

## COMMERCIAL LIST USERS' COMMITTEE NEWSLETTER

### ISSUE #5

- March 2013 -

Editors:

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The Commercial List Users' Committee (the "Users' Committee") continues to work on improvements to the practice and administration of the Court. We take this opportunity to report on the activities of the Users' Committee since Issue #4 of this Newsletter in May 2012.

### GENERAL OVERVIEW

#### Toronto Region Matters

Only Toronto Region matters can be listed on the Commercial List, unless, for special reasons, authorization is given by the supervising judge.

Counsel wishing to have a matter heard on the Commercial List that has a connection with another judicial region are required to book a 9:30 scheduling appointment with a Commercial List judge through the Commercial List Office at 416-327-5043 or [toronto.commercialist@jus.gov.on.ca](mailto:toronto.commercialist@jus.gov.on.ca), in order to request that the matter be added to the Commercial List docket.

The 9:30 judge hearing the scheduling application will generally contact the Regional Senior Judge for the region with which the matter has a connection. Generally, if the matter can be accommodated in that region, the parties will be heard in that court, rather than before the Commercial List.

#### Oppression Remedy Applications

As discussed in the May 2012 Newsletter Issue #4, not all oppression remedy cases are accepted on the Commercial List. Oppression remedy applications are reviewed to ascertain whether the matter has a significant commercial component. If so, these matters are generally accepted. However, if a matter predominately involves subjects of a non-commercial nature, the matter may not be accepted on the Commercial List.

Counsel with questions or doubts as to whether the matter will be heard on the Commercial List should book a 9:30 scheduling appointment with a Commercial List judge through the Commercial List Office at 416-327-5043 or [toronto.commercialist@jus.gov.on.ca](mailto:toronto.commercialist@jus.gov.on.ca), in order to request that the matter be added to the Commercial List docket.

## **Trials**

Trial dates on the Commercial List are fully booked through until April 2013, with the possibility of short trials being accommodated.

## **Motions**

In November 2012, Masters May Jean and Donald Short, with assistance of Mr. Justice Campbell, conducted a “blitz” for the purpose of substantially reducing the backlog of long motions in outstanding bankruptcy discharge matters. The “blitz” was very successful, reducing the backlog by approximately 50%. A further “blitz” is anticipated in the spring. As well, any new “long matters” in bankruptcy cases (estimated for more than 1 hour) will now require completion of a scheduling form available through the Commercial List office in order to be scheduled.

In appropriate cases, judges of the Commercial List may refer interlocutory motions to Masters Jean and Short for hearing.

## **Practice Request**

The judges of the Commercial List would appreciate counsel including their email addresses, not just facsimile numbers, on application and motion records, and on the back of draft orders.

Also, it is helpful for the judges to manage the volume of materials before them, if the titles on notices of motion and draft orders include some description of the relief sought; for example:

Notice of Motion  
(Sale Approval and Vesting Order)

Order  
(Sales Process)

The assistance of the bar in adopting these practices is much appreciated.

## **REPORT ON SUB-COMMITTEES**

### **MODEL ORDERS**

#### **Foreign Main Proceedings**

The Users’ Committee approved the revised Initial Recognition Order and Supplemental Order under the CCAA in respect of the recognition of a foreign main proceeding.

The Initial Recognition Order is to be used for the recognition of a foreign proceeding as a foreign main proceeding and contains a general stay of proceedings in accordance with Section 48 of the CCAA.

The Supplemental Order, which should normally be sought at a subsequent hearing, provides for a more comprehensive stay of proceedings, the appointment and the powers and duties of an Information Officer, and provides for other relief such as interim financing and court-ordered charges. These model orders are now available on the Superior Court of Justice website at <http://www.ontariocourts.on.ca/scj/en/commercialist>.

### **E-SERVICE PROTOCOL**

The model order sub-committee led a discussion with the Users' Committee regarding issues related to the electronic service of court material and documents in CCAA filings. The sub-committee finalized its draft report of the E-Service Protocol which was presented to the Users' Committee at its January meeting. A copy of the draft E-Service Protocol as at January 17, 2013 is attached. The subcommittee will be circulating the draft protocol for review and comment by industry groups. All comments are welcome. We hope to provide in the next Newsletter a final version and any directions for implementation.

### **PRE-FILING REPORTS**

At its meeting on March 26, 2012, the Users' Committee approved the sub-committee's report on the appropriate use and content of a pre-filing report by a proposed monitor in connection with an initial application under the CCAA. Although the sub-committee's report has been widely distributed, a copy of the report is attached for anyone who has not had a chance to review it. The Users' Committee will monitor the use of pre-filing reports over the next year, and provide an update as appropriate through this newsletter.

### **E-DELIVERY PROJECTS**

The Office of the Chief Justice has approved the e-delivery project protocol developed by the sub-committee with the assistance of Mr. Justice David Brown. The protocol, entitled "Toronto Region Commercial List e-Delivery Pilot Project: Guidelines for Preparing and Delivering Electronic Documents requested by Judges" is available on the Superior Court of Justice website at <http://www.ontariocourts.on.ca/scj/en/commercialist>.

### **NEW SUB-COMMITTEES**

#### **Disclaimers in Monitor's and Receiver's Reports**

A new sub-committee has been struck and is expected to prepare a report on the “boiler plate” disclaimers in monitor’s and receiver’s reports to respond to concerns that disclaimers may be too broad in the circumstances of a particular report and may undermine the evidentiary value of the report.

### **SITTING JUDGES**

Consistent with past practice, the Commercial List will not be scheduling lengthy trials during July and August.

The following judges will be sitting on the Commercial List in the 2013 Winter Term (January – March) and the Spring Term (April – May): Justices Morawetz, Brown, Campbell, Cumming, Mesbur, Newbould and Wilton-Siegel.

The following judges will be sitting on the Commercial list in the 2013 Fall Term (September - December): Justices Morawetz, Brown, Campbell, Newbould, Spence and Thorburn.

### **CLUC ANNUAL EDUCATION AND GOLF RETREAT**

The Users’ Committee, in partnership with the Ontario Bar Association, Insolvency Law Section, and the Ontario Association of Insolvency & Restructuring Professionals, will once again be hosting the annual educational program, golf retreat and dinner on **June 6, 2013** at the Richmond Hill Golf & Country Club. Further details will be provided by organizers. Please mark the date in your calendar.

### **IN MEMORIAM**

Our colleague and friend Michael MacNaughton of Borden Ladner Gervais LLP passed away this past November after a courageous battle with ALS. Michael was a leading insolvency lawyer who possessed a keen intellect, a great sense of humour and practiced with integrity. He will be missed.

## **Users' Committee Members**

Mervyn D. Abramowitz, Kronis Rotsztain Margles Cappel LLP

Scott Bomhof, Torys LLP

Harvey Chaiton, Chaitons LLP

Robin Dodokin, Garfinkle, Biderman LLP

Catherine Francis, Minden Gross LLP

Deborah Grieve, Cassels Brock & Blackwell LLP

Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP

Geoff Hall, McCarthy Tetrault LLP

Brett Harrison, McMillan LLP

Jeffrey Hoffman, Gowling Lafleur Henderson LLP

Pamela Huff, Blake, Cassels & Graydon LLP

Bruce Leonard, Cassels Brock & Blackwell LLP

Alex MacFarlane, Gowling Lafleur Henderson LLP

Chris Matthews, Aird & Berlis LLP

Elizabeth Pillon, Stikeman Elliott LLP

Tony Reyes, Norton Rose Canada LLP

Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP

Allan Sternberg, Ricketts Harris LLP

Sheldon Title, MNP LLP

**Ontario  
Superior Court of Justice**

**Commercial List**

**E-Service Protocol**

**PART I: INTRODUCTION**

1. Proceedings on the Ontario Superior Court (Commercial List) (the “**Court**” or the “**Commercial List**”) frequently involve multiple and evolving stakeholders located nationally and internationally. These proceedings involve “real time litigation” which, by its nature, requires efficient, effective and cost efficient methods of providing service and notice to stakeholders.

2. The methods of service provided for under the *Rules of Civil Procedure (Ontario)* (the “**Rules**”) do not always operate efficiently in multi-party, multi-jurisdictional proceedings, nor do they take advantage of the most current technologies. Service provisions in Commercial List orders before the development of this protocol evolved in an *ad hoc* manner without precision or specificity with respect to such fundamental terms as the “service list”.

3. The purpose of this Commercial List E-Service Protocol (“**E-Service Protocol**”) is to provide modern and efficient processes to effect service and give notice in certain Commercial List proceedings. In order to achieve this purpose the E-Service Protocol utilizes three tools:

- (a) Service of documents by electronic mail;
- (b) A “service list” with defined parameters; and
- (c) Mandatory websites containing defined minimum levels of information.

4. The E-Service Protocol will be incorporated by reference in orders at the initial stages of certain Commercial List proceedings as a form of substituted service pursuant to Rule 16.04 of the Rules [**subject to Rule 17.05(3)**]<sup>1</sup>. A copy of the E-Service Protocol will be available on the Commercial List website at [www.ontariocourts.ca/scj/en/commerciallist/](http://www.ontariocourts.ca/scj/en/commerciallist/) and need not be appended to the incorporating order.

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<sup>1</sup> [NTD: The prior draft of this Protocol provided an “opt out” to the recipient. The opt out was based upon concerns regarding due process with respect to service outside of Ontario. Justice Brown has indicated that, in his view, E-Service should be mandatory and there should be no opportunity to opt out. Accordingly, in this draft, the opt out has been deleted. However, focusing on service *ex juris*, Rule 17.05(3) seems to be mandatory. There are different rules dealing with contracting states, non-contracting states, objecting states and non-objecting states. There are also distinctions dealing with originating and non-originating process. We need more work/thought given to the jurisdiction of the Ontario Superior Court to make a substitutional service order on each type of foreign respondents or whether the order will need a carve out for some.

5. The E-Service Protocol permits service upon persons on the E-Service List<sup>2</sup> by those who have the right to serve and file material in the proceeding under the Rules of Civil Procedure, an order of the Court or otherwise. The E-Service Protocol does not itself give any person the right to serve and file material. To that end, the E-Service Protocol is not meant to alter or replace requirements under the Rules with respect to such matters as the delivery of Notices of Appearance. The E-Service Protocol is subject to modification by the Court in appropriate cases.

6. Nothing in this E-Service Protocol varies any requirements under the Rules or applicable practice directions with respect to the filing of Court Documents with the Court.

7. The E-Service Protocol will be used in the following insolvency proceedings (collectively, the “**Insolvency Proceedings**”) pending before the Commercial List:

- (a) Proceedings under the Companies’ Creditors Arrangement Act (Canada) (“**CCAA**”);
- (b) Receivership proceedings, including proceedings under the *Bankruptcy and Insolvency Act (Canada)* (“**BIA**”), the *Courts of Justice Act (Ontario)*, the *Securities Act (Ontario)* and other legislation which provides for the appointment of court officers;
- (c) Proceedings under the *Winding-Up and Restructuring Act*;
- (d) Division I proposal proceedings under the BIA; and
- (e) Any other insolvency-related proceedings, including bankruptcy proceedings under the BIA or other Commercial List proceedings, where the Court determines that it would be beneficial to use the E-Service Protocol.<sup>3</sup>

8. In addition to the Insolvency Proceedings, the E-Service Protocol may be used in large or complex arrangement, re-organization or similar court proceedings under the *Business Corporations Act (Canada)* and the *Business Corporations Act (Ontario)* where the Court determines that its use would be beneficial (“**Reorganization Proceedings**”). Insolvency Proceedings and Reorganization Proceedings are referred to collectively as “**Commercial List Proceedings**”.

## **PART II: SERVICE BY EMAIL**

9. Electronic mail (“**Email**”) will be the required mechanism to serve documents to be filed in court (“**Court Documents**”) in Commercial List Proceedings. If service by Email is not practicable Court Documents may be served as provided in the Rules.

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<sup>2</sup> As defined in Part III below.

<sup>3</sup> CCAA proceedings involve, by definition, cases with more than \$5 million of debt. No debt level criteria have been provided for other Insolvency Proceedings that may take advantage of the E-Service Protocol – though the E-Service Protocol, and in particular, the Case Website, may be inappropriate for smaller cases.

10. Court Documents are documents that must be served under the Rules with respect to motions or applications in Commercial List Proceedings such as notices of motion, notices of application, affidavits, facta, Court Officer<sup>4</sup> reports and orders.

11. Service by Email on the E-Service List shall be used only for the following purposes:

- (a) Service of Court Documents;
- (b) Delivery of correspondence containing information with respect to motions or applications such as the location or timing of a Commercial List Proceeding or other directions with respect to a proceeding; and
- (c) Circulation of material related to motions or applications such as draft orders.

12. Email sent to the E-Service List shall not be used in order to provide a party's general comments on the proceedings or to advocate positions or for any other use not specifically provided for herein.

13. The moving party in a Commercial List Proceeding shall seek Court adoption of the E-Service Protocol in the order initiating the proceeding (or as soon as practicable thereafter). The following provision shall be included in such order unless varied by the Court:

**“Substituted Service and Case Website<sup>5</sup>**

THIS COURT ORDERS THAT the E-Service Protocol of the Commercial List (the “**Protocol**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at [www.ontariocourts.ca/scl/en/commercialist](http://www.ontariocourts.ca/scl/en/commercialist)) shall be valid and effective service. Subject to Rule 17.05(3)<sup>6</sup> this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 20 hereof, service of documents in accordance with the E-Service Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL ‘<[@](#)>.’”

14. Except as otherwise provided herein, Email service is a sufficient mode of service of Court Documents without duplicating service by facsimile, hard copy delivery or other method of service.

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<sup>4</sup> Court Officers include Monitors, Receivers, Information Officers, Interim Receivers, Trustees in Bankruptcy, Proposal Trustees and other similar persons.

<sup>5</sup> As defined in Part IV below.

<sup>6</sup> See Note 1.



15. Court Documents should be served by Email by way of HTML link or PDF files. If the party serving the Court Document can create an HTML link to the Court Document on the Case Website<sup>7</sup> prior to serving the Court Document, service of such document by PDF file shall not be necessary. The HTML link must be a link directly to the document being served.

16. To the extent practicable, Court Documents shall be in a format which is compliant with the Toronto Region Commercial List e-Delivery Pilot Project – Guidelines for Preparing and Delivery of Electronic Documents requested by Judges – June 2012.<sup>8</sup>

17. Where a party is serving more than one document by Email of HTML links, the Email shall specify each document being served and shall include a separate HTML link for each document being served.

18. If a Court Document is being served by way of an Email of a PDF file, the party serving the Court Document shall be cognizant of the size of the file and send the Court Document in multiple Emails if the PDF file would appear to be too large to serve in a single Email.

19. If the party serving the Court Document by Email receives notification of a transmission failure, the party serving the Court Document shall make reasonable efforts to ensure that successful Email transmission of the Court Document occurs or that the Email comes to the attention of the intended recipient or his or her firm.<sup>9</sup>

20. Any Court Document served by Email should clearly state in the subject line of the Email: (i) notification that a Court Document is being served; (ii) a recognizable short form name of the Commercial List Proceeding; (iii) the nature of the proceeding; and (iv) the nature of the Court Document.<sup>10</sup> The body of the Email should contain a description of the party serving the Court Document, a brief description of the nature of the Court Document being served, the date of the proceeding and any other specific information with respect to the proceeding such as, for example, a specific commencement time or court location if known.

21. In accordance with Rule 3.01(d), a Court Document served by Email before 4:00 p.m. shall be deemed to be received that day and Court Documents served after 4 p.m. or at any time on a holiday shall be deemed to be received on the next day that is not a holiday.

22. Each party serving a Court Document in a Commercial List Proceeding is responsible for complying with the E-Service Protocol. Nothing herein, however, is intended to change the substantive law about who is required to be served with materials in respect of any particular motion or proceeding brought within a Commercial List Proceeding.

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<sup>7</sup> As defined in Part IV below.

<sup>8</sup> This may require further discussion with respect to whether Reports should be “locked”.

<sup>9</sup> Parties who are on the E-Service List shall ensure that “out of town notifications” or other similar notifications contain the name and Email address of another member of that person’s firm or business to whom the Court Document should be sent.

<sup>10</sup> By way of example – E-SERVICE: Nortel - Approval of Sale of Assets - Motion Record.

23. Even though a Court Document has been served in accordance with this E-Service Protocol, a person may show that the Court Document:

- (a) did not come to the person's notice;
- (b) came to the person's notice later than when it was served or effectively served, or
- (c) was incomplete or illegible.

24. Each party serving a Court Document by Email shall prepare an affidavit of service containing the particulars of the service including the E-Service List served, the Email addresses to which Court Documents were sent and the time of the Emailing. A copy of the affidavit of service shall be filed with the Court.

### **PART III: THE E-SERVICE LIST**

25. The E-Service List in a Commercial List Proceeding ("**E-Service List**") is a mechanism to facilitate service of Court Documents on stakeholders who should be served with Court Documents ("**Stakeholders**"). Stakeholders include a corporation, body corporate, partnership or individual that has a legal interest in the Commercial List Proceeding. The E-Service List is not intended as a mechanism to generally disseminate information with respect to the status of a Commercial List Proceeding.

26. The E-Service List shall list the names, contact coordinates, including Email addresses, of Stakeholders or their counsel, who may be served by Email in accordance with Part III hereof. Inclusion of a party on the E-Service List allows effective service of Court Documents on such party by Email.

27. After the order is issued authorizing the use of the E-Service Protocol in a Commercial List Proceeding, counsel for the party initiating the proceeding, or the appointed Court Officer, if appropriate, (the "**E-Service List Keeper**") shall prepare the initial E-Service List containing the names and e-mail addresses of Stakeholders upon whom service is to be effected by Email.

28. The E-Service List Keeper shall use its best efforts to ensure that the Email address of a Stakeholder is correct and will result in an effective transmission of Court Documents to the intended recipient when initially placed on the E-Service List. Stakeholders on the E-Service List shall notify the E-Service List Keeper of any subsequent change of its Email address.

29. The E-Service List Keeper shall send an Email to each proposed Stakeholder advising that: (i) the proposed Stakeholder has been placed upon the E-Service List, (ii) Court Documents will be validly served upon the proposed Stakeholder by Email; and (iii) that any Stakeholder on the E-Service List may serve Court Documents on any other Stakeholder on the E-Service List in accordance with this E-Service Protocol.

30. During the course of the Commercial List Proceeding, the E-Service List Keeper shall add Stakeholders to the E-Service List from time to time as required subject to the procedure set out in paragraph 29.

31. The E-Service List must include the following parties:

- (a) Counsel for the applicant/moving party in the Commercial List Proceeding;
- (b) The Court Officer appointed in the Commercial List Proceeding and counsel for the Court Officer;
- (c) Counsel for any party that has delivered a Notice of Appearance under the Rules from time to time;
- (d) Any party or counsel to any party who should be served with Court Documents in accordance with the Rules and the practice in the Commercial Court; and
- (e) Any Stakeholder or counsel to a Stakeholder who has filed a RES.<sup>11</sup>

32. Stakeholders who wish to be placed on the E-Service List in order to receive service of Court Documents in a timely and efficient manner shall Email to the E-Service List Keeper a duly completed Request for Electronic Service (“RES”) in the form attached as Schedule “A” hereto<sup>12</sup>.

33. If a Stakeholder on the E-Service List no longer has an ongoing legal interest in a Commercial List Proceeding, that Stakeholder may request that the E-Service List Keeper delete that Stakeholder from the E-Service List.

34. Those persons who are interested in monitoring a Commercial List Proceeding but are not required to be served with Court Documents in accordance with the Rules or the practice in the Commercial List are not to be placed on the E-Service List. Such parties should monitor the Commercial List Proceeding by accessing the Case Website.<sup>13</sup>

35. A lawyer who files an RES on behalf of a client must identify such client. Lawyers receiving E-Service of Court Documents on behalf of clients must be properly accredited lawyers within the jurisdiction in which they practice. By delivery of such RES, the lawyer warrants his or her authority to receive service on behalf of his/her client.

36. In addition to the E-Service List referred to in paragraph 26 hereof, the E-Service List Keeper shall create and maintain a copyable Word document containing the Email addresses of the Stakeholders on the E-Service List from time to time (the “**Address List**”). The purpose of the Address List is to allow Stakeholders on the Service List to copy and paste the Email

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<sup>11</sup> As defined in paragraph 30 below.

<sup>12</sup> Parties who do not reside in Ontario should consider whether, based upon the substantive law, the delivery of an RES constitutes attornment to the Ontario proceeding.

<sup>13</sup> As defined in Part IV below.

addresses of the current Stakeholders on the E-Service List into Emails serving Court Documents. This process is designed to avoid E-Service of Court Documents using out of date or inaccurate E-Service Lists. The practice of serving Court Documents by “replying to all” on a previous Email is discouraged. The E-Service List Keeper shall provide a current copy of the Address List to the WebHost<sup>14</sup> from time to time.

37. Any party wishing to serve a Court Document in a Commercial List Proceeding shall use the then current copy of the Address List posted on the Case Website to serve the Court Documents. If possible, the serving party shall make enquiries of the E-Service List Keeper to determine if the E-Service List Keeper is aware of parties to be added to the Address List who have not yet been added.

38. During the course of a Commercial List Proceeding, certain motions or applications require service of Court Documents on respondents with an interest in that particular motion or application only; for example, service on lien claimants with an interest only on specific property with respect to a sale approval and vesting order. In such circumstances the party bringing the motion or application shall prepare a Supplementary E-Service List listing the names and Email addresses of the “one time” respondents that the moving party wishes to serve by Email. The cover Email shall contain the information designated in paragraph 20 and 29 hereof. The affidavit of service with respect to that motion shall include the Supplementary E-Service List.

39. The E-Service List Keeper shall use its best efforts to maintain the E-Service List current and accurate. In addition to any other protection that may be available to it by statute or Court order, the E-Service List Keeper shall incur no liability in carrying out the provisions of this E-Service Protocol and, in particular, with respect to the creation or maintenance of the E-Service List, except for any gross negligence or wilful misconduct on its part.

#### **PART IV: THE CASE WEBSITE**

40. The Case Website hereinafter described will be established for the purpose of:

- (a) Creating a comprehensive and current record of Commercial List Proceedings;
- (b) Allowing easy and inexpensive access to the record of proceedings to Stakeholders involved in Commercial List Proceedings and to parties with a potential interest in the proceedings;
- (c) Providing a mechanism to facilitate service of Court Documents by Email with HTML links to particular Court Documents; and
- (d) Provide a mechanism to facilitate the dissemination of notices and information to larger groups of interested parties such as employees, retirees or general unsecured creditors.

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<sup>14</sup> As defined in Part IV herein.

41. The Case Website shall be hosted by the Court Officer appointed in the Insolvency Proceeding or by counsel to the applicant in Reorganization Proceedings (the “WebHost”) or as the Court may order.

42. The Case Website, or a link to the Case Website, shall be located on the WebHost’s website and shall be prominently identified so as to ensure easy public access to the Case Website and the Court Documents posted thereon. The Case Website shall be specifically devoted to the posting, organization, storage and display of electronic versions of all Court Documents delivered in a Commercial List Proceeding.

43. The Case Website shall be organized in a manner that facilitates the ability of any interested party to easily locate Court Documents delivered in the Commercial List Proceedings and other documentation relevant to the Commercial List Proceedings such as proof of claim forms and creditor meeting documentation.

44. The WebHost shall post the following categories of documents, as served or to be served:

- (a) Notices of application/notices of motion;
- (b) All affidavits, including exhibits, and other material filed by an applicant/moving party with respect to an application/motion;
- (c) All responding affidavits, including exhibits, and other material delivered in response to the application or motion by all respondents;
- (d) All facts and written arguments delivered by any party to an application or to a motion;
- (e) Books of authorities;
- (f) All court reports filed by Court Officers;
- (g) All Court Orders, Reasons for Decision and Endorsements;
- (h) The current version of the E-Service List and Address List; and
- (i) Any document that requires dissemination to interested parties, such as proof of claim forms, notices of creditor meetings, plan disclosure statements, plans of reorganization and voting letters as requested by the restructuring debtor or the Court Officer.

If the WebHost is uncertain whether a document should be posted on the Case Website as a result of its content, the WebHost may seek directions from the Court at a 9:30 appointment.

45. This list of information to be posted to the Website is not meant to be an exhaustive list. The WebHost may post other case-related information to the Website in its discretion. In the case of a Monitor under the CCAA, nothing in this E-Service Protocol shall

affect any requirements set out in the CCAA or the regulations thereunder with respect to the posting of documents to a website by the Monitor.

46. Documents that have been sealed by Court order or documents in respect of which sealing orders are being requested shall not be posted on the Case Website.

47. Any party intending to bring a motion or application in a Commercial List Proceeding shall, if reasonably possible, provide an electronic copy of the motion or application record to the WebHost for posting on the Case Website prior to service. If the motion or application record has been posted on the Case Website, the moving party or applicant may serve the proceeding by Email using HTML links as provided herein. Where time does not permit the prior posting of motion or application records, the applicant or moving party shall serve the Court Documents on the E-Service List by Email of a PDF.

48. Counsel shall send an electronic copy of Court Documents to the WebHost at the time of service of the Court Documents on the E-Service List.

49. The WebHost shall use its best efforts to post documents provided to it by counsel in PDF format on the Case Website as soon as practicable.

50. The WebHost shall maintain the Case Website for a period of at least six months after the earlier of completion of the Commercial List Proceeding or the discharge of the WebHost if a Court Officer.

51. To the extent practicable the WebHost shall post links to foreign proceedings related to the Commercial List Proceedings on the Case Website.

52. The WebHost is entitled to charge for the time spent establishing and maintaining the Website at the usual hourly rates charged by its staff. No additional charges or fees may be claimed with respect to the establishment and maintenance of the Case Website.

53. The WebHost shall use its best efforts to maintain the Case Website current and complete. In addition to any other protection that may be available to the WebHost by statute or Court order, the WebHost shall incur no liability or obligation in carrying out the provisions of this E-Service Protocol and, in particular, with respect to the creation and maintenance of the Case Website, except for any gross negligence or wilful misconduct on its part.

**SCHEDULE "A"**

**REQUEST FOR ELECTRONIC SERVICE ("RES")**

*Please refer to important notes below*

<b>In the Matter of the</b> <input type="checkbox"/> CCAA <input type="checkbox"/> Receivership <input type="checkbox"/> BIA Proposal  <input type="checkbox"/> Other _____ of:	XYZ Company Ltd _____ (the "Debtor")  < <a href="http://www.caseurl.com">http://www.caseurl.com</a> >
<b>Legal Counsel to Stakeholder listed below:</b>  (please provide firm name, lawyer's name, address and email address)  Please indicate your preference (by checking applicable box below):  <input type="checkbox"/> Serve counsel only  <input type="checkbox"/> Serve counsel & Stakeholder listed below	<Lawfirm LLP _____ > <Lawyer name _____ > <Address line 1 _____ > <Address line 2 _____ > <email address _____ >
<b>Name of Stakeholder requesting E-Service:</b>  (please provide full legal name, address, email address and describe Stakeholder's legal relationship to the Debtor:	<u>ABC Company Inc.</u> <Address line 1 _____ > <Address line 2 _____ > <email address _____ >
<b>Date:</b>	< Insert current date _____ >

I acknowledge having read the Ontario Superior Court of Justice Commercial List E-Service Protocol. I hereby request to be placed on the E-Service List. By so doing, I agree as a Stakeholder or as counsel to a Stakeholder that the Stakeholder accepts service by electronic means in this case and will be bound by that service:

Stakeholder/ Counsel to Stakeholder  
\_\_\_\_\_

**PLEASE RETURN SIGNED COPY OF FORM TO** <insert name of E-Service List Keeper here>:  
<email address> | 416-xxx-xxxx

### IMPORTANT NOTES

1. The E-Service List is intended to provide a timely and efficient method for effecting service in Commercial List Proceedings in accordance with the **E-Service Protocol**, a copy of which has been posted on the Commercial List website at [www.ontariocourts.ca/scj/en/commerciallist/](http://www.ontariocourts.ca/scj/en/commerciallist/).
2. Persons interested solely in monitoring the proceedings should do so by reference to the Case Website noted above and should not request to be placed on the E-Service List.
3. By filing this RES form, you hereby agree that the Stakeholder accepts service by electronic means as the sole means of service and will be bound by that service.
4. Parties residing outside of Ontario should consider whether, based on substantive law, the delivery of an RES constitutes an attornment to the Ontario proceedings.



## MEMORANDUM

**TO:** Commercial List Users' Committee                      **DATE:** November 29,  
2011

**FROM:** Harvey Chaiton  
Pamela Huff  
John Page

This report is submitted by the subcommittee of the Commercial List Users' Committee established to consider and make recommendations regarding the expectation and practice of a pre-filing report by the proposed Monitor in connection with an initial application under the *Companies' Creditors Arrangement Act* ("CCAA"). Concerns have been expressed by insolvency practitioners and judges both as to the practice of submitting a pre-filing report and as to the appropriate content of such a report, recognizing that considerable weight is generally given to the views and opinions expressed by the Monitor in its reports to the Court. We understand that pre-filing reports are not required and their use is somewhat criticized in other provinces.

Section 11.7(1) of the CCAA requires the Court on the initial application to appoint a licensed trustee to monitor the business and financial affairs of the debtor company. The duties and powers of the Monitor are set out in section 23 of the CCAA and include the preparation of information reports to the Court and the creditors. In its supervisory role, the Monitor is an officer of the Court and must act independently and impartially.

At the time of the initial application, the proposed Monitor has no official capacity nor does it have the benefit of the statutory protections under the CCAA for the Monitor once appointed. It may have been acting as financial advisor to the debtor company or secured creditor(s) in advance of the filing. While that does not disqualify the proposed Monitor from the appointment, it raises concerns as to the ability of the proposed Monitor to demonstrate an impartial and independent review of issues unless and until it is appointed and able to dialogue with other stakeholders.

The subcommittee has had the benefit of discussions with judges sitting on the Commercial List, lawyers of the insolvency bar, senior accounting professionals who regularly serve as Monitors and discussions on the topic at various educational programmes. The subcommittee held two sessions with senior accounting professionals to ascertain their views in a group dialogue. It was apparent to the subcommittee that they were cognizant of their duties as a court officer to act with integrity, independence and impartiality, and were well aware of the concern of a perceived bias in any pre-filing reports, particularly if they had acted in an advisory role prior to their appointment. They welcomed guidelines that would address the appropriate scope of a pre-filing report, which would also assist in addressing the expectations of CCAA applicants.

As a result of this consultative process, the subcommittee was able to ascertain a general consensus as follows with respect to pre-filing reports in CCAA matters.

1. A pre-filing report is not mandatory, but is viewed as very helpful to the presiding judge on particular topics.

2. A pre-filing report should address the qualifications of the proposed Monitor, indicate its consent to act and disclose any prior involvement with the debtor company or stakeholders.
3. A pre-filing report should not be a repetition of the evidence of the debtor company in support of its application, nor should it advocate the debtor company's application. Such advocacy is for the debtor company.
4. A pre-filing report should address the statutory requirements of the Monitor, ie. to review the company's cash-flow statement as to its reasonableness [(CCAA, s. 23(1)(b)]. Since cash-flows are filed on the initial application, a pre-filing report can address the reasonableness, rather than a report being filed after the Monitor's appointment. If extraordinary relief is being sought on the initial application for which the Monitor is obligated by statute to review and consider [ie., CCAA s. 36(1) - Restriction on disposition of business assets; CCAA s. 11.2(1)(4) – Interim financing], such issues should be addressed in a pre-filing report.
5. While not a statutory requirement, it is generally viewed as helpful for a pre-filing report to consider the appropriateness of the quantum of any charges sought on the initial application [ie., Administrative Charge (CCAA s.11.52), Directors & Officers Charge (CCAA s. 11.51), Critical Suppliers Charge (CCAA s. 11.4)]. By way

of comparison, it is generally viewed as unhelpful for a proposed Monitor to opine in a pre-filing report on the reasonableness of any Key Employee Retention Plans, for which there are no statutory requirements for the Monitor to review, there is a direct impact on other stakeholders who may not have been consulted and where such arrangements are the result of the particular needs of and dynamics between the debtor company and key management employees.

6. A pre-filing report should consider any other extraordinary relief on the initial application. Any material changes or additions to the model order should be addressed. A pre-filing report is appropriate to review any proposed pre-packaged plan, immediate commencement of a sale process, or “quick flip” of assets.
7. In most cases, a pre-filing report should not contain “recommendations” which suggest advocacy of the debtor’s application and the relief sought in the initial order. It should be viewed rather as a “review for reasonableness”, recognizing that the proposed Monitor has not necessarily had the opportunity to discuss the relief requested with interested stakeholders and the impact on them. While the pre-filing report may be deemed to be the first report of the Monitor once appointed, the proposed Monitor does not have status or the statutory protections of the

CCAA. There was a consensus that a pre-filing report should be a tool available to the presiding judge to make a decision without advocating or overreaching, and the topics should be limited as described above.

8. It would be appropriate to seek approval of the conduct and activities of the proposed Monitor as set out in the pre-filing report on a subsequent attendance following the application for the Initial Order, after interested parties who may not have been served have an opportunity to review.

While not part of the mandate of the sub-committee, we considered and discussed pre-filing reports by a proposed receiver. There was a general consensus that a proposed receiver should not file a pre-filing report, as it does not have the statutory mandates of a Monitor, which influences the need for a pre-filing report described below. A pre-filing report by a proposed receiver would be appropriate if the Court is being asked to approve such matters as a “quick flip” of assets on the receivership application, immediate approval of a sales process (with or without a stalking horse bid), immediate approval for operational financing or material changes or additions to the model order.

**Note:**

Recommendations of the sub-committee were approved by the Commercial List Users' Committee at its meeting on March 26, 2012.