

End of the Road: The Supreme Court of Canada Denies Leave to Appeal in *Iona Contractors Ltd. v The Guarantee Company of North America*

April 14, 2016

The Supreme Court of Canada today released its highly anticipated decision in [*Iona Contractors Ltd. v The Guarantee Company of North America*, 2015 ABCA 240](#) dismissing the application for leave to appeal by the Trustee in Bankruptcy (the "Trustee") of the bankrupt, Iona Contractors Inc. ("Iona"). The application for leave arose from the decision of the Alberta Court of Appeal, which we reported on following its release on July 16, 2015.

The case relates to a dispute between the surety, The Guarantee Company of North America ("The Guarantee"), subrogated to the rights of Alberta *Builders' Lien Act* ("BLA") trust claimants, and the Trustee over entitlement to unpaid contract funds. The issue before the Court was whether the trust created by s. 22 of the Alberta BLA conflicted with the priority regime of the federal *Bankruptcy and Insolvency Act* ("BIA") and, if not, whether a proper common law trust was created on the facts of the case.

The majority of the Alberta Court of Appeal found that the BIA and BLA are not in operational conflict and that, based on the facts of the *Iona* case, a valid common law trust was created. As a result, the Court ordered that the Trust Funds be paid to The Guarantee in its subrogated capacity to the position of the trust claimants.

The Trustee sought leave to appeal the decision of the majority of the Alberta Court of Appeal to the Supreme Court of Canada, on the basis of alleged national importance and alleged conflicting decisions on the interaction between the lien legislation trust provisions and the BIA provisions in other provinces. The Supreme Court of Canada denied the application for leave to appeal and, as is customary, did not provide reasons for its decision. A conditional cross appeal was also brought by The Guarantee with respect to the issue of whether the unpaid contract funds were payable to Iona. However, as the cross appeal was conditional on the application for leave to appeal, which was not granted, the conditional cross appeal was also dismissed.

The fact that the Supreme Court of Canada found that the *Iona* decision did not warrant further consideration provides a strong endorsement of the reasoning of the majority of

the Alberta Court of Appeal. The extensive (and often contradictory) commentary on the lower Court decisions will now have to be considered in the context of the guidance provided by the Supreme Court of Canada. One likely implication is that the reasoning of the Court of Appeal will be applied across Canada and give direction on the operations of the statutory trust provisions.

The clarity provided by the majority of the Alberta Court of Appeal and now, the Supreme Court of Canada, should provide comfort to subcontractors and suppliers that the trust rights contained in the provincial lien legislation provide an effective remedy to protect contract funds and facilitate payment on a construction project even in insolvency cases. Resort to the trust remedy should be considered by subcontractors and suppliers across Canada at the earliest possible time in the face of a contractor's insolvency, as a potential means of recovery.

The Guarantee was represented by [Rick Shaban](#) and [James MacLellan](#).

This case comment is not intended to be legal advice, but in the event that you require advice on a particular matter do not hesitate to contact the authors.

By

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