

Here's the Drill: Commingling of Funds – Carillion Canada

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On June 28, 2021, the Court of Appeal for Ontario released a decision dealing with an insolvent contractor and the complications that arose when the funds it received from project owners become “comingled” with other monies.

This is (unfortunately) not such an uncommon issue that can play out on construction projects. For example, if a general contractor becomes insolvent, its unpaid subcontractors and suppliers will be looking to access the funds the contractor had received from the owner but not yet paid out those beneath it in the construction pyramid. In many provinces, the funds the contractor received from the owner will be impressed with a “trust” under the province’s construction or builder’s lien legislation. This trust is intended to protect the funds so the unpaid subcontractors and suppliers can access them. However, as the recent Carillion decision illustrates, this may not be such a straightforward exercise in every case, especially where the funds have been “comingled” with other monies. As we describe below, in the Carillion case the funds the contractor had received from multiple project owners had been comingled with other monies as part of certain banking arrangements which resulted in the funds becoming part of the insolvent contractor’s estate.

Background

The monitor in the case, Ernst & Young, brought a motion in the context of the *Companies’ Creditors Arrangement Act* [\[1\]](#), (“CCAA”) proceedings involving Carillion Canada and related entities (“**Carillion Canada**”). In 2018, Carillion plc, the UK parent company of Carillion Canada, commenced insolvency proceedings which triggered Carillion Canada’s CCAA filing.

Shortly before its downturn, Carillion Canada received \$28,844,390.53 from the owners of four different Ontario construction projects. At the time, these funds were impressed with a trust in favour of unpaid subcontractors and suppliers under to section 8 of Ontario’s (then) *Construction Lien Act*.

As part of cash sweep and pooling arrangements that Carillion Canada had with HSBC Bank (who was providing Carillion with banking services), these funds from the project owners were “swept” daily from Carillion Canada’s local bank accounts and ended up in accounts at HSBC UK in England. The cash sweep was terminated once the Canadian CCAA proceeding commenced.

In its motion, the Monitor asked the court to confirm that the funds from the project owners were subject to a trust and would not form part of the insolvent estate. However, the court dismissed the motion and held that the Monitor failed to establish the “certainty of subject-matter” requirement for a trust. In the court’s view, the funds were not “identifiable” because they had been “irreconcilably comingled and converted by seven different companies in two countries.” [\[2\]](#) The court also explained that the funds could not be traced because the payments were deposited into and transferred among mixed accounts, and put to various uses. [\[3\]](#) (As a general rule, tracing is available even if trust funds pass through several different bank accounts; it is only when the funds stop being “identifiable” that they become untraceable). [\[4\]](#)

Leave to Appeal

The Monitor moved for leave to appeal but was denied by the Court of Appeal for Ontario.

In denying leave, the Court of Appeal focused on the fact-specific nature and operation of the Carillion Canada's unique banking structure which the court viewed as critical factors.^[5] Although there could have been more clarification on the extent to which funds can be commingled before certainty of subject matter is lost, it does not appear as if construction companies will need to maintain separate accounts just for the purposes of preventing commingling (which would undoubtedly increase costs). The extent to which the comingling occurred in this case was unique to the facts which involved a daily cash sweep arrangement.^[6]

Fortunately for the construction industry, it remains that as long as the commingled trust funds can be traced, they should not form part of the insolvent contractor's estate.^[7]

Provincial Trust Funds Requirements

For contractors and subcontractors, this decision also serves as an important reminder of the provincial trust funds requirements that may apply to your organization.

In Ontario, the statutory trust fund requirements were updated as part of the first tranche of changes to the *Construction Act* (previously the *Construction Lien Act*) that occurred in 2018. For contractors and subcontractors, they must ensure the trust funds are deposited into a bank account in the "trustee's name" (take note of this if you operate your business under different corporations). It is also a requirement that monies coming in and out of your trust funds be carefully tracked with written records. Funds from different projects can be deposited into a single mixed trust account (and they will still remain traceable) so long as you comply with the record keeping requirements.

Failing to comply with these trust fund requirements can result in significant repercussions. In Ontario, the repercussions include potential *personal liability* for directors, officers and others in your organization.

Whichever province you are working in, ensure you and others in your organization are familiar and up-to-speed with the trust funds requirements that apply to your operations.

^[1] [R.S.C., 1985, c. C-36](#).

^[2] *Carillion Canada Holdings Inc. (Re) ("Carillion")*, 2021 ONCA 468 at para 4.

^[3] *Carillion*, *ibid* at para 4.

^[4] *The Guarantee Company of North America v. Royal Bank of Canada ("Guarantee")*, 2019 ONCA 9 at para 87.

^[5] *Carillion*, *supra* note 2 at para 14.

^[6] *Carillion*, *supra* note 2 at para 12.

^[7] *BMP Global Distribution Inc v. Bank of Nova Scotia*, 2009 SCC 15 at para 85.

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