

Financial Services Flash

AIRD & BERLIS LLP
Barristers and Solicitors

June 18, 2014

No Builders' Lien Act (Alberta) Deemed Trust in Bankruptcy

By Sam Babe

In its June 11, 2014 decision in *Iona Contractors Ltd. (Re)*, 2014 ABQB 347 ("*Iona Contractors*"), the Court of Queen's Bench of Alberta (the "*Alberta QB*") held that the trust created by section 22 of the *Builders' Lien Act* (Alberta) is not effective in the bankruptcy of a would-be trustee debtor. This result is consistent with, but reached completely independently of, the recent Ontario Superior Court of Justice (Commercial List) decision in *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062 ("*Atlas Block*") which held, among other things, that a trust claim pursuant to section 8 of the *Construction Lien Act* (Ontario) (the "*CLA*") does not survive bankruptcy unless it also bears all the marks of a valid common law trust.

Where the *Atlas Block* decision had to address a broad range of issues and left some readers wanting more explanation of how Justice Penny overcame what was regarded as the long-standing legal principle that CLA trusts survive in bankruptcy, the *Iona Contracting* decision thankfully provides a more fulsome discussion of the issue. In particular, *Iona Contracting* deals head-on with the 1962 decision of the Supreme Court of Canada (the "*SCC*") in *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 ("*Troup*"), which seems to have formed the underpinning of the legal analysis that statutory construction trusts do survive in bankruptcy. Justice Eidsvik of the Alberta QB held that *Troup* was

effectively overruled because it had been considered in the SCC's decision in *Husky Oil Operations Ltd. v. Minister of National Revenue* [1995] 3 S.C.R. 453 ("*Husky Oil*"), yet was at odds with an application, to statutory construction trusts, of the principles laid out in *Husky Oil* and in the SCC's earlier decision in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

With the same conclusion being reached in parallel by separate courts in *Iona Contractors* and *Atlas Block*, it seems safe to conclude that the legal landscape has now shifted for the construction and lending industries.

The Financial Services Group at Aird & Berlis LLP has a great deal of experience both in 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