

COMMERCIAL LIST USERS' COMMITTEE NEWSLETTER

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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 over the past half year.

MESSAGE FROM MR. JUSTICE MORAWETZ

By way of update, there have been some recent changes in the administrative procedures concerning sealed documents that I would like to bring to your attention.

The sealing room for sealed documents in Commercial List Matters is in the process of being relocated from 393 University Avenue to 330 University Avenue (7th Floor).

This change is in respect of Commercial List matters only. Civil matters will continue to have documents sealed at 393 University Avenue.

The revised process for sealing is as follows:

1. Counsel are to bring documents to court and request a sealing order. It is possible that counsel will make arrangements through the Commercial List Office to submit documentation prior to the motion with instructions that the documents be provided directly to the judge before the motion. The documents should be referenced as being "confidential".
2. Assuming that the sealing order is made, the Court Registrar will place the documents in the plastic sealing envelopes provided by the court. It is not acceptable to seal the documents from counsel in brown envelopes marked "confidential". The proper envelopes for sealing purposes must be used. The Court Registrar will affix the sealing label for signature by the judge. The Court Registrar should also affix directly to the envelope either the order providing for the sealing or a copy of the judge's endorsement providing for the sealing.

3. Court Room Staff will bring the envelope to the Commercial List Office, where it will be received by a member of the Commercial List Office Staff. The administrative staff will then put an entry into the log book confirming receipt of the sealed documents.
4. Commercial List Office Staff will then make the entry in the computerized system confirming the receipt of the sealed material.
5. Designated Commercial List Office Staff will physically take the documents to the sealing room. Access to the sealing room is restricted to Designated Commercial List Office Staff.

When documents are required for a future hearing, the procedure is as follows:

1. Counsel should get in touch with the Commercial List Office Staff, on a timely basis, and clearly specify that the sealed material is required for an upcoming motion.
2. Commercial List Office Staff will then make arrangements to retrieve the sealed documents from the sealing room and provide them on a timely basis to the judge.
3. At the conclusion of the hearing in which the sealed material has been considered, the judge will then have to make a disposition clearly specifying whether the materials are to be re-sealed, in which case, the above procedure in respect of sealed documents must again be followed.

REPORT ON SUB-COMMITTEES

Model Orders

The model orders sub-committee tabled a model Initial Recognition Order and a Supplemental Order under the *Companies' Creditors Arrangement Act* ("CCAA") in respect of the recognition of a foreign main proceeding, which was approved at the meeting of the Users' Committee on March 26, 2012. 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 normally will 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 expected to have formal approvals shortly so that they can be made available on the Superior Court of

Justice website at <http://www.ontariocourts.on.ca/scj/en/commercialist>. In the meantime, a copy of the draft model Initial Recognition Order and Supplemental Order is attached.

PRE-FILING REPORTS

The sub-committee finalized its report to the Users' Committee concerning the expectation and practice of a pre-filing report by the proposed monitor in connection with an initial application under the CCAA. Although not its mandate, the sub-committee also made observations on the expectation and practice of pre-filing reports by a proposed receiver in connection with an application under Section 243 of the *Bankruptcy and Insolvency Act* and/or Section 101 of the *Courts of Justice Act*. As a result of a consultative process 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 programs, the sub-committee was able to ascertain a general consensus with respect to pre-filing reports. The recommendations of the sub-committee were approved by the Users' Committee at its meeting on March 26, 2012. A copy of the report is attached and will be available at the Education and Activities Day on June 7, 2012.

ACCESS TO COURT PROCEEDINGS

Members of the media have expressed some concerns regarding timely access to court materials. A sub-committee was established last year to inquire into the means by which media can obtain access to materials in respect of insolvency filings, and the potential ability to expand that access, if necessary. The sub-committee has prepared a draft report to the Users' Committee setting out its findings and recommendations. One solution under consideration is for insolvency court filings to be posted on the website of the Insolvency Institute of Canada or other insolvency organizations within hours of the initial order that would identify links to other websites such as monitors' websites.

OPPRESSION REMEDY CASES

Over the past year, the Commercial List has seen an increase in the volume of oppression remedy applications sought to be dealt with on the Commercial List. A number of these cases include wrongful dismissal, family or estate cases that are combined with oppression relief in order to gain access to the Commercial List. The Commercial List judges will be screening these applications to distinguish cases that are predominately oppression cases, which qualify for the Commercial List, from those that are not and should be brought elsewhere.

EDUCATION AND ACTIVITIES DAY

The Users' Committee, in partnership with the Ontario Bar Association, Insolvency Law Section, and the Ontario Association of Insolvency & Restructuring Professionals, is hosting the annual educational program, retreat and dinner on June 7, 2012 at the Richmond Hill Golf & Country Club. The organizing committee has worked arduously to yet again bring together seasoned panels of Commercial List judges and practitioners who will discuss a variety of topics of interest. Those that have attended in the past thoroughly enjoyed the education program activities, and the company of their friends and colleagues.

SITTING JUDGES

The Summer Schedule is in effect for 9 weeks, commencing July 2, 2012. During this period, two judges will be sitting on the Commercial List.

Consistent with past practice, the Commercial List will not be scheduling trials during July and August. In addition, most matters that are expected to take in excess of one day will likely be deferred until the fall. However, matters that are time sensitive will, to the extent possible, be scheduled for hearing on a timely basis.

The following judges will be sitting on the Commercial List in the 2012 Fall Term: Justices Morawetz, Brown, C. Campbell, Cumming, Newbould, Pattillo and Wilton-Siegel.

RECENT APPOINTMENTS

We congratulate Madame Justice Pepall and Madame Justice Hoy on their elevation to the Court of Appeal for Ontario.

REGISTRARS

We are pleased to report that Master Sproat and Master Short have been provided Registrars fiat and will be the two Masters located in Toronto dedicated to hear matters within the jurisdiction of the Registrar in Bankruptcy.

MURRAY KLEIN AWARD

Congratulations to Michael J. MacNaughton of Borden Ladner LLP who was selected the 2012 recipient of the Murraray Klein Award for Excellence in Insolvency Law. Michael is recognized as a leading

insolvency lawyer who throughout his distinguished career has represented debtors, creditors, court officers and other stakeholders in domestic and cross-border insolvency and restructuring proceedings. Michael has made a valuable contribution to the profession as a prolific writer and speaker at insolvency law conferences. Michael is a well deserved recipient of the award. The award was presented to Michael on May 16 at the Albany Club in Toronto, Ontario.

Users' Committee Members

Justice David Brown	Mervyn D. Abramowitz, Kronis Rotsztain Margles Cappel LLP
Justice Colin Campbell	Scott Bomhof, Torys LLP
Justice Peter Cumming	Harvey Chaiton, Chaitions LLP
Justice Ruth Mesbur	Robin Dodokin, Garfinkle, Biderman LLP
Justice Geoffrey Morawetz	Catherine Francis, Minden Gross LLP
Justice Frank Newbould	Deborah Grieve, Cassels Brock & Blackwell LLP
Justice Herman Wilton-Siegel	Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP
Master May Sproat	Geoff Hall, McCarthy Tetrault LLP
Master Don Short	Brett Harrison, McMillan LLP
	Jeff Hoffman, Gowling Lafleur Henderson LLP
	Pamela Huff, Blakes, 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
	Kim Policelli, Ministry of Attorney General
	Tony Reyes, Ogilvy Renault LLP
	Ken Rosenberg, Paliare Roland Rosenberg Rothstein LLP
	Allan Sternberg, Ricketts Harris LLP
	Sheldon Title, MNP LLP

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.