

Financial Services Flash

AIRD & BERLIS LLP
Barristers and Solicitors

May 28, 2014

No Construction Lien Act (Ontario) Deemed Trust in Bankruptcy

By Sam Babe

In his recent decision in *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062 (“Atlas Block”), Justice Penny of the Ontario Superior Court of Justice (Commercial List) held that trust claims pursuant to section 8 of the *Construction Lien Act* (Ontario) (the “CLA”) do not survive the bankruptcy of the would-be trustee debtor. Justice Penny held that the CLA deemed trust provisions are not an exception to the general rule, laid down by the Supreme Court of Canada a quarter century ago, that a statutory trust is not preserved in bankruptcy by operation of paragraph 67(1)(a) of the *Bankruptcy and Insolvency Act* (the “BIA”) unless all marks of a common law trust are also present. In particular, any commingling of funds destroys the required certainty of a valid trust, even where tracing is possible.

Although there was little helpful case law on this point in Ontario, it appears that general practice among Ontario trustees in bankruptcy has been to accept proofs of claims for CLA trust claims. This practice could be explained by reliance on the most popular BIA commentary’s annotation to paragraph 67(1)(a), which erroneously suggests statutory construction trusts do survive bankruptcy.

Justice Penny also held that the CLA does not impose any obligation on a court-appointed receiver to place post-receivership collections (of pre-receivership accounts receivable) into a trust that would survive the debtor’s subsequent bankruptcy. He rejected the would-be-trust claimant’s attempt to rely on the line of load broker’s cases

starting with *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.* (2005) 7 C. B. R. (5th) 202 (Ont. C.A.), which held that a court officer steps into the shoes of debtor, including any obligation to create and maintain a trust under provisions now found in the *Highway Traffic Act* (Ontario). Citing the *Pension Benefits Act* (Ontario) deemed trust case, *Ivaco Inc. (Re)*, (2006) 25 C.B.R. (5th) 176 (Ont. C.A.), and the *Employment Standards Act* deemed trust case, *Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.*, (2007) 37 C.B.R. (5th) 107 (Ont. S.C.J.), Justice Penny held that, unlike the statutory (and formerly regulatory) obligations imposed on load brokers, the deemed trust provision of the CLA only deemed a trust into existence, but did not impose a positive duty to create a trust. The receiver in *Atlas Block* had not segregated would-be CLA trust funds, believing, correctly, that it was not under any statutory duty to do so.

The successful arguments in *Atlas Block* were made by the applicant secured lender, represented by the Aird & Berlis LLP team of Sam Babe and Courtney Raphael. The Financial Services Group at Aird & Berlis LLP has a great deal of experience both advising lenders on potential construction and other priorities issues and in addressing priorities issues that arise in insolvency and restructuring. Details can be found on our [Financial Services, Insolvency and Restructuring](#) web page, by clicking on [members](#).

Click here to view our other [newsletters](#)
or visit www.airdberlis.com