

Insolvency

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

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

In [Ontario Securities Commission v Camerlengo Holdings Inc.](#), the Ontario Court of Appeal was confronted with the question of how to address

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

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

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

What's one trend you are expecting in 2024?

Looking forward, 2024 will see clarification on a number of key legal issues surrounding insolvency litigation and the availability of assets in insolvency proceedings. The Supreme Court of Canada is slated to release decisions for multiple appeals that it heard in December 2023. [John Aquino v Ernst & Young Inc.](#), for example, concerns the doctrine of corporate

attribution or, in other words, when a company or non-natural person can be said to “know” something or “intend” a certain consequence. There, the company's president orchestrated a false invoicing scheme and used the company's resources to effectuate the scheme. The company itself, however, did not benefit from the scheme. The Supreme Court of Canada will answer whether the company can be said to have “intended” this scheme, or whether such intent is limited to the company's president as an individual.

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



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