

A Year in Review – April 2016

More than a year has passed since the last issue of the Newsletter as there has been little to report in the intervening period. The Users' Committee is pleased to provide the following updates to the Commercial List Bar.

Message from Justice Newbould

We have had a very busy year in the Commercial List. There have been many more CCAA filings this year, most of which have had their various complexities. As well, cases booked for a trial have not settled at the same rate that was our experience in the past few years, with the result that we have needed more judge time for trials. There has therefore been some difficulty in booking matters for a timely disposition. If you have an urgent matter and are having trouble getting it booked, you can book a 9:30 a.m. appointment and we will see that you will have your matter scheduled as required.

We continue to have staffing changes in the Commercial List office and our staff is doing its utmost to serve all law firms and members of the public. Like everything else in life, change is constant and we all have to deal with that.

You will find elsewhere in this newsletter a section on best practices. Please take the time to educate your lawyers and staff on the requirements of the Commercial List. Quite often these practices are not being followed, even by those firms who are regular users of the Commercial List.

The Judges for the fall term on the Commercial List will be RSJ Morawetz (part time) and Justices Newbould, Conway, Hainey, Mesbur, Penny and Wilton-Siegel.

I hope to see you all at our annual education and golf retreat this year on June 1st.

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Administration

(i) Door Sheets

The Users' Committee has looked into having information regarding hearings released in advance of the date of the hearing. The current Province wide practice is to not disclose information in advance of Court. The Attorney General has advised that it is unlikely that the current practice will be changed to accommodate the Commercial List.

(ii) Joe Dipietro

As many of you are aware, Joe has changed positions and is no longer with the Commercial List office. The Users' Committee thanks Joe for his invaluable assistance over the years.

Best Practices

(i) Booking Time

A growing problem on the Commercial List is the overbooking of time for motions. The bar should be cognizant of this problem and try to be as accurate as possible when estimating the time that will be required. Under booking time has generally not posed a problem to date.

(ii) Filing Of Materials

The Commercial List Bench has identified an unfortunate trend of materials being filed late. The filing of materials outside of the time prescribed by the Rules should only take place in exceptional circumstances.

Counsel should put a general description of the order being sought on the front of Motion Records, facta and briefs of authority (e.g. "Motion re: Claims Process") and the date that the matter is returnable.

A copy of the order sought blacklined to the relevant model order is to be included in the motion or application record.

Do not put the service list at the front of the material filed. It is unnecessary and often adds a large number of pages to facta, records and briefs.

A factum should be filed for every contested motion or application with a brief of authorities.

All material should include the e-mail address of the lawyers.

All material should be filed no later than 12 noon on the day before the hearing and if possible sooner than that. Counsel for each party should take the responsibility of ensuring that all materials, including USB sticks, are with the Court by this time.

The default delivery location for all material to be filed is the Commercial List Office on the 7th Floor of 330 University Avenue.

With respect to 9:30 appointments, counsel should be selective and exercise judgment with materials as there is no opportunity for the Judge to review or consult any volume of materials. A discussion with the Court staff is helpful.

(iii) Motion Materials on USB sticks

The Bench has reiterated its preference to receive facta and affidavit evidence for contested motions or applications on a USB key. The contents of facta and affidavits should be in Word format that allows copying and pasting of the contents. Exhibits should be in searchable PDF unless they are available in Word, which is often the case with key agreements or correspondence. USB keys should arrive in time for a Judge to have an opportunity to review the contents. The Bench notes that far too many USB keys are being delivered without a proper label. The following points should be kept in mind:

- i. hyperlinking is very useful and the Bench encourages the parties to hyperlink the facta and affidavits;
- ii. all USB keys should be properly labeled to identify the matter and the party providing it. Do not just put an unlabeled USB key in an envelope that has this information on the front. USB keys should be placed in a plastic cover and not form part of the public file.

(iv) Culling of Material

It is important to ensure that when a Judge receives materials for a motion or application, the file has been culled to remove material that is not relevant. Too often the Commercial List staff is not sure what to put before the Judge with the result that irrelevant material is sent to the Judge. This is particularly important in matters with continuous records such as CCAA proceedings. Counsel should take steps with the Court staff so that they will know what to put before the Judge and what is not necessary.

(v) Approval of Monitor's Activities

On a motion for approval of the Monitor's reports and activities in *Target Canada Co., Re*, 2015 ONSC 7574 ("*Target*"), Regional Senior Justice Morawetz addressed the issue of when such approval should be granted, and how that approval should be limited. In *Target*, the Monitor sought Court approval of its reports together with its activities set out in each of those reports, which has become a routine practice in CCAA proceedings. The motion was opposed by certain landlords of the Applicants who took the position that the approval of the Monitor's activities was both premature and unnecessary and that such approval would be unfair to the creditors, especially if the approval might later be relied upon by the Applicants or any other party to the prejudice of creditors. The Court recognized that the principle of *res judicata* and related doctrines applied to the approval of Monitors' reports and caution should therefore be exercised where approval is sought for the Monitor's reports and activities in a general sense. The Court held that the benefit of any such approval should be limited to the Monitor itself and that to the extent that approvals are granted, their effect should not extend to the Applicants or other parties. Accordingly, the Court granted approval of the Monitors reports and activities, but ordered that the following language be included in the Order: "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

Report on Sub-Committees

Model Orders

New Co-Chairs

Tony Reyes and John Page have retired as the co-chairs of the Model Order Sub-committee. The Users' Committee thanks Tony and John for their significant contribution over many years in this role and welcomes Scott Bomhof and Sharon Hamilton as the new co-chairs of the Sub-Committee.

Electronic Delivery Protocol

In order to improve and increase the use of electronic delivery of documents requested by the Commercial List Judges, the Model Orders Committee has prepared tutorial videos which will instruct counsel and their assistants on how to properly format and submit electronic documents. The tutorial videos can be found on the following website: http://www.canlii.org/en/info/onsc_e-delivery.html.

U.S. Steel Provisions

The Users' Committee has discussed the inclusion of the "U.S. Steel provisions" in the Model Order and has determined that while they may be appropriate in certain cases, they are not necessarily appropriate in all cases and should therefore not form part of the Model Order. The provisions are attached to this Newsletter and may be included in the language of the Order where appropriate.

Retail Insolvency Model Order Provisions

Given the frequency of retail insolvencies recently, the Users' Committee has considered whether it would be useful to have a model order provisions which provide for standard sale guidelines for insolvent retailers. The issue was looked at from a variety of perspectives including debtors, creditors, landlords and Court-appointed officers. Ultimately, it was determined that such model order provisions are not required at this time.

Other Activities

The Model Order Sub-Committee is considering whether possible changes to the CBCA Plan Model Order and the Anton Pillar and Mareva Model Orders are warranted. Recommendations have been made and the Sub-Committee is in the process of evaluating them to determine if changes to these Model Orders would be beneficial.

Canadian Anti-Spam Legislation (CASL) Sub-Committee

In January 2015, the CASL Sub-Committee approved the following language for inclusion in CCAA Initial Orders and Receivership Appointment Orders in order to address concerns with CASL:

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

Congratulations to Kevin McElcheran of McElcheran ADR who was selected the 2015 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award was presented to Kevin on May 6, 2015 at the Royal Canadian Military Institute in Toronto.

It was recently announced that the recipient of the 2016 Murray Klein Award will be Tony Reyes of Norton Rose Fulbright. Congratulations to Tony for this well-deserved honour. The award will be presented to Tony on June 7, 2016 at The Royal Canadian Military Institute. Notice of the award presentation and registration form were recently circulated by the OBA Insolvency Law Section. We look forward to seeing you there.

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 1, 2016** at the **Richmond Hill Golf & Country Club**. Registration for the event is now open. Space is limited so register early.

Posting of Newsletters

This is Issue #8 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/courtatters.htm>, and Toronto Lawyers Association:
<http://www.tlaonline.ca/?page=CommercialListUsers>.

Users' Committee Members

- Mervyn D. Abramowitz, Kronis Rotsztain Margles Cappel LLP
- Derek J. Bell, Bennett Jones LLP
- Brendan Bissell, Goldman Sloan Nash and Haber LLP
- Scott Bomhof, Torys LLP
- Harvey Chaiton, Chaitons LLP
- Robin Dodokin, Garfinkle Biderman LLP
- Brian Empey, Goodmans LLP
- Sharon Hamilton, Ernst & Young LLP
- Brett Harrison, McMillan LLP
- Jeffrey Hoffman, Dale & Lessmann LLP
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- Allan Sternberg, Ricketts Harris LLP
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Editors:

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Appendix “A” – Court Order

THIS COURT ORDERS that a party who makes a motion in these proceedings shall, subject to further Order, serve a motion record at least ten (10) calendar days' before the date on which the motion is to be heard (the **"Return Date"**).

THIS COURT ORDERS that any responding party objecting to the relief sought in a motion must serve responding materials no later than 4 p.m. on the date that is four (4) calendar days before the Return Date (the **"Objection Deadline"**). If the responding party will not be serving responding material but nevertheless intends to object to the relief sought in a motion, then such responding party must serve, by the Objection Deadline, a notice stating its objection to the relief sought and the grounds for such an objection (a **"Notice of Objection"**).

THIS COURT ORDERS that if either (i) responding materials, or (ii) a Notice of Objection is served in respect of a motion, the motion shall be heard on the Return Date, unless the Court orders otherwise.

THIS COURT ORDERS that, if neither (i) responding materials; nor (ii) a Notice of Objection is served by the Objection Deadline, the Monitor shall contact the judge having carriage of the motion (the **"Presiding Judge"**) and request a determination as to (a) whether a hearing is necessary, (b) whether such hearing will be in person, by telephone or by written submissions only, and (c) which parties, if any, are required to make submissions on the motion (collectively, the **"Hearing Details"**). Promptly after being advised by the Presiding Judge of the Hearing Details, the Monitor shall advise the service list of such Hearing Details. If the Presiding Judge does not direct otherwise in any Hearing Details, then the motion shall be heard on the Return Date.