

# Commercial Litigation

*“Your conduct with contract counterparties may be just as important as the words in a contract.”*

## What was the most interesting development of 2023, and why?

While Canadian courts in 2023 grappled with a number of relevant issues in commercial litigation, the spotlight was on issues related to contractual relationships, from formation to breach.

The past year saw several interesting cases considering the principles of contractual formation in the digital era. These cases emerged from the shift to more informal communication during negotiations. In [Lithium Royalty Corp v Orion Resource Partners](#), Justice Vella found that, notwithstanding the fact that the parties had yet to agree to a term sheet, a binding agreement had been reached for the purchase of an 85% interest in the royalties of a Lithium mine. The essential terms of the agreement were concluded in an email exchange. Similarly, in [South West Terminal Ltd v Achter Land](#), Justice Keene concluded that not only did a “thumbs-up” emoji from a user’s unique phone

constitute acceptance of a contract, it also satisfied the signature requirement under the *Sale of Goods Act*.

2023 also saw material developments in jurisprudence relating to damages flowing from a breach of the duty of good faith. Following two recent Supreme Court of Canada decisions about good faith in contractual performance, the Court of Appeal for Ontario provided much needed guidance on a claimant’s evidentiary burden to prove loss in the context of a breach of the duty of honest performance. In [Bhatnagar v Cresco Labs Inc](#), Justice Gillese clarified that, while a presumption of loss may be drawn in circumstances where the dishonesty of the breaching party impedes the claimant’s ability to provide proof of the lost opportunity, claimants are not relieved of the burden to establish an evidentiary foundation of their loss.

## What’s the primary takeaway for businesses from the past year?

Businesses must be mindful that their conduct with contract counterparties may be just as important as the words in the contract. The conduct of the parties during the negotiations, implementation, and execution of the contract remains the paramount consideration of the court in determining liability and damages where a breach has been alleged. As seen above, courts not only reaffirmed the principles of contract law but also emphasized the highly fact-specific and contextual nature of the inquiry.

In 2024 and beyond, it is essential for businesses to act in good faith with counterparties while maintaining timely and accurate records of contractual relations. Specifically, when engaged in negotiations, organizations must be explicit about their positions on offers and counteroffers and maintain a well-documented record of communications. In the context of obligations performed under a contract, to the extent possible, maintain records of any lost opportunities

caused by the conduct of the counterparty.

## What trends are you are expecting in 2024?

An emerging area to monitor carefully for directors and officers of corporations is the use of the oppression remedy to advance a claim of personal liability against the individual directors and officers. In [FNF Enterprises Inc v Wag and Train Inc](#), the sole shareholder and director of the corporation brought a motion to strike a claim against them by unsecured creditors in the context of a corporation’s breach of a non-commercial lease. The claimants had argued, among other things, that the sole shareholder and director of the corporation had stripped value from the corporation despite knowledge of the corporation’s debts. At the Court of Appeal, Justice Zarnett concluded that, while the claim for piercing the corporate veil could not succeed, a claim for oppression remedy against the director and sole shareholder of the defaulting corporation was arguable and could proceed to trial. The Court found that a creditor could get standing when its interest as a creditor is “compromised by unlawful and internal corporate maneuvers against which the creditor cannot effectively protect itself.” This case highlights a potential developing area of director and officer liability pursuant to the oppression remedy, as an alternative to piercing the corporate veil or breach of contract against the corporation.

We also anticipate that 2024 should continue to see developments in the areas of artificial intelligence, cybersecurity, securities regulation, and privacy, as these matters make their way through the courts.

Finally, we are eager for the outcome of seminal cases already before the courts, including the Supreme Court of Canada’s decision in [Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc](#), where the Court will consider sale of goods legislation for the first time in nearly 30 years.



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## OUR COMMERCIAL LITIGATION PRACTICE

Commercial litigation represents the heart of our practice. Our lawyers have a wealth of experience in pursuing complex, high-profile and often highly confidential cases across the spectrum of business-related legal matters. Our well-honed courtroom skills have won the respect of judges and fellow counsel at all levels of the courts – including the Toronto Commercial List, where many of Canada’s most complex commercial cases are heard.