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 – 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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