

## ANNEX 5

### Consolidated Practice Direction Concerning the Commercial List

Effective June 15, 2023. This Practice Direction applies to matters on the Commercial List in the Toronto Region. This Practice Direction supersedes all Toronto Region Practice Directions concerning the Commercial List issued before the effective date of this Practice Direction.

However, counsel and parties are advised to refer to the Consolidated Civil Provincial Practice Direction revised \*\* 2023 any other relevant Notices to the Profession or **Toronto Region-specific Notices and Guides**, which are available on the Superior Court of Justice website at: [www.ontariocourts.ca/scj](http://www.ontariocourts.ca/scj). To the extent there is any inconsistency between this Practice Direction and the general Consolidated Civil Provincial Practice Direction with respect to the conduct of matters on the Commercial List, this Practice Direction shall govern.

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## **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 and bankruptcy and insolvency matters. The special procedures adopted for the hearing of matters on the Commercial List expedite their hearing and determination, and have been met with considerable approval. The ability of the Commercial List to continue to adjudicate commercial, bankruptcy and insolvency matters effectively and efficiently depends to a significant degree on the continued cooperation of the commercial bar and its familiarity and compliance with this Practice Direction.

All participants in matters on the Commercial List are expected to know and follow this Practice Direction. Bringing matters on the Commercial List remains, in the first instance, voluntary, except for the matters marked with an asterisk in Part II below. Applicants and plaintiffs may continue to set down for hearing any other matters that qualify for the Commercial List either on the Commercial List or on the general Civil List of the Ontario Superior Court of Justice.

A continuous re-evaluation process by the Court and the Commercial List Users' Committee ("CLUC") determines whether: (i) other matters should be added to those that may be listed on the Commercial List; or (ii) its procedures should be further modified or continued.

This Practice Direction governs the conduct of matters on the Commercial List, subject to further amendments as required and subject to the *Rules of Civil Procedure* and any other applicable Practice Direction.

## **Part II: Matters Eligible for the Commercial List**

1. Matters that may be listed on the Commercial List are applications, motions and actions that at their core involve the following (matters marked with an asterisk are mandatory and must be brought on the Commercial List in the Toronto Region):
  - a. *\*Bankruptcy and Insolvency Act*;
  - b. *Bank Act*, relating to realizations and priority disputes;
  - c. *Business Corporations Act (Ontario)* and *Canada Business Corporations Act*;
  - d. *\*Companies' Creditors Arrangement Act*;
  - e. *Limited Partnerships Act*;
  - f. *Pension Benefits Act (Ontario)* and *Pension Benefits Standards Act, 1985 (Canada)*;

- g. *Personal Property Security Act*;
  - h. \*receivership applications and all motions related to the receivership proceeding;
  - i. *Securities Act*;
  - j. \**Winding-Up and Restructuring Act*;
  - k. *Credit Unions and Caisses Populaires Act*, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated;
  - l. suitably complex matters relating to appeals from domestic arbitration awards under the *Arbitration Act, 1991* (Ontario) and/or the enforcement of international arbitral awards under the *International Commercial Arbitration Act, 2017* (Ontario) and the *Commercial Arbitration Act* (Canada); and
  - m. such other commercial matters as the Commercial List Team Lead may direct to be listed on the Commercial List.
2. In considering whether to make a direction under sub-paragraph 1) m), the Team Lead 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**

- 3. The Commercial List shall be administered through the facilities of the Commercial List Office, 9th Floor, 330 University Avenue, Toronto M5G 1R7 E-Mail: [mag.csd.to.scjcom@ontario.ca](mailto:mag.csd.to.scjcom@ontario.ca).
- 4. Matters listed on the Commercial List shall usually be heard in 8<sup>th</sup> floor courtrooms at 330 University Avenue, Toronto. Short matters, including scheduling appointments and case conferences, and matters scheduled for a hearing of less than 90 minutes, will continue to be conducted via Zoom. Matters scheduled for a hearing of 90 minutes or more will continue to proceed in-person at 330 University Avenue unless the presiding judge orders otherwise.
- 5. Counsel are expected to be gowned for appropriate matters, whether the hearing is being conducted virtually or in-person. In particular, and consistent with the Notice to the Profession and Parties-Toronto Region, Part E, and subject to the discretion of the Commercial List judge hearing a particular matter, counsel are not required to be gowned to appear for short matters as described above, including scheduling appointments and case conferences, and generally those matters that if conducted in person, would be addressed in Chambers. For greater certainty, counsel are required to be gowned for any contested or substantive matter, regardless of the length of the attendance or mode of hearing (zoom or in-person).

The Notice to the Profession and Parties-Toronto Region, Part E addresses accommodations for personal circumstances, such as pregnancy or disability, which will be followed by the Commercial List.

6. The availability of remote hearings for short, non-contested or scheduling matters, or other matters directed to be heard virtually by the presiding judge, is intended to maximize efficiency. It is not intended to compromise the requirements of dress and decorum. Counsel, parties and witnesses are reminded of their obligations to continue to respect the institution of the Court, proceed as if the matter were in-person and are reminded of the prohibition on recording proceedings contained in s. 136 of the *Courts of Justice Act*.
7. If counsel or the parties are aware that a judge sitting on the Commercial List should not hear a particular matter (i.e., due to a potential conflict), the Commercial List Office should be advised in advance of the hearing and as early as possible.
8. Cooperation, communication and common sense (the “Three Cs”) shall continue to be the Commercial List principles of operation.

#### **Part IV: Originating Process**

9. Actions and applications under sub-paragraphs 1 a) to l) intended to be listed on the Commercial List may be issued through the Commercial List Office. Otherwise, all originating processes shall be issued from the appropriate office of the Ontario Superior Court of Justice as provided in the *Rules of Civil Procedure* and the applicable Practice Direction(s) for that Region and Court.
10. Motions to have matters commenced and issued on the Commercial List under sub-paragraph 1 m) should be accompanied by the consent of counsel for all parties and a completed Request Form. It is incumbent upon counsel to provide cogent reasons for the matter to be listed on the Commercial List.
11. 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 this Practice Direction (as described in Part VIII below).

#### **Part V: Place of Hearing**

12. Only Toronto Region matters can be listed on the Commercial List (unless, for special reasons, authorization is given by the Commercial List Team Lead). 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**

13. Mandatory matters that must proceed on the Commercial List (i.e., those Toronto Region matters referred to above at subparagraphs 1 a, d, h and j), are expected to be commenced on the Commercial List by issuance of originating process through the Commercial List Office.
14. Mandatory matters commenced on the general Civil List 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 sub-paragraphs 1 a), d), h) or j) above.
15. Non-mandatory Toronto Region matters which may be eligible for the Commercial List must be approved for issuance on, or transfer to, the Commercial List. Such approval is to be sought by way of motion in writing to the Commercial List Team Lead or another designated judge sitting on the Commercial List. Motions to have matters transferred to the Commercial List should be accompanied by the consent of counsel for all parties and a completed Request Form. It is incumbent upon counsel to provide cogent reasons for the non-mandatory matter to be transferred to the Commercial List.
16. 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 a motion for transfer before a judge of the Commercial List by one of the parties or as the judge may direct.
17. Originating process (usually a Notice of Application) may be issued by the Commercial List Office where appropriate according to the criteria set out above, to be returnable on a date to be fixed by the Commercial List Office following a scheduling conference.

## **Part VII: Court Documents**

16. The name of the Court in the title of proceedings of matters listed on the Commercial List shall be: **“Ontario 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”.
17. A Request Form is required to schedule any hearing. All parts of a Request Form must be completed for all cases and for each proceeding (including scheduling and case conference matters, matters to be 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 shall be emailed to the Commercial List Office at [mag.csd.to.scjcom@ontario.ca](mailto:mag.csd.to.scjcom@ontario.ca).

18. Copies of the current Request Forms are appended to this Practice Direction and are also available from the Commercial List Office. Note that there are two different Request Forms to be used: the **Chambers Request Form** is to be used to schedule an appointment for a matter already on the Commercial List, while the **New Matter Request Form** is to be used to schedule an appointment in respect of a matter sought to be transferred to the Commercial List.
19. A Case Timetable Form should be completed for all matters being case managed or where a case timetable is requested. 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 should be filed in advance of the next scheduling appointment or case conference, or provided to the supervising judge in accordance with their direction. A copy of the current Case Timetable Form is appended to this Practice Direction and may be obtained from the Commercial List Office.
20. If the parties cannot agree on a schedule, they should attend before a supervising judge in chambers (see Part X below). 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, and should recognize that there may be cost consequences for the failure to comply with a Case Timetable.

### **Part VIII: Dates for Applications, Motions and Trials**

21. The Commercial List Office shall maintain the Commercial List. Subject to the provisions of this Practice Direction, the office staff, acting under the direction of a supervising judge, may assign initial hearing dates for matters other than trials.
22. A supervising judge may assign initial hearing dates for matters not assigned by the office staff at a 9:30 a.m. scheduling appointment. Trial dates may be obtained only from the Commercial List Team Lead or other designated judge sitting on the Commercial List.
23. For trials and trials of issues, including summary judgment motions, a request to set a hearing date shall be made to the Commercial List Team Lead or another designated judge sitting on the Commercial List by motion or at a case conference. A trial date shall not be set unless the parties have completed a **Trial**

**Requirements Memorandum**, including a brief outline of the case, its issues and witness time estimates. The Trial Requirements Memorandum Form is appended to this Practice Direction and may be obtained from the Commercial List Office.

24. For all scheduling appointments, counsel must provide a list of three mutually convenient hearing dates from which the judge may select. Counsel are expected to check with the Commercial List Office for available dates immediately prior to the scheduling appointment and to have conferred with each other and their own schedules in advance of the scheduling conference. Directions to counsel apply equally to self-represented litigants in matters on the Commercial List. Counsel shall assist self-represented litigants on any matter in which counsel is appearing by referring them to the applicable Rules and this Practice Direction.
25. 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. Counsel are expected to consult among themselves in this regard so that matters can be dealt with on the scheduled return date.
26. 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.
27. The Court will also hear matters where there are immediate and significant financial or other consequences or impacts which may result if there is no judicial hearing on a timely basis. The Commercial List judges will use their discretion to determine whether a matter should be heard urgently. The same process will be applied to determining the urgency and time sensitivity of new matters. Matters that fall into the following categories may fall into the urgent or time-sensitive matters and be heard:
  1. Initial Orders under the CCAA;
  2. CCAA stay extensions;
  3. Receivership Applications;
  4. Plans of Arrangements;
  5. Injunctions, including *Mareva* injunctions, *Anton Piller* orders and/or *Norwich* orders;
  6. Approval and Vesting Orders; and
  7. Urgent contested bankruptcy applications, and/or BIA proposal stay extensions.

## **Part IX: Estimates of Required Time**

28. 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 15-minute scheduling appointment. Once established, 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 become 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. The Court schedules matters based on those estimates, and the failure to adhere to the time allotted for a matter may, in the presiding judge's discretion, result in the adjournment of all or part of the matter.
29. 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**

30. Chambers matters may be scheduled through the Commercial List Office before Commercial List judges to be conducted via Zoom beginning at 9:30 a.m. on each day to deal with scheduling, consent, urgent or *ex parte*, matters. Generally, chambers matters will proceed by way of:
  1. Scheduling appointments - not to exceed 15 minutes; or
  2. Case Conferences – typically 30 – 60 minutes.

The Request Form and consent proposed timetable (or where there is no consent, alternative proposed timetables) are to be provided together with a brief outline (of no more than 3 pages) of the issues about which directions are sought and, where appropriate, the issues or topics of dispute to be addressed and possibly decided at the Case Conference (“Aide Memoire”).

Note: Case Conferences do not include Settlement Conferences (or “judicial mediations”), which are addressed separately below.

31. Where Chambers matters are particularly urgent, and in the discretion of the Commercial List judge hearing the matter, chambers appointments may be scheduled at other times of the day, including before or following the usual Court sitting day.



32. *Ex parte* matters on the Commercial List will be rare, particularly for Chambers matters. Counsel shall be required to justify the reason for not notifying the responding parties. In most cases, notice shall be required, particularly if the matter is part of an ongoing dispute and there is counsel known to be representing the respondents, even if in respect of other matters.
33. Judges of the Commercial List may conduct Case Conferences pursuant to Rule 50.13 to address matters contemplated in Rule 50.13 with respect to case management and scheduling issues, and also to explore methods to resolve contested issues in the form of a “judicial mediation”. As provided in subrule 50.13(1), such case conferences may be scheduled by a judge of the Commercial List on his or her own initiative or at the request of any party.
34. Counsel should request a “judicial mediation” only at an appropriate point in a proceeding where it is reasonably likely that a settlement of the matter, in whole or significant part, is likely to be achievable. A “judicial mediation” may only be scheduled by the Commercial List Team Lead or another designated judge, who shall take into account available Commercial List resources.
35. Request Forms, Case Conference Aide Memoires and Settlement Conference Briefs are to be filed electronically with the Commercial List Office no later than 2:00 p.m. two days prior to the hearing to which the document relates.

## **Part XI: Adjournments and Settlements**

36. Counsel shall 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. The Commercial List continues to derive efficiency in part from the fact that it is a court of non-adjournment. As a general rule, matters are expected to proceed on the merits once scheduled. Counsel are expected 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.
37. 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.

38. 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.
39. If a matter is adjourned to permit the continuation of realistic settlement discussions and the matter is not settled within a reasonable time, the parties shall arrange to attend on a case conference to set a timetable for remaining steps to ready the matter for a final adjudication on the merits.
40. Counsel on Commercial List matters are expected to canvass the matter of settlement conscientiously and continuously, 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**

41. It is anticipated that a Commercial List judge who determines a substantive component of a proceeding will continue to hear all subsequent substantive components in that proceeding, if possible. Arrangements for these subsequent proceedings may be made directly with the Commercial List Office or during a case conference or scheduling appointment before that judge.

#### **Part XIII: Case Management**

42. 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 supervising Commercial List judge who will preside over all aspects of the matter, where possible, through informal case management in the manner provided for in accordance with this Practice Direction. 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.
43. Where a Commercial List matter is subject to specific case management, a case conference (if not already held at the time of transfer or otherwise) shall be held with the case management judge no later than one month after the close of pleadings, or the date of the order directing the appointment of a specific case management judge, 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 proceeding. The prospects for settlement should also be addressed. The results of a case conference will be recorded in a Case Timetable.

44. Counsel will be expected to have conferred among themselves, prior to the case 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.
45. Case Conferences may be held at any time where the supervising judge considers it necessary for the proceeding's efficient or orderly conduct. Case conferences may be scheduled by the supervising judge on his or her own initiative, or where one or more of the parties request a case conference.

#### **Part XIV: Commercial List Motions before an Associate Judge**

46. No Commercial List motions should be heard by an associate judge unless referred by a Commercial List judge, except for matters that are properly within the jurisdiction of an Associate Judge sitting as the Registrar in Bankruptcy.
47. Once there has been a referral from a Commercial List judge, counsel may book a short (two hours or less) Associate Judge motion. If the motion is for a half-day or longer, or if a series of motions are anticipated where it would be beneficial for one Associate Judge to be seized, no such motions shall be booked until an Associate Judge is assigned by the Team Leader–Toronto for Associate Judges. The assigned Associate Judge's Registrar will then contact counsel to arrange for scheduling of the motion.

#### **Part XV: Motions for Summary Judgment**

48. All motions for summary judgment are to be scheduled by the Commercial List Team Lead or another designated judge sitting on the Commercial List. Accordingly, case conferences for such motions should be made returnable before the Team Lead or another designated judge and should be scheduled for a minimum of 30 minutes.
49. Generally, a hearing date for a summary judgment motion will not in the ordinary course be scheduled until:
  - a. The moving party has delivered its notice of motion and supporting evidence and the responding materials have been delivered, or the parties are otherwise 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 before the Team Lead or another designated judge, at which counsel must be prepared to address why a summary judgment motion is appropriate, whether there are concerns about partial summary judgment, whether there are issues of credibility or other facts in dispute that might require oral evidence to 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; and

- c. The judge hearing the case conference has directed that a motion date be booked.

## **Part XVI: Applications**

50. It is expected that applications, which can require some oral evidence, will be managed in the same manner as motions for summary judgment described above, although they may be scheduled at a scheduling appointment or case conference convened before any judge sitting on the Commercial List.

## **Part XVII: Alternative Dispute Resolution and Pre-Trials**

51. 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. For greater certainty, this includes third-party or private mediation, which is encouraged. Pursuant to subrule 24.1.04(2)(c), mandatory mediation does not apply to cases on the Commercial List. Note also the provisions above with respect to Settlement Conferences and judicial mediations.
52. It shall be the duty of the case management or supervising judge and the obligation of counsel to explore methods to resolve the contested issues between the parties, including the resort to ADR, whether at case conferences and on whatever other occasions it may be fitting to do so.
53. At any time, and particularly on the parties’ consent, the case management or supervising judge may refer any issue for ADR, as appears appropriate.
54. When a matter, or any issue within a matter, has been referred to ADR, counsel shall report to the case management or supervising 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 or supervising judge.
55. 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. 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.
56. 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**

57. Materials filed for the use of the Court will be filed with the Commercial List Office and uploaded to CaseLines within the time prescribed by the Rules or any agreed-upon or approved timetable. Early filing is recommended.
58. Commercial proceedings that require any material to be filed to the Court shall be filed by:
- first, filing the materials through the Commercial List Office via email to [mag.csd.to.scjcom@ontario.ca](mailto:mag.csd.to.scjcom@ontario.ca) or the [Civil Submissions Online](#) portal (except for bankruptcy matters to be heard by a judge or and associate judge sitting as the Registrar in Bankruptcy which must be emailed to [Toronto.Bankruptcy.Filings@ontario.ca](mailto:Toronto.Bankruptcy.Filings@ontario.ca));
  - second, by uploading documents into the CaseLines document-sharing platform, in accordance with the *Supplementary Notice to the Profession and Litigants in Civil and Family Matters Including Electronic Filings and Document Sharing (CaseLines Pilot)* and Rule 4.05.3 of the *Rules of Civil Procedure*; and
  - Commercial List Office staff will create a new CaseLines Bundle for each hearing. It is the responsibility of counsel and the parties to ensure that all documents filed for a hearing are uploaded to the correct Bundle. Counsel and parties should not assume that the judge hearing the matter will have access to anything other than the current Bundle for that hearing. Accordingly, any materials previously filed in respect of an earlier step in a matter should be uploaded to the current Bundle if it is expected that they will be referred to at a hearing.
59. The required formal record shall be supplemented with a 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. This

shall be composed of an electronic index that is hyperlinked to the pinpoint page reference in the material that the court will be directed to in CaseLines or on CanLII during oral submissions. Counsel are expected to have consulted among themselves in the preparation of a joint Compendium. The Compendium shall contain only essential materials.

60. Even where a factum is not required by the Rules, those appearing on the Commercial List are expected to file a factum with their materials on any matter that is or might be contested. Even in uncontested motions or applications, an outline of argument or Aide Memoire should be filed to provide the presiding judge a roadmap or outline of the relief sought and the key arguments to be made at the hearing with reference to key authorities to support the request.
61. All records and submissions shall 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 are to be numbered sequentially.
62. All materials, indices and footnotes, including but not limited to Motion or Application Records, Compendia, facta and Authorities Briefs, must be hyperlinked in CaseLines.
63. Facta shall not, except with leave, exceed 25 pages in length. Shorter, concise facta are encouraged. Aide Memoires shall not exceed 3 pages.
64. Reply facta of up to five pages are permitted but shall be restricted to new matters not previously addressed in the factum of the Responding Party or Parties. A Reply factum shall not exceed five pages in length.
65. Books of Authorities that are not hyperlinked to CanLII shall be highlighted or side-barred to indicate the passages that will be referred to in argument.
66. Parties may file relevant excerpts of decisions from approved private electronic databases in their book of authorities. "Approved private electronic databases" are private databases that are dedicated to the publication of judicial decisions (e.g. Quicklaw, and Westlaw).
67. For decisions of the Ontario Superior Court of Justice released on or after January 1, 2010, parties should provide the neutral citation number (e.g. 2010 ONSC 1) in addition to the other required citations.
68. The Court encourages the use of diagrams, corporate organization charts, list of persons involved, point-form chronologies and other synopses of complex or technical evidence, where appropriate.

69. 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 shall be filed.
70. It is common for applications and motions on the Commercial List to be capable of a fair and just adjudication based on a written record. Occasionally, there may be relevant issues in respect of which it is appropriate for parties and/or key witnesses to offer *viva voce* evidence. This will not typically justify a conversion of an application to an action, nor will it typically justify a requirement that all witnesses testify through *viva voce* evidence. Rather, the requirement for *viva voce* evidence will be restricted to those witnesses and issues that require it as may be determined at a case conference in advance of the hearing, subject to the presiding judge's discretion. The presiding judge will also determine all issues related to the mode of hearing, including whether some or all witnesses giving *viva voce* evidence should do so in a virtual or in-person format.
71. Where the relief sought on the motion or application includes a sealing or non-publication order, public, redacted motion or application materials shall be served and filed in the usual manner. Confidential appendices, or those materials in respect of which a sealing order is sought, shall be provided to the Commercial List judge hearing the motion or application either through the Commercial List Office or, upon the Court's direction, via email to that judge directly. Such materials shall not be filed with the Commercial List Office or uploaded to CaseLines unless and until directed by the judge hearing the matter.
72. Sealing orders will only be granted if the presiding judge is satisfied that it is appropriate to do so having regard to the applicable test. Counsel requesting sealing and confidentiality orders should be prepared to address the requirements for such orders and also to satisfy the judge that their request is not one that comes within the requirements of the Superior Court of Justice's policy regarding requests for publication bans is set out in section (H) of Part VI of the Court's **Consolidated Provincial Civil Practice Direction**. According to that Practice Direction, any person seeking a discretionary publication ban in a proceeding before the Superior Court of Justice must (i) serve and file a formal Notice of Application/Motion, and (ii) provide notice to the media using the publication ban notification system established by the Court. See: **Publication Ban Requests in the Superior Court of Justice**.
73. Counsel should expect that a judge who grants a sealing order will require as a term of that order in most cases that counsel provide a physical copy of the sealed materials to the Commercial List Office in a sealed envelope marked: "Confidential and not to form part of the public Record subject to further order of this Court".

## **Part XIX: Expert Witnesses**

72. Counsel shall 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 shall 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 Rules 4.1, as well as Rule 53.03 and subrules (1), (2) and (2.1).

## **Part XX: Reasons for Decision**

73. 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**

74. The Court will generally award and fix costs at the end of the hearing of a matter. Accordingly, counsel should be prepared to make submissions as to entitlement, scale and quantum at the conclusion of argument on all motions and applications.
75. Counsel should discuss in advance of the hearing the issue of costs. It is expected that, in most cases, they will be able to reach agreement on quantum, even if entitlement depends upon the outcome of the motion or application. In compliance with subrule 57.01(6), counsel shall prepare (and upload to CaseLines) in advance of the hearing of a motion or application Costs Outline and/or Bill of Costs based on the factors set out in Rule 57.01.
76. The Commercial List judge hearing the matter has the discretion to defer the determination on costs until after the decision is rendered in the matter. This may occur where, for example, offers of settlement are relevant to the disposition of costs and should not be made available to the Court in advance of the matter's hearing. In most cases, however, counsel should expect that the Court will include a costs disposition together with, and at the same time as, the matter's disposition. Conversely, the Commercial List judge hearing the matter also may decline to make any order as to costs if a party has not complied with the Rules and this Practice Direction regarding costs.



## **Part XXII: Users' Committee**

77. A Commercial List Users' Committee ("CLUC" or the "Committee") has been established. It is composed of members of the judiciary who sit on the Commercial List from time to time, practitioners approved by the Court (usually through the Commercial List Team Lead) who are familiar with the operation of the Commercial List and whose candidacy may be suggested by relevant user organizations in conjunction with the Committee, and of a representative of Courts Administration from the Commercial List Office.
78. The names of the Committee's members may be obtained from the Commercial List Office.
79. The Committee meets regularly to consider improvements to the Commercial List's organization and operation, and to make recommendations to the Regional Senior Justice and the Chief Justice in that regard. The 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**

80. The Team Lead 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**

81. Current versions of the Request Forms (both New Matter and Chambers), Case Timetable and Trial Requirements Memorandum are appended to this Practice Direction and copies may also be obtained from the Commercial List Office or on the Commercial List website: <https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/>.

## **Part XXV: Frequently Cited Cases in Commercial Proceedings**

82. An Authorities Book for Commercial List matters containing cases frequently relied on has been developed and approved for use in matters assigned to the 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/](http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial-list-authorities-book/).

83. The cases in question appear on this list under various headings or topics which are not in any way intended to provide legal advice.
84. If counsel or parties 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

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

85. The Commercial List has approved the adoption for matters on the Commercial List and is a formal signatory to the *Guidelines for Communication and Cooperation between Courts in Cross-border Insolvency Matters* (“Guidelines”) prepared by the Judicial Insolvency Network (“JIN”) and adopted at the JIN Conference of October, 2016 together with the *Modalities of Court-to-Court Communication* adopted at the JIL Conference of April, 2019.
86. The *Guidelines* focus on the principles of court-to-court communication, while the *Modalities* focus on the mechanics for initiating, receiving and engaging in such communication. The *Guidelines* are available at: <https://jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf>. The *Modalities* are available at: <https://jin-global.org/modalities.html>. Other signatory jurisdictions, the list of which continues to expand, include the Supreme Court of British Columbia, the United States Bankruptcy Court for the District of Delaware, the United States Bankruptcy Court for the Southern District of New York, and the Chancery Division of England and Wales.
87. The *Guidelines* and *Modalities* have already been applied, and will continue to be applied, to international insolvency cases on the Commercial List. It is expected that these *Guidelines* and *Modalities* will continue to 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.
88. The *Guidelines* and *Modalities* will only be applied in specific cases following adequate notice to the parties.
89. Although the *Guidelines* and *Modalities* were prepared for court-to-court communications as between courts in 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. All counsel appearing on the Commercial List in cross-border and international insolvency cases should be familiar with the *Guidelines*

and the *Modalities* and be prepared to conduct the matter according to those requirements as may be directed by the supervising Commercial List Judge.

90. 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.
91. The Commercial List confirms, as noted in the *Guidelines*, that the *Guidelines* and *Modalities* are not meant to be static but, instead, 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.

Dated: \*\* 2023. Geoffrey B. Morawetz, Chief Justice of the Ontario Superior Court of Justice, and Stephen E. Firestone, Regional Senior Justice, Superior Court of Justice, Toronto Region.