

A Year in Review – Revised May 2017

Another year has passed since the last issue of the Newsletter. The Users' Committee is pleased to provide the following updates to the Commercial List Bar with respect to the activities of the Users' Committee and the Commercial Court.

Message from Justice Newbould

While insolvency work has been down somewhat in the last several months, the Commercial List judges have been fully engaged, partly caused by having too few judges caused by the lack of judicial appointments to the Superior Court in Toronto. We do however want to be sure that any urgent matter is heard in a timely way and so be sure to request a 9:30 appointment to be able to see a judge on an urgent basis.

I want to thank all of the members of the Commercial List Users' Committee for all of the work that they have done, particularly the active work of several of the committees. It is the CLUC and its work that makes the Commercial List special and the envy of practitioners and courts across the Country.

I have announced that I will be retiring from the Court on June 1, 2017. I have thoroughly enjoyed my time as a judge and particularly the time I have been able to spend on the Commercial List. It has given me the opportunity to meet and get to know a large group of lawyers, both senior and more importantly junior lawyers, in chambers and in court, many of whom I would not have otherwise met. That has been my privilege and I am grateful for it. As you know, the work of our commercial court is interesting and it is good counsel who appear in commercial matters that make it such a pleasurable experience for our judges.

I hope to see you all at the Education/Golf day on May 31, 2017.

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Administration

(i) Report from the Judiciary

Justice Newbould reports that workloads on the Commercial List are down as of January 2017, compared to the level of activity earlier in 2016. Matters are being handled efficiently by the Commercial List office and e-mail communications between the Court office and counsel are working well to efficiently address matters that are not proceeding, without the necessity of an attendance.

When communicating with the Commercial List office, counsel should use the general email address: **toronto.commercialist@jus.gov.on.ca**.

(ii) Electronic Court (Nortel Equipment)

Over the course of 2016, the Users' Committee considered the potential future use of the Nortel audio-visual equipment situated in Courtroom 8-1. The Committee considered whether the Nortel equipment would be useful for future cross-border hearings and other matters, given the improvements in technology since its installation and costs of maintenance and operation. Discussions were entered into with the Ministry of the Attorney General ("MAG") to address issues such as access to the equipment and the costs associated with its maintenance and operation. The Users' Committee has been advised that MAG has no issues with the Users' Committee or another appropriate organization owning and operating the Nortel equipment in the Court premises and there do not appear to be any union or operational policy issues that would interfere. MAG is prepared to enter into a memorandum of understanding with an appropriate party, such as the User's Committee, that would own and operate the equipment, which will confirm such an arrangement. However, MAG will not provide any funding or support for the maintenance and operation of the equipment, other than the resources needed to facilitate the arrangement for maintenance and operation by a third party.

In a recent cross-border hearing in *Performance Sports*, the parties were unable to re-start the Nortel equipment in order to connect the Ontario Court with the Delaware Court and it was necessary for audio-visual equipment to be provided at the offices of the Monitor.

This is a recent example where the availability of the Nortel equipment would have enhanced the operation of the Commercial List.

A subcommittee chaired by Ken Rosenberg and consisting of Sharon Hamilton, Liz Pillon, Pam Huff, Brian Empey, Brett Harrison and Justice Newbould has been established to investigate avenues and costs for the maintenance and operation of the Nortel equipment, in order to determine whether the ownership of the Nortel equipment for use by the Court is viable.

(iii) Rule 48.14 and the Commercial List

Rule 48.14 deals with the administrative dismissal of an action for delay and provides that unless the court orders otherwise, the registrar shall dismiss an action for delay if the action has not been set down for trial or terminated by any means by the later of the fifth anniversary of the commencement of the action and January 1, 2017. As of July 1, 2017, the Rule will only contemplate a dismissal of an action on its fifth anniversary.

Subsection (1.1) provides that the Rule does not apply to actions placed on the Commercial List established by practice direction in the Toronto Region. This was confirmed by Marrocco, A.C.J.S.C. in *Daniels v. Grizzell*, 2016 ONSC 7351, where the Court held that Rule 48.14 does not apply to case managed actions including those placed on the Commercial List.

(iv) Court Call

Court Call is a system allowing counsel to participate in court hearings remotely, using audio-visual technology accessible from a computer desktop or laptop. The system has been used successfully in the US and certain regions of New Brunswick. MAG has agreed to use Court Call on a pilot basis.

Court Call has been in operation since March 2017 as a pilot project for Commercial List and general civil matters in Toronto with respect to unopposed, consent or scheduling matters. Routine scheduling matters will be able to be handled from counsel's office, on a more efficient basis. Judges will decide how to allocate appointment slots, which would be held in a court room or chambers. Counsel will be able to attend by webcast using their computers, but will also be able to attend in person if they wish. Court Call should materially reduce unnecessary court attendances by counsel in person and thereby reduce costs.

A copy of the Practice Advisory Direction issued by Regional Senior Justice Morawetz concerning video and telephonic conferencing is attached.

(v) Renovations at 330 and 393 University

Regional Senior Justice Morawetz reports that the courthouses at 330 and 361 University will undergo extensive renovations and there will be changes to what matters are heard in which courthouse. Family courts will be moved from 393 to 361 University and civil courts will be moving from 393 to 330 University. Masters will remain at 393. New courtrooms will be constructed on the 5th and 7th floors of 330 University and minimal changes are expected on the 9th and 10th floors. Steps will be taken to minimize the impact of the renovations on existing court operations. It is expected that the renovations will be completed in 2018.

(vi) e-filing Pilot Project

The Ministry has indicated a desire to move to electronic filing for court materials. E-filing pilot sites are to be established in the near future.

Best Practices

(i) Motion Materials on USB Sticks

The Bench continues to stress 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.

(ii) Pulling Material

The Bench has recognized that counsel have been taking steps to ensure all necessary materials are before the Judge in advance of a hearing. The Bench asks that all counsel continue this practice or implement it if they are not already doing so.

As part of this exercise, 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 to the hearing. This is particularly important in continuing matters such as CCAA and receivership proceedings, where voluminous materials may have been filed.

Report on Subcommittees

Model Orders

CBCA Plan of Arrangement Model Order

A new subcommittee of the Model Order Subcommittee was established comprised of Justice Wilton-Siegel, Elizabeth Pillon, Aubrey Kauffman, and Jeremy Dacks to update the model order for plans of arrangement under the CBCA. The subcommittee has consolidated the comments it has received and expects to circulate a draft model order in the next few months.

Anton Pillar Model Order

The Model Order Subcommittee prepared a draft Anton Pillar model order which was broadly circulated to interested groups including the Ontario Bar Association, Toronto Lawyers' Association and the Advocates' Society. The draft model order was prepared in consultation with a memo prepared by Ira Nishisato of Borden Ladner Gervais LLP. No comments were received by the Subcommittee from its broad consultation process. Justice Newbould provided some revisions to the draft model order and the final draft was approved by the User's Committee. The Anton Pillar model order has now been approved by the Chief Justice and once translated into French will be posted on the Superior Court of Justice website.

Mareva Model Order

The Model Order Subcommittee considered whether the current model Mareva Order should be updated and recommended that no changes should be made to the model order at this time.

Business Law Advisory Council (BLAC)

The BLAC is comprised of members of the Ontario Bar Association and other expert members of the legal community. The BLAC was established in March 2016 to review Ontario's corporate and commercial legislation and to provide advice to Government on priorities to reform that legislation. One of BLAC's initiatives is to review provincial avoidance legislation such as the *Assignments and Preferences Act* and *Fraudulent Conveyances Act*. This mandate is not restricted to Ontario. Brian Empey of Goodmans LLP was appointed as a member of BLAC and will provide updates to CLUC on its progress.

In March 2017 the *Bulk Sales Act* (Ontario) ("**BSA**") was repealed. The Model Orders Subcommittee will review the model orders to remove any references to the BSA.

Sitting Judges

The following judges will be sitting on the Commercial List in the 2017 Fall Term (September – December): Justices Hainey (Team Leader), McEwen, Conway, Myers, Wilton-Siegel (part-time) and Regional Senior Justice Morawetz (part-time).

Murray Klein Award

The Award was created to recognize Ontario insolvency and restructuring lawyers for their combined and consistently demonstrated integrity, decency and selflessness in their approach to professional practice - qualities that our friend and colleague, Murray Klein, was himself well recognized for by those who engaged with him both in and outside of professional practice.

Congratulations to Jay Swartz of Davies Ward Phillips & Vineberg LLP who has been selected the 2017 recipient of the Murray Klein Award for Excellence in Insolvency Law. The award will be presented to Jay on June 5, 2017 at the Royal Canadian Military Institute in Toronto. We encourage everyone to sign up and attend the presentation of this well-deserved award to our colleague. Registration can be made online at http://www.cbapd.org/details_en.aspx?id=ON_17BKT0605T.

Posting of Newsletters

This is Issue #9 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/courtmatters.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, DLA Piper LLP
- Brendan Bissell, Goldman Sloan Nash and Haber LLP
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- Brian Empey, Goodmans LLP
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Appendix “A” – Practice Advisory re Video Conferencing for Civil Practice Court, Commercial List Chambers Matters and Estates List 9:30 Appointments in the Toronto Region



Superior Court of Justice



Civil

Criminal

Family

Divisional Court

Small Claims Court

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Practice Advisory re Video Conferencing for Civil Practice Court, Commercial List Chambers Matters and Estates List 9:30 appointments in the Toronto Region

The following Practice Advisory is in effect as of March 8, 2017.

1. In accordance with rule 1.08 of the Rules of Civil Procedure, counsel and/or parties may appear by video conference, unless otherwise directed by the court, for (i) consent matters, (ii) unopposed matters and (iii) scheduling matters in the following types of events:
 - a. Civil Practice Court appearances (as described in paragraphs 1 – 2 of the [Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region](#))
 - b. Commercial List Chambers Matters (as described in paragraphs 25 – 27 of the [Consolidated Practice Direction Concerning the Commercial List](#))
 - c. Estates List 9:30 appointments (as described in paragraphs 11 – 15 of the [Consolidated Practice Direction Concerning the Estates List in the Toronto Region](#)).
2. Parties or counsel who choose to appear by video conference for one of these events must make their own arrangements to do so, in accordance with rule 1.08(6); they may do so through one of the two methods set out below.

Appearing by video conference using CourtCall (no prior Court approval required)

3. CourtCall is a third-party video conferencing service that is available for the court matters and events described in section 1.
4. A CourtCall video appearance is voluntary. Any party or counsel wishing to appear by video using CourtCall must contact CourtCall directly to make the necessary arrangements, which include the following:
 - i. If not already registered with CourtCall as a client, register at courtcall.com .
 - ii. **At least two (2) business days before the hearing**, book the appearance by logging into the CourtCall website (courtcall.com) and completing a “New Appearance” request, or by contacting CourtCall at 1-888-882-6878.
 - iii. Pay the fee set by CourtCall for the video appearance.
 - iv. CourtCall will email or fax a confirmation upon completion of the booking and payment.
 - v. The participant appearing by video must supply his or her own telephone and computer with a camera and internet connection with sufficient bandwidth to allow them to connect and participate.

- vi. On the day of the hearing, the participant must initiate the video appearance by clicking on the link and dialing the toll-free teleconference number provided in the confirmation sent by CourtCall.
 - vii. A pre-hearing check-in is required fifteen minutes before the scheduled hearing time.
 - viii. For further information, please refer to the CourtCall website (courtcall.com ) or contact CourtCall at 1-888-882-6878.
5. The party/counsel must also advise the Court, in writing, that he/she will be attending the court event by video using the CourtCall service. This can be done by completing the appropriate section on the scheduling/confirmation form filed with the Court.
 6. All persons who have completed the necessary arrangements with CourtCall and advised the Court, in accordance with the steps outlined above, may assume that they have the Court's permission to appear for the event by video, unless otherwise directed by a judge.

Appearing by other means (prior Court approval required):

7. A party or counsel who wishes to appear for one of the court matters/events described in section 1 by video conference through means other than the CourtCall service or by telephone conference must (i) obtain the Court's prior approval to appear by the means proposed (in accordance with rule 1.08(2) or (3)) and (ii) then make the necessary arrangement in accordance with rule 1.08(6).

Dated: March 8, 2017

Heather J. Smith
Chief Justice
Superior Court of Justice (Ontario)

Geoffrey B. Morawetz
Regional Senior Judge
Superior Court of Justice, Toronto Region

Note: CourtCall can be used for video appearances at **court dates on or after March 27 2017**. Counsel/parties can begin scheduling appearances on CourtCall's website as of March 20, 2017.

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