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## Should One Trust Trump? Competing Priorities of Provincial Statutory Trusts and the Bankruptcy & Insolvency Act

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Insolvencies occur in the construction industry. When a contractor becomes insolvent, there is often a dispute as to who has priority over the assets of the insolvent contractor. The resolution of this dispute involves the interplay of provincial statutory trusts and the *Bankruptcy and Insolvency Act* ("BIA"). The recent cases of *Iona Contractors Ltd v Guarantee Company of North America*<sup>1</sup> ("*Iona*") and *The Guarantee Company of North America v Royal Bank of Canada*<sup>2</sup> ("*GCNA*") provide us some clarity.

In the *Iona* case, Iona Contractors had contracted to perform work for the Calgary Airport Authority. After the work was substantially completed, some of Iona's subcontractors remained unpaid. The Calgary Airport Authority withheld further payment; they used \$182,869 of the funds to complete deficiencies in the work. The Calgary Airport Authority still held \$997,716. Iona Contractors was subsequently assigned into bankruptcy. The unpaid subcontractors argued that they were entitled to the remaining funds because the funds were protected by a trust created under the Alberta *Builders' Lien Act*. The Trustee in Bankruptcy opposed this argument on the grounds that the trust provisions of the *Builders' Lien Act* did not trump the priority distribution regime in the BIA.

In the *GCNA* case, the contractor, A-1, had four major ongoing projects with the City of Hamilton and the Town of Halton Hills. A-1 became insolvent and \$675,372 was paid to the Receiver who, in turn, deposited the funds into a specific account. A dispute arose between RBC, GCNA, and the unpaid employees of A-1 as to who had priority to the funds held by the Receiver. RBC was a secured creditor pursuant to a general security agreement. GCNA was the contractor's surety company and it also had a security agreement. The GCNA had paid out over \$1.8 million in lien claims and was subrogated to those claims. The employees claimed for unpaid wages. RBC argued that the funds held by the Receiver formed part of the contractor's estate and that those funds should be made available, and distributed, to A-1's creditors as per the priority scheme in the BIA. By contrast, the GCNA and the employees argued that the funds were trust funds as per the Ontario *Construction Lien Act* and as such, the funds were outside of the scope of the BIA.

The Alberta Court of Appeal (ABCA) in the *Iona* case held that the *Builders' Lien Act* created a comprehensive system to ensure that unpaid subcontractors are compensated fairly for their work that added value to project lands. Further, the ABCA held that the trust provisions of the *Builders' Lien Act* should not be read in isolation, but must be interpreted within the larger scheme of the legislation. The Ontario Court of Appeal (ONCA) in the *GCNA* case came to the same conclusion. The ONCA noted the trust provisions in the *Construction Lien Act* are integral to a larger scheme that intended to protect the rights and interests of those engaged in the construction industry. The Courts in both of these cases concluded that the provincial lien legislation was a valid exercise of a province's constitutional authority to legislate over property and civil rights.

The ABCA and the ONCA then considered whether the statutory trusts created by the provincial lien legislations had the three (3) critical characteristics found in all common law trusts: certainty of intention, certainty of object, and certainty of subject matter. In other words, the Courts considered whether these statutory trusts were true trusts.

<sup>1</sup> *Iona Contractors Ltd (Receiver of) v Guarantee Co of North America*, 2015 ABCA 240.

<sup>2</sup> *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9.



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In the *Iona* case, the ABCA concluded that trust provisions in the *Builders' Lien Act* exhibited the three above noted certainties common to all common law trusts. The clear intention of the relevant section of the *Builders' Lien Act* was to create a trust. The object of the trust (i.e. the beneficiaries of the statutory trust) was the unpaid subcontractors. Lastly, regarding the subject matter, the relevant section of the *Builders' Lien Act* stated that any "payment by the owner" was subject to the trust provisions. Therefore, the trust created by the *Builders' Lien Act* did not cause any operational conflict with the priority scheme in the BIA because the statutory trust did not deliberately attempt to reorder the priorities in the BIA. Put another way, the statutory trust in the *Builders' Lien Act* only affected the characterization of the funds, but it did not directly determine how they would be distributed. Accordingly, the ABCA ruled in favour of distributing the funds in the Trustee's hands to the unpaid subcontractors.

In the *GCNA* case, the ONCA also considered whether the three (3) characteristics of common law trusts were present.

In regard to certainty of intention, RBC argued that certainty of intention had to be determined independent of the wording found in the relevant legislation. However, the ONCA rejected this argument. Relying on a precedent established by the Supreme Court of Canada in *Henfrey*<sup>3</sup>, the ONCA held that a court was actually required to look to the deeming language of the statute in order to determine whether there was "certainty of intention".

Regarding certainty of subject matter, the ONCA concluded that the amounts owed by the City and the Town to the contractor were debts, which would properly and clearly qualify as the subject matter of a trust. Further, the certainty of the trust was enhanced by the fact that the Receiver had carefully accounted for the funds received from each owner and the Receiver had deposited the funds into a clearly marked account.

The Court in both cases looked to the purpose of provincial lien legislation and saw it is a form of remedial legislation designed to provide a remedy for persons that the legislation was aimed at (i.e. unpaid subcontractors). This broad, purposive approach and the precedent from *Henfrey* allowed the Courts to find that the 3 elements of a trust were actually present. In turn, that also allowed the Courts to see harmony between the provincial statutory trusts and the priority scheme in the BIA. These decisions provide clarity that will be well-received by the industry.

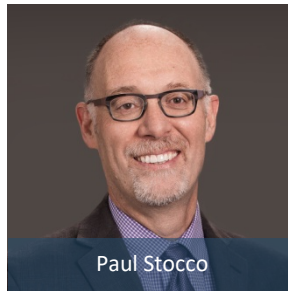
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<sup>3</sup> *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 S.C.R. 24, 1989 CarswellBC 351.



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