2024 Snapshot

Through the Lens of Lenczner Slaght

Lenczner Slaght

Introduction

Our *2024 Snapshot* highlights the most significant developments, decisions, and trends in litigation from the past year across 20 areas of expertise. Reflect on 2024 and look ahead to 2025 through the lens of our expert litigators. They share their knowledge and insights, exploring key questions such as:

- What was the most interesting development of 2024, and why?
- What's the primary takeaway for businesses from the past year?
- What's one trend you are expecting in 2025?

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

Artificial Intelligence

"Businesses looking to incorporate AI should have robust policies in place to ensure that in the event of litigation, potential evidence is not compromised."

What was the most interesting development of 2024, and why?

2024 saw the first cases relating to artificial intelligence (AI) emerge in the courts.

A group of Canada's leading media companies and news publishers, represented by Lenczner Slaght, commenced the first Canadian lawsuit for copyright infringement and breach of contract against ChatGPT creator, OpenAI. The action seeks damages and payment of any profits OpenAI made from using the organizations' news articles, along with an injunction banning OpenAI from using their articles in the future.

In *CIPPIC v Sahni* (as we previously discussed here), the defendant's copyright registration naming an AI app as one of the authors of a work is being challenged, and if the case proceeds, is expected to address several novel issues including whether a machine can hold copyright and the originality criteria as it applies to AI-generated works.

A decision from 2024 also highlights a challenge with current AI abilities, particularly with models like ChatGPT that can produce outputs or answers that are incorrect or misleading. In *Zhang v Chen*, the Supreme Court of British Columbia grappled with such fabrications, sometimes called "hallucinations", addressing a notice of application containing fabricated legal authorities that had been "hallucinated" by ChatGPT. The lawyer who included the references gave evidence at the hearing that she did not know ChatGPT could generate fake authorities.

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

As businesses, including law firms, continue to incorporate AI into their daily practices, AI-generated work products are becoming ubiquitous. With increased prevalence comes increased risk of errors like hallucinations and liability relating to harms caused by AI tools and AI-generated products. Businesses must remain vigilant to ensure the quality of their records are maintained. Businesses looking to incorporate AI should have robust policies in place to ensure that in the event of litigation, potential evidence is not compromised.

More specifically, companies using generative AI tools looking to mitigate copyright risk should ensure indemnities are in place to protect from liability when using AI tools; review terms of service to determine who owns the content that is generated by the AI tool; and, if used in the provision of services, consider disclosing use of AI tools to customers and disclaiming liability relating to copyright ownership.

What's one trend you are expecting in 2025?

With AI permeating every aspect of our lives, we expect legal challenges involving AI will continue to proliferate in 2025. Some major issues we hope the courts will address soon include:

- In what circumstances does AI-generated content (e.g., deep fakes) infringe on rights of personality, privacy, and/or reputation? See our previous discussion here.
- Can an AI be an author or inventor worthy of copyright or patent protection?
- Can generative AI companies and/or companies using their products be liable for damages caused by "hallucinations" (incorrect/fake/misleading results)? See our previous discussion here.
- Is the use of a work to train an AI copyright infringement? If your work is used to train an AI, what, if any, compensation should you receive?
- In areas of the law where consent is required, is disclosure that AI will be used a requirement for that consent to be informed?
- If an AI is a part of a product that causes harm to users, who is liable for that harm?
- Can an AI act as an "expert" witness? Can AIs be used in judicial or quasi-judicial decision-making? See our previous discussion here.
- Is non-explainable AI a form of willful blindness? See our previous discussion here.
- What standard of care should an AI or AI company be held to? What impact should voluntary codes of conduct have on such a standard?

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OUR AI EXPERTISE

The current landscape is inundated with narratives surrounding AI and its intersection with the law. As advocates focused on the future, we are able to build interdisciplinary teams and bring together subject-matter experts to address new and complex problems, like AI, for our clients.

Class Actions

"While the overall volume of class action lawsuits filed nationwide in 2024 remained steady, there was a significant increase in the number of filings in British Columbia."

What were the most interesting developments of 2024, and why?

In our 2023 Snapshot, we highlighted the uptick of class actions being filed outside of Ontario and in particular, in British Columbia. This was in part due to a concern that the Ontario certification test had become harder to meet due to certain legislative amendments and the draw of litigating in a no-cost jurisdiction. Consistent with 2023, we noted that while the overall volume of class action lawsuits filed nationwide in 2024 remained steady, there was a significant increase in the number of filings in British Columbia. This reality raises the importance of examining the appropriateness of the jurisdiction selected by class counsel. As an example, the British Columbia Court of Appeal in *MM Fund v Excelsior Mining Corp*, which is a shareholder class action, refused to certify the class action because the representative plaintiff could not satisfy the residency requirements set out in class proceedings statute.

Back in Ontario, at long last, we now have closure on the two-step evidentiary test to satisfy the commonality requirement under section 5(1)(c) of the *Class Proceedings Act*. For years, there has been debate over whether it is necessary for the proposed representative plaintiff to only adduce some basis in fact that the common issue can be answered in common across the class (the one-step test) or whether it is also necessary to show that the proposed common issue actually exists (the two-step test). In *Lilleyman v Bumble Bee Foods LLC*, the Court of Appeal confirmed that to satisfy the commonality requirement, the proposed representative plaintiff must overcome the two-step test. The Court described this approach as "a matter of logic and common sense." With the clarity that this decision brings, we expect there will seldom be disputes over the evidentiary requirement in the future.

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

Businesses can take some comfort in the many developments in the case law in 2024. These changes indicate that judges are diligently fulfilling their gatekeeping roles, a task which has been facilitated by the clarity provided by various appellate decisions on recurring issues, such as:

1. The availability of pure economic loss;
2. The proper approach to dismissal for delay; and
3. The appropriate commonality requirement.

These appellate decisions have made it easier for judges to navigate these complex issues, ultimately benefiting businesses by ensuring a more predictable and fair legal environment.

Regardless of these developments, businesses should continue to take class action risks seriously. Class proceedings continue to be steadily filed year over year with many cases reaching settlements in the hundreds of millions to billions of dollars. While not rising to the level seen in the United States, Canadian courts have become very familiar with significant settlements and awards which are accompanied by significant class counsel fees. The latter continues to make it worthwhile for class counsel to spend the time and energy on investigating potential wrongdoings, developing coherent legal theories, and pursuing class actions to advance access to justice.

What's one trend you are expecting in 2025?

We anticipate a significant increase in class action activity this year due in large part to the developments in the case law that we saw in 2024.

In 2024, we saw a strong emphasis on the importance of an expeditious determination of civil proceedings including class actions. In *Barbiero v Pollack*, an appeal where we successfully acted for the respondent, the Court of Appeal had its eye on the contemporary needs of the civil justice system and upheld the dismissal of a class proceeding for delay under the Ontario Rules of Civil Procedure. Very recently, in *Tataryn v Diamond & Diamond Lawyers LLP*, the Court of Appeal upheld the dismissal of a class action for delay under section 29.1(1) of the *Class Proceedings Act*. Both of these cases lay out principles that will certainly be tested under different fact scenarios.

We could not conclude our remarks without highlighting the case recently argued at the Supreme Court of Canada, *Markowich v Lundin Mining Corporation*. Corporations are eagerly awaiting the decision which is expected to provide clarity to the definition of "material change" (that is, what is important enough to merit public disclosure) under the *Securities Act*. Lenczner Slaght represented the CFA Societies Canada Inc, one of the intervenors on this appeal. The Supreme Court of Canada's decision will impact the prevalence of future securities class actions.

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OUR CLASS ACTIONS EXPERTISE

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.

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OUR ARBITRATION EXPERTISE

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, our extensive and unrivalled trial experience makes us a top choice for arbitration clients.

"Arbitration cannot be extended to non-parties without their unequivocal agreement."

What was the most interesting development of 2024, and why?

Arbitrations are confidential and final processes, with limited scope for appeal and judicial oversight. It was therefore no surprise that the biggest cases in 2024 dealt with issues of arbitrator bias — an area where courts are often asked to intervene.

In *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*, Justice Steele overturned two arbitration awards because of a reasonable apprehension of bias stemming from the arbitrator's failure to disclose a subsequent appointment by the same counsel. Arbitrators promptly moved to disclose everything under the sun, rather than risk the same result in their cases.

In its Court of Appeal decision, the Court reinstated the arbitral awards and clarified that under the Model Law, the test for disclosure is objective, focusing on how an objective observer would view the situation. The Court also emphasized that repeat appointments alone do not trigger a disclosure obligation unless there is a stronger connection, such as overlapping issues or parties.

In *Vento Motorcycles Inc v United Mexican States*, Justice Vermette found a reasonable apprehension of bias after the respondent offered undisclosed opportunities to one of the arbitrators during the arbitration. Nonetheless, the Court exercised its discretion under Article 34(2) of the Model Law and declined to overturn the award on the basis that bias affecting one arbitrator does not necessarily "taint" the award if the remaining members of the panel are unbiased. This case is now under appeal and will be one to watch carefully in 2025.

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

Building on *Peace River Hydro Partners v Petrowest Corp*, courts have considered if and how successors, assignees, and beneficiaries are made subject to arbitration agreements. Recent decisions suggest a reluctance to require non-signatories to arbitrate absent express acceptance of arbitral agreements.

In *Sociedad Concesionaria Metropolitana De Salud SA v Webuild SPA*, the Court stayed the enforcement of an arbitral award against a successor entity who was not a signatory to the arbitration agreement, holding that the "threshold issue" of whether the successor entity assumed liability through a restructuring process had to be determined first.

In *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, the Court of King's Bench of Alberta held that the third-party beneficiary under the warranty provisions of a subcontract was bound by an arbitration clause, despite being a non-signatory. The Alberta Court of Appeal disagreed and held that in the absence of explicit contractual language binding Husky Oil to arbitrate warranty claims, no obligation to do so could be imposed on a non-signatory. This decision underscores the principle that arbitration cannot be extended to non-parties without their unequivocal agreement.

What's one trend you are expecting in 2025?

Another way courts can intervene in the arbitral process is when interim injunctive relief is required. Justice Kimmel's recent decision in *NorthStar Earth & Space Inc v Spire Global Subsidiary Inc*, suggests that a more "relaxed" modified standard for injunctive relief should be applied in the context of international arbitrations.

NorthStar contracted with Spire to manufacture, launch, and bring satellites into commercial operation. However, due to performance issues with the satellites, NorthStar stated that it would commence arbitration. In the interim, NorthStar sought an urgent injunction to prevent the deorbiting or decommissioning of the failed satellites until their claims are resolved. The Court granted the injunction, holding that only a "reasonable possibility" of success was required in the arbitral context, rather than the usual requirement of a "strong *prima facie* case."

The decision in *NorthStar* departs from longstanding Ontario precedents that have consistently applied the RJR-MacDonald test for the issuance of interim measures in both domestic and international arbitrations. This case may mark the beginning of a new trend, providing a new and compelling reason to seek urgent relief through the courts, even when an arbitration agreement is in place.

Commercial Litigation

"Businesses pursuing breach of contract claims should be aware that they may be held responsible for any damages resulting from their own actions."

What was the most interesting development of 2024, and why?

While Canadian courts addressed many commercial issues throughout 2024, one decision stood out for clarifying the law in Ontario on a previously unclear area, and for its potentially far-reaching consequences for commercial actors.

In *Arcamm Electrical Services Ltd v Avison Young Real Estate Management Services LP*, the Court of Appeal for Ontario confirmed that courts can apportion damages in a breach of contract case based on a consideration of the "contributory negligence" of the parties. There was a longstanding disagreement in the case law whether contributory negligence was limited to actions in tort or could apply equally to contractual disputes.

In that case, the plaintiff obtained summary judgment against the defendant for unpaid invoices related to the repair of the defendant's electrical power system. The defendant defended the action by alleging, among other things, that the plaintiff's conduct caused a portion of the damage that the plaintiff repaired and invoiced for.

On appeal, the defendant argued that this "contributory fault defence" raised a genuine issue for trial. Justice Gillese agreed. She found that the defendant's contributory fault defence was a genuine issue for trial, and in so doing reviewed whether contributory fault could be advanced as a defence to a claim in contract. Justice Gillese acknowledged the "long-standing debate" about whether the courts can apportion damages in a breach of contract case based on a consideration of the "contributory negligence" of the parties and reviewed the prior conflicting case law on this topic.

Justice Gillese cited with approval the reasoning in *Tompkins Hardware Ltd v North Western Flying Services Ltd*, that negligence on the part of a plaintiff should have the same effect in reducing damages regardless of whether the claim is brought in tort or contract, and that the principle in tort cases where a person is part author of their own injury, the person cannot call upon the other party to compensate them in full, applies equally in contract cases. This confirmation by the Court of Appeal is interesting not simply because it clarifies a long-disputed area of law, but because the extension of the principle to contract cases has necessary implications for many ongoing or future cases.

What's the primary takeaway for businesses from this decision?

The decision clarifies that businesses pursuing breach of contract claims should be aware that they may be held responsible for any damages resulting from their own actions.

For businesses advancing such claims, it is another potential hurdle to recovering in the action. Businesses that have claims against other parties for breach of contract need to carefully consider whether (and if so, to what extent) their conduct could have contributed to the damages claimed. This is an important component in evaluating their claims, and in evaluating their likely recovery if successful. Businesses already had to consider the obligation to mitigate damages, but must now be alive to the risk of reduction of damages based on their own negligence.

For businesses defending such claims, it is another potential tool in defending the action. Those businesses who face claims for breach of contract should assess whether the plaintiff's conduct led to some of the damages claimed. For many businesses, a contributory fault defence may supplant the necessity of a counterclaim, with potentially less exposure to costs.

Businesses should also consider whether the presence of such a defence triggers any insurance reporting or coverage issues.

What's one trend you are expecting in response?

It will be important to follow those decisions that apply *Arcamm* in the coming months and throughout 2025.

As these defences are adjudicated on the merits, identifying the specific factual circumstances in which courts grant these defences (and where they do not), along with the evidence required to succeed, will be important for businesses to understand and consider in evaluating their claims and defences.

In the interim, we expect that defendants to breach of contract actions will begin more regularly advancing contribution defences.

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OUR COMMERCIAL LITIGATION EXPERTISE

Commercial litigation is 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.

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Commercial litigation is 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, including fraud. 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.

Commercial Litigation – Fraud

"Businesses are not only at risk of being victims of fraud, but also of being sued by their clients who are victims of fraud."

What was the most interesting development of 2024, and why?

The growing reliance of businesses on cyberspace has led to increased threats and proliferation of fraud using digital technology. In response, we have seen the courts demonstrate an ability and willingness to adapt to the evolving landscape of cyber fraud, keeping pace with cyber-fraudsters. In recent years, the courts have engaged with the unique nature of cyber fraud disputes, embracing the challenges involved. As a result, we continue to see the implementation of effective and time-critical legal remedies in this area.

Some of the most common cyber fraud trends affecting businesses involve cyber scams aimed at perpetuating financial fraud, and schemes involving exploitation of digital assets, such as cryptocurrencies.

Similar to other civil fraud cases, interim injunctive relief and related investigation and freezing orders continue to be the most effective remedies granted by the court in dealing with cyber fraud. Following significant cases such as *Li v Barber*, where Lenczner Slaght acting as agent for class counsel in a class proceeding successfully obtained an *ex parte* Mareva (freezing order) involving cryptocurrency, and *Cicada 137 LLC v Medjedovic*, where the Court granted an Anton Piller search order in connection with $15 million in digital assets, courts have continued the trend of providing parties with necessary protections, by granting injunctions and other extraordinary relief where appropriate.

In *Kirshenberg v Schneider*, which involved misappropriation of funds by a cryptocurrency brokerage, the Court granted an interim order for the custody and preservation of a cryptocurrency wallet, as well as an accompanying Anton Piller search order to assist the plaintiff with locating any passcodes to the wallet. In making the order, the Court relied upon the specific and unique nature of digital assets in concluding that the orders were necessary. This case demonstrates that our courts have become increasingly more knowledgeable and comfortable in adjudicating cases relating to digital assets and cyber fraud.

Courts are also granting injunctive relief in cyber fraud cases to facilitate the disclosure of documents and information for the purposes of identifying parties and tracing assets. In *Meintjies v John Doe*, which involved the wire transfer of funds to a fraudulent bank account, the Court granted a Norwich order compelling a financial institution to produce information and documents assisting the plaintiff with tracing the missing funds and determining the identity of the wrongdoers.

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

Businesses should be mindful of the fact that cyber fraud related breaches are occurring regularly, with cyber-fraudsters continuously exposing new vulnerabilities. No organization is immune. In 2024, both public and private institutions have been subject to high profile attacks, from libraries to hospitals, law firms, retailers, and financial institutions.

Businesses must invest in prevention, detection, and monitoring in response to cyber threats. Rather than wait until they have fallen victim to cyber fraud, they should proactively consider their existing policies and practices to avoid potential risks against the business and its clients and other stakeholders.

Businesses are not only at risk of being victims of fraud, but also of being sued by their clients who are victims of fraud. In *Gesner v Coast Capital Federal Savings*, the British Columbia Supreme Court concluded that the defendant bank was not liable for failing to protect its client from an online romance scam. However, the British Columbia Court of Appeal in *GD v South Coast British Columbia Transportation Authority* allowed a privacy class action by employees against their employer which had been a victim in a cyber attack, because of the loss of privacy suffered by the employees. The Court concluded that there may be a cause of action against an organization that failed to institute adequate protection against a cyber attack.

What's one trend you are expecting in 2025?

We anticipate that 2025 will continue to see an increase in cyber fraud and all the types of related litigation, with fraudsters leveraging AI and other cutting edge technologies.

As exposure to cyber fraud grows and knowledge about potential threats increases, we also expect increasingly greater regulation of cybersecurity and digital assets.

Commercial Litigation – Shareholder Disputes

"In the absence of fraud or other serious misconduct, we expect the trend of minimum intervention and interim relief to continue."

What was the most interesting development of 2024, and why?

Shareholder disputes in 2024 focused on the little things. Instead of blow-out oppression trials, which risk ending in lose-lose situations, shareholders in closely held companies pursued incremental interim and interlocutory remedies in efforts to end deadlocks, resolve succession disputes, and regain oversight (if not control) of their businesses.

In *Penelas v Cruise*, Justice Kurz granted an interlocutory injunction restoring the ousted director of a corporation until such a time as the trial can be heard. In *Georghiades v Georghiades*, Justice Black appointed a monitor with a prescribed mandate to regularize information sharing between two co-owner brothers in an oppression dispute. In both cases, the Court weighed in on the terms of how the corporations should be operated on an interim basis, without making any final decisions about oppression or control.

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

Shareholder disputes can get ugly fast. While the best protection is to ensure that robust governance and carefully drafted shareholder agreements are in place before a dispute arises, the second best protection is to seek early input from experienced outside advisors.

Courts faced with shareholder disputes will be asked to scrutinize every past interaction. Shareholder disputes are often emotional, especially when they involve family or long-standing friendships. If you are the "insider" responsible for the day-to-day operations, having an external personal advisor vet your communications and business decisions can protect you against the risk of self-harm. For "outsiders", early accounting and legal advice is crucial to ensure that requests for information and oversight are detailed and effective.

Leaders of closely held companies often consider the company to be an extension of themselves — particularly if they are also the controlling shareholder. Be careful to keep your personal advice personal. If litigation is on the horizon, it is often a good strategy to appoint separate counsel for the company. While it may be tempting to have the lawyer for the controlling shareholder also act as counsel to the company, that approach can compromise solicitor-client privilege and create a conflict of interest that is difficult to manage.

In *Sanfilippo c Csombo*, the Superior Court of Québec disqualified a lawyer from acting on behalf of both the controlling shareholder/sole director and the corporate entities. The Court held that where the interests of the majority shareholder in their capacity as shareholder might conflict with the best interests of the corporation, independent corporate counsel should be appointed by consensus of all shareholders.

What's one trend you are expecting in 2025?

Succession is not just a hit TV show. Generational change is coming, or already here, in many closely-held and family businesses. Whether that means children hungry for ownership responsibilities, an unequal division of labour among siblings, or a lack of business interest or aptitude in the younger generation, periods of transition can be fraught and outside assistance is often required to manage expectations and resolve disputes.

Where litigation is unavoidable, the oppression remedy offers an exceptionally flexible tool to allow the court to intervene with a light touch. In the absence of fraud or other serious misconduct, we expect the trend of minimum intervention and interim relief to continue, with both the court and litigants loath to engage in full-fledged battles that risk harming — or ending — successful and long-standing businesses. In particular, we would not be surprised to see more courts dealing with early motions for buy-sell terms where the parties agree to separate their interests, but cannot agree on terms.

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OUR COMMERCIAL LITIGATION EXPERTISE

Commercial litigation is 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, including shareholder disputes. 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.

Competition

"In 2025, there will be more enforcement action, both by the Competition Bureau exercising its new powers and through expanded private enforcement of competition laws."

What was the most interesting development of 2024, and why?

The most interesting development was legislative change. In 2024, the third wave of recent *Competition Act* amendments received royal assent, and prior amendments that had been delayed to allow businesses time to prepare came into effect. This is part of an ongoing expansion of the powers and scope of the Competition Bureau enabling it to more effectively foster competition in Canadian markets. For example:

- The Act now explicitly prohibits "greenwashing" as a reviewable deceptive marketing practice, defined as inaccurately representing to the public that a product or business activity protects or restores the environment or mitigates the causes or effects of climate change;
- The Act now contains stronger powers for both the Commissioner and private parties to address anticompetitive agreements before the Competition Tribunal; and
- The Act contains a variety of tools to allow the Commissioner to more effectively address potentially anti-competitive mergers.

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

As the Commissioner for Competition recently stated: "we are in 'a new era' of competition law, of compliance and of enforcement". Businesses can expect a more robust Competition Bureau, with a larger budget and more powers to investigate and prosecute anti-competitive conduct.

However, there remains little guidance from the Competition Bureau on what many of the recent legislative changes mean and clarity is needed. While the Competition Bureau is consulting in several areas and is expected to release enforcement guidelines and policy statements in 2025 respecting many of its new and expanded powers, including the new greenwashing amendments, there is currently much uncertainty about how many of its new powers will be exercised. It will also take time for courts and the Competition Tribunal to release decisions that clarify the amendments and evolve the law. It is important for businesses to re-evaluate their compliance with competition laws to account for the new changes. This may be particularly important for businesses that operate in areas likely to attract increased scrutiny from the Competition Bureau in the years ahead, such as those that make environmental claims about the products or services they offer.

What's one trend you are expecting in 2025?

There will be more enforcement action, both by the Competition Bureau exercising its new powers and through expanded private enforcement of competition laws. This is likely to increase the amount of competition litigation involving businesses.

Of particular note, in June 2025, *Competition Act* amendments expanding private rights of action before the Competition Tribunal will take effect, which is likely to dramatically increase private enforcement. While private access to the Competition Tribunal is not new, under the amendments, private parties may (with leave) challenge a far broader range of reviewable practices than they can now, including deceptive marketing practices and anti-competitive agreements that are not criminally actionable under section 45.

The test for private standing before the tribunal has also been amended. Currently, a private applicant must prove it is directly and substantially affected by the conduct in question. For some applications, the amendments lower the requirement for proving that an applicant has been affected and require the application to be in the "public interest". Other applications need only be in the public interest. While we await guidance from the Competition Bureau on how these tests will be applied, both are expected to be far lower thresholds than the current test for standing.

Finally, there will be a new monetary remedy intended to incentivize private parties to bring matters to the Competition Tribunal. The available remedy, calculated based on the benefit the respondent derived from its anti-competitive conduct, is potentially quite substantial. The award may be paid to the applicant or any other person affected by the conduct. This collective relief option may mean that certain private actions operate similar to class action litigation.

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OUR COMPETITION EXPERTISE

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 competition class actions. Our clients include leading multinational manufacturers, auto parts companies, and technology companies, among others. 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.

Construction

"All construction industry participants will have to consider the changes introduced by Bill 216 and may need to improve, or at least adjust, project controls and commercial strategies to reflect this new statutory scheme."

What was the most interesting development of 2024, and why?

The most interesting development of 2024 was the Ontario Government's introduction and passing of Bill 216: Building Ontario For You Act (Budget Measures) ("Bill 216"). Once enacted, Bill 216 will make significant changes to the holdback regime in Ontario's *Construction Act*.

The Act currently only permits the phased or annual release of holdback in circumstances where:

1. The contract price is more than $10 million; and
2. The parties agree.

Bill 216 eliminates the monetary threshold, and requires all owners make annual holdback payments in construction contracts with a duration of greater than a year. It also requires that the owner publish a notice of the annual holdback release. Bill 216 extends these same obligations to contractors and subcontractors.

Further, section 27.1 of the Act previously permitted non-payment of holdback by an owner or contractor if the appropriate notice was provided. However, with Bill 216 repealing section 27.1, there is now no obvious right for an owner or contractor to exercise a right to set-off or issue a notice of non-payment. Instead, owners and contractors may only be excused from releasing annual holdback payment if there are liens that have not been vacated or discharged.

Once these amendments come into effect, they will have immediate application to ongoing projects, except for projects commenced before the 2018 amendments to the Act.

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

Mandatory annual holdback release is a significant change which will disrupt a lot of the existing dynamics on projects of all sizes. All construction industry participants will have to consider the changes introduced by Bill 216 and may need to improve, or at least adjust, project controls and commercial strategies to reflect this new statutory scheme.

The annual release of holdback will be welcome news for contractors and subcontractors working on long term projects where holdback can sometimes remain with the owner for years. It does, however, come with additional administrative burdens which may be onerous for small projects or for small subcontractors.

Given the short turnaround for notice and payment of holdback, and the consequences of non-compliance, it will be important for owners and contractors to have a system in place to manage and keep track of the holdback deadlines.

The amendments are not without some controversy as it is unclear whether a contractor (or subcontractor) has an independent obligation to release all accrued holdback to their subcontractors, even if the owner does not comply with their obligations. This could put contractors and down-stream construction industry participants in a difficult situation if the owner makes a partial release of holdback.

What's one trend you are expecting in 2025?

One trend we expect to see in 2025 is a shift towards a greater need to manage risk, cash flow, and claims, throughout the life of a construction project. This is in part a result of the changes to the Act, including previous changes to the legislation in 2019, which require claims to be addressed and adjudicated mid-project, and the impending changes that will require companies to manage lien and holdback claims throughout the life of the project.

The need for ongoing risk and claims management throughout the life of a project will be elevated further by the increased market risks caused by threatened tariffs on construction materials, and potential labour issues stemming from changes to immigration rules and restrictions across the continent. These factors all work together to make it more difficult than ever to defer the consideration of claims until the end of a project, and militate in favour of increased flexibility in selecting project delivery models and dispute resolution schemes.

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OUR CONSTRUCTION & INFRASTRUCTURE EXPERTISE

Lenczner Slaght handles some of the largest, most complex, and high stakes construction matters in Canada, including for owners and developers, contractors and subcontractors, lenders and underwriters, and architecture and engineering firms. Our 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.

Defamation

"In reported decisions, Ontario courts ultimately dismissed over two-thirds of anti-SLAPP motions in 2024."

What were the most interesting developments of 2024, and why?

There were at least three interesting developments in the law of defamation in 2024.

First, courts were more reluctant to grant motions to dismiss defamation actions pursuant to provincial anti-SLAPP legislation.

Anti-SLAPP legislation in Ontario and British Columbia allows defendants to seek the early dismissal of lawsuits that unduly limit expressions related to a matter of public interest.

In reported decisions, Ontario courts ultimately dismissed over two-thirds of anti-SLAPP motions in 2024. The Court of Appeal for Ontario allowed two appeals from anti-SLAPP judgments. In both, the Court reversed decisions that had granted the anti-SLAPP motions (*Marcellin v London (Police Services Board)* and *Hamer v Jane Doe*), allowing the defamation actions to proceed.

Similarly, in the high-profile case of Steven Galloway in *Rooney v Galloway*, the Court of Appeal for British Columbia affirmed a lower court decision dismissing the anti-SLAPP motion, allowing Mr. Galloway's action to proceed. In doing so, the Court even reinstated certain aspects of Mr. Galloway's claim that had been dismissed.

When expressing their reluctance to dismiss defamation actions in 2024, courts repeatedly noted that anti-SLAPP motions are intended as a simple screening mechanism. We expect this trend to continue.

Second, courts affirmed the significance of the presumption of general damages in defamation law on an anti-SLAPP motion.

Canadian anti-SLAPP precedents require plaintiffs to show credible evidence of harm that outweighs the public interest in the speech at issue. In 2024, courts confirmed that the presumption of general damages is evidence of harm and may be sufficient to outweigh the public interest value in the impugned expression. In affirming the significance of this long-standing presumption, the Court in *Kielburger v Canadaland Inc*, a case in which Lenczner Slaght acted as counsel, concluded that the plaintiff's subjective feelings of injury outweighed the public interest value of the impugned expressions.

Third, in 2024, courts were much more inclined to grant successful claimants their costs of an anti-SLAPP motion.

Anti-SLAPP legislation altered the usual "loser pays" rule in Canadian civil litigation, meaning that plaintiffs who successfully defend against these motions face a rebuttable presumption that they are not entitled to their costs. However, in 2024, courts were more likely than before to award costs to successful plaintiffs.

Our analysis of 2024 Ontario anti-SLAPP motion decisions shows that more than three-quarters of such decisions, which dismissed the motion and addressed costs, did so by awarding costs to the plaintiffs. Those costs awards ranged from $10,000 to $110,000.

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

Previously, defendants frequently used anti-SLAPP motions due to high standards for plaintiffs and lower risks of adverse costs. However, decisions in 2024 show that these conditions have changed. Moving forward, businesses and media outlets facing defamation risks must now be more strategic in using anti-SLAPP motions. They are no longer always the best initial defense.

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OUR DEFAMATION & MEDIA EXPERTISE

Lenczner Slaght has decades of litigation experience in defamation and related media matters. We regularly act as litigation or advisory counsel in libel issues arising across all print, broadcast and digital media channels. We have represented both plaintiffs and defendants through libel trials and appeals. We don't just practice libel law: we shape it. Our lawyers have argued some of the leading defamation law cases before the Supreme Court of Canada.

Document Discovery

"While technological advances over the last five years continue to reduce the cost of reviewing and analyzing electronic data, the ever-increasing size of datasets may offset the savings that technology can provide."

What were the most interesting developments of 2024, and why?

Last year we watched generative AI's rapid evolution into a credible tool for the review and analysis of electronic evidence. While forms of AI, such as machine-learning assisted review, have been available for some time, 2024 was noteworthy in that widely used review platforms, such as Relativity, introduced their generative AI capabilities to the market. Significant effort was also made to demonstrate the trustworthiness and reliability of the generative AI review processes offered.

Using properly crafted queries or prompts, counsel using these generative AI tools should be able to quickly and accurately review large sets of documents for relevant issues in a case and to locate significant documentary evidence within a matter of hours and with minimal manual document review. Some tools even write summaries of their results, helping counsel build their cases. While the need to supervise these processes and critically examine the output of generative AI remains, this is facilitated by features available in the software itself which support generative AI's findings through specific document citations or explanatory text.

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

As the volume of data created and housed by organizations continued to grow in 2024, so did the cost of handling electronic evidence. While technological advances over the last five years continue to reduce the cost of reviewing and analyzing electronic data, the ever-increasing size of datasets may offset the savings that technology can provide. Organizations interested in reducing their litigation spending must have a good handle on their data such that they can easily identify sources of relevant information when involved in a legal proceeding.

In 2024, generative AI failed to deliver expected cost savings. Many clients found the per-document pricing, up to 40 cents, too high. For large document sets, the costs of using generative AI were comparable to, or even higher than, human review

What's one trend you are waiting for in 2025?

2024 witnessed the start of generative AI's move from the interesting-but-untested margins of document discovery to its core functions. In 2025, we will see generative AI continue to forge into the mainstream. We expect to see generative AI tools being tested in major litigation matters, by reputable law firms who will report positive results to the market. The technology will also be tweaked and improved over 2025 based on feedback from these early adopters.

Review platforms featuring generative AI may begin to explore more affordable or flexible pricing models. Nevertheless, we suspect the cost to use these tools will remain prohibitively high for many matters in 2025. Finally, third-party service providers who wish to continue in the legal review space will need to quickly learn how to incorporate generative AI into their workflows and how to better master the technology.

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OUR DOCUMENT DISCOVERY EXPERTISE

We develop and execute the most efficient and effective document management solutions for our clients. This includes creating a tailor-made discovery strategy for each matter that considers budget, the matter's value, the nature of the electronic evidence involved, and risk. We regularly assess the best discovery techniques to use in a given case, and leverage all forms of technology to make discovery more efficient.

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OUR EMPLOYMENT EXPERTISE

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 should review and update termination clauses and think twice before entering fixed-term employment agreements."

What was the most interesting development of 2024, and why?

2024 provided the employment bar with decisions from both the Ontario Superior Court of Justice and the Court of Appeal for Ontario in the case of *Dufault v The Corporation of the Township of Ignace*. In the lower court decision, Justice Pierce introduced new grounds for invalidating termination clauses in employment agreements. Justice Pierce found that the termination clause, which contemplated an employer's ability to terminate "at any time" and "in their sole discretion", violated the *Employment Standards Act* (ESA) because pursuant to the protections afforded by the ESA, an employee cannot be terminated at the conclusion of a statutory leave (section 53) or for attempting to exercise a right under the ESA (section 74).

This reasoning ignores the plain meaning of the termination clause and misconstrues the ESA. The plain meaning of the clause at issue does not provide an intention by the employer to terminate employment in circumstances contrary to the ESA.

This decision is significant because many termination clauses contain "at any time" or "in their sole discretion" language. This decision impugns the enforceability of many employment agreements in Canada. The employment bar hoped the Court of Appeal would clarify the law, however, in their decision, the Court of Appeal specifically chose not to address this issue.

The decision may still be appealed to the Supreme Court of Canada.

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

Employers should review and update termination clauses and think twice before entering fixed-term employment agreements.

In both the cases of *Dufault* and *Kopyl v Losani Homes (1998) Ltd*, the termination clauses were found to be unenforceable, and the former employees were entitled to all compensation and benefits to the end of the fixed term. In *Dufault*, the employee was terminated two months into a 25-month fixed-term contract and was awarded the remaining 23 months. In *Kopyl*, the employee was terminated 9 days into a 12-month fixed-term contract and was awarded the remaining nearly 12 months.

Termination clauses limiting termination entitlements to those set out in applicable employment standards legislation, or providing greater entitlement, mitigate risks associated with the early termination of a fixed-term contract. Such clauses should typically be favoured over fixed-term contracts.

What's one trend you are expecting in 2025?

We are watching to see if the use of motions to strike in wrongful dismissal claims will become more common following the decision in *Bertsch v Datastealth Inc.*

In *Bertsch*, the Superior Court confirmed the enforceability of an ESA-minimum termination clause that excluded common law notice periods in a motion to strike. The defendant employer brought the motion to strike in advance of defending the claim.

The Court held that the motion was appropriate in this case and could be relied on to resolve issues of law relating to contractual interpretation. The Court noted that the use of a motion to strike in this situation is an efficient use of the Court's processes, resulting in a useful and just outcome.

Ultimately, the Court agreed with Datastealth that the terms of the contract were unambiguous, and that there is no reasonable interpretation of the provisions which result in a violation of the minimum requirements of the ESA and its regulations. The claim was struck without leave to amend.

In the end, the Court sided with Datastealth, agreeing that the contract's terms were clear and straightforward. The Court found that there was no reasonable way to interpret the contract that would lead to a violation of the minimum requirements set by the ESA and its regulations. As a result, the claim was dismissed, and no changes to the claim were allowed.

We understand the case is being appealed. If the decision is upheld, we anticipate more employers will use motions to strike in contractual termination clause disputes as they provide a timely and cost-effective path to dismiss frivolous claims.

Injunctions

"Injunctions decided across Canada in 2024 continue to be as varied and diverse as the rights and interests they aim to protect."

What was the most interesting development of 2024?

Injunctions decided across Canada in 2024 continue to be as varied and diverse as the rights and interests they aim to protect.

This year, we noted several interesting developments in injunctions addressing clashes between public and private rights. In *University of Toronto (Governing Council) v Doe*, in which Lenczner Slaght represented the University of Toronto, and *Vancouver Island University v Kishawi*, the Ontario Superior Court and BC Supreme Court respectively granted an injunction to end protest encampments on campus. In each case, the courts considered whether the Charter applied to University property with both courts expressing serious doubt that it does. Relatedly, courts in Ontario, Alberta, and British Columbia — in *Heegsma v Hamilton*, *Coalition for Justice and Human Rights Ltd v Edmonton*, and *Matsqui-Abbotsford Impact Society v Abbotsford (City)* respectively — all addressed injunctions concerning encampments for unhoused individuals. Each of these injunctions unsuccessfully sought to prevent the enforcement of statutes and bylaws that would allow officials to evict encampment residents. While the Courts denied the injunctions, they generally held that the relevant statutes and bylaws needed to be enforced in a manner that respected the Charter rights of the encampment residents.

Notwithstanding the high bar to meet, many litigants also attempted to seek injunctions to prevent future harmful speech in defamation cases. Freedom of expression features heavily in these cases and in relation to the still relatively new tort of placing a party in a "false light" (see for example *Gillespie v Fraser*). As noted in the recent decision in *Evangelisti v Canadian Broadcasting Corporation* (upheld at the Court of Appeal of Ontario):

> "A court will only issue an injunction to restrain future speech where the court is satisfied that any reasonable trier of fact would find the words to be spoken so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed."

However, where a defendant's statements meet this threshold and there is evidence that the statements were made maliciously or there is an intention to continue making them, freedom of expression will continue to fall away in favour of the need to protect victims of defamatory content. This is particularly so in the internet era, where courts continue to recognize the wide reach of potential harm, as seen in *Spurvey v Melew* and *Château Morritt Inc c Chauret*.

Finally, in 2024, injunctions continued to be a powerful tool to respond to cases of fraud. In *Eurobank Ergasias SA v Bombardier Inc*, the Supreme Court of Canada upheld an injunction granted initially by the Québec Superior Court, enjoining National Bank from honouring a letter of credit which was found to have been demanded on a fraudulent basis. 2024 was also another strong year for Mareva injunctions, with the Toronto Commercial List issuing cases such as *Trustar Underwriting Inc v Moses* and *Original Traders Energy Ltd (Re)*, a case in which Lenczner Slaght acted as counsel, demonstrating that while freezing orders have long been characterized as "extraordinary relief" and even, at times, "draconian" — provided a moving party can adduce enough evidence to meet the test and comes to court making full and frank disclosure, the relief is very likely to be granted.

What are some takeaways for businesses from the past year?

The test to obtain an injunction remains a difficult one to meet (at a minimum, requiring a serious issue to be tried, irreparable harm, and a balance of convenience). Significant evidence is typically required. Nevertheless, despite this high threshold, businesses should keep in mind that courts are inclined to grant an injunction when a compelling case is made. Successfully obtaining an injunction can often lead to a favourable resolution of the litigation. Used carefully and strategically, an injunction can be a powerful tool in the litigation toolbox.

What's one trend you are expecting in 2025?

Consistent with 2024, we expect that injunctions will be increasingly brought in the context of pressing political and social issues, including climate change, human rights, and public health. For a further example from this year, in the Alberta Court of Appeal's decision in *Ferguson v Tejpar*, the Court dealt with a restrictive covenant related to property use, which limited a property owner's ability to build one residence per lot. While the Court found an injunction to enforce the valid restrictive covenant was premature on the facts, such decisions could be a precursor to more disputes involving environmental regulations and land use.

These injunctions, and others like them, may raise complex and novel legal and factual questions, as well as ethical and political dilemmas, that will require careful and creative analysis and resolution by the courts.

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OUR INJUNCTIONS EXPERTISE

Both obtaining and responding to extraordinary legal remedies such as injunctions require the support of a highly skilled and experienced legal team. Lenczner Slaght has extensive experience and knowledge in this specialized practice area and has successfully obtained and responded to a variety of injunctions on an urgent basis, including prohibitive, mandatory, and temporary injunctions, as well as Mareva, Anton Piller, and Norwich Orders.

Insolvency & Restructuring

"2024 saw a substantial annual increase in business insolvency filings, especially in Ontario."

What was the most interesting development of 2024, and why?

The Supreme Court of Canada applied the corporate attribution doctrine in the bankruptcy and insolvency context for the first time in two important decisions. The corporate attribution doctrine is a legal principle that determines when the actions and intentions of individuals within a company (like directors or employees) can be considered as the actions and intentions of the company itself.

In *Aquino v Bondfield Construction Co*, the Court addressed corporate attribution in the context of the corporation setting aside payments as transfers at undervalue under the *Bankruptcy and Insolvency Act*. The directing mind of two insolvent family-held construction companies, John Aquino, had siphoned tens of millions of dollars from the companies through a false invoicing scheme. The Court held in *Aquino* that corporate attribution was appropriate in this case to protect the companies' creditors. It found that Mr. Aquino acted within his corporate responsibility in his intention to defraud, defeat, or delay a creditor, and that his intent should therefore be attributed to the companies. It attributed this intent in spite of the fact that Mr. Aquino had also defrauded the companies themselves, and they did not benefit from his actions.

In *Scott v Golden Oaks Enterprises Inc*, the Court addressed corporate attribution for the purpose of determining when the corporation discovered claims arising out of a Ponzi scheme perpetrated by the corporation. The Court rejected the argument that the knowledge of a sole directing mind in a "one-person" corporation must *always* be attributed to the corporation, as that effectively sets aside the principle of corporate separateness. Attributing knowledge of the wrongdoer directing mind would have unfairly barred the bankruptcy trustee's claims before it could assert them.

Both cases emphasize the courts will not apply mechanical, "one-size-fits-all" corporate attribution rules in insolvency cases where they create unfairness for corporate stakeholders and creditors.

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

Recent developments in both the courts and Parliament have brought significant changes to insolvency rules, underscoring the importance for businesses facing financial distress to stay informed and proactive in protecting their interests.

In *Poonian v British Columbia (Securities Commission)*, the bankrupts engaged in market manipulation causing investors to lose millions of dollars. The BC Securities Commission sought to ensure that its order for $13.5 million in administrative penalties and its order requiring the bankrupts to disgorge the approximately $5.6 million in proceeds from their fraudulent scheme survived the individuals' bankruptcies.

The Supreme Court of Canada emphasized that for debts like these to survive a bankruptcy discharge under section 178(1)(e) of the *Bankruptcy and Insolvency Act*, "there must be a direct link between the fraudulent statement in issue and the debt or liability". It held that the disgorgement order survived the bankrupts' discharge under that section, whereas the administrative penalties did not satisfy this test.

The federal government also enacted the *Global Minimum Tax Act* in June 2024, which applies to certain multinational enterprises. It contains measures governing claims by the Crown against insolvent multinational enterprises, including limitation periods for assessments and prosecutions.

What's one trend you are expecting in 2025?

In 2025, we expect the trend of increasing bankruptcy and insolvency litigation to continue. 2024 saw a substantial annual increase in business insolvency filings, especially in Ontario.

We also expect that courts will continue to emphasize commercial certainty in insolvency proceedings, for example:

- Where parties have agreed to contractual remedies upon default. If a party opposes the enforcement of agreed-upon remedies, for example the appointment of a receiver, they should be ready to provide evidence to support their opposition (see *Canada Ici Capital Corporation v Ecre Smart Living Hinton Inc*).
- Where a creditor alleges that an insolvent debtor's transaction is a fraudulent conveyance in bankruptcy, courts will analyze whether the transaction arises directly from the debtor's corporate structure, and whether the creditor knew of that structure prior to lending (see *IE CA 3 Holdings Ltd v NYDIG ABL LLC*).

With a likely federal election on the horizon, it is uncertain whether the federal government's 2024 budget proposal to repeal the debt forgiveness rules and the loss restriction rule for bankrupt corporations will be enacted.

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OUR INSOLVENCY & RESTRUCTURING EXPERTISE

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

"For claims that address wrongdoing and damages spanning an extended time period, it is important to ensure that all applicable insurers are put on notice and potentially named in any coverage suit."

What was the most interesting development of 2024, and why?

Two significant decisions released by the Ontario Court of Appeal in 2024 demonstrate that the court will give effect to the contractual bargain between the insurer and the insured, as well as the stipulated conditions and terms for coverage.

Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada addressed insurers' responsibilities in defending long-term claims related to the opioid crisis, which span several decades and involve multiple liability policies. In its decision, the Court rejected the idea that a single insurer could be responsible for all defense costs, regardless of the policy's time limits. Instead, the Court confirmed that defense costs should be shared among successive insurers based on the duration each insurer was on risk. The decision underscores the importance of adhering to the specific terms agreed upon between insurers and the insured.

This case clarifies how defense costs should be allocated among insurers in long-term claims, ensuring that each insurer only pays for the period they were on risk.

Lenczner Slaght represented the appellant, AIG Insurance Company Canada, in this matter.

In *Furtado v Lloyd's Underwriters*, an insured individual did not inform their insurer about a mandatory interview with a securities regulator. Initially, the law prohibited the insured from disclosing the investigation, and the insurance policy excused them from notifying the insurer under such circumstances.

However, the law was later amended to allow disclosure to insurers, but the insured still did not provide notice. The Court ruled that the insured failed to give timely notice. Since notifying the insurer was a condition required for coverage, the insured could not be excused from this requirement.

This case highlights the importance of staying updated on legal changes and ensuring timely communication with your insurer to maintain coverage.

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

These decisions demonstrate the importance of being familiar with and complying with any terms and conditions in insurance policies. Regardless of sympathetic circumstances, insurance is a contractual bargain which courts will enforce. Providing timely notice of a claim is essential and typically required for coverage. For claims that address wrongdoing and damages spanning an extended time period, it is important to ensure that all applicable insurers are put on notice, and potentially named in any coverage suit.

What's one trend you are expecting in 2025?

In *Gagne v Harrison*, a decision favouring the insured's interests, the Court overturned a motion judge's finding that an insurer could never owe a duty to an insured to assess an individual's needs regarding the appropriateness of an insurance product. While the ultimate issue is yet to be litigated, the door remains open to assert such a duty and for claims of this nature.

At the same time, like all industries, insurance providers are turning to generative AI to assist with creating efficiencies in their business models, including in the underwriting process. As this expands, there will be less human consideration of any individual issues that may arise. For example, outside the insurance industry, in *Moffatt v Air Canada*, a Civil Resolution Tribunal decision from February 2024, Air Canada was held liable for negligent misrepresentations made by its AI Chatbot to a consumer about the availability of refunds for bereavement fare. Similar concerns could easily arise in the context of underwriting coverage and/or responding to claims made in the future as these technologies become more sophisticated and are

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OUR INSURANCE EXPERTISE

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

"Many decisions from 2024 highlight challenges faced by businesses, specifically patentees, when applying for and enforcing patents in Canada."

What were the most interesting developments of 2024, and why?

2024 saw interesting developments relating to patents, trademarks, and copyright.

For patents, the Federal Court of Appeal clarified the law on entitlement to equitable remedies including injunctions in two companion appeals brought by Rovi Guides. The FCA reversed errors made by the trial judge and clarified that a successful patentee is presumptively entitled to profits tied to infringement, unless the defendant provides evidence why the Court should not award this remedy. Similarly, the FCA held that a permanent injunction should be refused to a successful patentee "only in very rare circumstances", a principle that holds true even if the patented invention is only a small part of the accused product, and even if the patentee does not practice its invention in Canada.

For pharmaceutical patents, in *Bayer v Amgen*, the Federal Court addressed section 6.07(1) of Canada's *Patented Medicines (Notice of Compliance) Regulations* for the first time since updates to the regulations seven years ago. The Court granted a declaration that the impugned patent was ineligible for inclusion on the Patent Register, and lifted the 24-month stay in respect of that patent.

In the area of trademarks, a key development was the publication of amendments to Canada's Trademarks Regulations. Of note, the amended Regulations will allow the Registrar to award costs against a party to a proceeding, a change that may deter parties from commencing unmeritorious oppositions or engaging in delay tactics during a proceeding.

For copyright, the proliferation of litigation relating to AI has been a key development, which we canvass in our blog series, *AI in the Courtroom*.

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

Many decisions from 2024 highlight challenges faced by businesses, specifically patentees, when applying for and enforcing patents in Canada.

For patent applications, the Supreme Court of Canada denied leave to hear an appeal in *Canada (Attorney General) v Benjamin Moore & Co*, missing an opportunity to provide clear guidance on the convoluted and complex area of patent law dealing with the patentability of computer-implemented inventions.

Several decisions also highlight challenges for patent enforcement. In *Mud Engineering Inc v Secure Energy Services Inc*, the majority of a divided FCA found the plaintiff failed to establish patent ownership in a summary trial. The majority held that the question of ownership is a threshold standing issue (for which the patentee bears the burden), rather than treating ownership as a validity attack (for which the defendant bears the burden). In *Steelhead LNG (ASLNG) Ltd v Arc Resources Ltd*, the FCA upheld a finding that the marketing of an apparatus that – if built – would infringe the patent, did not constitute "use" under section 42 of the *Patent Act*, limiting the flexible approach courts have historically taken when interpreting patent use.

What's one decision you are waiting for in 2025?

Leave to the Supreme Court of Canada was granted in *Pharmascience v Janssen*, addressing the question of whether dosing regimens are patentable subject-matter. Up to now, such regimes were patentable so long as not amounting to a method medical treatment. The appeal asks the SCC to reverse that long applied principle and find that dosing regimens are not an invention under the *Patent Act* and not patentable. This critical appeal is expected to be heard in mid-2025. The SCC decision of that matter has the potential to significantly impact the pharmaceutical industry; both in the ability to obtain and later enforce patents for dosage regimens. The SCC may also comment on patentable subject matter more broadly, which could have a bearing on, for example, computer-implemented inventions, and have far-reaching implications for all patentees in numerous industries.

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OUR INTELLECTUAL PROPERTY EXPERTISE

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.

Lenczner Slaght

Internal Investigations

"Before conducting an independent investigation, organizations should consider whether the benefits of creating a privileged relationship with the investigator outweigh the risk."

What was the most interesting development of 2024, and why?

In *Toronto Metropolitan Faculty Association v Toronto Metropolitan University*, an arbitrator held that investigations conducted by external legal counsel, where the terms of counsel's retainer create a solicitor-client relationship with the retaining organization, cannot comply with an organization's investigatory obligations under the Ontario Human Rights Code, the *Occupational Health and Safety Act*, and, in the particular case before the arbitrator, the organization's Collective Agreement and internal policies.

Two faculty members at Toronto Metropolitan University filed complaints regarding investigations they were subject to. They claimed that the investigator could reasonably be perceived as biased because the agreement between the investigator and the University suggested a lawyer-client relationship. The arbitrator found that, although the retainer agreements said that the investigators were being retained to conduct "independent investigations," they also expressly created a "legal services relationship" to preserve privilege. This was sufficient to create a solicitor-client relationship or, at the very least, a reasonable perception that one existed.

The arbitrator held that serving a dual role as an organization's lawyer and its independent investigator created an inherent conflict of interest, giving rise to a reasonable apprehension of bias, because:

- A lawyer's duty of loyalty and commitment to their clients causes conflicts with the fairness and neutrality required of an independent investigator.
- A lawyer's duty of candor conflicts with an investigator's interest in accommodating witnesses' reasonable requests for confidentiality or anonymity.

The arbitrator concluded that the duties of a lawyer "are antithetical to the fulfillment of the impartial, unbiased, independent, and objective role" of an independent investigator, and declared that the investigations in this case violated the terms of the University's Collective Agreement and its obligations under the Human Rights Code and the *Occupational Health and Safety Act*.

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

This decision could have significant implications for how statutory investigations are conducted in Ontario.

The result of the decision, if endorsed by the courts, is that organizations who retain external counsel to conduct investigations to comply with statutory obligations under the *Occupational Health and Safety Act* or the Human Rights Code should ensure that:

1. The retainer is not framed as a solicitor-client retainer (and that the organization is not otherwise in a solicitor-client relationship with the lawyer); and
2. The organization is aware that privilege will not apply to their communications with the investigator.

While the arbitrator clarified that an organization can always choose to retain external counsel to investigate under the umbrella of solicitor-client privilege, such an investigation will not meet the organization's requirements to conduct an impartial, fair, and reasonable independent investigation.

The arbitrator held that employees of an organization can perform independent and fair investigations, as they are not subject to the same professional obligations as lawyers. While the arbitrator did not address the issue of whether in-house counsel could properly conduct an independent and fair investigation, the natural implication of his decision is that they cannot. That would be unfortunate, as internal counsel are often well-placed to conduct procedurally fair investigations, because of their training.

It remains to be seen whether the arbitrator's analysis will be adopted by courts. In the meantime, before conducting an independent investigation, organizations should consider whether the benefits of creating a privileged relationship with the investigator outweigh the risk of an eventual adverse finding that the investigation did not comply with its statutory obligations.

Organizations should also consider whether their collective agreements or internal policies call for "independent" investigations, and whether their practices are consistent with that requirement if the arbitrator's interpretation were to be adopted by courts.

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OUR INVESTIGATIONS EXPERTISE

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

"While lawyers are permitted to leverage AI tools, we must 'supervise' them in the same manner as we would a non-licensee to ensure compliance with professional obligations."

What was the most interesting development of 2024, and why?

The increasing adoption of generative artificial intelligence was an important theme in 2024.

Professionals have embraced this technology and are reaping initial rewards. Health professions, for example, have recently seen growth in the use of AI-scribes, which summarize clinical encounters in detailed notes. These tools show potential to improve efficiency and reduce the administrative burdens faced by professionals. Professional service firms, including law firms, are integrating AI-powered document management, research, and composition tools into practice.

Professional regulators across industries have taken notice of AI adoption and are providing preliminary guidance to members. For example:

- The Chartered Professional Accountants of Ontario published a case study highlighting the risks presented by "hallucinations" – a phenomenon in which AI generates outputs that are not factual or reliable. CPAO reminds its members to fact-check AI-generated outputs.
- The College of Physicians and Surgeons of Ontario provided advice to physicians on the use of AI-scribes. This guidance specifically highlights the need to obtain patient consent for the use of these tools, review AI-generated notes for accuracy, and maintain patient privacy.
- The Law Society of Ontario issued a white paper to guide lawyers on the use of generative AI. It reminds lawyers that while they are permitted to leverage AI tools, they must 'supervise' them in the same manner as they would a non-licensee to ensure compliance with professional obligations.

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

While generative AI can provide an effective starting point in professional practice, it is important to keep a "human in the loop".

Zhang v Chen is an important reminder to exercise caution when using generative AI. In this case, a lawyer was ordered to pay a portion of her client's costs personally after relying on two non-existent cases "hallucinated" by ChatGPT in a notice of application. Although the lawyer withdrew these cases, Justice Masuhara ordered her to pay personal costs, reminding the profession that "... generative AI is still no substitute for the professional expertise that the justice system requires of lawyers". Following Justice Masuhara's decision in *Zhang*, the Law Society of British Columbia confirmed that it is investigating the lawyer's conduct. The LSBC reminded the public that it expects lawyers "to comply with the standards of conduct expected of a competent lawyer" when using generative AI.

Professionals are entitled to integrate generative AI into their practices. The appropriate use of these tools stands to improve efficiency and work product to the benefit of the public. However, inadequate oversight in the use of AI can have significant reputational and regulatory consequences.

What are the trends you are expecting in 2025?

We predict that in 2025, regulators and administrative tribunals will begin adopting generative AI into their processes.

Some groundwork for the use of AI by administrative bodies has already been laid at the federal level in the Treasury Board of Canada's Directive on Automated Decision-Making, which provides guidance on the steps that ought to be taken prior to incorporating AI into regulatory processes. For example, one important factor to be considered is how directly the process will impact individual rights or economic interests. A more cautious approach to the use of AI is warranted where a process will directly impact such rights and interests.

We are already beginning to see the adoption of AI-assisted automation in "back office" regulatory functions such as case-assignment and data analysis. For example, the US Securities and Exchange Commission has incorporated AI and machine learning into its process for detecting financial reporting fraud through an AI-based tool which detects anomalous patterns in the public financial reporting of corporate securities issuers.

It remains unclear whether there will be a meaningful role for AI technologies in those aspects of administrative justice that directly impact the rights and economic interests of individuals, such as tribunal decision making. However, AI-based tools will undoubtedly present regulators with many opportunities to increase efficiency in fulfilling their mandates with limited resources. The full extent of the use of generative AI in administrative law is still unfolding, and 2025 will be a year to watch.

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OUR PROFESSIONAL LIABILITY & REGULATION EXPERTISE

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.

Public Law

"Discussions around delegated authority and what it means to perform a 'public function' are likely to permeate Charter application decisions in the years ahead."

What was the most interesting development of 2024, and why?

In 2024, after a long period of uncertainty (and some jurisprudential friction), the Supreme Court of Canada turned its mind to the Charter's application to quasi-government entities.

Section 32 of the Charter limits its application to Parliament and the government of Canada, and the legislature and government of each province. For almost thirty years, the 1997 Supreme Court case of *Eldridge v British Columbia (Attorney General)* has been the leading case on the interpretation of section 32.

The Court in *Eldridge* outlined two branches for the application of the Charter:

1. If an entity is part of government because it is governmental in nature or substantially controlled by government, then the Charter applies to all its activities; or
2. If an entity is not formally part of government but performs governmental activities, then those activities are subject to the Charter.

With governments' expansion of delegated authority in recent years, however, more questions have been raised about what constitutes "government" for the purposes of Charter applicability.

The Supreme Court provided some additional clarity in March 2024 in *Dickson v Vuntut Gwitchin First Nation*. Here, the Court held that the Charter applied to a self-governing Indigenous community in the Yukon. The Court concluded that the First Nation was a government "by nature" under the first branch of *Eldridge*, based on its unique governing characteristics such as its adoption of democratic elections, general taxation power, and ability to make and enforce binding laws within its territory.

The Supreme Court addressed Charter applicability again in September 2024 in *York Region District School Board v Elementary Teachers' Federation of Ontario*. In *York Region*, the Court found that public school boards in Ontario are "manifestations of government" for the purposes of section 32, also under the first branch of *Eldridge*.

The Court's confirmation that First Nations governments like Vuntut Gwitchin First Nation and public school boards in Ontario are "government" for the purposes of section 32 is an important development in Charter applicability jurisprudence. What's more, the Court has now firmly established that all actions carried out by these entities are subject to Charter scrutiny.

What is the key takeaway for organizations on Charter applicability this year?

Courts have been homing in on whether, how, and to whom the Charter applies. *Dickson* and *York Region* provide helpful contextual clues about what constitutes "government" for the purposes of section 32 that can help determine whether similar entities should also be operating with a view to their constitutional responsibilities under the Charter.

Organizations that function like or instead of the government — such as public school boards in Ontario, human rights commissions, and provincial transit authorities — should consider whether their activities may make them subject to the Charter.

Private organizations that perform specific government functions, such as private schools or transportation services, should review their activities to determine if the Charter applies to them under the second branch of the *Eldridge* test. This process can be challenging, as discussed below.

What developments do you anticipate on Charter applicability in the year(s) ahead?

Discussions around delegated authority and what it means to perform a "public function" are likely to permeate Charter application decisions in the years ahead. The Court's comments in *Dickson* and *York Region* (especially those in dissent and concurrence) suggest that further litigation on the application of the Charter to other quasi-government entities is only a matter of time.

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OUR PUBLIC LAW EXPERTISE

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.

Real Estate

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OUR REAL ESTATE EXPERTISE

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.

"No matter the complexity of the dispute, the status quo remains, and traditional property law doctrines continue to govern real estate matters."

What was an interesting development in 2024, and why?

In 2024, two cases (both of which were argued by Lenczner Slaght), *The Rosseau Group Inc v 2528061 Ontario Inc* and *Block Developments Inc v Brewers Retail Inc*, underlined differing approaches to the assessment of damages in the wake of terminated real estate transactions.

In December 2023, the Ontario Court of Appeal ruled in *Rosseau* that the standard measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the property on the assessment date. This approach is the presumptive approach, meaning it is firmly established and not easily challenged.

However, in *Block Developments*, the Ontario Superior Court determined that using the market value approach would not fairly assess the plaintiff's damages for wrongfully breached purchase and sale agreements related to the development of mixed-use condominiums. Instead, the Court calculated damages based on the lost profits that would have been earned from the development.

While the Court of Appeal has made clear that the presumptive market value approach is not easily displaced, it will be interesting to see how the case law continues to develop in relation to terminations of purchase agreements for development properties, which can give rise to large lost profit claims.

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

What remains clear is that no matter the complexity of the dispute, the status quo remains, and traditional property law doctrines continue to govern real estate matters.

For example, in *CanDeal Group Inc v Capservco Limited*, on a motion for summary judgment, the Court once again reaffirmed that the longstanding principle of *caveat emptor* ("buyer beware") is "alive and well in Ontario modern real property jurisprudence". In that case, a subletter sought a declaration that its sublease was void by reason of the defendant's alleged concealment and misrepresentation of the noise of idling trains at Union Station in Toronto. The Court reaffirmed that, absent fraud, breach of contract, or misrepresentation, a vendor will not be liable for failing to disclose latent defects they knew about or ought to have known about, unless they render the property unsafe or unfit for habitation.

Likewise, in *3 Gill Homes Inc v 5009796 Ontario Inc (Kassar Homes)*, the Court affirmed the finding below that the vendor was entitled to terminate the transaction where a "time is of the essence" clause governed, and the purchasing party delivered closing funds 35 minutes late. While the Court noted that the outcome was "harsh", the wording of the contract and the several warnings provided beforehand from the vendor were clear, and accordingly, the vendor was within its rights to terminate the contract. The Court is again signaling that it will uphold contractual terms even where it appears unfair (absent terms which are unconscionable), particularly where the parties are made aware of those terms and demonstrate a clear intention to be bound by them.

What's a decision you are waiting for in 2025?

We are following the outcome in *Canada Life Assurance Company v Aphria Inc*.

In this case, the appellant argued that commercial landlords should have a duty to mitigate damages when they reject a tenant's repudiation of a lease without terminating the contract. Currently, a long-standing Supreme Court decision means that in common law provinces, commercial landlords are not required to mitigate their damages if a tenant defaults on a lease, unless they accept the repudiation and terminate the lease. This allows landlords to refuse to relet their unit and claim unpaid rent for the remainder of the lease term from the defaulting tenant.

The duty to mitigate exists in Québec, some U.S. states, and under Ontario's *Residential Tenancies Act*. However, the Court dismissed the appeal, on the basis that this issue is well settled by precedent in Ontario.

Since this decision was released in December, we are monitoring whether an appeal to the Supreme Court will be sought and granted, and what the outcomes might be.

Securities

"Regulators face the ongoing challenge of balancing the growing public interest in digital assets against their heightened volatility."

What was the most interesting development of 2024, and why?

The Supreme Court of Canada's ruling in *Poonian v British Columbia (Securities Commission)* stands out as a significant development to the securities regulatory regime. A husband-and-wife team was found to have run a "pump-and-dump" scheme. After being declared bankrupt, they applied for a discharge from bankruptcy which the Commission opposed.

The Court held that under the *Bankruptcy and Insolvency Act*, Parliament must have intended to exclude orders of administrative tribunals for discharge of debts resulting from "court orders of fines, penalties, and restitutions". A further exception for "debts or liabilities arising from fraudulent means" required the existence of a "direct link" between the fraudulent conduct and the debt or liability. As such, the Commission's $5.6 million disgorgement order would survive the discharge, as it represented the value of the Poonians' fraud. However, the administrative penalties (totaling $13.5 million) were dischargeable.

Since the decision's release, the B.C. Securities Commission has openly called for legislative changes to the bankruptcy regime, describing the current BIA as leaving an "escape hatch" for fraudsters. This led Canada's Superintendent of Bankruptcy to step up to defend the BIA, indicating that the bankruptcy system is intended to carefully balance a variety of interests and denying the existence of any "escape hatches" in the legislation. Time will tell whether and how the federal government responds.

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

The B.C. Securities Commission's decision in NorthWest Copper Corp raised the bar for establishing joint actorship on the part of shareholders, requiring evidence of a mutual agreement, commitment, or understanding for a specific purpose. This decision, while providing clarity on early warning requirements, limits an issuer's arsenal of defences in dealing with shareholder activism and potential take-over bids.

What's a decision you are waiting for in 2025?

The Supreme Court of Canada is set to rule on the definition of "material change" under the *Securities Act* in the appeal of *Lundin Mining Corporation v Dov Markowich*. This decision, the Court's first direct examination of securities disclosure standards in a decade, will be crucial for public issuers. It is expected to provide guidance on the distinction between "material facts" (which do not require immediate disclosure) and "material changes" (which must be disclosed promptly). The Court heard the *Lundin* appeal on January 15, 2025, where our team at Lenczner Slaght represented an intervenor, CFA Societies Canada. The decision is under reserve.

What's one trend you are expecting in 2025?

Crypto regulation and enforcement proceedings have been a priority for Canadian securities regulators for some years. However, it is widely expected that changes in the U.S. government will change the attitude of the world's most powerful security regulator to crypto regulation and enforcement. Will Canada follow suit? If not, will Canada's crypto investment industry migrate south?

Regulators face the ongoing challenge of balancing the growing public interest in digital assets against their heightened volatility, while also appearing responsive to high profile scandals such as the collapse of FTX, Quadriga, or high profile "memecoins".

In Ontario, diversifying investment funds into other crypto assets will be difficult, if not impossible, if the proposed amendments to National Instrument 81-102 Investment Funds, released for public comment in early 2024, are enacted. A key aspect of these amendments is the restriction to crypto assets that trade on a "recognized exchange." Critics argue that these stringent rules may push investors towards unregulated markets and service providers. Notably, the Canadian Securities Administrators' most recent Year in Review reported that over half of the 1,054 investor alerts and warnings to the public were related to crypto. Given these challenges, Canadian regulators might reconsider and opt for a less restrictive regime to reduce the need for extensive investigations and proceedings.

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OUR SECURITIES EXPERTISE

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.