

THE ABC'S OF THE COMMERCIAL LIST

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BACKGROUND

The Commercial List was established in Toronto in 1991 in response to calls from the bar regarding the need for access to judges with specialized knowledge and experience in the field of commercial law. Prior to that time, anyone with a complex, commercial matter or an involved, corporate restructuring was required to bring their matter on what is now known as the “general civil list” and hope that the judge assigned to the matter would have some passing familiarity with commercial law or insolvency. Unfortunately, and through no fault of the judges assigned to the matter, that was not always the case.

Further, access to judges who could provide timely decisions was less than ideal. The result was longer waiting times to be heard, and longer hearing times, as counsel were obliged to lead the judges through the details and background of the unfamiliar commercial agreements and legislation, or the manner in which the area of law had developed. This led to longer times to obtain decisions from the court and sometimes the need to proceed with appeals as and when necessary.

The Commercial List changed all that. The first judges to sit on the List, Justices Saunders, Farley and others, brought a wealth of experience with them, as well as the understanding of the need for timely hearings and decisions where important and time-sensitive commercial interests were at stake. These were not simply matters that involved large sums of money, but included matters where the economics were such that the very lives and economic interests of many persons, often called stakeholders, were at stake. It could be the proposed shut-down of a large plant where many jobs were at stake; it could be the need to have a receiver enter into certain business premises to take control of the operations and avoid ongoing commercial disputes; it

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could be a priority dispute that involved the rights of several persons over various types of assets that were in the process of being liquidated. In each case, the hallmarks of timely hearings and timely decisions were involved.

Since that time, the Commercial List has been widely recognized for its successes and has expanded both in terms of the number of judges who now sit on the Commercial List and the number and types of cases it handles. Most recently, some of the best features and highlights of the Commercial List have been adopted by the “general list” in the Superior Court in Toronto.

WHAT, WHERE, WHO, WHEN

The Commercial List is a part of the Ontario Superior Court of Justice (“Superior Court”). It does not have a special status as an independent court and it is not a separate court of record. Rather, it is an administrative division within the Superior Court at Toronto. It is usually styled on court documents as the Ontario Superior Court of Justice (Commercial List). A copy of the front and back pages of a Notice of Application with the appropriate court styles are attached at appendix 1.

The Commercial List judges are judges of the Superior Court and usually sit at 330 University Avenue, 8th floor, Toronto, Ontario.² Documents for the Commercial List are filed at the Commercial List office, being the designated counter on the 7th floor of 330 University Avenue.³ The Commercial List judges are made up of a Team Leader and a number of judges who choose to sit on the Commercial List, and are so designated usually as a result of their background and / or interest in commercial matters. The current team leader of the Commercial List is the Honourable Justice Frank Newbould.

² Commercial List Practice Direction (“Practice Direction”), part III, s.3

³ Practice Direction, part III, s.2

The Commercial List sits every day and hears matters beginning at 10 am in the 8th floor courtrooms of 330 University Avenue. The judges also hear matters daily in chambers, which begin at 9:30 am.⁴

Lists of matters to be heard on a particular day may be found beginning on the afternoon of the day before the hearing on the Ontario Court Dates website: <http://www.ontariocourtdates.ca/>. In addition, lists of matters to be heard that day are also posted by the elevators at 330 University Avenue, on the 8th floor each morning.

PRACTICE DIRECTION

The practice on the Commercial List is governed by a Practice Direction, the most recent edition of which came into force on July 1, 2014. A copy of the current Practice Direction is attached as appendix 2, but can also be found on the court's website here:

<http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/>.

The Practice Direction is the guiding force / Bible for anyone who has any matter on the Commercial List, and it is recommended that it be committed to memory in its entirety (said only partially in jest). While the Rules of Civil Procedure certainly do apply to matters on the Commercial List, it is often the case that, as a practical matter, certain rules are dispensed with and specific procedures that have been adopted by the Commercial List replace the particular rules. The most recent version of the Practice Direction is quite comprehensive and deals with many of these matters. Hence the recommendation that anyone intending to practise on the Commercial List familiarize him/ herself with these matters prior to appearing in court or even on the file. You don't want to be faced with opposing counsel who can cite to you chapter and verse as to why your documents are not in conformity with the Practice Direction, much less the people at the Commercial List office who refuse to accept them.

⁴ Practice Direction, part X, s.25

That being said, the Rules of Civil Procedure are also in full force and effect in the Commercial List, particularly with respect to any commercial litigation matters dealt with there, and a full grasp and understanding of the Rules is therefore also mandatory.

TYPES OF MATTERS THAT MAY BE HEARD ON THE COMMERCIAL LIST

The types of matters that can be dealt with on the Commercial List are varied, though, despite the court's name, it is not just any matter involving commercial law that can be commenced there. The Practice Direction (see below) sets out a list of the types of proceedings that can be commenced on the Commercial List. In general, if a matter qualifies for the Commercial List, it is then up to counsel to decide whether to commence the matter on the Commercial List. The only exception is in the case of bankruptcy matters, where the court sits as the Bankruptcy Court, as set out in the Bankruptcy and Insolvency Act. Any bankruptcy matters must be commenced on the Commercial List.⁵

The current list of matters that qualify for commencement on the Commercial List are matters in relation to:

- 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*;

⁵ Practice Direction, part I

1. *Credit Unions and Caisses Populaires Act*, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated; and
- 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). [See 771225 *Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1993] O.J. No. 1772 and *Maple Valley Acres Limited v. CIBC*, [1992] O.J. No. 2610), *Piedra v. TSX Inc.*, [2009] O.J. No. 5351 (Div. Ct.)].⁶

Counsel should take note of the last item on the list above (clause (m)), said to cover any matter that does not fall within the specific list of matters enumerated above. Clause (m) is commonly known as the “basket clause”. If counsel wish to commence a particular matter on the Commercial List under the basket clause, they will likely be required to attend a 9:30 chambers appointment (see below) to explain to a Commercial List judge why the particular matter should proceed on the Commercial List. Without an order from the judge, the Commercial List office will likely not permit the matter to be commenced on the Commercial List.⁷ Counsel are advised to consult with counsel experienced in seeking leave under the basket clause, so as to avoid wasting the court’s and their own time and resources.

TORONTO-BASED MATTERS ONLY

One important feature of the Commercial List is the fact that it only exists in Toronto and only deals with Toronto-based matters.⁸ This is so for both practical and philosophical reasons. First, the Toronto region is by far the largest region in the Ontario Superior Court in terms of the number of matters. This permits a certain specialization that other regions do not possess. In

⁶ Practice Direction, part II

⁷ Practice Direction, part X, s.27

⁸ Practice Direction, part V, s.8

particular, the Toronto region deals separately with matters of family law, criminal law, estate law, civil law and others. It is therefore not a stretch for commercial disputes to have their own courts and judges specializing in that area.

Second, the Bankruptcy and Insolvency Act (“BIA”) provides that the Ontario Superior Court is to be invested with jurisdiction in bankruptcy and other proceedings authorized by that particular statute in Ontario.⁹ Thus, the Ontario Superior Court sits and hears matters where appropriate as the “bankruptcy court” (titled as In Bankruptcy and Insolvency) and it is therefore appropriate to have a separate division of the Superior Court dealing with matters pertaining to bankruptcy and insolvency. There are only a few districts in Ontario where proceedings are commenced in respect of bankruptcy matters under the BIA – one of those is Toronto. Indeed, prior to 1991, there was a bankruptcy court in Toronto. Since 1991, bankruptcy matters are part of and are heard by the Commercial List.

However, another reason why only Toronto based matters are heard on the Commercial List as a rule is to ensure that other courts in other regions continue to be able to hear all matters within their geographic jurisdiction and are not “robbed” of the opportunity to hear and deal with commercial cases. There are many judges in the other regions outside Toronto who are able to and wish to hear commercial matters of the type commonly heard on the Commercial List. It is neither fair nor appropriate that cases be dealt with in Toronto, simply because counsel choose, for whatever reason, to go to Toronto, and not commence their matters in the jurisdiction that has the best geographic connection with the matter.

That being said, there are times when certain cases may strain the resources of some of the other regions and make it desirable that a large, involved, commercial matter be heard in Toronto on the Commercial List. In such a case, and where the Regional Senior Justice of the region where the matter would normally be commenced, or where it is currently domiciled, may communicate with the Commercial List Team Leader to consider having the matter transferred to or commenced in Toronto. It is expected that such circumstances will be rare, so as to ensure that

⁹ BIA, s. 183(1)(a)

cases from all over the province are not being transferred to the Commercial List where it is not necessary that that occur.

THE THREE C'S

From its inception, the Commercial List has been said to operate under “the three C’s”. In the words of the Practice Direction, “Cooperation, communication and common sense shall continue to be the principles of operation of the Commercial List.”¹⁰ Anyone who wishes to practice with any regularity on the Commercial List would be well advised to take heed of this particular directive.

The judges of the Commercial List (and indeed many of its most senior practitioners) have no time for petty arguments between counsel that spill over into the conduct of a matter or into actual court hearings. Counsel are expected to cooperate in all matters, including setting timetables, providing indulgences, extensions of time, and even seeking adjournments (prior to the hearing date) where necessary.

In order to cooperate, the parties’ lawyers need to communicate and act with common sense. While email correspondence is now the communication tool of choice, there is still nothing more immediate than a telephone call or an actual in person meeting. Counsel are encouraged to communicate effectively so as to move the matter along to a hearing or resolution where possible.

Common sense. What more needs to be said? No fighting about irrelevant matters, no wasting time on losing arguments and no standing on ceremony. Act in a manner that you would hope and expect someone to act toward you. Remember the Golden Rule about doing unto others? It’s still around precisely because it makes sense.

¹⁰ Practice Direction, part III, s.5

9:30's

One of the most unique features of the Commercial List has been the ability to get before on a judge on an urgent or otherwise timely basis using what are termed “9:30’s”. A 9:30 is an in chambers appointment with a judge, commencing at 9:30 am. 9:30’s are scheduled by the Commercial List office and are typically heard every day.¹¹ You may request a 9:30 by filing a 9:30 Hearing Request Form (available from the Commercial List office, the current version of which is attached as appendix 3)

However, 9:30’s only proceed until 10 am (at least in theory!) when the formal day’s hearings begin. Thus, they are short matters and are only available for limited purposes. As per the Practice Direction, they are only for scheduling, consent and ex parte (without notice) matters, each of which is to last no longer than 10 minutes.

So, if you have a quick consent matter, or a quick scheduling matter, the 9:30 may be the optimal tool for you to use to obtain your order. In all cases, counsel are expected to have consulted in advance (see above re: the three C’s) and if appropriate have a draft order in hand. Any materials that you want the judge to have reviewed in advance should also have been filed in advance (makes sense).

9:30’s, if used properly, can be a great help to lawyers and their clients. If on the other hand, they are abused, then everyone suffers. The 9:30 appointment is not, for example, the time to go before the judge and make lengthy submissions about your case or complain about opposing counsel. Get in, say why you’re there, and get out.

¹¹ Practice Direction, part X, s.25

MATERIALS

It goes without saying that any materials for use at a hearing must be filed in advance with the Commercial List office in accordance with the requirements of the Practice Direction and the Rules of Civil Procedure.

However, the Commercial List also encourages the use of specific documents that are designed to assist the judge (and counsel) to understand the case and the issues at hand. In particular, the Commercial List encourages the use of compendia.¹² A compendium is what the judges used to call a “yellow-tabbed special”. What they meant was, counsel would file volumes of materials in advance for the court to review and digest, yet at the hearing, counsel only made reference to certain key documents that were tabbed, using yellow Post-It notes, or highlighted extracts and key portions of the documents and cases to which they intended to refer. The compendium contains, in a nicely tabbed, bound volume, only the key extracts (perhaps 2 pages of that 24 page agreement or case you have) or highlighted portions of the documents to which you will actually refer. Yes, you’ll still have to file complete copies of documents as part of your record, but the compendium will be the document you and the judge will actually use at the hearing.

There are also forms to be completed, depending on whether you are commencing your proceeding on the Commercial List, continuing your matter on the List, or seeking to transfer your matter onto the Commercial List. Those forms can be found on the Superior Court website here, under the subject heading Commercial List Forms (including Model Orders):

<http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/>

Additional forms are available from the Commercial List office:

toronto.commerciallist@jus.gov.on.ca

¹² Practice Direction, part XVIII, s.51

MODEL ORDERS

Another area in which the Commercial List is unique is in its development and use of Model Orders. These are template orders that are initially prepared by the Commercial List Users' Committee (see below) and then sanctioned by the court. Once approved, they are recommended for use when appearing before the Commercial List. The Model Orders are intended to be a means of simplifying the process of obtaining relief in court and ensuring that there is consistency in the way in which court orders are made. The current list of Model Orders designed for use in commercial litigation includes the following:

- Approval and Vesting Order (re: sale of assets)
- Mareva Order
- Order to Allow Entry and Search of Premises (Anton Pillar-type order)
- Receivership Order
- Receiver Discharge Order

When preparing one's materials for filing with the court, it is expected that counsel include two copies of the proposed draft order, first, a copy of the order intended to be sought, "black-lined" against the Model Order where one is available, and then a "clean" version of the order sought. In that way, the court can view the proposed changes, additions, and deletions to what would typically be considered to be the standard form of order.

Further, it is incumbent upon counsel proposing to use the Model Orders to point out to the judge hearing the matter any substantive changes to the Model Order, and make submissions to the judge as to why such proposed changes are appropriate in the case in question. It is not sufficient to simply advise that there are changes to the Model Order. The onus is upon counsel to point the changes out to the judge and seek to justify why they are appropriate.

The Model Orders can be obtained from the court's website here under the heading Commercial List Forms (including Model Orders): <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/>

THE ESTATE LIST AND THE COMMERCIAL LIST

At the moment, and in response to certain issues with respect to resources in the courts in Toronto, the Commercial List judges also hear matters on the Estate List, another subset of the Superior Court. This is a recent development and is subject to further change, depending on what is decided by the Chief Justice of the Superior Court and the Regional Senior Justice for the Toronto region.

CLUC

The Commercial List Users' Committee (CLUC) is a committee comprised of members of the bench, courts administration and senior members of the bar designed to facilitate and improve the practice on the Commercial List.¹³ Members are approved to sit on CLUC by the Commercial List Team Leader, and typically serve three year terms, which can be renewable.

CLUC holds regular meetings to consider, among other things, comments from members regarding any concerns with respect to the functioning of the Commercial List and any possible improvements to the court. In addition, CLUC considers, as appropriate, various initiatives that, if accepted by the court, may find their way into the court's practice, often consolidated in a future version of the Practice Direction, or that may impact some other aspect of the Commercial List.

CLUC also has a standing subcommittee that deals with the Model Orders that are commonly used by the court and its practitioners. The Model Order subcommittee considers changes as appropriate to any existing Model Orders, whether they be in response to a change in practice, or a change in various laws that impact the Model Orders.

¹³ Practice Direction, part XXII, s.62

By way of example, CLUC recently had reason to deal with the issue of the recent Canadian Anti-Spam Legislation (or “CASL”). The matter was raised at CLUC as one that may impact various practices by insolvency law practitioners and their legal counsel to provide notice to various persons and stakeholders via electronic means, as well as certain of the Model Orders that codified those practices. A subcommittee was struck to investigate the matter and make recommendations to CLUC. The recommendations were then reviewed by the Model Order subcommittee who then reported back to CLUC with its recommendations with respect to the Model Orders. The court then considered and approved the appropriateness of the measures recommended by CLUC, resulting in changes to the Model Orders and the practice before the Commercial List.

CONCLUSION

The Commercial List can be an exciting place to practise law. The judges and counsel on the List make it so. Many of the counsel who practise on the List are the best at what they do. They work hard, they prepare, they don’t mess around. They are familiar with and adhere to the Practice Direction. They observe the Three C’s. Those who put in the extra work and effort will tell you that it is all worth it. And the judges encourage counsel to practise on the List. Take them up on the opportunity. You won’t be disappointed, and you will likely be a better lawyer for it.

APPENDIX 1

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

(Court Seal)

Applicant

and

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The Claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on _____, at 10:00 a.m., before a judge presiding over the Commercial List at 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

Applicant

-and-

Respondent

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPLICATION

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APPENDIX 2

Consolidated Practice Direction Concerning the Commercial List

Effective July 1, 2014 This Practice Direction applies to matters on the Commercial List in the Toronto Region.

It *supersedes* all Toronto Region Practice Directions concerning the Commercial List issued before July 1, 2014, which are hereby revoked.

Counsel and parties are advised to refer to the relevant Parts of the Consolidated Provincial Practice Direction the Consolidated Practice Direction for Divisional Court Proceedings as well as any other relevant Toronto region-specific Practice Directions and Guides which are available on the Superior Court of Justice website at: www.ontariocourts.ca/scj.

- Part I: Introduction
- Part II: Matters Eligible for the Commercial List
- Part III: Judges, Court Officials, Courtrooms and General Procedures
- Part IV: Originating Process
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- Part VI: Applications for Transfer to/from the Commercial List
- Part VII: Court Documents
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- Part XIV: Commercial List Motions before a Master
- Part XV: Motions for Summary Judgment
- Part XVI: Applications
- Part XVII: Alternative Dispute Resolution and Pre-Trials
- Part XVIII: Materials for use of Court
- Part XIX: Expert Witnesses
- Part XX: Reasons for Decision
- Part XXI: Costs
- Part XXII: Users' Committee
- Part XXIII: Enquiries
- Part XXIV: Commercial List Forms
- Part XXV: Frequently Cited Cases in Commercial Proceedings
- Part XXVI: Protocol Concerning Court-to-Court Communications in Cross Border Cases

Part I: Introduction

The Commercial List was established in 1991 for the hearing of certain actions, applications and motions in the Toronto Region involving issues of commercial law. The special procedures adopted for the hearing of matters on the Commercial List expedite the hearing and determination of these matters and have been met with considerable approval. All counsel appearing in matters on the Commercial List are expected to know and follow the current Practice Direction. The Commercial List remains, in the first instance, voluntary, except for bankruptcy matters. Applicants and plaintiffs may continue to set other matters that qualify for the Commercial List down for hearing either on the Commercial List or elsewhere. There is, however, a provision for any party to have a matter

transferred to, or removed from, the Commercial List. A continuous re-evaluation process by the court and the Commercial List Users' Committee determines whether (i) other matters should be added to those matters which may be listed on the Commercial List or (ii) its procedures should be further modified or continued. This Practice Direction is to govern the conduct of matters on the Commercial List subject to further amendments as required.

Part II: Matters Eligible for the Commercial List

1. Matters which may be listed on the Commercial List are applications, motions and actions which in essence involve 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; and
 - 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)*. [See *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1993] O.J. No. 1772 and *Maple Valley Acres Limited v. CIBC*, [1992] O.J. No. 2610), *Piedra v. TSX Inc.*, [2009] O.J. No. 5351 (Div. Ct.)].

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.

Part III: Judges, Court Officials, Courtrooms and General Procedures

2. The Commercial List shall be administered through the facilities of the Commercial List Office, 7th Floor, 330 University Avenue, Toronto M5G 1R7 fax: (416) 327-6228.
3. Matters listed on the Commercial List, including bankruptcy matters, shall usually be heard in courtrooms at 330 University Avenue, Toronto.
4. If counsel are aware that a judge sitting on the Commercial List should not hear a particular matter, the Commercial List Office should be advised.

5. Cooperation, communication and common sense shall continue to be the principles of operation of the Commercial List.

Part IV: Originating Process

6. Actions and applications under sub-paragraphs 1a) to l) (above) intended to be listed on the Commercial List may be issued in the Commercial List Office. Otherwise, all originating processes shall be issued from the appropriate office of the Superior Court of Justice as provided in the Rules of Civil Procedure.
7. For all applications, an initial return date must be obtained from the Commercial List Office or selected by counsel in conformity with the provisions of paragraphs 16 to 22 (below).

Part V: Place of Hearing

8. Only Toronto Region matters can be listed on the Commercial List (unless, for special reasons, authorization is given by the supervising judge). Aside from urgent insolvency matters, there should be a material connection to the Toronto Region over and above the location of counsel. Matters listed on the Commercial List shall only be heard in Toronto.

Part VI: Applications for Transfer to/from the Commercial List

9. Matters may be transferred to or removed from the Commercial List on a motion to a judge sitting to hear matters on the Commercial List.
10. A matter may be provisionally transferred to the Commercial List by a judge who is hearing the matter or a proceeding in the matter but who is not sitting to hear matters on the Commercial List, with the consent of all parties appearing. Such provisional transfer shall be for the purpose of bringing an application for transfer in accordance with paragraph 9 by one of the parties or as the judge may direct.
11. A matter may be transferred to the Commercial List by the Commercial List Office staff if the transfer is on consent of all parties, a Request Form and Case Timetable are fully completed and the matter is a Toronto Region matter which clearly falls within the categories of sub-paragraphs 1a) to l) (above).

Part VII: Court Documents

12. The name of the court in the title of proceedings of matters listed on the Commercial List shall be: "Superior Court of Justice – Commercial List". All Notices of Application and Notices of Motion involving the Commercial List shall state that the application or motion will be made to "a judge presiding over the Commercial List at 330 University Avenue, Toronto".
13. All parts of the front and the back of a Request Form must be completed for all cases and for each proceeding (including 9:30 a.m. matters, matters added to the Commercial List and all other attendances) and the form must be signed by all counsel or an explanation for not doing so must be given. If all counsel cannot sign the same form, they may sign individual copies. Completed Request Forms may be faxed to the Commercial List Office at (416) 327-6228. Copies of the current Request Forms are available from the Commercial List Office.

14. For matters that are scheduled for a hearing time of one day or more, the Request Form shall set out an estimate of the amount of time it will take a judge to read the materials in advance.
15. A Case Timetable should be completed. If this cannot be done before the matter is first spoken to (it being recognized that the schedule may depend on the setting of a hearing date), a Case Timetable should be agreed among counsel as soon as possible thereafter and a copy sent to the Commercial List Office. In the event that counsel cannot agree on a schedule, counsel should attend before the supervising judge in chambers (see paragraph 26). It is expected that preliminary procedures shall be completed sufficiently in advance of the deadline dates to allow for consideration of the matter by counsel and for some subsequent slippage in the timetable. If a step is not completed in accordance with the Case Timetable, counsel are expected to get the matter back on schedule as soon as possible: (see *Re: Mernick* (1992), 14 C.B.R. (3d) 263). Copies of the current Case Timetable form are available from the Commercial List Office.

Part VIII: Dates for Applications, Motions and Trials

16. The Commercial List Office shall maintain the Commercial List. Subject to paragraphs 41 and 42 (below), the office staff, acting under the direction of the supervising judge, may assign initial hearing dates for matters other than trials.
17. The supervising judge or designate may assign initial hearing dates for matters not assigned by the office staff and for trials which, may be made in chambers at 9:30 a.m.
18. For trials and trials of issues, a motion to set a hearing date shall be made, unless the matter is otherwise scheduled by the supervising judge or designate in chambers on consent or on the appearance of all parties. The motion should be made to the supervising judge or designate, either as a chambers motion under paragraph 25 (below), or by special appointment. A trial date shall not be set unless the parties have completed a Trial Requirements Memorandum, including a brief outline of the case and its issues and witness time estimates. The Trial Requirements Memorandum form may be obtained from the Commercial List Office.
19. For a scheduling motion to a judge to be heard in chambers, counsel should try to provide a list of three mutually convenient and disparate dates from which the judge may select. Counsel are expected to check with the Commercial List Office for available dates immediately prior to the motion.
20. Except where special circumstances otherwise require, in selecting a return date for a matter, counsel are expected to allow reasonable time for all preliminary steps to take place before the return date (see paragraph 14). Counsel are encouraged and expected to consult among themselves in this regard, so that matters can be dealt with on the scheduled return date without further adjournment.
21. Counsel may specify the return date for a matter as "on a date to be established by the Commercial List Office" if there is no agreement on the return date.
22. A list of matters scheduled to be heard the following day will be posted on the bulletin board at 330 University Avenue by 4:00 p.m. Information about matters listed for the following day may also be obtained by calling (416) 327-5045 after 4:00 p.m.

Part IX: Estimates of Required Time

23. A realistic estimate of the time required for hearing the matter must be stated in the Request Form. If such an estimate cannot be given on the initial return of a matter, the Request Form must be appropriately amended when the matter is subsequently re-scheduled. If all parties do not sign the Request Form, the initial return of the matter shall be for only a 10 minute scheduling hearing. Counsel should allocate the estimated hearing time appropriately among themselves, failing which the court shall assume that counsel have agreed to an equal division of time. If the time estimates in the Request Form becomes obsolete, then it is to be revised by notice to the Commercial List Office, giving the reason for the change. The court expects counsel to adhere to their time estimates.
24. The court may attempt to fix not only the date, but also the time, of the hearing, in appropriate situations. This shall require the cooperation of all counsel to correctly estimate the time required for their matters, to complete them within the time previously scheduled and to minimize wasted time for all concerned.

Part X: Chambers Matters

25. Commercial List judges will be available in chambers at 9:30 a.m. on each day to deal with *ex parte*, urgent, scheduling and consent matters, each of which must take not more than 10 minutes. Counsel must book these chambers matters through the Commercial List Office and these bookings will be made to allow the Chambers Judge to hear all chambers matters by 10:00 a.m. Counsel are expected to have discussed the matter in advance and to have prepared a draft resolution for consideration by the Chambers Judge. Counsel should file the materials for the appointment on the previous day, so that the judge is aware of the nature of the matter to be considered.
26. *Ex parte* matters on the Commercial List will be rare. Counsel shall be required to justify the reason for not notifying the respondents. In most cases, notice shall be required, particularly if the matter is part of an ongoing dispute and there are solicitors known to be representing the respondents, even if in respect of other matters.
27. Motions to have matters listed on the Commercial List under sub-paragraph 1m), should be accompanied by the consent of the other counsel involved or a completed Request Form so that the judge may make an order either granting or refusing the motion.

Part XI: Adjournments and Settlements

28. Counsel shall be expected to be ready to proceed with matters for which hearing times have been agreed to or set; adjournments of previously scheduled matters shall be granted only in special circumstances and for a material reason. Counsel are expected conscientiously to have sought to resolve most adjournments and waiting periods among themselves before a hearing, in a way which minimizes inconvenience and difficulty for the parties. Parties are expected to have retained counsel promptly and requests for adjournments because counsel have not been retained promptly or because new counsel have been retained just prior to the hearing shall be dealt with accordingly. Applications for adjournments on consent should be forwarded to the Commercial List Office or, if directed by the supervising judge, shall be spoken to at the next available 9:30 a.m. sittings; counsel are expected to ensure that adjournments are sought at the earliest opportunity, so that time is not blocked which could be used for other matters. It is expected that the first counsel to speak to a proposed adjournment shall be in a position to outline the position of other counsel appearing.

29. If an adjournment of a previously scheduled matter is to be sought or appears likely to be required, the Commercial List Office must be alerted as soon as possible to accommodate rescheduling of another matter or alerting counsel on standby matters.
30. If a matter is adjourned to permit the continuation of realistic settlement discussions and the matter is not settled within a reasonable time, a report should be made to the supervising judge through the Commercial List Office on the status of those discussions. This report should be made within 30 days and may be made in court, in chambers or by letter, as appropriate.
31. Where appropriate, matters may be scheduled to be heard on a "standby" basis for a particular date. In these cases, counsel should be prepared to proceed on short notice or they must keep the Commercial List Office advised of times when they become unavailable.
32. Counsel on Commercial List matters are expected to conscientiously and continuously canvass the matter of settlement and to advise promptly of all concluded settlements, or matters which are reasonably likely to settle, so that other matters may be rescheduled.

Part XII: Judge to Hear Whole Matter

33. It is anticipated that a judge who determines a substantive component of a proceeding will continue to hear all subsequent substantive components in that proceeding. Arrangements for these subsequent proceedings may be made directly with the Commercial List Office. The continuing judge should be contacted in writing about the nature of the matter to be heard and a list of times which are convenient to all counsel, so that the judge can conveniently schedule the matter or can refer it back to the Commercial List Office for re-assignment. For matters of sufficient complexity or duration, in the event that the original judge is not sitting on the Commercial List at the time or has not then been assigned to a future Commercial List team, a request may be made for the appointment of a new continuing judge.

Part XIII: Case Management

34. It is expected that most matters of substance and of an ongoing nature on the Commercial List shall be subject to a form of case management by a Commercial List judge. Paragraph 33 already provides for significant informal case management for each case on the Commercial List. When a matter is transferred to the Commercial List, when the trial of an issue is directed or in any other matter where a party moves for case management and a Commercial List judge so directs, a specific case management judge may be appointed.
35. Where a Commercial List matter is subject to specific case management, a Scheduling Conference (if not already held at the time of transfer or otherwise) shall be held with the case management judge not later than one month after the close of pleadings or the date of the order (referred in paragraph 34) to determine a plan to process the case in a timely and reasonable fashion and to deal with any matters of a procedural nature which should be addressed at an early stage of the proceedings. The prospects for settlement should also be addressed. The results of a Scheduling Conference will be recorded in a Case Timetable.
36. Counsel will be expected to have conferred among themselves, prior to the Scheduling Conference, for the purpose of preparing a plan to process the case, including a discovery plan pursuant to rule 29.1 and a Case Timetable, for review with the case management judge.

37. Unless otherwise ordered, a Case Conference shall also be held with the case management judge not later than one month after the completion of discoveries. The plaintiff or applicant shall have the onus of arranging the Case Conference. The purpose of the Case Conference is to monitor the progress of the matter, to canvass settlement or other disposition of all or as many of the issues as possible, and to provide whatever directions as may be necessary or appropriate with respect to the disposition of the matter.
38. A Case Conference may be held at any other time during the proceeding where the parties consent or where a party moves for the scheduling of a Case Conference and the case management judge so directs.

Part XIV: Commercial List Motions before a Master

39. No Commercial List motions should be heard by a master unless referred by a Commercial List judge. The judge should indicate his/her referral by a written endorsement or direction to that effect.
40. Once there has been a referral from a Commercial List judge, counsel may book a short (two hours or less) master's motion through the scheduling unit on the 10th Floor at 393 University Avenue, but if the motion is a half day or longer or if a series of motions are anticipated where it would be beneficial for one master to be seized, no such motions shall be booked until a master is assigned by the Team Leader – Toronto Masters. The assigned Master's Registrar will then contact counsel to arrange for scheduling of the motion.

Part XV: Motions for Summary Judgment

41. If a motion for summary judgment is brought in a proceeding on the Commercial List, a motion date will not in the ordinary course be booked until:
 - a. The parties have exchanged all motion materials, on an agreed schedule or one fixed at a 9:30 a.m. chambers appointment, and are sufficiently advanced in the preparation of the motion to crystallize the issues and the evidence relating to them;
 - b. A case conference has been booked at which counsel must be prepared to address whether oral evidence should be heard on the motion in accordance with subrule 20.04(2.2), the length of time necessary for the hearing of the motion, judicial preparation time necessary and any other directions that may be required;
 - c. The judge hearing the case conference has directed that a motion date be booked, bearing in mind that it is expected that the case conference judge will hear the motion.

Part XVI: Applications

42. It is expected that applications, which can require some oral evidence, will be managed in the same manner as motions for summary judgment in paragraph 41.

Part XVII: Alternative Dispute Resolution and Pre-Trials

43. Resort to the techniques of "alternative dispute resolution" (ADR), where appropriate, is recognized and encouraged as an effective aid in the disposition of issues and matters on the Commercial List. Pursuant to Rule 24.01.04(2) (c), mandatory mediation does not apply to cases on the Commercial List.

44. It shall be the duty of the case management judge and the obligation of counsel to explore methods to resolve the contested issues between the parties, including the resort to ADR, at the case conferences and on whatever other occasions it may be fitting to do so.
45. At any time, particularly on consent of the parties, the case management judge may refer any issue for ADR, as appears appropriate.
46. When a matter, or any issue within a matter, has been referred to ADR, counsel shall report to the case management judge at regular intervals as to the progress of the ADR proceedings. The timing of such reports shall be agreed upon between counsel and the case management judge.
47. The court may schedule intensive pre-trials for either entire cases or for significant matters within cases. These pre-trials should be booked through the Commercial List Office, with enough time for the matters in issue and the possibility of settlement to be canvassed thoroughly. At least five days before the pre-trial, each party shall deliver to the other parties a pre-trial brief containing:
 - a. a concise statement of facts including the agreed facts and admissions;
 - b. where necessary, a concise summary of the issues;
 - c. any outstanding procedural issues;
 - d. the current settlement position of each party; and
 - e. an estimate of the trial time, including a list of witnesses and an estimate of the time required for hearing the evidence of each.
48. A trial management conference, which is to be arranged by counsel at least two months before trial, is to be held to deal with arrangements for managing the trial or hearing.

Part XVIII: Materials for use of Court

49. It is expected that materials filed for the use of the court will be filed with the Commercial List Office at least within the time prescribed by the Rules. Early filing is recommended. All moving party or applicant material must be filed seven days (excluding holidays) before the hearing. All responding material must be filed four days (excluding holidays) before the hearing.
50. The Commercial List Office should be advised of what specific materials from its files are required for the hearing of any particular proceeding. This is particularly important where the matter is on-going or the materials in the court files are voluminous. It is suggested that counsel co-ordinate on a common numbering scheme for the records, transcripts, factums, authorities and other materials intended for use by the court and that a representative attend at the Commercial List Office before a hearing to ensure that the correct materials are available to the judge.
51. In appropriate cases, to supplement any required formal record, counsel are requested to consider preparing an informal Compendium of the key materials to be referred to in argument (fair extracts of documents, transcripts, previous orders, authorities, etc.) to assist in focusing the case for the court: (see *Saskatchewan Egg Producers' Marketing Board v. Ontario*, [1993] O.J. No. 434.) Relevant portions of the Compendium should be highlighted or marked. Counsel are urged to consult among themselves in the preparation of a joint Compendium, if possible. The Compendium should contain only

essential materials. The use of a loose-leaf format is particularly helpful to the court both for conducting hearings and for writing decisions.

52. All records and submissions should note on the cover page and the back page the nature of the proceeding for which the material is filed and the scheduled hearing date. When there is more than one affidavit of an individual filed in any proceeding, the affidavits should be numbered sequentially.
53. Factums should not, in the ordinary course, exceed 25 pages in length.
54. Unless it is not possible, briefs of authorities and substantial documents should be reproduced using both sides of the page.
55. Books of Authorities must be highlighted or side-barred to indicate the passages that will be referred to in argument.
56. The court invites the use of diagrams, corporate organization charts, list of persons involved, point-form chronologies and other synopses of complex or technical evidence.
57. The prior preparation of draft orders for consideration by the court at the end of a hearing will greatly expedite the issuance of orders. Where relevant model orders have been approved by the Commercial List Users' Committee, a copy of the draft order blacklined to the model order and indicating all variations sought from the model order must be filed.
58. For trials, the court encourages the use of sworn witness statements to replace examination in chief, in whole or in part, in appropriate circumstances. All such witness statements must be exchanged with all other parties and counsel well in advance of the hearing and, unless a prior order is made, the witness should be available for cross-examination at the trial. (Also see rule 53.02).

Part XIX: Expert Witnesses

59. It is expected that counsel will comply with requirements set out in subrule 53.03(1) and (2) so as to provide notice of the intention to call an expert witness, including delivery of a signed report which contains the information mandated by subrule 53.03(2.1) within the expert report. Counsel must bring to the attention of their expert witness the duties of an expert set out in rule 4.1. Best practice should include providing the expert with the language of rule 4.1 and rule 53.03, subrules (1), (2) and (2.1).

Part XX: Reasons for Decision

60. If an endorsement, order or decision is hand-written or dictated and not transcribed by the court, counsel for the plaintiff or moving party shall assist the court in preparing a typed draft and providing to the court the typed draft for editing by the judge, along with an electronic version of the draft and a copy of the hand-written version or dictation media, highlighting any passages which were difficult to read.

Part XXI: Costs

61. The court will seek to award and fix costs at the end of the hearing of a matter. Counsel must submit a costs outline [subrule 57.01(6)] and be prepared to deal with costs (including liability, scale and amount) at the conclusion of the hearing of the matter or, if absolutely necessary, by written submissions immediately thereafter.

Part XXII: Users' Committee

62. A Commercial List Users' Committee has been established. It is comprised of members of the judiciary who sit on the Commercial List from time to time, of practitioners who are familiar with the operation of the Commercial List and who are nominated by relevant user organizations in conjunction with the Users' Committee and of a representative of Courts Administration from the Commercial List Office. The names of the members of the Users' Committee may be obtained from the Commercial List Office. The Users' Committee meets regularly to consider improvements to the organization and operation of the Commercial List and to make recommendations to the Regional Senior Justice and the Chief Justice in that regard. The Users' Committee welcomes suggestions, compliments and complaints from other practitioners who have had cases on the Commercial List. Communications may be sent to the Commercial List Office, which will direct them to the office of the Regional Senior Justice.

Part XXIII: Enquiries

63. The supervising judge of the Commercial List may be contacted about the scheduling of trials, long matters and urgent matters. In such cases, it is expected that counsel shall give details of the matter, the urgency, if any, expected length and mutually convenient dates. A Request Form and Case Timetable may be used for this purpose.

Part XXIV: Commercial List Forms

64. Current versions of the Request Forms, Case Timetable and Trial Requirements Memorandum may be obtained from the Commercial List Office.

Part XXV: Frequently Cited Cases in Commercial Proceedings

65. An Authorities Book for Commercial List matters containing cases frequently relied on, has been developed and approved for use in matters assigned to the Toronto Commercial List. There will be additions to, and deletions from, the list from time to time. The Authorities Book is available on the Superior Court's website at: www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial-list-authorities-book/.
66. The cases in question appear on this list under various headings or topics which are not in any way intended to provide legal advice.
67. 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 for the matters before the Commercial List in Toronto.

Part XXVI: Protocol Concerning Court-to-Court Communications in Cross Border Cases

68. The Commercial List has approved the adoption of the Guidelines Applicable to Court-to-Court Communications in Cross Border Cases ("Guidelines") prepared by the American Law Institute, for matters on the Commercial List. The Guidelines are available at: www.iiglobal.org/component/jdownloads. The Guidelines have already been applied to international insolvency cases on the Commercial List. It is expected that these Guidelines will facilitate cooperative procedures for insolvency proceedings and other types of commercial disputes involving cross-border proceedings, where court-to-court communications might facilitate in harmonizing proceedings to help ensure consistent results and increase efficiency.

69. The Guidelines will only be applied in specific cases, following adequate notice to the parties.
70. Although the Guidelines were prepared for court-to-court communications as between Canada and the United States, the Commercial List endorses their application in court-to-court communications between Canada and other countries, and as between Ontario and the other provinces and territories.
71. Counsel and/or the parties should ensure that any issues concerning the confidentiality of materials to be transmitted by the Commercial List to another jurisdiction, including the deemed undertaking rule, Rule 30.1 of the *Rules of Civil Procedure*, be addressed when consideration is given by the court to the transmittal of evidentiary or written materials from the Commercial List to another court. The Guidelines are to apply only in a manner that is consistent with the *Rules of Civil Procedure* and the practice in this jurisdiction.
72. The Commercial List confirms, as noted in the Guidelines, that the Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases, and to change and evolve as experience is gained from working with them.
73. A copy of the Guidelines may also be obtained from the Commercial List Office at 393 University Avenue, 10th Floor, Toronto, Ontario M5G 1E6, Telephone 416-327-5043, Fax 416-327-6228.

Dated: April 11, 2014 Heather J. Smith Chief Justice Superior Court of Justice (Ontario) Geoffrey B. Morawetz Regional Senior Judge Superior Court of Justice, Toronto Region

APPENDIX 3

