials in the fall sittings.

Estate Matters

The Commercial List continues to have the capacity to hear estate matters due to the reduced volume of insolvency matters. The current practice is for one Commercial List Judge to hear estate scheduling matters at 9:30 a.m. each day and judges are scheduled to hear contested estate matters as required. Estates trials are heard in the regular Civil List. This has worked well and there has been a noticeable reduction in the backlog of matters on the Estates List. Care is being taken to ensure that commercial matters are scheduled as required.

Administration

Door Sheets

While many practitioners would have enjoyed a return to the prior system of sending door sheets directly to counsel, there is no change expected to the province-wide policy and practice of the Ontario Superior Court in this regard. Daily door sheets are available at <http://www.ontariocourtdates.ca/daily-docket.aspx>, but will not be sent to counsel directly.

Scheduling

Joe DiPietro is responsible for scheduling both bankruptcy and Commercial List matters.

Best Practices

Motion Materials on USB sticks

The judges of the Commercial List note that, despite the widely circulated and promoted e-Delivery Protocol, they are not consistently receiving USB sticks containing application/ motion materials. The Judges' e-mail capacities are limited, so USB sticks are required for the Judges to have electronic access to court materials.

All materials for a hearing should be saved on a USB stick, in a PDF file format that allows searching within the documents and the copying of extracts from a document. A word version of any factum and of key affidavits should be included as well as key affidavits. The USB stick should be clearly labeled to ensure that court staff and Judges can identify the matter and hearing date to which it applies.

Counsel are encouraged to review and adopt in their practice the e-Delivery Protocol available on the website of the Superior Court of Justice at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/electronic-documents>.

Email Addresses

Counsel are reminded that they should include their e-mail addresses on the front of all application and motion records and facta, to facilitate communication of endorsements and other matters.

CLUC Nomination Process

The term of office for a member of the Users' Committee is generally 3 to 6 years, with a staggered turnover of membership every three years. The Users' Committee has established a Nominations Committee, consisting of Regional Senior Justice Morawetz, Justice Newbould, Ken Rosenberg and Pamela Huff, to consider applications from those wanting to serve as a member of the Users' Committee for an initial three-year term commencing in the Fall of 2015.

Of the current 20 members of the Users' Committee, plus the Judges/registrars 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 Litigation Section)
- Ontario Bar Association (Insolvency Law Section)
- International Insolvency Institute
- Toronto Lawyers' Association
- Ontario Association of Insolvency and Restructuring Professionals
- Insolvency Institute of Canada

Those who are interested in becoming a member of the Committee are encouraged to 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 on your qualifications is sufficient. If interested, please forward your application on or before **February 27, 2015** to the Secretary of the Users' Committee:

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Report on Sub-Committees

Model Orders

The Model Orders Sub-committee continues to review developments in the law and in practice, and considers revisions to the existing model orders as appropriate. Counsel are reminded that the following model orders have been developed by the Users' Committee and should check for the most current versions on the website of the Ontario Superior Court of Justice at <http://www.ontariocourts.on.ca/scj/en/commercial> list:

- Approval and Vesting Order
- Companies' Creditors Arrangement Act Initial Order
- Final Order Plan of Arrangement
- Foreign Main Proceeding – Initial Recognition Order
- Foreign Main Proceeding – Supplemental Order
- Mareva Order
- Interim Order – Plan of Arrangement
- Receiver Discharge Order
- Receivership Order
- Order to Allow Entry and Search of Premises

Model Initial Order

As part of the ongoing review, the Model Order Sub-committee is considering incorporating new notice provisions into the model Initial Order in an effort to reduce the

strain on judicial resources and the number of unnecessary court attendances by counsel, and to deal with the continuing concern of short service of motion materials. The proposed changes are based on language contained in the Initial Order in the US Steel Canada CCAA proceedings.

The new provisions would require a party to serve a motion record within 10 calendar days before the return date of the motion, and any party objecting to the relief sought would serve responding materials or a notice of objection no later than 4 calendar days before the return date. If no party served responding materials or a notice of objection by the deadline, the Monitor would contact the presiding Judge and request a determination as to (i) whether a hearing of the motion is necessary, (ii) whether such hearing will be in person, by telephone or in writing, and (iii) which parties, if any, are required to make submissions on the motion. The Monitor would then advise the service list of the presiding Judge's determination on the above.

Proposed language is under review and is expected to be incorporated in the model Initial Order in the coming months.

Electronic Delivery Protocol

As noted above, the judges of the Commercial List strongly encourage counsel to submit USB sticks in accordance with the e-Delivery Protocol. In order to improve and increase the use of electronic delivery of documents requested by the Commercial List Judges, the Model Orders Sub-committee has prepared tutorial videos which will instruct counsel and their assistants on how to properly format and submit electronic documents in PDF searchable format. The videos will be available on CanLII once they have been finalized in the coming months.

Sitting Judges

The following judges will be sitting on the Commercial List in the 2015 Winter Term (January – March) and Spring Term (April – May): Justices Morawetz, McEwen, Newbould, Patillo, Conway and Wilton-Siegel.

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 educational program and golf retreat on **June 3, 2015** at the **Richmond Hill Golf & Country Club**. Please mark this date in your calendars and keep your eyes open for further information.

Murray Klein Award

Congratulations to Michael Rotsztain of Goldman Sloan Nash & Haber LLP who was selected the 2014 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award was presented to Michael on May 22, 2014 at the Albany Club in Toronto.

Posting of Newsletters

This is Issue #7 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

- Mervyn D. Abramowitz, Kronis Rotsztain Margles Cappel LLP
- Scott Bomhof, Torys 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, Blake 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
- Barbara Krever, Ministry of Attorney General Tony Reyes, Norton Rose Canada LLP
- Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP
- Allan Sternberg, Ricketts Harris LLP
- Sheldon Title, MNP LLP

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