

**This is Schedule to my endorsement dated**

---

**D. M. Brown J.**

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**STANDARD CASE MANAGEMENT DIRECTIONS FOR PROCEEDINGS CASE-  
MANAGED BY D.M. BROWN J.**

**The objective of case management**

[1] The case management of this proceeding will focus on the key question in any civil case: what means will best ensure that the merits of this particular case, with its particular facts, and its particular simplicity or complexity, will be determined fairly, quickly and cost-effectively?

**The conduct of case-managed litigation**

[2] Counsel and self-represented parties are expected to practise the “3 Cs” of the Commercial List: Co-operation, Communication and Common Sense. While communication amongst counsel by email may be convenient, often to resolve difficult issues there is no substitute for “live” communications between counsel, such as picking up the phone or chatting over a coffee.

**Pleadings brief**

[3] Five days before the first case conference counsel for the plaintiff/applicant shall file with the Commercial List Office, to my attention, a brief containing (i) all pleadings in the action or (ii) the notice of application, main applicant’s affidavit and main respondent’s affidavit, where available.

**Standing agenda items for any case conference**

[4] At each case conference in a proceeding, counsel always should be prepared to discuss three issues:

- (i) What do the parties require in order to begin meaningful settlement discussions?
- (ii) Applying the principle of “*viva voce* evidence when necessary, but only as much as *viva voce* evidence as is necessary”, what form of final hearing on the merits is best

suited to the characteristics of this case – Summary judgment motion? Hybrid trial? Full trial?

- (iii) Can a date for the final hearing on the merits now be set?

### **9:30 appointments and case conferences**

[5] 9:30 appointments and case conferences can be conducted by teleconference, as well as by Skype or GoToMeeting if those services are available to all involved. 9:30 appointments can start as early as 8 a.m., at counsel's request. The day before any 9:30 appointment, counsel should send the Commercial List Office a very short email or fax identifying the issue(s) that counsel wish to discuss.

[6] Case conferences usually take a minimum of 30 minutes. They may be held from 8:00 a.m. to 9:30 a.m., or after 3:00 p.m. through to 6 p.m. Materials to be filed for a case conference will usually be identified in the Case Conference Memorandum from the previous conference.

### **Discovery issues**

[7] **E-discovery:** Counsel must explore creative ways to ensure that e-discovery costs remain proportionate to the complexity of the issues and the amount of money at stake in the case. Those creative ways can include (i) limiting the number of issues on which initial documentary discovery can be made, (ii) delaying e-mail documentary discovery until after core documents related to the limited issues have been exchanged, and then (iii) limiting the scope of e-mail documentary discovery.

[8] **Undertakings:** Each party must deliver answers to undertakings no more than 60 days following the date of the examination on which the undertaking was given.

[9] **Refusals/Under Advisements:** Parties are strongly encouraged to use Rule 34.12(2) of the *Rules of Civil Procedure*. If they do not, the parties must select one of the following options for refusals:

**Option A:** I am prepared to write an endorsement stating that the parties have agreed to refrain from bringing refusals motions, but on the clear understanding that by so doing they will not be faced at trial with the submission by an opposite party that their failure to move on refusals should work against them. If, at trial, an issue arises about a question refused, then the trial judge can consider the matter. If the trial judge concludes that the refusal was proper, so be it. If the trial judge concludes that the refusal was improper, then an adverse inference would be drawn against the refusing party for failing to disclose material evidence;

**Option B:** I will deal with a motion involving up to eight (8) key refusals (not categories, but actual refusals) at a 30-minute "Friday Morning Discovery Hearing" – see paragraph 10 below. However, parties must understand that if they proceed by way of motion, I shall approach the costs of that motion on an "amount per refusal" basis, specifically \$1,500.00 per refusal, payable within 30 days. That is to say, if a party moves on 8 refusals, but succeeds only on two, it may risk adverse cost consequences of

up to \$6,000 (i.e. success on 2 refusals (+\$3,000) less failure on 6 refusals (-\$9,000), or a “net” adverse cost award of \$6,000). In addition, in assessing the costs of the motion I shall take into account the refusal of a moving party to have accepted an offer by the other side to use Rule 34.12(2) on the examinations. By communicating my approach to costs to the parties in advance of bringing a refusals motion, I wish to afford parties an opportunity to take a sober look at exactly how many refusals are material for a fair determination of the issues at trial or final hearing and therefore require adjudication by this Court. If a refusals motion will involve more than eight (8) refusals, it most likely will be referred to a Commercial List Master for hearing.

**Option C:** The parties may identify those refusals in respect of which they wish to use Option A and those in respect of which they wish to proceed with a motion under Option B. I offer this third option recognizing that in some actions important, proper questions may well be wrongfully refused on an examination and that fairness requires an adjudication of those refusals in advance of the trial so that the actual disclosure of specific information occurs before trial, rather than simply relying on the drawing of an adverse inference. The number of such material refusals in any action usually is quite small and the cost consequences outlined in Option B should operate to confine the number of argued refusals only to very material issues.

### **Friday Morning Discovery Hearings**

[10] Each Friday morning, from 8:30 a.m. until 9:30 a.m. (except for my Judgment Writing Weeks), I will hold brief, 30-minute hearings on any discovery-related disputes arising in cases which I am case-managing – e.g. scope of e-discovery; scheduling of examinations; identity of person to be examined; refusals; etc. Counsel shall schedule a Friday Morning Discovery Hearing through the Commercial List Office.

[11] If the hearing will deal with refusals, no more than 8 refusals in aggregate will be dealt with at the hearing. All motion materials must be delivered no later than 5 p.m. on the Tuesday preceding the hearing date.

[12] For all other discovery-related matters, counsel must submit a joint letter, no later than 12 noon on the Thursday preceding the hearing date, describing the issue(s) and the parties’ respective positions. The letter shall not exceed five (5) pages in length.

### **Motions generally**

[13] In my view, the ability to prepare a case for a final hearing on the merits without resorting to any process-related interlocutory motion represents the gold standard for hearing preparation.

[14] No date for the hearing of an interlocutory motion will be set in this proceeding without an initial discussion of the procedural problem at a 9:30 attendance. At the 9:30 attendance: (i) the moving party must present a draft of the notice of motion and a draft of the order which will be sought on the motion; and, (ii) the responding party must present, in writing, its proposed resolution to the procedural problem which would obviate the need for the motion.

[15] If a scheduled motion will involve a hearing of three or more hours, it would be my preference to conduct a “paperless” hearing. Counsel must prepare electronic copies of the motions materials in accordance with the *Toronto Region Commercial List e-Delivery Pilot Project Guidelines for Preparing and Delivering Electronic Documents requested by Judges* found at: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/electronic-documents/> Counsel must ensure that their staff perform Optical Character Recognition (OCR) with the pdf copies to enable text searching; imaged copies are not acceptable. Ideally counsel should cooperate and file, through the Commercial List Office, one USB key that contains the motion materials for all parties at least three (3) days before the hearing of the motion.

### **Summary judgment motions**

[16] When requesting a date for a summary judgment motion, counsel must demonstrate that they have engaged in the discussions contemplated by paragraph 73 of the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7:

A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

[17] In *Hryniak* the Supreme Court of Canada stated that the summary judgment process would enable a judge to reach a fair and just determination on the merits when, *inter alia*, the process “is a proportionate, more expeditious and less expensive means to achieve a just result” (para. 49). Consequently:

- (i) A party seeking a date for a summary judgment motion should file, in advance of the request, a copy of the proposed notice of motion together with the information to perform the sort of cost/benefit or proportionality analysis described in Schedule “A” to *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001;
- (ii) A party which opposes the setting of a summary judgment motion date must file a brief letter proposing a means by which to determine the case on the merits which would be more proportionate, expeditious and less expensive than a summary judgment motion.

### **Service**

[18] The *Commercial List E-Service Protocol* applies to this proceeding. It can be found at: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>