

THE TORONTO “COMMERCIAL LIST”: A PRIMER

by Mario Pietrangeli and Katie Di Tomaso

Insurers may face a wide variety of claims, depending on the nature of the risks underwritten. In most cases, the claims to be defended by insurers will generally be advanced, and defended, in the general civil courts of the province, which in Ontario, is the Superior Court of Justice. This will apply to most cases of property and casualty insurance, and typically, to professional liability, directors and officers, and other types of claims for which insurance is generally available. Generally, the procedure in the Superior Court of Justice is governed by the Ontario Courts of Justice Act, and the Rules of Civil Procedure.

It is worth remembering, however, that in certain types of cases, actions in Toronto may be brought within the special jurisdiction of the “Commercial List,” a specialized panel of Superior Court Justices who may hear motions and trials in commercial cases.

While insurers and their counsel may not face claims in the Commercial List with regularity, that is all the more reason for insurers and their counsel to have some familiarity with the jurisdiction and procedures of the Commercial List, in the event that one

finds a claim being brought within the jurisdiction of that specialized panel.

Jurisdiction

Pursuant to the Practice Direction, matters which may be listed on the Commercial List are applications, motions and actions which involve Bankruptcy and Insolvency Act; Bank Act, relating to realizations and priority disputes; Business Corporations Act (Ontario) and Canada Business Corporations Act; Companies' Creditors Arrangement Act; Limited Partnerships Act; Pension Benefits Act; Personal Property Security Act; receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver/managers; Securities Act; Winding-Up and Restructuring Act; Credit Unions and Caisses Populaires Act, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated; and such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List.

In light of the above, it is apparent that negligence actions against trustees, accountants, receivers or others who play a direct role in bankruptcy and

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Noteworthy

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insolvency matters, in Toronto, will be brought within the Commercial List. This is an area in which the writers have direct experience.

In addition, claims that originate in the ordinary courts may be transferred to the Commercial List where appropriate. Accordingly, tort actions brought within the jurisdiction of the ordinary courts may be transferred to be heard within the Commercial List where the bankruptcy of one of the parties triggers Commercial List proceedings.

For example, a tort defendant faced with mass products-liability litigation may seek the protection of the BIA, CCRA or, in American jurisdictions, Chapter 11 (Canadian courts will assist in the administration of American bankruptcies which impact upon parties or proceedings in Canada). In such cases, the Commercial Court will have jurisdiction over the bankruptcy, and may assume responsibility for the adjudication, administration and payment of claims in tort, and the application of insurance monies to judgments involving bankrupts.

This was the case, for example, in the administration of the class-action settlements against the Red Cross, federal and provincial governments and others; and, the administration of Canadian litigation against certain American manufacturers and distributors of food supplements, to cite two examples in which our firm was involved.

Special Procedures

Except for bankruptcy matters, access to the Commercial List remains voluntary, in the sense that parties have the option to bring their actions within the Commercial List, or the regular Superior Court, even in Toronto. However, as there are distinct advantages to having a matter heard by a Judge of the Commercial List, consideration should be given to proceeding in the Commercial List in all Toronto actions which may be eligible.

Procedures in the Commercial List are governed by a Practice Direction issued April 1, 2002, which expressly states that:

“Co-operation, communication and common sense shall continue to be the principles of operation of the Commercial List.”

The primary advantage of proceeding in the Commercial List is the availability of special procedures which serve to expedite the hearing and determination of these matters. In addition, the Judges assigned to the Commercial List are generally experienced in commercial matters, with a view to achieving results which are commercially reasonable as well as correct in law.

Key Court Documents: Names, Request Form and Case Timetable

Matters listed on the Commercial List must have the name of the court in the title of the proceedings, bearing the title, “Superior Court of Justice – Commercial List”. The Request

Form must be completed for each proceeding and must be signed by all counsel.

A Case Timetable should accompany the Request Form. If this cannot be done before the matter is first spoken to, a Case Timetable should be agreed among counsel after and sent to the Commercial List Office. If counsel cannot agree on a schedule, they must attend before the supervising judge in chambers.

Dates for Applications, Motions and Trials

“Short matters” are matters requiring one day or less for hearing. All other matters are assigned initial hearing dates by the supervising judge in chambers. For all applications and motions for which a date has not otherwise been set, the application or motion shall initially be made returnable in the assignment court held on the first Monday of the month. The date for hearing is assigned by the supervising judge afterwards.

For trials and trials of issues, a motion to set a hearing date must be made, unless the matter is otherwise scheduled by the supervising judge in chambers on consent or on the appearance of all parties. The motion should be made to the supervising judge, either as a chambers motion or by special appointment. A trial date will not be set unless the parties have completed a Case Timetable.

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Adjournments and Settlement

Adjournments of previously scheduled matters will only be granted in special circumstances and for a material reason. This principle is strictly enforced. Applications for adjournment on consent should be forwarded to the Commercial List Office as soon as possible, to allow for "standby" matters to be heard. Where appropriate, matters may be scheduled to be heard on a "standby" basis for a particular date.

Judge to Hear Whole Matter

Typically, a judge who determines a substantive proceeding will continue to hear all subsequent substantive proceedings in that matter. Arrangements for these subsequent proceedings may be made directly with the Commercial List Office. The 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.

Case Management

Generally, most matters are subject to a form of case management by a Commercial List judge. A Scheduling Conference will be held with the case management judge not later than one month after the close of pleadings. The aim is 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 are also addressed. The results of a Scheduling Conference are recorded in a Case Timetable.

Prior to the Scheduling Conference, counsel are expected to have conferred to prepare a plan to process the case, including a time schedule for review with the case management judge.

ADR and Pre-Trials

ADR is encouraged as an effective way to dispose of issues and matters on the Commercial List. It is the duty of the case management judge and obligation of counsel to explore methods to resolve the contested issues between the parties, including resorting to ADR. At any time, the case management judge may, especially on consent of the parties, refer any issues for ADR, if appropriate. If this happens, counsel must report to the case management judge at regular intervals as to the progress of the ADR proceedings.

The Court may also schedule intensive pre-trials for either entire cases or for significant matters within cases.

Materials for the Court

The usual practice for filing materials pertains to matters on the Commercial List too. The Commercial List Office should be advised of what specific materials from its files will be re-

quired for the hearing of a particular proceeding. This is important where the matter is ongoing and the court file is voluminous. The Practice Direction suggests that counsel coordinate on a common number scheme for the materials.

The Commercial Court welcomes the use of diagrams, corporate organization charts, lists of persons involved, point-form chronologies and other synopses of complex or technical evidence. In addition, the Court welcomes the use of a "Compendium" of key documents, in cases where the documents are otherwise voluminous.

Reasons for the Decisions

If the Court's decision takes the form of a handwritten endorsement, plaintiff's counsel or the moving party is required to assist the Court by typing out the decision and sending an electronic copy on disk to the Court with any illegible sections highlighted along with the original handwritten decision or dictation tapes.

Costs

Counsel should be prepared to make costs submissions at the hearing of a matter or, if absolutely necessary, by written submissions immediately thereafter.

Questions

If counsel has questions for the court, the supervising judge of the Commercial List may be

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contacted about the scheduling of trials, long matters and urgent matters. If counsel has a question, it is expected that counsel give details of the matter, the urgency, expected length and mutually convenient dates.

Summary and Conclusion

The Commercial List provides an expeditious and specialized

forum for the resolution of certain classes of commercial dispute. If a matter may be brought within the Commercial List, hearings can generally be scheduled more quickly than in general litigation matters, with more streamlined, case-managed procedures to achieve that end. In addition, one has the benefit of experienced Judges who are anxious to achieve commercially viable, as

well as legally correct, results. Because of these special procedures, however, counsel practicing in the Commercial List will themselves require some specialized knowledge and experience with respect to the practice in the Commercial List, as well as the substantive areas of law that govern the nature of the dispute in issue.

FIRM NEWS

Hughes Amys is pleased to welcome to the firm our two new Associates, Tyler Dellow and Michelle Surace. Both Tyler and Michelle articulated with the firm and have joined as Associates upon their call to the bar. We welcome them both to the firm.

Richard Horak and Bill McCorrison participated in the Canadian Institute's Advanced Forum on Motor Vehicle Accident Litigation on September 26, 2007. Richard participated in a panel discussion about the future of damages claims, while Bill participated in a panel discussion on the value of private mediation in the litigation process.

Mario Pietrangeli returned this year as cross-examining counsel in the evaluative component of the Diploma in Investigations and Forensic Accounting program of the Rotman School at the University of Toronto in August 2007. In addition, Mario is currently serving as an Instructor in the Trial Advocacy course for third-year law students at Osgoode Hall Law School at York University, which runs Tuesday evenings from September to December 2007.

The ARC Group, a national network of independent law firms to which Hughes Amys belongs, will hold its annual seminar on Thursday, October 25, 2007. The topic for this year's seminar is Class Action Litigation: Cost Containment and Avoidance.

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