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The Commercial List Update: What You Need to Know

Litigating On The Commercial List

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Monday, November 5, 2012

Ontario Bar Association
Continuing Professional Development

LITIGATING ON THE COMMERCIAL LIST

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October 2012

As the law has evolved and grown more complex, a number of specialized courts have been created to deal with specialized areas of law. It was believed that having different procedures and, in some cases, judges with particular experience or expertise, would better serve the ends of justice for these cases. In 1991, the Commercial List was created and designed to respond to the challenges and issues that are unique to modern day complex commercial cases.

But what makes complex commercial cases unique, how has the Commercial List addressed the unique issues, and what does this mean for counsel appearing before the Commercial List?

Typical litigation involves an adversarial process where combatants battle to convince the Court to accept their version of past events, and to convince the Court of the legal consequences following from that version of historic events. Often, it is a zero-sum, winner take all high-stakes game. In traditional civil litigation with multiple parties, the parties' usually have a similar connection to the matter.

It is often different in complex commercial litigation. Many complex commercial cases do not involve an inquiry into the legal consequences of historic events, but rather deal with an unfolding and developing situation affecting a company and its various stakeholders. Commercial litigation matters often involve many stakeholders with different interests, and the decisions of the Court will impact the future conduct and affairs of the company. In many cases, there is no "final" decision that the Court can make to satisfactorily resolve the entire matter, and the court process is an adjunct or facilitator to business negotiations. Of course, there are times where a judge of the Commercial List is called upon to conduct a full trial and to render a judgment in the traditional sense, but as is discussed below, many cases can – and should – be successfully resolved prior to trial.

The practices, procedures and ethos of the Commercial List have developed under a paradigm that the Commercial List is not merely a court whose role it is to mete out adjudicated decisions, but instead is a facilitator for the resolution of corporate disputes. While the processes and the practices that were developed on the Commercial List have sometimes left visiting barristers a little perplexed, the Commercial List has developed a national and international reputation for the efficient and fair resolution of complex commercial disputes.[1]

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[1] See F. Myers, "Justice Farley in Real Time", Annual Review of Insolvency Law, 2006, (Carswell, J.P. Sarra, ed.), for an excellent overview and history of the origins and development of the Commercial List and its practices.

I. ACCESS TO THE COMMERCIAL LIST

A. Key Factor - Commercial Complexity

In determining whether or not a matter should be commenced or transferred to the Commercial List, counsel must determine whether or not the matter is one that the Commercial List is designed to address, i.e., a matter that has at its heart some sort of commercial complexity. The Commercial List is not simply a court to deal with all business law issues, or business cases that have factual complexity or involve large sums of money; rather, the dispute should have at its core some matter of "commercial complexity". This flows from the fact that the Commercial List does not see itself as mere Court, but rather a court that facilities the resolution of commercial disputes. However, commercial complexity is much like obscenity – hard to define, but we know it when we see it.

Paragraphs 1(a) to (l) of the Commercial List Practice Direction identifies a number of types of cases that *prima facie* qualify for the Commercial List, and paragraph 1(m) provides a "basket clause" describing how other matters might be placed on the Commercial List:

> Matter which may be listed on the Commercial List are applications, motions and actions which in essence involved the following:
>
> a. *Bankruptcy and Insolvency Act*;
>
> b. *Bank Act*, relating to realizations and priority disputes;
>
> c. *Bulk Sales Act*;
>
> d. *Business Corporations Act* (Ontario) and *Canada Business Corporations Act*;
>
> e. *Companies' Creditors Arrangement Act*;
>
> f. *Limited Partnerships Act*;
>
> g. *Pension Benefits Act*;
>
> h. *Personal Property Security Act*;
>
> i. Receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;
>
> j. *Securities Act*;
>
> k. *Winding-Up and Restructuring Act*;

l. *Credit Unions and Caisses Populaires Act*, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated;

m. Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List, including: suitably complex cases under the Arthur Wishart Act (Franchise Disclosure), suitable commercial matters under the International Commercial Arbitration Act (Ontario), Arbitration Act, 1991 (Ontario) and Commercial Arbitration Act (Canada)...

In considering whether to make a direction under sub-paragraph 1m), the judge may take into account the current and expected caseload of matters listed on the Commercial List. [emphasis added][2]

Some of these matters by their very nature involve commercial complexity or have been delegated to the Commercial List - for example, proceedings under the *Companies' Creditors Arrangement Act* are by their very nature the quintessential real-time, commercially complex matters. It should be noted that the matter must "in essence" be related to one of the enumerated areas. While there are no "hard and fast rules" in the assessment of the sufficiency of the commercial nature of the matter proposed to be commenced on the Commercial List,[3] simply finding some tenuous hook under one of the enumerated items under the Practice Direction may not be sufficient to qualify the case for the Commercial List.

While it is likely that any attempt to define corporate and commercial complexity is likely doomed to failure, some general observations can be made. Cases suited for the Commercial List tend to deal with corporate finance or the governance of a company; a restructuring of the company in some manner; real-time litigation of matters effecting the business; deal with multiple and disparate stakeholders of the company; or deal with a commercial urgency that require the procedural flexibility of the Commercial List to ensure justice is done.[4]

Deciding to commence or transfer a matter to the Commercial List is not without consequences – many cases may be better resolved and determined through the more traditional civil litigation process. For example, the more traditional civil litigation process, being more grounded in the strictures of the *Rules of Civil Procedure*, may have a needed disciplining effect on the parties and the conduct of the litigation in order to either facilitate a settlement or a trial. Moreover, the

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[2] Commercial List Practice Direction, June 10, 2010 (the "Practice Direction")

[3] *Piedra v. TSX Inc.*, [2009] 257 O.A.C. 112 (Div. Ct.)

[4] *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1992] O.J. No. 1772 (Gen.Div); *Maple Valley Acres Limited v. CIBC,* [1992] O.J. No. 2610 (Gen. Div.); *Gyles vc. Mytravel Canada Holiday Inc.*, [2006] O.J. No. 2497 (S.C.J.); *Banten Communications Services Ltd. v. General Motors of Canada Ltd.*, [1996] O.J. No. 1803 (Gen. Div.); *Fenix Developments G.P. Inc. v. Willemse*, [1993] O.J. No. 285 (Gen. Div.)

processes and ethos of the Commercial List is geared towards finding or facilitating the commercial resolution of a matter and the parties must expect heavy case management and prodding from the Court before getting to trial – if the matter is being driven by "principle" or principles that cannot be simply resolved by the payment of funds on a commercially reasonable basis, the regular civil list may be more appropriate.

B. New Procedures Governing Commencement of New Matters on Commercial List

In order to address the increasing numbers of cases being placed on the Commercial List that do not have at their core issue of commercial complexity, the Commercial List has adopted a new practice of reviewing certain types of cases before they are commenced on the Commercial List At present, this procedure is being used for oppression and franchise claims.

(i) Oppression Claims

One way in which counsel have attempted to create a "hook" to get their case onto the Commercial List is by adding an oppression claim to a case that otherwise does not have any true commercial complexity or a real issue under the OBCA or CBCA. In particular, an oppression claim is often added to cases that are, in substance, an employment law case or a case that is grounded upon a family dispute.

As noted above, the Commercial List's procedures that increase accessibility and resolution of commercial cases can actually decrease the efficiency with which these types of cases are dealt with. Easy access to judges on 9:30 Chambers appointments and quicker scheduling of motions may tempt family litigants who are not merely looking for a commercial resolution to bring more issues before the court that are not truly judiciable. While oppression claims can often sound like a "he said, she said" affair since they are based on the reasonable expectation of the parties, if the matter is truly in essence a family dispute, the litigation might be conducted more efficiently on the regular civil list as the natural flow of litigation on the regular civil list may have a disciplining effect on how the litigation is conducted.

(ii) Franchise Claims

Franchise claims are another area where claims are sometimes brought on the Commercial List even though they are not in essence complex commercial cases. Like oppression claims, there is a wide variety of franchise disputes - from complex disclosure and governance issues, to more routine breach of contract matters.

It should be noted that franchise matters are not listed as a stand-alone subject matter in paragraph 1of the Practice Direction as are other matters. Instead, it is listed in the basket clause as a type of matter that might be suitable for the Commercial List.

By way of example, issues regarding the disclosure of financial affairs between a franchisor and a franchisee may raise complex commercial matters, while a dispute regarding a franchisee's obligations to upgrade premises or disputes regarding violations of maintenance or cleaning standards under a franchise agreement are not complex commercial matters.

(iii) Procedure for New Oppression and Franchise Matters

When a request is made to issue a new oppression or franchise proceeding on the Commercial List, the Commercial List Office will place the matter down on the "New Matters List" to be spoken to at a 9:30 Chambers Appointment. At that appointment, the presiding judge will review the matter to ensure that it is a matter that contains the requisite commercial complexity to be placed on the Commercial List.

Counsel should be prepared to speak to the matter to explain and demonstrate the commercial complexity of the matter, and should not assume that it is a mere formality. A good practice may be, in the appropriate case, to ensure that the nature of the commercial complexity is clearly set out in the Notice of Application or Statement of Claim.

The "New Matter Hearing" can be conducted on an *ex parte* basis, which in many instances may be prudent. For example, it might be important to commence an oppression application before notifying the other party that you have done so. Given that substantive issues are not being addressed at the New Matter Hearing, the usual burdens associated with bringing an *ex parte* matter should not apply (although this does not appear to have been tested yet).

The next day's schedule for the New Hearing Matters is currently being distributed by the Commercial List Office via email with the regular scheduled door sheets. Accordingly, counsel should consider whether or not it is prudent to schedule the New Matter Hearing using the names of the parties, or whether or not a "John Doe" type name should be used. Given that it might take a few days before your attend to speak to the new proposed matter, you will need to consider the impact of having a draft style of cause being distributed to counsel in the door sheets that are emailed to counsel. While absolute privilege will attach to statements contained in the court documents that are filed with the Court, it is not clear whether the same absolute privilege will attach to documents that are not circulated with respect to legal proceedings that have not yet been commenced.

C. Toronto Connection

The Practice Direction requires that the matters being placed on the Commercial List should have a "Toronto Connection". Certain matters are, by their nature, not connected to one region of the province or country (such as CCAA matters), and a matter may have such commercial complexity and range of stakeholders that the Commercial List will accept the matter. However, as many counsel have been told, the mere location of counsel in Toronto is not in itself sufficient to establish a connection to Toronto.

One area in which the issue of a Toronto Connection often arises is in the area of receiverships. The general practice of the Ontario Superior Court of Justice is to have receiverships managed in the regions in which the debtor is located. If counsel is attempting to commence a receivership proceeding on the Commercial List where the debtor is located far outside of Toronto, counsel should be prepared to explain why the matter should be placed on the Commercial List.

The "Toronto Connection" requirement may continue to be an important factor in determining which cases may be placed on the Commercial List given that the paragraph 1 of the Practice Direction provides that the judges may consider the Commercial List's current caseload in determining whether or not to allow a matter to be commenced on the Commercial List. Preference will continue to be given to matters with a stronger "Toronto Connection" over those that are more closely connected to another region in order to ensure that the workload of the Court is maintained at a level that will allow the Commercial List to continue to operate as intended.

II. YOU'RE ON THE COMMERCIAL LIST – NOW WHAT IS EXPECTED?

In the early days of the Commercial List, there was much judicial comment (in both decisions and from the bench) about the Three "Cs" of the Commercial List:

(a) communication;

(b) cooperation; and

(c) common Sense.

While the Three "Cs" may have been written about and spoken about in Court less frequently in the last couple of years, they nonetheless remain the governing canons for the Commercial List. Indeed, they encapsulate the ethos of the Commercial List and speak to the difference in the expectations of how matters are to be dealt with on the Commercial List as compared to the regular civil list.

What do the Three "Cs" mean? While they will mean different things depending on the case, they reflect the paradigm that the Commercial List is a facilitator for the resolution of commercial disputes. They mean that counsel are expected to resolve the procedural and timetable issues whenever possible (which means not just attempting to accommodate fellow counsel's schedules, but also making one's self available as necessary and as required by the file). They mean that common issues and areas of agreement should be canvassed, indentified and told to the Court. They mean that *bona fide* attempts to settle should be considered and pursued throughout the matter. They mean communicating with the Court and counsel about your client's interests and needs throughout the process.

There are two key practice points that arise from this. First, whether dealing with a hotly-contested motion or proposing a timetable, the judge will expect that counsel look to propose what is a reasonable commercial or business solution in the circumstances. Indeed, commercial law favours commercially reasonable outcomes, and successful counsel often succeed by showing that the position taken by their client is the most commercially reasonable in the circumstances. Demonstrating this commercial reasonableness should not to be saved for the courtroom at a contested hearing, but should permeate both the client's and counsel's approach throughout the whole case.

Second, counsel should consider communicating your client's limitations or "red-lines" frankly at an early stage in the proceedings with both the other parties and the Court. This early communication will help set to the expectations of both the Court and the parties. Of course, it is important that these "red-lines" be seen to be commercially reasonable and allowing client to participate in the proceedings as part of the solution to the issue. Parties who are seen as "wearing the white hat" throughout the proceedings will often have an easier time of demonstrating that their "red-lines" are commercially reasonable in the circumstances.

To the counsel steeped in the adversarial traditions of the common law, an expectation from the Court that she or he is required to communicate and cooperate with opposing counsel, and to deal with matters with common sense, may seem antithetical to how litigation is supposed to be done. However, while the Three "C's" may have been a radical paradigm shift at the advent of the Commercial List twenty years ago, issues of "civility" now permeate the professional discourse, and even the *Rules of Civil Procedure* have adopted the concept of "meeting and conferring" with respect to discovery plans.

The litigation process should resemble a well-organized prize fight, not an uncontrolled street fight or riot. And there is nowhere where this is more important than on the Commercial List. Even though litigation is a battle and counsel are duty-bound to be the fearless gladiators for their clients, clients are typically better served by ensuring that the litigation process is carried out in a manner that honours the Three "C's" through reduced costs and less time lost to the litigation.

III. PROCEDURAL TOOLS FOR MANAGING COMPLEX CASES

In addition to the attraction of access to a roster of judges who are experienced in complex commercial matters, one of the main attractions of the Commercial List is the flexibility to fashion a process that fits the case and the various tools that can be used to manage the case.

A. 9:30 Chambers Appointment

One of the most defining features of the Commercial List is the 9:30 Chambers Appointment. As set out in the Practice Direction, 9:30 Chambers Appointments are intended to deal with consent, *ex parte* or scheduling matters and should not take longer than ten minutes. The effective use of 9:30 Chambers Appointments is a key success factor in managing complex litigation on the Commercial List.

In the appropriate cases, 9:30 Chambers Appointments can be used for a variety of purposes. A 9:30 Chambers Appointment can be used to keep the judge appraised of how matters are transpiring in real-time matters, obtain initial feedback on a proposed course of action, discuss how potential or upcoming motions might be dealt with, and deal with counsel who are engaging in abusive tactics.

When setting a schedule for a matter at a 9:30, counsel should consider and address anything touching on the hearing so that the parties and the court can ensure that all issues are addressed prior to the hearing and there are no surprises. For example, not only should the timetable for the exchange of the materials be discussed, but counsel should also discuss the nature of the motion, what it is the parties hope to accomplish, any anticipated complexities in the motion, the anticipated materials to be filed, and whether or not the court would like any particular materials filed on the motion (e.g., compendiums, etc.)

Counsel should not assume that the judge has had the opportunity to review all the materials that are attached to a 9:30 hearing request form, as the purpose of the 9:30 Chambers Appointment may suggest that such a review is unnecessary. If it would be helpful for the judge to have reviewed certain material prior to the 9:30 Chambers Appointment, counsel should attach a letter with the 9:30 request indicating what should be reviewed or make it clear on the request form. Moreover, counsel should keep in mind that, consistent with the purpose of a 9:30 Chambers Appointment, they should not expect that the judge will have a sufficient time to review complex or voluminous materials.

B. Case Conferences and Settlement Conferences

If the matters to be addressed at a 9:30 Chambers Appointment may take more than 10 or 15 minutes as a result of complexity of the issues or the number of counsel involved, counsel should consider requesting a "Case Conference" instead of a 9:30 Chambers Appointment. Case Conferences can be requested at a 9:30 Chambers Appointment or organized through the Commercial List Office.

The key benefit of organizing a Case Conference is that additional time can be set aside by the judge so that the matter can be dealt with thoroughly. For example, it may be possible to schedule a Case Conference in the afternoon when the judge will have more time to address the matter, and appropriate facilities can be arranged for all counsel.

If the parties wish to explore the possibility of settlement with the assistance of the judge, a case or settlement conference can be convened to allow the parties to address the possibility of a settlement. For example, if a multi-day complex motion has been scheduled, having a settlement case conference before the motions judge or another judge may assist the parties to reach a settlement or even narrow the issues and thereby save time and costs on the motion. The benefit of having a case conference over a traditional mediation is that the case conference judge can issue any orders or directions as a result of the resolutions that are reached.

For complex settlement case conferences, or even mediations being conducted by a judge, counsel should consider whether or not a particular judge would be suitable to preside over the case conference or mediation. This is not to suggest that one should engage in judge shopping, but the parties should consider whether or not a particular judge – even if she or he is not sitting on the Commercial List – has sufficient knowledge of the subject matter of the parties such that he or she may have a unique background that could be of assistance in the matter.

C. Dedicated Case Management Judge

Paragraphs 34 to 38 of the Practice Direction provide how the parties may request formal case management for a matter on the Commercial List. Experience suggests that the steps prescribed by those paragraphs tend not to be followed strictly, and that case management evolves throughout a case as is necessary by either a judge seizing a matter either through the natural evolution of the file. This often happens as a result of the Commercial List's preference to try to keep the same judge hearing the same matter to the extent possible.

However, if counsel determine that a matter is sufficiently complex such that the case is best served by having a dedicated case management judge appointed, a request should be brought at a 9:30 Chambers Appointment before the Commercial List team leader. However, before requesting the appointment of a case management judge, counsel should consider whether or not

the perceived benefits of having a case management judge sufficiently outweighs the potential downside. For instance, the parties will be more subject to that judge's schedule (including holidays, non-sit weeks, etc.) and the case may be better served by being able to access the other judges of the Commercial List. Moreover, the judges rotate to sit in different parts of the court and, therefore, the case management judge may not be available for the duration of the matter.

D. Masters Motion

One of the most significant changes that has happened on the Commercial List in recent history is the addition of masters to the Commercial List. With the replacement of masters for the bankruptcy Registers in the Bankruptcy Court, two masters have been assigned to handle bankruptcy matters and to support the Commercial List.

At present, the masters are Master Short and Master May-Jean. As of writing, the masters have been working through the backlog in the Bankruptcy Court and have had some success in this regard. It is anticipated that they will be available to deal with certain motions on the Commercial List that would otherwise be heard by judges. Accordingly, counsel will need to determine whether or not the motion is properly to be brought before a judge or a master, whereas before this all motions on the Commercial List where brought before the judge.

The ability to have Commercial List motions heard before masters is not intended to be a invitation to change how litigation is conducted on the Commercial List – the expectation that counsel will work through procedural type of issues will continue. While masters will be available to deal with motions such as undertakings and refusals and other procedural motions, the ability of the masters to hear motions will also be dependent on their timetable as they will also be dealing with the bankruptcy matters previously dealt with by the Registrars.

The Masters sit on the bankruptcy floors at 393 University Avenue. Motions can be booked through the Commercial List Office.

E. Flexibility of Procedures Generally

One of the other key benefits of proceeding on the Commercial List is the flexibility that is available in crafting a litigation process designed to suit the particular needs of the case. For example, direct examination may be completed by affidavit evidence, discovery process can be modified and questions can be directed to the Court. In one extreme case, an issue for trial was identified during a motion in the morning and the trial of the issue occurred later that day with the witnesses being examined by the telephone. While that may be a high-water mark for unique processes, the possibilities are only limited to counsel's imagination on the dictates of fair procedures.

F. Protocols

A potentially powerful tool in attempting to manage a complex case is the use of a court-approved protocol or litigation plan. A protocol can deal with management of the various aspects in a case including service, notice of proceedings, timetables or next steps, a discovery plan, filing of documents with the Court, and the ability of counsel to amend timetables and other issues upon consent without the need of going back to the court.

There are already certain orders that incorporate some of these items. For example, initial orders in CCAA proceedings and receivership orders often provide for how notice and service is to be effected (for example, by email or posting information on a website). However, non-solvency matters do not have the benefit of an initial order which sets out these rules and standards that increase the efficiency of the litigation process. In appropriate cases, counsel may wish to consider the development of a protocol at the outset to address these sorts of issues.

IV. RESOLVING DISPUTES PRIOR TO TRIAL

There will often be times when clients will not be able to reach a commercial resolution as a result of a *bone fide* disagreement regarding certain threshold issues. Even clients who are desirous to reach a resolution may not be able to reach a settlement or resolution that they believe to be both reasonable and defensible to their own constituents until certain threshold issues are resolved. In these cases, the window of opportunity to settle a case may not really open until the Court has determined certain preliminary or threshold issues.

The challenge for counsel in these cases then becomes how to engage the Commercial List to obtain the rulings that are necessary to facilitate a resolution.

Fortunately, in addition to the traditional summary judgment motion, there are certain other approaches that counsel can take in the appropriate case to obtain the rulings that are necessary to facilitate a judgment. In this counsel's opinion, justice and clients would be better served by a fuller embrace of procedures that allow clients to obtain judicial decisions on those parts of their case that may be a material hurdle to resolving the matter. In many cases, it does not serve the ends of justice or judicial economy to require a party to take to trial ten issues where the early determination of just one would have a promising chance of allowing the parties to reach a resolution of the matter. This is particularly the case with matters on the Commercial List where, many times, the material facts that are relevant to the resolution of the matter are not truly in dispute.

However, a word of caution: Like all parts of the Court, the judicial attitude towards certain approaches both evolves and ebbs and flows as the roster of judges sitting on the list changes. Counsel should not take for granted that the judge presiding over their matter will be as willing

to accept a streamlined procedure as another judge. If in doubt, a well-timed 9:30 Chambers Appointment or case conference can be used to identify any preliminary concerns that the judge hearing the matter may have.

There are three principle means of attempting an early determination of the matter: (i) Case or Settlement Conferences and Mediations; (ii) motions to determine an issue; and (iii) summary judgment motions.

A. Case/Settlement Conferences and Mediations

Convening a case or settlement conference with the judge to address certain issues will allow the judge to explore with the parties the issues they face, including to a certain extent the relevant law. Judges on the Commercial List have historically been successful in addressing legal issues in chambers to determine whether or not a contested hearing is necessary while still maintaining the requisite impartiality to decide the matter at a fully contested hearing. Often the insights provided by the judge at a well-timed conference or mediation can help the parties assess the potential merits of their case and what a reasonable resolution might look like.

Counsel can also consider requesting that another judge (or a retired judge) be appointed as the case conference judge or as a mediator. The judge acting in such a role may feel more at liberty to clearly share his or her views regarding the legal strengths of the case, and how they expect the matter to be decided. Having a mediator with the gravitas of a judge lends a considerable amount of credence to the views expressed by mediator, and provides an invaluable early assessment of the parties' positions.

B. Motion to Determine An Issue

In some cases, a matter becomes ripe for determination at an early stage because as the position of the parties or the material underlying facts are generally known or accepted. In such cases, counsel can consider bringing a motion for the determination of a substantive issue that will either affect the conduct of the proceedings or the party's rights more generally. In such cases, a traditional summary judgment motion may not be appropriate or viable, yet the determination of the issue will have a significant effect on the conduct of the proceeding.

While variations of such motions exist in numerous cases, two recent illustrative examples are motions brought in *Sino-Forest Corporation*[5] and in *Murphy v. Wise*.[6] In both cases, there were certain issues for which a judicial determination was desirable or required in order to allow the

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[5] *Re Sino-Forest Corporation*, 2012 ONSC 4377 at para. 71-75

[6] *Murphy v. Wise*, [2010] O.J. No. 3967 (S.C.J.)

proceedings to proceed as efficiently as possible or to allow the parties to be able to attempt to resolve other substantive matters in the proceedings.

C. Summary Judgment

In some cases, a motion for summary judgment may be viable. At present, with the recent summary judgment decisions of the Court of Appeal for Ontario on appeal to the Supreme Court of Canada,[7] the exact role and powers of a judge on a summary judgment motion are still unsettled. This will present difficult choices for counsel considering a summary judgment motion until the Supreme Court of Canada releases its decision.

So what then is to be done in the interim? In addition to considering the viability of the case for summary judgment, counsel should consider the differences between a motion for summary judgment and a trial on the Commercial List.

A motion for summary judgment presents unique challenges to the motions judge. The judge is tasked with attempting to support her or his findings, inferences, etc., in the paper record and only the paper record. The judge is not able to make findings based on their observations of the witnesses, which may make it harder for the judge to grant the motion and may make the decision more susceptible to being overturned. Until the Supreme Court of Canada provides further guidance on the new rules, this makes the volume of material and the complexity of the issues still relevant considerations in determining whether or not a matter is suited for summary judgment, regardless of whether there are any "facts in dispute". As a result, there may be cases where it is simply more efficient to simply proceed to trial.

This suggestion appears to be contrary to much that was stated above. However, before matters on the Commercial List are sent to trial, there is typically a high-degree of case management by the Court to attempt to streamline the matter as much as possible to ensure that the trial process fits the needs of the particular case.

When this is coupled with the fact that regular trials can now be scheduled in just a little over the time that it would take to schedule a summary judgment motion, counsel should seriously consider the advisability of simply pushing to the trial of the matter.

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[7] *Combined Air Mechanical Services Inc. v. Flesch*, [2011] O.J. No. 5431 (C.A.); leave to appeal all'd, (2012), 344 D.L.R. (4th) 193

V. MATERIALS ON THE COMMERCIAL LIST

A. Materials for Court

Counsel who have appeared before a Commercial List judge in chambers will have seen the volume of court materials that the judges have to contend with on a daily basis. Given that judges sitting on the Commercial List are noted for the commitment to have pre-read the materials to the extent possible, the burden on them becomes self-evident.

As a result, counsel should actively consider what can be done to manage the documents for any hearing to assist the judge as much as possible. (Of course, this is not solely a matter of courtesy or altruism, but also contains a large dose of advocacy.)

There is no one-size fits solution when it comes managing the documents in a particular case, and sometime less is more. However, the following are some tools to consider:

(i) Compendiums

Where there are voluminous materials in a contested motion, consider whether or not it would be useful to prepare a compendium of the key documents or fair excerpts from those documents.[8] Justice Farley referred to these as a "yellow tag special" - a collection of the pages that counsel have identified in their own copies with yellow post-it notes.[9] There is no need to include an entire 200-page document in the compendium if the there are only a few key pages - put a copy of the front page of the document in order to identify it, followed by copies of the relevant pages. The compendium can include affidavits, exhibits, fair extracts from a transcript and cases all in one document. In designing the compendium, the focus should be on how the document can be useful to the Court.

(ii) Cheat Sheets

Where there are complex sets of facts, a large number of parties, a complex corporate structure, or anything else that may be hard to follow, counsel should consider preparing cheat sheets for the Court which can be filed with the court materials or handed up at the hearing. For example:

(a) a "Cast of Characters" can assist the Court in understanding who the various actors are in the case;

(b) a "Chronology" can assist in setting out the facts; and

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[8] See *Saskatchewan Egg Producers' Marketing Board v. Ontario*, [1993] O.J. No. 434 (S.C.J.) at para. 28- 31 (although it should be noted that compendia are typically cerlox bound and not in a binder)

[9] Justice J. M. Farley, "The Commercial List from the Perspective of the Bench", CBAO Conference "Efficient Justice: The Commercial List in Practice" (Friday, October 30, 1992)

(c) diagrams can be used to explain complex corporate structures or transactions.

The key question to ask yourself is whether or not you would want the cheat sheet yourself if you were dealing with the matter for the first time.

While counsel will often try to turn every opportunity into an opportunity for advocacy, the preparation of cheat sheets should be balanced and fair, otherwise, they may not be of much use to the Court or, worse still, may highlight the holes or weaknesses in your own case.

(iii) Blacklines to Model Orders

Through the cooperation of the Commercial List Bench and members of the bar through the Commercial List User's Committee, a number of model orders have been created. The model orders include an Initial CCAA Order, Receivership Orders, Discharge Orders, Vesting Orders and Interim and Final Orders used in arrangements under the OBCA and CBCA. Counsel are expected to use these model orders as the basis of the orders that they seek from the Court. Accordingly, it is important that counsel provide the Court with a blackline of the order sought to the model order in order for the Court to see where the differences are.

(iv) Hyper-link Documents

In complex matters involving voluminous documents, consider whether or not the judge would like to receive an electronic version of the factum or affidavit that contains hyper-links to the exhibits or referenced documents. Guidelines on how this can be done is set out in the E-filing Guidelines discussed below.

(v) Prior Notice to the Court

Given that judges will try to review the materials before the hearing, if there is a particular key or critical document, filing a note to the Court (copied to opposing counsel) identifying the key documents that will be relied upon if there is voluminous materials can be of assistance to the Court.

A related consideration is notifying the Commercial List Office of the expected amount of time the judge will require to review the materials if it is expected that the amount of reading time will be longer than what would be expected given the length of motion. For example, in corporate restructurings under the CBCA or the OBCA, the motion for the Interim Order is often scheduled for only 15 to 20 minutes, yet the materials that usually accompany these motions are longer than the materials that would typically be filed for a short motion. Notifying the Commercial List Office that the judge will likely require additional reading time will ensure that motions are appropriately scheduled.

(vi) Discuss the Materials at a 9:30 Chambers Appointment

Where the issues are complicated or the materials may be voluminous, consider discussing what materials will be filed with the Court at a 9:30 Chambers Appointment. This can be a particularly useful tool when scheduling the motion. Advising the judge about the materials the parties expect to file will allow the judge to appropriately schedule the date and length of time of the motion.

B. E-Filing Pilot Project

On September 1, 2012, the Commercial List launched an E-Filing Pilot Project Guidelines (the "E-Filing Guidelines") governing the filing and exchange of electronic court records. The E-Filing Guidelines are a comprehensive guide on how electronic documents are to be created and filed with the Court.

The key highlights from the E-Filing Guidelines are as follows:

(a) in most cases, counsel will be expected to deliver electronic copies of documents to the judge on a USB key through the Commercial List Office;

(b) factums are to delivered in Word;

(c) remaining documents are to be delivered in an "organized" PDF file (the E-Filing Guidelines describe how to create an "organized" PDF File);

(d) documents subject to a sealing order should not be delivered electronically;

(e) guidelines for emailing documents directly to the judge; and

(f) that names that are to be assigned to the electronic files are set out.