# A 2023 Snapshot
## *Through the Lens of Lenczner Slaght*

Lenczner Slaght

# Introduction

We are proud to launch *A 2023 Snapshot*, providing a look into the most significant developments, decisions, and trends in litigation from the last year, across 15 practice areas. Revisit 2023 and look ahead to 2024 through the lens of our expert litigators who, in the last year, have represented clients on their most complex matters across dozens of areas and industries, before all levels of courts, including the Supreme Court of Canada. They share their extensive knowledge and insights, reflecting on the following questions:

- What was the most interesting development of 2023, and why?
- What's the primary takeaway for businesses from the past year?
- What's one trend you are expecting in 2024?

# About Lenczner Slaght

Widely recognized as Canada's leading litigation practice, we have successfully represented clients' interests in some of the most complex, high-profile cases in Canadian legal history. Our lawyers are distinguished by their depth of courtroom experience, appearing regularly at all levels of the federal and provincial courts and before professional and regulatory tribunals, as well as in mediation and arbitration proceedings. We bring expert strategy — backed by rigorous research, skilled data management and solid administrative support — to demanding cases in all areas of litigation. In short, we're expert litigators.

# Contents

# Arbitration

*"Arbitration clauses can extend to non-signatories if there is a real nexus with the parties and rights in the underlying contract."*

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

After the Supreme Court's decision in *Uber v Heller*, arbitration clauses between unequal parties in standard-form contracts were at real risk of being declared unconscionable and therefore unenforceable. In *Davis v Amazon Canada Fulfillment Services*, the Ontario Court confirmed that there was nothing *per se* unconscionable about requiring disputes to be arbitrated, provided that there was no onerous cost or complexity to the process. Interestingly, while the Court considered that stand-alone clauses prohibiting class proceedings may be void for illegality, such a provision may be permissible if contained within an arbitration clause.

The reasoning in this case is the subject of a pending appeal — despite the fact that section 7(6) of the *Arbitration Act* provides that there is no appeal from a decision to stay a proceeding in favour of an arbitration agreement. If the Court of Appeal takes up the appellant's offer to review this stay decision, transferring a dispute out of the courts and into arbitration may become a much lengthier process.

**What's the primary takeaway for businesses from the past year?**

Arbitration clauses can compel non-signatories to submit to, and be bound by, arbitration if there is a real nexus with the parties and rights in the underlying contract. In 2022, the Supreme Court in *Peace River Hydro Partners v Petrowest*, held that an otherwise valid arbitration clause could be rendered inoperative in the context of an insolvency proceeding. Although the circumstances of that case were quite specific, the Court's commentary on the reach of arbitration clauses to third parties — including subsidiaries, assignees, trustees, and receivers — has wider application. In *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, the Alberta Court confirmed that third party beneficiaries can be bound by arbitration clauses when seeking to enforce contractual rights, even if they are non-signatories to the underlying contract.

**What's one trend you are expecting in 2024?**

Arbitral awards are notoriously difficult to overturn, especially if there is a "final" clause in the arbitration agreement. Appeal rights, if any, will be determined by the terms of the agreement to arbitrate and any applicable statutory law. Unsuccessful parties often have two options: an application to set aside the award (usually on procedural or fairness grounds), or an appeal on a question of law, or some other prescribed or limited grounds.

For set-aside applications, watch for the Court of Appeal's pending decision in *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*. This case is about whether an award should be set aside because of the failure of an arbitrator to disclose that they were retained by counsel in a second, unrelated arbitration proceeding. Justice Steele, in the Superior Court, held that concurrent appointments by the same firm gave rise to a reasonable apprehension of bias on the specific facts of this case. The Court of Appeal for Ontario heard the appeal in December 2023. If the lower court decision is upheld, expect more complete and detailed disclosures from arbitrators and a general refusal to take on concurrent mandates for the same firm.

For appeals, the question of whether the *Vavilov* standard applies to appeals of arbitral awards remains an unsettled question. Pre-*Vavilov*, the reasonableness standard applied. Since this landmark SCC decision, however, some courts hearing appeals from arbitral awards have moved towards the general appellate standard of correctness for questions of law, and palpable and overriding error for facts and mixed fact and law. Since arbitral appeals are typically limited to questions of law, this is an area of considerable importance. We expect to see appellate courts start weighing in on this question in 2024.



KEY AUTHORS AND CONTACTS

Lawrence E. Thacker
PRACTICE GROUP LEADER
416-865-3097
lthacker@litigate.com

Andrew Parley
PRACTICE GROUP LEADER
416-865-3093
aparley@litigate.com

Madison Robins
PARTNER
416-865-3736
mrobins@litigate.com

OUR ARBITRATION PRACTICE

Clients sometimes choose arbitration for cases involving complex or confidential matters that can be resolved more efficiently, expeditiously and predictably behind closed doors. In other cases, clients turn to arbitration for cross-border disputes or cases involving multiple jurisdictions, where the legal issues are typically complex and often involve competing jurisdictions and conflicting substantive law. In either case, the unrivalled trial experience that makes Lenczner Slaght a litigation leader serves our clients equally well in arbitration.

# Class Actions

*"There is no question that class actions will remain a significant risk for businesses."*

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

Over the last few years, we have seen a pronounced willingness by courts to dispose of claims at an early stage, either through pre-certification motions to strike, at certification for failing to show a cause of action, or failing to show some basis in fact for the existence of a common issue. For example:

In *Dussiaume v Sandoz Canada Inc*, a proposed class action arising from alleged defective heartburn medication, the British Columbia Supreme Court heard an application to strike and for certification simultaneously. The claim was struck on the basis that at its core, the claim was one of increased risk of harm which is not compensable.

In *Setoguchi v Uber BV*, involving a data breach by a third party, the Alberta Court of Appeal upheld the certification judge's dismissal where a key element of a cause of action could not be shown.

In *Gebien v Apotex Inc*, a personal injury class action arising from the opioid crisis, the Ontario Superior Court of Justice dismissed certification as against opioid distributors because there are public policy reasons for why a distributor should not have to police the illegal trade of pharmaceuticals.

In *Frayce v BMO Investor Line Inc*, which was recently upheld by the Divisional Court, the class action was dismissed for failing to show some evidence of wrongdoing (in that case, that the payment of trailing commissions was illegal).

At least in the common law provinces, and particularly Ontario and British Columbia, these decisions and others confirm that judges have been rigorously exercising their gatekeeper function leading to the dismissal of numerous class actions.

**What's the primary takeaway for businesses from the past year?**

While many corporations scored significant victories in the past year, the plaintiffs' bar is inventive and alert. They remain ready to issue class proceedings where potential class-wide liability exists. Take, for example, the recent class action filings relating to defective allergy medication or the cantaloupe recall.

Given this environment, there is no question that class actions will remain a significant risk for businesses. Businesses should continue to expect to see the filing of class actions and to take appropriate measures to manage class action risk. For example, in response to consumer product defects, businesses should be ready to implement an effective recall program which has been found in the case law to be preferable to a class action. An effective recall program was a central fact in the dismissal of certification in *Larsen v ZF TRW Automotive Holdings Corp*. Businesses should also take comfort in the heightened scrutiny that proposed class proceedings are facing as we discussed above. Class actions can be disruptive and time-consuming for a business. A defense strategy with consideration of an early dismissal should not be overlooked.

**What's one trend you are expecting in 2024?**

In 2024, we expect to see continued growth of class action filings across the country. Where those filings will be made is something to keep an eye on. While Ontario was for many years the primary battleground for class proceedings, there has been, for strategic reasons, an uptick in filings in other provinces in the past few years or a preference to advance class proceedings in other provinces. In particular, in response to legislative amendments to the preferable procedure requirement (i.e., the superiority and predominance requirements) in Ontario, many defence counsel observed an uptick in class action filings in British Columbia, which is a no-cost jurisdiction.

However, in the wake of two recent Ontario decisions interpreting the amended preferable procedure requirement, we may see a resurgence of Ontario filings. In *Banman v Ontario*, an institutional negligence case, Justice Perell concluded that the new preferable procedure test certainly raises the bar; however, the test itself has not fundamentally changed. Justice Perell's views in *Banman* were then adopted by Justice Akbarali in *Grozelle v Corby Spirit and Wine Limited*, which dealt with mold damage caused by emissions from whisky aging warehouses.

Certainly, in the months to come, we will see more applications of the recalibrated preferable procedure test. Should subsequent decisions continue to follow the reasoning in *Banman*, the bar for certification in Ontario may not be the game changer that some thought these amendments would be.

KEY AUTHORS AND CONTACTS

**Paul-Erik Veel**
PRACTICE GROUP LEADER
416-865-2842
pveel@litigate.com

**Brian Kolenda**
PARTNER
416-865-2897
bkolenda@litigate.com

**Jonathan Chen**
PARTNER
416-865-3553
jchen@litigate.com

OUR CLASS ACTIONS PRACTICE

Our lawyers' class actions expertise has been sharpened through hands-on experience in a wide range of complex and technically demanding proceedings. Our firm has defended many of Canada's most closely watched class action lawsuits over the past three decades. It's that experience that has led to our lawyers being repeatedly recognized by various organizations as leaders in the class action bar.

# 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.



KEY AUTHORS AND CONTACTS

**Monique Jilesen**
PRACTICE GROUP LEADER
416-865-2926
mjilesen@litigate.com

**Eli S. Lederman**
PRACTICE GROUP LEADER
416-865-3555
elederman@litigate.com

**Margaret Robbins**
PARTNER
416-865-2893
mrobbins@litigate.com

**Arash Nayerahmadi**
ASSOCIATE
416-238-7452
anayerahmadi@litigate.com

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.

KEY AUTHOR AND CONTACT

Paul-Erik Veel

PRACTICE GROUP LEADER
416-865-2842
pveel@litigate.com

OUR COMPETITION PRACTICE

Lenczner Slaght has extensive experience in all areas of competition litigation. We regularly act in cases involving alleged breaches of the *Competition Act*, including misleading advertising, price fixing, and other conspiracy cases. We also represent defendants in class actions alleging violations of the *Act*. Our clients include leading multinational manufacturers, auto parts companies, and technology companies, among others. The breadth of our courtroom experience, combined with our deep understanding of strategic business issues, allows us to provide effective representation for both Canadian and international clients in the most vigorously contested disputes.

# Competition

*"As a result of the flurry of legislative amendments in recent years, businesses need to ensure they're re-evaluating their approach to competition law compliance."*

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

The biggest development of 2023 in this space were further amendments to the *Competition Act*.

In recent years, the government has undertaken significant legislative reform efforts in this space to strengthen the Competition Bureau's enforcement abilities and try to more effectively address anti-competitive conduct. Following an initial series of amendments in 2022, further amendments were passed in 2023, with yet more amendments likely in 2024. The key amendments passed in late 2023 include:

- Granting the Competition Bureau new information-gathering powers to conduct market studies (independent of any particular investigation).
- Expanding the scope of reviewable collaborations between companies.
- Removing the efficiency defence for both mergers and reviewable collaborations.
- Restructuring the legal test for abuse of dominance to make it easier to establish.
- Adding excessive and unfair selling prices as an anti-competitive act for abuse of dominance.
- Increasing the maximum available penalties for abuse of dominance, up to the greater of (a) $25 million for a first violation, or (b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the company's annual worldwide gross revenues.

**What's the primary takeaway for businesses from the past year?**

As a result of the flurry of legislative amendments in recent years, businesses need to ensure they're re-evaluating their approach to competition law compliance. Some practices that were historically lawful may have become unlawful in the last few years. And some business practices that were historically low risk have now become substantially riskier, particularly for larger players that arguably hold a dominant position in certain markets.

Rather than business as usual, companies need to carefully consider their existing practices against recent amendments to avoid potential risks. The coming into force of some provisions has specifically been delayed by a year in order to allow businesses to review their practices; they should take that opportunity. There have always been significant benefits for businesses to have robust competition law compliance programs. In light of developments in 2023, now is the time for businesses to review their policies to make sure they reflect updates to the legislation, and to audit the effectiveness of the program historically to ensure that it is sufficiently robust.

**What's one trend you are expecting in 2024?**

Over the course of 2024, both the Competition Bureau and the business community will continue to adapt to the new legislative framework. There is no doubt that the Competition Bureau will work on providing more information to businesses through updated enforcement guidelines and policy statements. While the Competition Bureau may be cautious in taking too much enforcement action too quickly, they will look for appropriate opportunities to flex their new legislative powers. The Competition Bureau's enforcement action will likely remain robust in more straight-forward areas, such as deceptive marketing practices, where the Competition Bureau plays a consumer protection role.

# Construction

*"The rising interest rates of 2022 and 2023 significantly impacted the construction industry and the risk allocation across projects."*

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

The Supreme Court of Canada's decision in *R v Greater Sudbury (City)*, was perhaps the most interesting legal development this year, in particular the Court's ruling that an owner could also be an employer under the *Occupational Health and Safety Act* ("OHSA"). This ruling changes the long held view that for health and safety purposes, an owner who hires a "constructor" (general contractor or construction manager) does not have extensive health and safety obligations since they have effectively delegated overall responsibility for health and safety.

The Supreme Court's decision was split 4-4 with two very strong dissenting opinions. As a result, the decision of the Ontario Court of Appeal overturning the acquittal of the City of Sudbury at trial stands. A plurality of the SCC held that an owner will also be an employer by virtue only of retaining a general contractor. While an owner may lack control over a construction project, a lack of control does not absolve an owner from their obligations as an employer. Issues of control are only relevant in considering an owner/employer's due diligence defence, which requires a determination that they took every reasonable precaution in the circumstances.

Practically, this decision imposes the health and safety obligations of an employer under the OHSA on project owners, simply by virtue of them having contracted with a general contractor. This is true regardless of the level of control the owner has over the actual work site. The plurality of the Supreme Court provided some guidance on how an owner's degree of control should be assessed as part of the due diligence defence. However, they returned the matter to the trial court to determine whether the project owner, the City of Greater Sudbury, had established a due diligence defence.

This is a significant change in onus for project owners who will bear the evidentiary burden of proving on a balance of probabilities that they took every reasonable precaution in the circumstances. Owners must also grapple with whether they should try to exert more control over their projects to ensure overall health and safety to establish a due diligence defence. At the same time, such efforts simultaneously could enhance the scope of their obligations for construction safety and expand the scope of what reasonable precautions the owner/employer could have taken to avoid an accident. The full impact of this decision, in particular its impact on how the Ministry of Labour prosecutes owners and how trial courts interpret the new due diligence guidance from the Supreme Court, remain to be seen and will be closely watched by the construction bar.

**What's the primary takeaway for businesses from the past year?**

The rising interest rates of 2022 and 2023 significantly impacted the construction and development industry and the risk allocation across projects that were commenced when interest rates were lower and relatively stable.

Such interest rate increases can significantly impact the ability to advance projects, as well as the risk distribution on projects that are governed by fix priced contracts in which one party has accepted the risk associated with a significant change in financing costs. In addition, damages for delay or interest owed on unpaid accounts can become a significant portion of an overall claim when compared with the size of such claims in the interest rate environment of the past two decades.

**What's one trend you are expecting in 2024?**

Across Canada we are increasingly seeing large P3 infrastructure projects reach completion or service commencement. As these projects conclude, we will see whether and how parties choose to litigate claims that arose and were tolled during the build phase. While we may continue to see parties turn to alternative dispute resolutions, like mediation and arbitration, as projects with large sums of money and interconnected networks of contractual parties and stakeholders are involved with disputes, we expect to see parties turn to more traditional adjudication methods, and may see some of these disputes litigated in court.



KEY AUTHORS AND CONTACTS

Andrew Parley
PRACTICE GROUP LEADER
416-865-3093
aparley@litigate.com

Aaron I. Grossman
COUNSEL
416-865-2941
agrossman@litigate.com

Kate Costin
ASSOCIATE
416-865-3729
kcostin@litigate.com

OUR CONSTRUCTION & INFRASTRUCTURE PRACTICE

Lenczner Slaght has regularly tackled the unique complexities of the construction sector. We've acted for various parties in construction-related disputes, including owners and developers, contractors and subcontractors, lenders and underwriters, and architecture and engineering firms. Our relevant litigation experience covers the spectrum of construction matters, from insurance claims, disputes relating to progress payments, holdbacks, and liens, and claims relating to delay and disruption, defects, omissions, and other performance issues.

Matthew Sammon
PRACTICE GROUP LEADER
416-865-3057
msammon@litigate.com

Aoife Quinn
PARTNER
416-865-9907
aquinn@litigate.com

## OUR EMPLOYMENT PRACTICE

Lenczner Slaght provides expert counsel in employment litigation to organizations of all sizes, acting on their behalf in disputes and helping to establish effective corporate policies and practices. Our focus is on complex employment law disputes, including terminations of executives, employee fraud, disputes involving departing employees who take confidential information to a competitor, and employment law class actions.



# Employment

*"Employers will want to periodically review their employment contracts to ensure that they will be enforceable in the event of a termination."*

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

In *Celestini v Shoplogix Inc*, the Court of Appeal for Ontario applied the "changed substratum" doctrine to find an otherwise valid employment contract unenforceable, and calculated the damages payable in lieu of notice at common law without reference to the written employment contract. The changed substratum doctrine renders portions of an employment contract that restrict or limit the amounts payable to a dismissed employee unenforceable where the employee's responsibilities and status have significantly changed. The idea behind the changed substratum doctrine is that with promotions and greater responsibilities, the substratum of the original employment contract has changed, and so the notice provisions in the original employment contract should be nullified.

This case has been seen as an extension of the typical use of the changed substratum doctrine. The employee was employed for 12 years as a senior executive, and held the same job title throughout until his termination. The Court held that there did not need to be a promotion of the employee for the doctrine to apply, but it was sufficient that the duties and responsibilities were fundamentally increased such that the meaning of the job title was redefined.

**What's the primary takeaway for businesses from the past year?**

The courts continue to be very employee friendly. The use of the changed substratum doctrine is one example.

Further, the courts continue to find termination provisions in employment contracts unenforceable for technical non-compliance with the *Employment Standards Act* ("ESA"). While it is generally clear if a termination clause is unenforceable where it provides for less notice than the minimum set out in the ESA, it may not be clear whether a termination clause properly provides for payment of non-salary items like vacation pay during the reasonable notice period.

Employers will want to periodically review their employment contracts to ensure that they will be enforceable in the event of a termination. They will want to consider whether the provisions are compliant with the ESA and whether the employee's duties or compensation have changed over time such that an update to the contract is warranted.

Where a termination clause is unenforceable, employees will be compensated in line with the common law with respect to reasonable notice of termination, which can be vastly more than the amount as set out in a written contract. In the absence of a contract, the courts determine the reasonable notice period by considering relevant factors such as the character of employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training, and qualifications of the employee.

**What's one trend you are expecting in 2024?**

We expect to see more employees attempting to assert claims for longer notice periods and therefore larger reasonable notice awards. The courts have held there is an upper limit on reasonable notice awards in the range of 24 months, absent "special circumstances." Last year, the Court of Appeal for Ontario upheld two awards of reasonable notice periods of 27 and 30 months, in the context of long-serving employees towards retirement age, where there was a finding that the employee's technical skills were geared towards the defendant's business. While these cases are very fact specific, and only directly applicable to long service employees near retirement age with specialized skills, it is likely that employees will attempt to rely on these cases more generally to extend the notice period outside the conventional 24-month notice period.

# Insolvency

*"2024 will see clarification on a number of key legal issues surrounding insolvency litigation and the availability of assets in insolvency proceedings."*

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

Among the many interesting developments in 2023 was further clarification regarding the law governing fraudulent conveyances. Generally, a fraudulent conveyance occurs where a party transfers property to impair another party's ability to satisfy their legal claim to the property. In the insolvency context, where creditors often fight over the right to a bankrupt's assets, a bankrupt may resort to fraudulent conveyances in order to remove certain property from that fight altogether. If a court finds that the bankrupt made a transfer with the intent of defeating the claims of creditors, the court will void the transaction and the property will be made available to creditors as part of the bankrupt's estate.

In *Ontario Securities Commission v Camerlengo Holdings Inc*, the Ontario Court of Appeal was confronted with the question of how to address an allegedly fraudulent conveyance made without contemplating any particular creditors. In that case, two business partners, in 1996, conveyed their houses to their respective spouses for no consideration. Over 20 years later, the Ontario Securities Commission ("OSC") sought to set aside the 1996 conveyance as intended to defeat the claims of future creditors. The motion judge found that the transfer was not a fraudulent conveyance because the OSC and other creditors could not have been contemplated at the time of the transfer in 1996. The Ontario Court of Appeal reversed the decision, holding that a conveyance is fraudulent even if it does not contemplate a specific or knowable creditor. An intention to impair any creditor, even a hypothetical future creditor, is sufficient to make the conveyance fraudulent.

**What's the primary takeaway for businesses from the past year?**

Ontario courts continue to prioritize creditors' claims over allowing the insolvent party to retain assets where any fraudulent intent can be imputed. As such, businesses should take particular care in how funds are handled to avoid even the appearance of financial impropriety. Such due care in the short term could pay dividends in the long term to avoid vexatious litigation if the business ultimately becomes insolvent.

**What's one trend you are expecting in 2024?**

Looking forward, 2024 will see clarification on a number of key legal issues surrounding insolvency litigation and the availability of assets in insolvency proceedings. The Supreme Court of Canada is slated to release decisions for multiple appeals that it heard in December 2023. *John Aquino v Ernst & Young Inc*, for example, concerns the doctrine of corporate attribution or, in other words, when a company or non-natural person can be said to "know" something or "intend" a certain consequence. There, the company's president orchestrated a false invoicing scheme and used the company's resources to effectuate the scheme. The company itself, however, did not benefit from the scheme. The Supreme Court of Canada will answer whether the company can be said to have "intended" this scheme, or whether such intent is limited to the company's president as an individual.

Similarly, the Supreme Court of Canada will decide whether provincial securities regulators alleging fraud can proceed despite the defendant's declaration of bankruptcy. The British Columbia and Alberta Courts of Appeal have diverged on whether administrative monetary penalties for alleged fraud survive bankruptcy or whether that debt is discharged after declaring bankruptcy. In *Poonian v British Columbia Securities Commission*, the Supreme Court will decide which approach is appropriate under the *Bankruptcy and Insolvency Act*.



KEY AUTHORS AND CONTACTS

**Matthew B. Lerner**

PRACTICE GROUP LEADER
416-865-2940
mlerner@litigate.com

**Doug Chalke**

LAWYER LICENSE PROCESSING CANDIDATE
416-865-3739
dchalke@litigate.com

OUR INSOLVENCY & RESTRUCTURING PRACTICE

Through more than three decades of courtroom experience, we have advanced our clients' interests in some of Canada's most challenging and complex bankruptcy, insolvency and restructuring litigation. We act not only for creditors and debtors, but also for court-appointed officers such as monitors and receivers. We offer clients a wide scope of substantial experience in commercial reorganizations and restructurings, personal property security matters, creditors' rights, receiverships, bankruptcies, and enforcement in secured transactions.

# Insurance

*"Insurance coverage is contractual. It is important to obtain or provide as much clarity as possible regarding the extent of coverage available."*

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

Ontario courts released anticipated rulings on coverage claims for the extensive business interruption losses suffered as a result of the COVID-19 pandemic. These decisions affirmed that where such coverage requires "direct physical loss or damage," actual tangible damage must be suffered. Broader coverage, including for loss of use of property that may not otherwise be damaged (as in *MDS Inc v Factory Mutual*), requires additional and more expansive policy language.

The Superior Court issued its decision in the class action *Workman Optometry Professional Corporation v Certas Home and Auto Insurance Company*, addressing whether there was coverage for business losses suffered by many businesses from COVID-19 closures under commercial property insurance policies. These policies insured against "all risks" of direct physical loss of, or damage to, property of the insured. The Superior Court held that the presence of the virus did not constitute direct physical loss or damage to property, as there was no tangible or concrete harm suffered to the property. Further, the policies did not provide "loss of use" coverage.

In *SIR Corp v Aviva Insurance Company of Canada*, our Court of Appeal addressed whether a loss of food inventories by insured restaurants arising from government-ordered COVID-19 lockdowns were covered losses as the damage arose from an order by a civil authority. It held that neither the virus nor the civil orders resulted in "direct physical loss or damage" to insured property. In the absence of direct physical loss or damage, the policies were not triggered.

**What's the primary takeaway for businesses from the past year?**

Insurance coverage is essential to manage liabilities, unexpected perils, and risks in business. But insurance coverage is contractual, and our courts will apply the policy's clear language in the absence of ambiguities. It is important to obtain or provide as much clarity as possible regarding the extent of coverage available.

**What's one trend you are expecting in 2024?**

Corporate spending on class action lawsuits continues to increase steadily. These lawsuits are expensive to defend and present potentially significant liabilities. They may claim losses that span multiple policy periods and may involve different insurers. Ensuring adequate insurance coverage and notifying all potential insurers and policies in the face of any claim is essential. Litigation among insurers may ensue to address which policies are triggered, the extent of obligations that might be owed in the face of other insurance, and how to allocate such liabilities among insurers. We are awaiting a decision in *Loblaw v Royal & Sun Alliance*, which will address some of these issues in the context of multiple class action claims against opioid manufacturers and distributors for the opioid epidemic and its costs.

## KEY AUTHORS AND CONTACTS

**Nina Bombier**
PRACTICE GROUP LEADER
416-865-3052
nbombier@litigate.com

**Sean Lewis**
ASSOCIATE
416-865-2973
slewis@litigate.com

## OUR INSURANCE PRACTICE

We cover all facets of insurance litigation. Our lawyers draw on extensive trial and appellate experience to advise clients on the spectrum of policy, coverage and defence matters. With over three decades of experience, Lenczner Slaght has a proven record in litigating coverage cases among and against insurers involving issues including trigger of coverage, allocation of defence and indemnity, covered/excluded claims, obligations among primary and excess insurers, reinsurance, drop-down matters and run-off coverage.

# Intellectual Property

*"In addition to pharmaceutical patent litigation, we are also expecting to see an increase in litigation relating to the enforcement of AI-related IP, and to copyright disputes in the context of generative AI."*

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

Reluctance to pursue summary adjudication in complex disputes.

In 2020 and 2021, several decisions from the Federal Court signaled a willingness to consider increased use of summary adjudication (summary judgment/summary trials) for complex IP disputes, such as patent infringement actions. This eagerness was significant because the Federal Court of Appeal had been historically reluctant to uphold summary adjudication for these types of cases because of their complexity. Building on this momentum, 2022 saw (i) the Federal Court of Appeal weigh in on those decisions, confirming that they would uphold a summary adjudication in the right circumstances, and (ii) the Chief Justice of the Federal Court issuing a rallying cry to the IP Bar to consider summary adjudication. Despite the expectation that an uptick in summary adjudication would permeate last year's docket, 2023 was a relatively quiet year, perhaps because of uncertainty around what constitutes the right circumstances for a summary trial or summary judgment motion. Our past comments in this area offer more practical guidance on what the right circumstances might be.

As the Court acknowledged, when used correctly, summary adjudication presents tangible benefits (e.g., had the parties pursued summary adjudication "a considerable amount of judicial resources would have been saved, and each party's legal costs would have been substantially reduced"). Parties with a clear litigation strategy from the outset, and who are prepared to put their best foot forward with respect to the evidence regardless of the procedure, are well-positioned to realize these benefits.

**What's the primary takeaway for businesses from the past year?**

Today's economy continues to be driven by technology and innovation. For successful businesses, some form of intellectual property is invariably their most valuable asset (e.g., key brands, patents, and proprietary know-how). In 2023, we increasingly saw companies leveraging their intellectual property in litigation to protect competitive advantage and prevent unfair competition. For example, the number of infringement actions commenced in the Federal Court in 2023 was 219, up from 192 in 2022. This trend was particularly important during 2023's near recession, and will continue to be important going forward so long as recessionary conditions remain in economic forecasts. The bottom line is that when competition gets tough, companies rely on their IP to weather the storm and emerge stronger. We saw that in 2023 and expect the trend to continue in 2024.

**What's one trend you are expecting in 2024?**

In 2024, we are expecting increased litigation related to the life sciences, technology, and energy sectors. During the pandemic, entities in these sectors were inclined to effectively put litigation on the back burner to focus on bringing new innovations to address pandemic needs (e.g., vaccines, shields, workplace safety and enhancement technology), their employees' well-being, and new operational challenges (e.g., reestablishing supply chains, building infrastructure, scaling up workforces and transitioning to remote work). With many of these operational challenges subsiding and pharmaceutical litigation picking up industry-wide, we anticipate 2024 will see companies fully engaged with the litigation process. In addition to pharmaceutical patent litigation, we are also expecting to see an increase in litigation relating to the enforcement of AI-related IP, and to copyright disputes in the context of generative AI. The intersection of AI and IP will continue to be on trend for 2024 across all industries.



KEY AUTHORS AND CONTACTS

**Sana Halwani**
PRACTICE GROUP LEADER
416-865-3733
shalwani@litigate.com

**Jordana Sanft**
PARTNER
416-596-1083
jsanft@litigate.com

**Andrew Moeser**
PARTNER
416-649-1815
amoeser@litigate.com

**Jim Lepore**
ASSOCIATE
416-865-2881
jlepore@litigate.com

OUR INTELLECTUAL PROPERTY PRACTICE

At Lenczner Slaght, we recognize the vital importance of intellectual property in a complex and fast-moving global marketplace. Our team represents clients in all types of high-profile and technically sophisticated patent, trademark, and copyright matters in proceedings before all levels of Court.

# Internal Investigations

*"Mittra v Royal Bank of Canada will be a highly significant ruling for financial sector clients in the wrongful dismissal context."*

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

In 2023, the Ontario Superior Court rejected an employee's novel argument in the ongoing battle regarding the scope and impact of claims of privilege over investigations conducted by counsel.

In *Mittra v Royal Bank of Canada* (reported in 2024 following a three-week trial in Spring 2023), RBC asserted that the plaintiff deliberately misled investigation counsel. During the discovery phase of the litigation, RBC produced typed "attendance notes" factually summarizing investigation interviews but claimed privilege over the investigators' handwritten interview notes and other work product. Rather than challenge RBC's privilege claim, the plaintiff sought at trial to prevent the investigator from testifying on the basis that he was prejudiced by RBC's claim of privilege over the original notes. The Court rejected this argument, the investigator testified, and the Court ultimately held that RBC had cause to dismiss the plaintiff for dishonesty. The Court made two important related rulings:

- The Court "accepted that there may be a legitimate basis, supported by jurisprudence" for an employer to assert privilege over the original notes and other work product of investigation counsel.
- In support of finding just cause on the basis of (among other things) misleading investigators, the Court held that "in the banking sector, a senior employee such as [the Plaintiff] is subject to an exceptionally high level of integrity and honesty", relying on British Columbia decisions from 1991 and 2003. This is the first time that an Ontario court has accepted this principle of law, and we expect it to be a highly significant ruling for financial sector clients in the wrongful dismissal context.

Lenczner Slaght represented RBC.

**What's the primary takeaway for businesses from the past year?**

Not all investigation files will be protected from disclosure on the basis of privilege. If the goal is to maintain privilege over an investigation file, businesses should consider:

- Retaining a lawyer or law firm at the beginning of the investigation to investigate the facts and to provide legal advice on the results of the investigation. Courts have held that privilege will not attach to an investigation that is limited to factual inquiries, even when the investigation is conducted by counsel.
- Drafting the engagement letter to make clear that the scope of the lawyer's retainer includes providing legal advice. Courts often rely on the engagement letter itself as strong evidence when considering a challenge to a privilege claim over an investigation.
- Maintaining confidentiality over the investigation report and investigation file. Instruct, in writing, all employees with access to the investigation that the investigation is privileged and confidential, mark all documents as privileged and confidential, and do not share documents with third parties (with certain exceptions).

KEY AUTHORS AND CONTACTS

Rebecca Jones
PRACTICE GROUP LEADER
416-865-3055
rjones@litigate.com

David Salter
ASSOCIATE
416-649-1818
dsalter@litigate.com

OUR INVESTIGATIONS PRACTICE

We conduct internal investigations for boards of directors, special committees, and management when they are confronted with critical and sensitive situations, including where investigations have been ordered by regulators. Our team is relied upon to conduct investigations with efficiency, discretion, and the utmost capability. We have an unparalleled understanding of the law, including the practical considerations courts and regulators apply in assessing an investigation.

# Professional Liability

*"Professionals should not assume that 'personal' expression will not attract regulatory scrutiny."*

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

An important theme in 2023 was the contested intersection of professional regulation and personal expression, and specifically the regulatory risk that professionals may face as a result of their social media activity. Many regulators have long taken the position that their members' social media activity falls within the proper scope of professional regulation. Several cases in 2023 served as clear reminders of the risks faced by regulated professionals who make public statements that are deemed to fall afoul of professional standards.

In *Peterson v College of Psychologists of Ontario*, the Divisional Court confirmed that a person who identifies him or herself as a professional in making "off duty" remarks cannot "have it both ways" — trading on one's professional status in social media statements may properly expose those statements to enhanced regulatory scrutiny.

In the ongoing *Hamm case* and others, professional regulators have taken members to task for public statements on healthcare and social issues (such as trans rights or pandemic measures) that do not accord with the regulator's view of professional practice or ethics.

The extent of this risk is underscored by the very recent decision in *College of Physicians and Surgeons of Ontario v Trozzi*. In this case, the Ontario Physicians and Surgeons Discipline Tribunal directed revocation of the member's certificate of registration based on governability concerns arising from his social media commentary, which was perceived to undermine important public health measures in response to the COVID-19 pandemic.

**What's the primary takeaway for businesses from the past year?**

The upshot of these cases is that professionals should not assume that "personal" expression will not attract regulatory scrutiny. "Off duty" social media statements can be a source of risk, particularly where they touch on matters related to one's profession (as in the *Trozzi* matter). Professionals have every right to engage in vigorous debate on contentious issues. However, regulators may take the view that public statements, even when made outside one's professional practice, are required to comply with expected standards of professionalism and competence. Statements in which a professional refers to his or her professional qualifications will attract added scrutiny.

**What's one trend you are expecting in 2024?**

Generative artificial intelligence will become increasingly pervasive and is likely to have a significant impact on all professions. Regulatory responses to the use of generative AI are in their infancy. At the Federal level, the proposed *Artificial Intelligence and Data Act* has not yet been passed. Some regulators are beginning to issue guidance – for example, the Office of the Privacy Commissioner of Canada and several other bodies have recently co-published a document entitled, *Principles for responsible, trustworthy and privacy-protective generative AI technologies*. Many professional regulators have yet to take any position. Given that generative AI will see increasing use in law, finance, healthcare, and other fields, we can expect an evolving regulatory response as governments and professions seek consensus in the face of shifting practice.



KEY AUTHORS AND CONTACTS

Jaan Lilles

PRACTICE GROUP LEADER

416-865-3552

jlilles@litigate.com

Dena N. Varah

PARTNER

416-865-3556

dvarah@litigate.com

Colin Johnston

PARTNER

416-865-2971

cjohnston@litigate.com

OUR PROFESSIONAL LIABILITY & REGULATION PRACTICE

Lenczner Slaght has one of the leading professional liability practices in Canada, representing clients in diverse fields across a broad landscape of regulatory, civil and quasi-criminal matters. We defend professionals before disciplinary and regulatory tribunals and in all levels of the courts across the country. We also prosecute professional disciplinary cases for many regulatory colleges and governing bodies. In addition, we act as general counsel to several of those bodies.

William C. McDowell
PRACTICE GROUP LEADER
416-865-2949
wmcdowell@litigate.com

Rebecca Jones
PRACTICE GROUP LEADER
416-865-3055
rjones@litigate.com

Jonathan McDaniel
PARTNER
416-865-9555
jmcdaniel@litigate.com

## OUR PUBLIC LAW PRACTICE

Lenczner Slaght's lawyers help clients navigate complex litigation matters involving all levels of government and the public-sector bureaucracy. Our public law practice includes litigation matters relating to constitutional, human rights, judicial review, municipal, procurement and professional regulation matters.



# Public Law

*"Developments in 2023 reinforced the need for businesses to carefully consider how their strategic and litigation decisions might be impacted by public law considerations."*

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

The most interesting public law development in 2023 was the release of the Public Order Emergency Commission's Report. The Commission inquired into the federal government's unprecedented decision to invoke the *Emergencies Act* to deal with the Freedom Convoy demonstrations in 2022.

The Commission concluded that the use of the *Emergencies Act* was appropriate and that the federal Cabinet had grounds to resort to it. The Report examines not only the protests and the government's response, but the right to protest in Canada and the limits placed on that right.

Lenczner Slaght represented Ottawa's former Chief of Police, Peter Sloly, during the Commission's 31-day hearing.

**What's the primary takeaway for businesses from the past year?**

Developments in 2023 reinforced the need for businesses to carefully consider how their strategic and litigation decisions might be impacted by public law considerations.

Anti-SLAPP case law continues to develop, with a decision by the Court of Appeal for Ontario in *Boyer v Callidus*. The Court dismissed Callidus Capital Corporation's $150 million counterclaim against a former employee for breach of fiduciary duty on the grounds that the employee's statements about how the company conducted business rose to the level of a "matter of public interest" under the Anti-SLAPP legislation. Lenczner Slaght represented the former employer.

Other public law developments impacted businesses in a wide range of sectors:

- **Lobbying** – The third edition of the federal *Lobbyists' Code of Conduct* took effect in July, which imposes new obligations on consultant lobbyists, in-house lobbyists, and their employers.
- **Manufacturers and Distributors** – The *Fighting Against Forced Labour and Child Labour in Supply Chains Act* now requires certain businesses to file public annual reports about preventing forced or child labour. The Act creates offences for not reporting, among other things, and imposes personal liability on directors and officers. The government has released guidance on the Act.
- **Natural Resources** – The Supreme Court of Canada held that large parts of the federal *Impact Assessment Act* are unconstitutional. The government has said that it will amend the impact assessment regime in response, so companies pursuing natural resource projects will need to keep an eye out for how their projects will be assessed going forward. In the meantime, the government has released guidance on the interim administration of impact assessments.

**What's one trend you are expecting in 2024?**

Looking forward, 2024 will see the first major test of the Supreme Court of Canada's clarification of the law of *de facto* expropriation (or "constructive taking") laid down in *Annapolis v Halifax Regional Municipality*. The Annapolis case, in which a Halifax landowner alleges that the City *de facto* expropriated its land to use as a Regional Park, will proceed to trial over the Spring. Lenczner Slaght represents the landowner.

Public law litigation about the Freedom Convoy will also continue and be closely watched. On January 23, 2024, the Federal Court held that the decision to invoke the *Emergencies Act* was unreasonable. The decision arose from four applications for judicial review of the Federal government's decision, two brought by public interest litigants, the Canadian Civil Liberties Association, and the Canadian Constitution Foundation. The Federal government has announced its intention to appeal, so we will await the Federal Court of Appeal's, and potentially the Supreme Court's, decision.

The scope of *Charter* protections afforded to homeless encampments will likely be clarified in 2024 as well. Occupants of an encampment in Kingston have appealed a Superior Court decision limiting the right to shelter in parks to the nighttime. Lenczner Slaght acts for the City of Kingston.

# Real Estate

*"A cautionary tale for businesses is to pay attention to their use of 'time is of the essence' clauses, which are a common feature in real estate contracts."*

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

In *The Rosseau Group Inc v 2528061 Ontario Inc*, the Court of Appeal affirmed the principle that "when a vendor breaches an agreement to sell real estate, the normal measure of the innocent purchaser's damages is the difference between the purchase price and the market value of the property on the date the sale was to be completed." The decision overturned a lower court decision arising after a seller refused to complete a sale of undeveloped lands for $6.6 million, and was found liable for over $11 million in lost profits. In setting the decision aside, the Court of Appeal did acknowledge the availability of alternative approaches to damages, such as an estimate of lost profits, but ruled that such methodologies will only be employed where it is demonstrated that the approach on market value is inadequate. The leading authority on the lost profit approach in a real estate context remains the Supreme Court's ruling in *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*.

**What's the primary takeaway for businesses from the past year?**

A cautionary tale for businesses is to pay attention to their use of "time is of the essence" clauses, which are a common feature in real estate contracts. This is illustrated in *3 Gill Homes Inc v 5009796 Ontario Inc (Kassar Homes)*, where a purchaser was 35 minutes late in delivering funds for the closing of a real estate purchase. The seller did not accept the funds, citing the lapsed deadline, and resold the property. The disappointed seller was unsuccessful in its attempts to enforce the contract, with the Court of Appeal noting that the result was harsh, but not unconscionable or unfair given the clear wording of the contract (and warnings about the deadline prior to its expiry). While the Court noted that a residual equitable jurisdiction does exist, whereby a court may relieve against the breach of a time provision, no facts were relevant in that case for it to be exercised.

Another notable case from the Court of Appeal is *More v 1362279 Ontario Ltd (Seiko Homes)*, where a "time is of the essence" clause was included, but without a specified time of closing. In that case the seller faxed a letter terminating the purchase agreement at 5:11 p.m. But because a closing time was not specified, the judge found that the actual deadline was midnight that same day, and in the result the seller had terminated the agreement prematurely. As a result, the buyer was able to obtain an order for specific performance.

**What's one trend you are expecting in 2024?**

Recent case law suggests that the remedy of specific performance remains alive and well in the commercial real estate context. In *Bellwoods Brewery Inc v 1896841 Ontario Limited*, the popular craft brewing company on Toronto's Ossington Avenue, was involved in a lease dispute concerning retail space. The brewing company was seeking a second location and entered into a 20-year lease for premises that included a "mammoth glass box" with 40-foot ceilings which could be "lit up at night to create a dramatic effect." While the Court accepted that the usual remedy for a breach of contract is damages, the fundamental question had to be whether the land, rather than its monetary equivalent, better serves justice between the parties. The Court accepted Bellwoods' evidence about the uniqueness of the property and ordered performance of the lease.



KEY AUTHORS AND CONTACTS

Matthew B. Lerner

PRACTICE GROUP LEADER
416-865-2940
mlerner@litigate.com

Christopher Yung

PARTNER
416-865-2976
cyung@litigate.com

OUR REAL ESTATE PRACTICE

Lenczner Slaght regularly represents the major players in real estate transactions, including developers, property managers, vendors, purchasers, landlords, tenants, lenders, and borrowers. Our real estate practice includes complex litigation matters involving agreements of purchase and sale, broker negligence, condominium disputes, construction contracts, defects and liens, injunctions, lease and mortgage enforcement, real estate investment consortia, tax matters, and more.

Brian Kolenda
PRACTICE GROUP LEADER
416-865-2897
bkolenda@litigate.com

Christopher Yung
PARTNER
416-865-2976
cyung@litigate.com

## OUR SECURITIES PRACTICE

Lenczner Slaght has extensive experience in litigating securities-related disputes before the courts, including the defence of professional negligence and other claims brought against investment advisors and dealers and significant expertise defending shareholder class action proceedings. We also help clients conduct internal corporate investigations relating to potential breaches of securities and other laws either prior to, or in conjunction with, inquiries by regulatory authorities.



# Securities

*"The focus of securities regulators on taking enforcement action related to cryptocurrencies and other new technologies can be expected to accelerate."*

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

In a rare outcome the Capital Markets Tribunal stayed enforcement proceedings in a November 2023 decision in *Canada Cannabis Corporation (Re)* on the basis of abuse of process. The underlying proceeding related to another case of alleged fraud in the cannabis sector. The respondents were said to have raised millions from investors, misused those funds and left the company depleted without ever engaging in the actual cultivation or distribution of cannabis. The Ontario Securities Commission ("OSC") began a confidential investigation under Section 11 of the *Securities Act*, which protected certain material from distribution. Unusually, the OSC sought (and was granted) a confidentiality order that the OSC said precluded certain material collected in the investigation from even being shared with the respondents once enforcement proceedings began. The Tribunal, critical of this approach to lack of disclosure, stayed enforcement proceedings against the moving respondent.

**What's the primary takeaway for businesses from the past year?**

Publicly traded companies will want to pay careful attention to the Court of Appeal's May 2023 decision in *Markowich v Lundin Mining Corporation*. The case concerned corporate disclosures following a rockslide at a Chilean mine. Lundin disclosed the rockslide approximately one month later in a news release generally addressing the company's "Operational Outlook." The market reacted swiftly to the news with a one day drop of more than $1 billion in market capitalization. A class action was brought alleging Lundin failed to make timely disclosures as required by the *Securities Act*. This case illustrates how assessing a "material fact" and "material change" can be very nuanced, highly contextual, and challenging. Issuers wanting to avoid the risk of a securities class action may choose to err on the side of caution and release information as soon as possible, but this must be balanced against other risks such as making premature disclosures if the information available is incomplete or potentially unreliable.

**What's one trend you are expecting in 2024?**

The focus of securities regulators on taking enforcement action related to cryptocurrencies and other new technologies can be expected to accelerate. As public and institutional exposure to cryptocurrencies grows, including through social media-based and other online efforts, Canadian securities regulators have reacted. Since 2017, the Canadian Securities Administrators, alone and together with IIROC (now CIRO) have issued nine Staff Notices providing market participants with important guidance on crypto market-related matters, including two important staff notices in 2023 alone related to crypto trading platforms. However, our experience has been that securities regulators have continued to expand the resources they have to enforcing securities laws against firms and individuals in the crypto markets, both in the form of investigations and enforcement proceedings, including against foreign-based crypto market participants. We believe this trend is only set to grow in 2024 and will be reflected in more investigations and proceedings being initiated in relation to alleged breaches of securities laws by those involved in crypto and other innovative technologies.

# Trusts & Estates

*"Standing must be established to challenge a trust interest – even in family law."*

**What should you know about 2023?**

The open court principle prevails – even over solicitor client privilege on a settlement approval.

2023 furthered the open court principle that was reinforced in the 2021 SCC decision in *Sherman Estate v Donovan*.

The presumptive open court principle is engaged by all judicial proceedings. In *SEC v MP*, the Court of Appeal confirmed that the open court principle applies to proceedings in writing, such as settlement approvals for a party under disability under Rule 7.08.

The importance of this principle is not eroded by solicitor client privilege on a Rule 7.08 approval motion. The court wants balance. If there is information that genuinely warrants protection, this should be isolated for specific sealing or by the use of initials to anonymize the minors. Blanket sealing will not be ordered.

Litigators should also be mindful that, consistent with the historical conservative approach of our courts validating wills, the exercise of discretion under 21.1 of the SLRA has focused on execution irregularities.

The courts have signalled that they are acutely sensitive about the potential for section 21.1 to trigger wide-ranging arguments about documents that may be alleged to have testamentary effect.

In *White v White*, Justice Myers granted a production order under section 9 of the *Estates Act* to produce a draft will in the custody of the testator's former solicitor in the context of a claim under section 21.1 of the *Succession Law Reform Act*. Justice Myers specifically cautioned that the order was granted in the very limited factual circumstances of the case. His Honour expressly rejected the use section 21.1 to trigger a hunt for documents based on the mere hope that they could support an argument under section 21.1.

**What should the Trusts & Estates Bar look out for in 2024?**

In 2024, "minimal evidentiary threshold" cases will continue to highlight important issues for the courts and for counsel.

Courts are still struggling with calibrating the "minimal evidentiary threshold", as raised in *Neuberger v York*, *Seepa v Seepa*, and *Johnson v Johnson*. The purpose of the test is to establish when a court is justified in dismissing out-right, on a preliminary basis, a challenge to a testamentary instrument.

In 2023, Justice Myers ruled on this issue in four cases: *Giann v Giannopoulos* (under appeal), *Carinci v Carinci*, *Dinally v Dinally*, *White v White* ONSC 3740 and ONSC 7286. These cases raise the following issues:

- **For the Courts** – The approach to minimal evidentiary threshold cases risks opening the door to early summary judgment in will challenge applications. Given the high importance of these preliminary challenges, these motions involve full evidentiary records, including responding affidavits and cross-examination.
- **For Counsel** – The courts are looking for "some evidence" in support of the application. A good case theory is not sufficient.

We will also continue to see important trust challenges before the Family Courts.

The alleged sham trust, in family law, is putting legitimate estate planning at risk.

Estate freezes and family trusts arise in multiple situations, including family trusts protecting generations of family assets, estate planning and trusts settled long before a marriage (often before a second marriage), or a family trust settled by a parent to pass wealth generated during the marriage to children.

Even if the trust is not set aside as a sham, some value for the trust interest may be included in the net family property calculation. Caution though, standing must be established to challenge a trust interest – even in family law.

In *Karatzoglou v Commisso*, the Court ruled that the "use" of the trust property was not enough to create a proprietary in the trust asset, or to establish a constructive trust. Further, the wife's equalization claim against the former husband did not establish any right or standing for the wife to pursue an interest in the trust property, on behalf of the former husband.



KEY AUTHOR AND CONTACT

Anne E. Posno
PRACTICE GROUP LEADER
416-865-3095
aposno@litigate.com

OUR TRUSTS & ESTATES PRACTICE

Lenczner Slaght zeroes in on the heart of the dispute, finding the remedy, and strongly advocating for its clients' best interests. We know that our courtroom expertise isn't enough in trusts and estates cases; strength, sensitivity, and fairness are important too. That's why we not only provide stellar advocacy, but we also know how to manage a case with with care and respect for all involved.

@LencznerSlaght
/LencznerSlaght