Top 10 business decisions for 2024 – – and the law firm players, Part II

By **Julius Melnitzer |** January 29, 2025

Here is the second part of Law360 Canada's annual list of the Top 10 business decisions in Canada for the year just ended. This is a two-part series, which began in Part I with our honourable mentions and the cases ranked 6-10. What follows are the Top 5 cases, in ascending order.

5. *Cormark Securities Inc (Re)*, 2024 ONCMT 26

5.

This Ontario Capital Markets Tribunal decision involved the legality of a triangular hedging transaction in the context of a private placement. The reasons offer the first interpretation of the Ontario Securities Act's extended definition of "distribution", which embraces transactions involving a purchase or sale of securities that are in the course of or incidental to the private placement of restricted shares.

The case arose when the Ontario Securities Commission alleged that the respondents had engaged in an "illegal and abusive short selling scheme" involving Canopy Growth Corporation shares. The impugned transactions saw a private placement investor, Saline Investment Ltd., borrow freely tradeable shares to sell short while pledging the restricted shares for which Saline had subscribed to the lender.

In a regulatory first for Canada, the Commission alleged that these transactions constituted an unlawful distribution of securities designed to circumnavigate prospectus requirements.

"This case had the potential to challenge the viability of many common hedging transactions," says Derek Ricci, the partner in Davies Ward Phillips & Vineberg LLP's Toronto office who led the team representing Saline.

But the CMT found no wrongdoing. The panel rejected the OSC's argument that the transactions were in the course of a distribution because Saline intended to engage in separate but related transactions involving different securities of the same class (a triangular transaction). In essence, the Tribunal ruled that the definition of "distribution" in the statute did not transform a distribution of one set of securities into a distribution of another set of securities.

"The decision defines 'incidental' on a narrower basis than that proposed by the OSC, and as such, provides more clarity in determining whether a swap transaction in this context amounts to a distribution," Ricci says.

Appearances: Ontario Securities Commission; Borden Ladner Gervais LLP; Crawley MacKewn Brush LLP; Groia & Company; Davies Ward Phillips & Vineberg LLP

4. *Workman Optometry Professional Corporation v. Certas Home and Auto Insurance Company, 2024 ONCA 479*

4.

This decision from the Ontario Court of Appeal is the first case in Canada to determine authoritatively that the COVID-19 virus did not cause "physical loss or damage to property" in the context of thousands of businesses throughout Canada who sought billions of dollars as business interruption insurance indemnification (among the largest claims ever to proceed to trial in this country) from more than a dozen insurers. The court concluded that the mere loss of use of property resulting from the pandemic did not trigger coverage under ordinary commercial property insurance policies.

"Going forward, with the growing number of outbreaks that we're seeing, such as bird flu, and the potentially vast exposure from claims arising from further contagions, the insurance industry has been watching this case very closely," says Chantelle Cseh, a commercial litigation partner at Davies Ward Phillips & Vineberg who was a member of the team that represented Continental Casualty Company.

Appearances: Davies Ward Phillips & Vineberg LLP; Dutton Brock LLP; Blake, Cassels & Graydon LLP; Bennett Jones LLP; Osler, Hoskin & Harcourt LLP; Fasken Martineau DuMoulin LLP; Branch MacMaster LLP; Stikeman Elliott LLP; Lerners LLP; Koskie Minsky LLP; Merchant Law Group LLP; Klein Lawyers LLP

3. *Privacy Commissioner of Canada v. Facebook, Inc.*, 2024 FCA 140

3.

The most significant aspect of this Federal Court of Appeal ruling dictates that the determination of meaningful consent in the context of The Personal Information Protection and Electronic Documents Act calls for an objective standard, that of a reasonable person, as opposed to a subjective standard gleaned from the evidence of individual app users. The decision provides Canadian businesses with important guidance on PIPEDA's consent requirements.

"The Federal Court judge had ruled that actual evidence of individuals' misunderstanding was required, but the Court of Appeal rejected that," says David Young of David Young Law, an Ottawa-

based privacy and regulatory law counsel. “Had the initial decision not been overturned, it would have been a complete recasting of the requirements for meaningful consent.”

The upshot was that Facebook had breached its obligations because a reasonable person would not have understood the privacy breach risks they took by installing a third-party app.

Appearances: Goldblatt Partners LLP; Office of the Information Commissioner of Canada; McCarthy Tétrault LLP

2. *Aquino v. Bondfield Construction Co.*, 2024 SCC 31; *Scott v Golden Oaks Enterprises Inc.*, 2024 SCC 32

2.

These twin judgments from the Supreme Court of Canada are now the leading precedents on the corporate attribution doctrine and the meaning of the undervalue transfer provisions in the *Bankruptcy and Insolvency Act*.

Jeremy Opolsky, a Toronto partner in Torys LLP’s litigation and insolvency department who was lead counsel for the respondent KSV Kofman Inc. in *Aquino*, says the decision’s impact goes beyond insolvency law.

“The SCC made it clear that its new attribution rules applied in any situation that requires a judge to determine the knowledge and intent of a corporation, and that includes cases relating to limitations and securities,” Opolsky says.

In formulating its new corporate attribution doctrine, the SCC rejected the argument that corporations could not be held liable for their employees’ fraudulent acts and ruled that those acts were attributable to the corporation if the wrongdoer was the directing mind of the corporation and the impugned acts were performed in the area of corporate responsibility assigned to them.

Attribution, however, was not appropriate where the directing mind acted in total fraud of the company or where the acts were not by design or resulted in some benefit to the corporation. Courts also had a discretion to refrain from applying the attribution doctrine where to do so would be in the public interest. In all cases, the attribution doctrine was to be applied purposively, contextually and pragmatically.

“In moving from a strict rule to a principled analysis based on the governing statute’s intent, the Supreme Court put Canada in line with the common law in, among others, the United Kingdom, Hong Kong and New Zealand,” Opolsky says.

Appearances: Law Office of Terry Corsianos; Corsianos Lee Barristers and Solicitors; Cassels Brock & Blackwell LLP; Norton Rose Fulbright Canada LLP; Torys LLP; Attorney General of Ontario; Davies Ward Phillips & Vineberg LLP

1. *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20

1.

This case disgorges the principle that parties can exclude statutory warranties only with clear and specific contractual wording in favour of a determination that focuses on the objective intent of the parties.

More particularly, the decision dealt with the legal requirements for excluding an implied condition under Ontario's *Sale of Goods Act*. The statute itself mandates an "express agreement" for contracting out.

While "presumed agreement" did not meet the standard, the court noted that the statute did not require "express language" but only an "express agreement". The upshot was that explicit language was not required: what was required was a consideration of the "objective intention" of the parties to exempt someone from statutorily imposed liability. In turn, ascertaining the "objective intention" engaged the application of modern contractual interpretation, which included assessment of the words in the document, the surrounding circumstances and the sophistication of the parties.

"Earthco is the most important contractual interpretation case decided in 2024," says Jeremy Opolsky, the Toronto partner in Torys LLP's litigation and insolvency department and lead counsel for the Canadian Chamber of Commerce, who intervened in the case. "And contract interpretation is the bread and butter of what most business people think about. What the decision teaches us is that interpretation is more about a factual matrix than magic words."

Barry Sookman, senior counsel in McCarthy Tétrault LLP's Toronto office, affirms Earthco's significance but criticizes the rule for creating uncertainty.

"Courts will not necessarily want to follow it because they are often reluctant to apply disclaimers and take away remedies," he says. "Unravelling a factual matrix to determine intention is a Pandora's box, which means that we have a decision that will produce many other disputes to decide what it really means."

Appearances: Spetter Zeitz Klaiman; Scalisi Barristers; Torys LLP

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- **Source:** This article was originally published by Law360 Canada, part of LexisNexis Canada Inc.

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