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# LEGAL & INSURANCE

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# Astolfo honoured with infrastructure law excellence award

DAN O'REILLY  
CORRESPONDENT

A milestone in construction law history occurred this past June when Toronto lawyer Sandra Astolfo was named the 2019 recipient of the Ontario Bar Association's (OBA) Construction and Infrastructure Law Award of Excellence.

A partner with WeirFoulds LLP, Astolfo is the youngest person and the first female to receive the award which is based on wide criteria including candidates' excellence in construction law matters and their volunteer commitment to the profession.

"For whatever reason there is a large turnover of female lawyers in construction law,"

Sandra Astolfo  
WeirFoulds LLP

The award was presented at the OBA's Construction and Infrastructure Law Section's year-end dinner. "I was humbled and shocked (to be named)," says

Astolfo, who only received notice of the selection a few weeks before the June event.

Only OBA members can make nominations and, as Astolfo understands it, a group of female construction lawyers put her name forward after clarifying with the association the award is not a "lifetime achievement award" for someone at or near the end of their career.

Asked why she believes she was nominated, Astolfo cites several factors such as her past record serving on the OBA executive, her willingness to speak and/or chair legal continuing education programs, and her legal demeanor.

"I always try to treat other lawyers with respect and deal with disputes in a courteous manner. You can be tough/firm, but there is no need to be rude or be a bully."

Nominating a female lawyer may also inspire other women to remain practising in the construction law field, says Astolfo who recently established an informal mentor group to connect younger female construction lawyers with women who have specialized in that discipline for some time.

"For whatever reason there is a large turnover of female lawyers in construction law," she says in explaining the rationale for the group's creation.



Sandra Astolfo

If the award was a major milestone for someone still very much in the prime of their profession, the beginning of that career, or at least her introduction to construction, can be traced back to her father. After immigrating to Canada from Italy, he became a mason and later started his own home building business.

"I had been on construction sites since I was a young girl and as I got older I helped my dad issue cheques to pay invoices."

Other people have influenced her career choices such as a family friend who was a lawyer and who Astolfo describes as a 'mentor'.

In her fourth year of university she was considering whether to apply to teachers' college or law school, but ultimately choose the second option in large part because of the impression the lawyer friend made.

"I always enjoyed speaking with him and respected the way in which he spoke of his profession. I admired the way in which he thought about problems and communicated his opinion."

After graduating from law school, Astolfo articulated with the firm of Fraser & Beatty and during that period a third person helped shaped the direction of her career.

"After my first year of practice, I knew this was an area of law that was exciting, ever changing, and would keep me engaged for a long time,"

Sandra Astolfo  
WeirFoulds LLP

Towards the end of her articling, David Bristow, the head of the firm's construction group, asked if she had any interest in practising construction law.

"My close family friend told me he also practised construction law in his early years and said that I would get plenty of courtroom experience and develop expertise in contract law and bankruptcy if I accepted David's invitation."

That was in the mid-1990s when there were very few female construction lawyers, says Astolfo, who realized she could distinguish herself "quite quickly" if she went that route.

"After my first year of practice, I knew this was an area of law that was exciting, ever changing, and would keep me engaged for a long time."

After articling and working as an associate with Fraser & Beatty (now Dentons), she moved on to a number of other firms and then joined WeirFoulds in 2016.

Along the way there have been a number of honours. In 2006 Astolfo was certified by the Law Society of Upper Canada as a specialist in construction law, a ranking with strict eligibility benchmarks including a minimum of seven years' experience, five of which must include a 30 per cent component of construction law. Four references from lawyers outside of a candidate's firm are also required.

And, then last year, she was invited to become a member of the Canadian College of Construction Lawyers, a process requiring being vetted by all the college's members or 'fellows'.

Touching on her volunteer speaking engagements, which range from five to seven yearly, she says the motive is to help other lawyers in the way she was helped.

"I have had excellent mentors throughout my years of practice so I always make myself available to help other lawyers and try to mentor in the same way that I was mentored," says Astolfo.

"Whenever I speak at a continuing education event, I am willing to share my 'tips' and 'knowledge' with members of the bar. If we keep something a secret it doesn't help the profession."

At the OBA's dinner in June where she received the award, Astolfo spoke about the need for 'balance' in lawyers' professional and personal lives and that's an objective she strives for in her own life. Every evening she leaves the office 'promptly' at 5.15 in order to pick up her daughter from school.

"That has never been a problem with clients or at any of the firms that I have worked at."

## Economic Snapshot

# Record gain in national headcount raises concerns about adequacy of housing supply



John Clinkard

In Snapshot # 18 titled "More going away than coming from away dampens Newfoundland and Labrador's near term outlook", we highlighted the fact that, over the past three years, more people left the province than "came from away".

Despite the shrinkage in population in its easternmost province, Canada's population increased by an unprecedented 531,497 people over the past four quarters. Year over year, the population rose by an unprecedented +1.4%, more than twice the growth rate exhibited by the U.S. and Britain (+0.6%), and well above gains in Germany (+0.3%) and France (+0.2%). Both Italy and Japan saw their populations shrink by -0.2% in 2018. For the former, it's the second consecutive year of decline: for the latter, there's been population reduction since 2010.

This brief overview of the latest population stats highlights four significant trends and their potential impact on housing demand. First, among the nine provinces which saw their population increase in 2018/19, almost half (47%) of the increase in total headcount was due to an unprecedented gain of 248,000 in Ontario. This marked the fourth consecutive year in which the province's population has increased by more than 150,000 and it was mainly driven by a 200,000 gain in international migration (including 17,000 asylum claimants) plus a net inflow from other provinces totaling 12,000, the bulk (6,600) of which originated in Quebec.

Although there are clouds over the outlook for Ontario's most important industrial driver (manufacturing), the province's low unemployment rate and high job vacancy rate suggest that it will continue to attract the bulk of Canada's international and domestic migrants over the next several quarters.

Second, after seeing a steady net outflow of migrants to other provinces (mostly Ontario) since the mid-1960's, net interprovincial migration turned positive in Quebec in the second quarter of this year for the first time since the fourth quarter of 2009. At the same time, the province welcomed an unprecedented 33,000 international migrants. This very strong pattern of international and interprovincial net migration in the second quarter made a significant contribution to the record 97,000 rise in the province's population over the past four quarters. It is worth noting that according to Immigration, Refugees and Citizenship Canada (IRCC), Quebec hosted 8,700 refugee claimants during the period June 30, 2018 to July 1, 2019.

Third, following the exodus of its residents to other provinces in the wake of the collapse in oil prices in 2014, net interprovincial migration made a positive contribution to Alberta's population growth in 2018/19 for the first time since 2016/17.

Fuelled by this net inflow of migrants from other provinces, mostly Ontario, plus 38,000 international migrants and a natural increase of

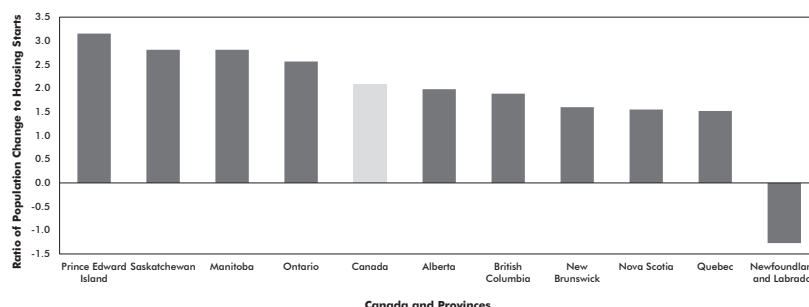
43,000, the province's population posted its largest four-quarter gain since 2014. Since 2016/17, growth of Alberta's population has accelerated from 1.1% y/y to 1.6% y/y. Despite flagging growth of energy investment and significant volatility in energy prices, there is evidence of strengthening labour demand reflected by a gradual increase in the province's job vacancy rate and a gradual decline in the province's unemployment rate.

The fourth and final trend indicated by the most recent population stats relates to the Atlantic provinces. Except for the above-noted shrinkage in Newfoundland and Labrador, population growth has accelerated in Prince Edward Island, Nova Scotia and New Brunswick over the past four years. Among these three provinces, Prince Edward Island's population was up by 2.2% in 2018/19, the fastest in the country and well north of the 0.2% y/y gain it posted in 2013/14. After four down years, Nova Scotia has seen the growth of its population accelerate from 0.8% to 1.2% in 2018/19, its highest rate of growth in more than 50 years. The combination of an inflow of 6,500 international migrants and 600 people from other provinces helped to boost New Brunswick's population by 0.8% in 2018/19, its fastest pace since 1984.

Finally, one of the major questions raised by this unprecedented increase in population is "What will be its impact on housing demand?" It is possible to put some perspective on this question by comparing the ratio of annual population growth to housing starts over the past four years across the ten provinces. The above (national average) ratio of population growth to housing starts in Prince Edward Island, Saskatchewan, Manitoba, and Ontario, illustrated by the chart, indicates that potential demand for new homes has been outpacing growth of the housing stock (i.e. supply) in these provinces relative to the rest of the country and it should contribute to a stronger pattern of new construction in them.

John Clinkard has over 35 years' experience as an economist in international, national and regional research and analysis with leading financial institutions and media outlets in Canada.

## Ratio of Population Change to Housing Starts\* 2015 to 2019



\*Population change to unit starts change, latest 4 years.

Data Source: Statistics Canada / Chart: ConstructConnect - CanaData.

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# Employment agreements a 'great foundation' for firms and workers: Expert

**GRANT CAMERON**  
CORRESPONDENT

Owners of construction companies, big and small, should protect themselves by having employment agreements in place with workers that spell out duties and expectations as well as what happens if they're fired, says Michelle Berg, human resources expert and CEO of Calgary-based Elevated HR Solutions.

"Employment agreements are basically like the pre-nup and the termination is like the divorce," she explains. "An agreement that's properly drawn up and put together can serve as a great foundation for both sides."

Surprisingly, though, according to Berg, many construction companies in Canada — bigger ones in particular — are sloppy and still seem to think they can get away with a handshake or no agreement at all.

"Specifically for the construction industry, I think that for a long time there's been this thought that because they're blue-collar positions they can treat people poorly and if it doesn't work out the workers can find another job. Employers also tend to think the workers are less educated so they can treat them a certain way."

But that, says Berg, is a mistake, especially in the age of digital and social media, as a disgruntled employee can affect the brand of a construction company simply by putting up a post on a site like Glassdoor.

Employment agreements can be verbal or written, says Berg, but are better in writing for obvious reasons and, while they can't solve all potential problems, they can deter-

mine accountabilities and expectations.

Berg, whose company works primarily with smaller organizations of 10 to 100 employees, recently spoke about how employment agreements can mitigate risk at a Calgary Construction Association event.

She encourages construction companies and contractors to set out the terms of hiring, benefits and pension entitlements, prior to an employee starting work, and also to lay out what happens if they are terminated.

"If companies can get that right at the outset, the chances of an amicable termination or ending of employment is much higher."



PHOTOS COURTESY OF SHUTTERSTOCK

**Construction companies and contractors should set out the terms of hiring, benefits and pension entitlements, prior to an employee starting work, and also to lay out what happens upon termination, says an expert.**

Berg warns that before starting a job, recruits must be given ample time to read and digest an agreement and an opportunity to ask questions.

**"In a termination without cause there is no 'why.' They simply must say, 'Your services are no longer required,' and leave it at that,"**

Michelle Berg  
Elevated HR Solutions

mination for the worker so there is no confusion, says Berg, and the contract should also make it clear that the industry is subject to temporary layoffs due to the seasonal nature of the work so an employee is fully aware of the lay of the land.

Importantly, the deal should also iron out rules around non-compete and non-solicitation by a worker who's leaving. Although enforcing such clauses in court is difficult, Berg says she still encourages employers to put language into agreements to at least serve as a deterrent to a worker taking away business.

When an employee is terminated with cause, she says it's essential for the employer to document how the worker was informed of inappropriate behaviour, followed by a letter that explains why he or she is being let go.

In the event an employee is terminated without cause, construction employers should properly inform the worker, document the process and outline when and how the worker will receive his or her final paycheck.

"One of the biggest issues we see without cause is that employers still try to provide a 'why.' In a termination without cause there is no 'why.' They simply must say, 'Your services are no longer required,' and leave it at that. But it does still have to be properly documented and papered on both sides."

These days, construction employers must be extra careful when firing employees, says Berg, because a worker can allege mental damages if the termination is not handled properly.

So, if terminating a worker the employer should not embarrass the individual, for example, in front of a group when they're being let go, she says.

In one case, Berg says, an employee received notice to attend a performance review on a Friday afternoon, but before the meeting received her pay stub with severance on it and saw her firing notice on a manager's computer. The worker got three times the original termination offer for mental anguish.

The most important thing for a construction employer to do when terminating a worker is to make it quick and clean, she says.

"Keep it simple and to the point as much possible. Have it written out and don't do it in front of others. Be respectful and also be aware of who you're telling in advance because it should be kept confidential."

If a worker is pushed to sign an agreement too quickly, and therefore doesn't fully understand the deal, if a sticky situation arises lawyers can argue it was done under duress and can't be enforced, she notes.

Often, when contractors and workers sign a deal they aren't thinking about the end, but it happens, says Berg, and it's important to lay out the ground rules beforehand rather than when emotions are high.

"The key for me is to be transparent. Not all employment ends well. Either you quit or they ask you to leave, one of the two. But if you can be transparent from the very beginning, they end that much better."

While a typical employment agreement will cover traditional items like wages, hours of work, pension and benefits, it should also clearly set out the length of

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# Citing climate change, carriers clamour to comment on code changes

IAN HARVEY  
CORRESPONDENT

Claiming that climate change losses are hitting their bottom line, insurance companies want a stronger voice on how homes are built in order to reduce those losses.

Whether climate change is wholly man-made or part of a deeper natural cycle isn't the question, say the Institute for Catastrophic Loss Reduction (ICLR) and the Insurance Bureau of Canada (IBC). It's how best to mitigate damage from floods, wildfires and wind storms.

As Dan Sandink, Director of Research at ICLR explains, the insurance industry had a voice at the Canadian Commission on Building and Fire Codes going back 40 years. However, that voice and interest dropped off for various reasons.

The impetus now is to restore that seat at the table and be more vigilant in tackling the issues of property damage on a proactive basis by upgrading the National Building Code on relevant issues.

Some of these discussions may drive changes as soon as next year — but probably not until the 2025 update.

“We have regular meetings with our insurance industry members and they are raising the issues they're seeing in the field which are these losses,” Sandink says. “It's not always clear why, but we know there are more people and more properties and there's a growing interest in reducing risk of loss. There are many things we can do including better planning and infrastructure management.”

**“Even after a flood, insurance companies are offering additional sums of money to install measures to prevent future flooding,”**

Dan Sandink  
ICLR

The ICLR is an independent, not-for-profit centre for multidisciplinary disaster prevention research and communication. Founded by the insurance industry, it is affiliated with Western University in London, Ont.

The institute was commissioned by the National Research Council and the Standards Council of Canada to research losses from storms, floods and wildfires. It has



BOB HILSCHER/SHUTTERSTOCK

**Severe flooding on the Muskoka River running through Huntsville, Ont. on April 27, 2019. The most severe flooding in this town since 2013. Better planning and infrastructure management can help reduce risk and loss for property owners, says an expert.**

put together a series of best practices dealing with such matters as how roofs are shingled and with what materials and how they are attached to the top-plates of a structure.

The centre has also looked at flooding issues, cataloguing those which result from building on known flood-plains or too close to waterways and those which result from sewer and storm drain back-ups.

The institute has also looked at how wildfires spread to structures and how to mitigate the transition of fire to homes from the bush.

Buildings are one part of the issue but an important part, Sandink says.

“The vulnerability to high winds really comes down to design and subdivision design,” he says, noting that while wind storms are unpredictable, there are well known areas where tornadoes are known to strike in Canada.

For the most part, he says, the industry sees losses mostly in residential structures while ICI structures are built differently and perform differently, so it's in that area they want to concentrate their input into the building code.

Even in already built areas, infrastruc-

ture upgrades can make a big difference to flood risk, such as separating storm and sanitary sewers, disconnecting downspouts, provision of sump pump specs and addition of back flow valves.

Insurance companies have been proactive around flooding, Sandink adds, offering discounts to homeowners if they take preventative measures while cities are helping fund back-flow valve installation.

“Even after a flood, insurance companies are offering additional sums of money to install measures to prevent future flooding,” he says.

“While most of the risk can be managed through incremental measures, the most revolutionary change is managing planning to avoid flooding.”

For wind protection, basic measures adopted in the building code would include roof design, longer nails for sheathing and more nailing to connect top plates to trusses and reinforcing of overhangs — something that is being piloted at 100 new homes in the Harvest Run Community in St. Thomas, Ont. being built by Doug Tarry.

This is the culmination of a 20-year partnership with Western University in

London, Ont.

Industry stats show high winds contributed in part to most natural catastrophes recorded by the Insurance Bureau of Canada between 1983 and 2016.

For example, the May 2018 windstorm in Southern Ontario and Quebec followed by tornadoes in the National Capital Region in September 2018, caused close to \$1 billion in insured losses, according to Catastrophe Indices and Quantification Inc.

The pilot project, being undertaken by Tarry and the university, focuses on basic measures to mitigate vulnerability as identified by research conducted at Western's Engineering faculty. This includes post-tornado forensics.

“It's not just the structure they want to protect,” Sandink says. “They always want to ensure wind-driven debris from collapsing houses doesn't create further damage to people and other properties.”

“This is really the first time a pilot project like this is going ahead,” he adds, noting that it draws from research into millions of dollars of losses from tornado damage.

Still, there is some resistance in the industry to the more comprehensive measures but often it's a case of explaining why they're needed. As such, progress is slow, Sandink says, though the industry did get tighter nailing patterns for roofs included in the 2012 Ontario Building Code revisions.

For basement floods this would involve limiting sump pump failure and sewer back-up.

“Most of the flooding losses are from sewer back-up,” Sandink says.

Wildfire mitigation involves simple things like landscaping and choice of roof materials, with untreated wood shingles being more vulnerable, he adds.

Forestry management is also important, as is cutting clear breaks between the bush and housing developments, given that embers can travel great distances and can ignite vegetation along the sides of a home which can then spread fire.

Debris build-up in eavestroughs also acts as kindling for those glowing embers, he says.

“Also, wood shingles will catch fire from an ember,” Sandink says. “And you want a 1.5-metre zone around the house clear of plants.”



PAUL MCKINNON/SHUTTERSTOCK

**An example of severe flooding on the Quebec side of the swollen Ottawa River on May 8, 2017. Pointe Gatineau is one of several areas in North America that has suffered from severe flood conditions.**

# Dispute resolution board use on the rise in Canada

DAN O'REILLY  
CORRESPONDENT

With the movement to very large infrastructure projects, especially public/private partnerships (P3s), a construction dispute resolution mechanism more commonly utilized in the United States and other nations is increasingly being used in Canada, says a leading Toronto construction lawyer.

Although not perfect and not suitable for every project, especially smaller ones because of the costs involved, dispute resolution boards are nevertheless less expensive and time-consuming than opting for arbitration or litigation, says Harvey Kirsh, who practices as an arbitrator, mediator, adjudicator, and referee with Kirsh Construction ADR Services Ltd.

“They are especially critical on tunnel projects “where changed conditions can lead to significant delays and additional costs,”

Gerald McEniry  
Revay and Associates Limited

Comprised of three “independent and impartial experts” — primarily engineers, the boards will investigate a dispute and then render a non-binding opinion.

The use of such boards is a condition which both parties have to agree to in the contract.

Similarly, they have to reach a consensus on the selection of all three members “who have an obligation to act impartially, without bias, and not have any conflict of interests.

“If they have had business dealings with the parties, they must make disclosure at the outset, and it is up to the party to waive that actual or potential conflict.”

Usually each party selects one DRB panelist, and then

the two panelists select the Chair. As the disputes are often of a more technical nature, lawyers have traditionally not sat on boards.

However, that is changing and gradually lawyers are being asked to serve as chairs because of their knowledge and familiarity with legal and process issues. The board members’ fees are shared on equal 50/50 basis by both sides, he says.

Unlike more formal litigation or arbitration proceedings conducted off site, the hearings are usually held in the project site offices and it has been Kirsh’s experience that the parties appear without the benefit of legal counsel and that presentations are made by one representative of each side, without any witnesses.

“There are no rules of evidence, no examinations or cross-examinations, no wide-ranging production of documents, and certainly virtually no legal process. And no precedent is set.”

The boards have considerable discretion on how they receive evidence, although how the hearing will be conducted is determined by the contract. It may or may not adhere to the guidelines laid out in a Practices and Procedures manual written by the Dispute Resolution Board Foundation, says Kirsh.

An updated 2019 version of the manual is scheduled for release this November, says foundation executive director Ann Russo, pointing that an electronic version can be accessed without charge, while hard print copies are available for a nominal fee.

Headquartered in Charlotte North Carolina, the foundation is a non-profit international organization funded by membership, training, and conference fees which is dedicated to construction dispute avoidance. Its internal structure is divided into three different zones with separate boards of directors: Region One — the United States and Canada; Region Two — Europe, Asia, Africa, and Latin America; and Region Three which consists of Australia and New Zealand.

Founded in 1996, it has now 10,000 members in 70 countries that come from every construction-related sector whether it be contractors, architects, financial institutions, or government agencies, she says.

A major ‘accelerator’ in its growth was a decision by the World Bank that a dispute resolution system be used on projects over a certain size which it finances. In the United States the Florida Department of Transportation requires a dispute resolution system on all its projects, she says.

Dispute resolution boards have been employed on over 2,700 projects according to foundation’s records and that information is compiled through a variety of methods. Although DRB proceedings in private sector disputes are usually confidential, agencies such as the Florida DOT “do share their statistics.”

They are especially critical on tunnel projects “where changed conditions can lead to significant delays and additional costs,” says Gerald McEniry, senior consultant with the Montreal office of Revay and Associates Limited and the Canadian representative on the foundation’s Zone One board of directors.

McEniry learned about the advantages of dispute resolution boards on Ontario Power Generation’s Niagara Tunnel project where Revay acted as the consultant for the contractor. That ultimately led him to take the foundation’s training and subsequently serve on a number of boards.

Commenting on the composition of the boards, McEniry says it’s important to have the neutral perspective of “three wise men or three wise women.”

That is a viewpoint emphasized by Kirsh Construction ADR Services Ltd.’s Harvey Kirsh.

Asked by why the parties in a construction project agree to the establishment of Dispute Resolution Board which renders a non-binding opinion, Kirsh explains the use a credible and knowledgeable board can discourage them taking the more expensive and time-consuming route of arbitration or litigation at the end of the project.

“And waiting to the end of the project can present a real cash-flow problem, especially for the contractor.”

If, however, they are still not satisfied they are usually entitled to take the dispute to court or arbitration. The contract will dictate whether the board’s decision is admissible in the subsequent court or arbitration hearing, says Kirsh.

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# Court ruling resets the playing field for bonding companies

IAN HARVEY  
CORRESPONDENT

A landmark court decision supporting a construction bonding company's claims in bankruptcy over a bank will stand without a Supreme Court of Canada appeal.

The unanimous five-member-panel decision in *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 cleans up conflicts between the Ontario Construction Lien Act and the Federal Bankruptcy and Insolvency Act.

The issue turned over whether funds owing to or received by a bankrupt contractor in a statutory trust created by s. 8(1) of the Construction Lien Act R.S.O. 1990, c. C. 30 ("CLA") are excluded from distribution to the contractor's creditors, pursuant to s. 67(1)(a) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA").

The case involved paving contractor A-1 which filed for bankruptcy around 2014. At the time it had four major ongoing paving projects, three with the City of Hamilton and one with the Town of Halton Hills.

In the bankruptcy process, the court directed A-1's receiver to deposit any accounts receivable from those jobs into a trust account. Subsequently the municipalities paid \$675,372.27 which in turn went into those accounts.

The Royal Bank of Canada (RBC) claimed those funds because they were a secured creditor under the federal legislation. Guarantee Company of North America, also a secured creditor, countered saying it had bonded A-1 and paid out 20 Construction Lien Act claims totaling \$1,851,852 to supplier and contractors.

Furthermore, the company countered that the Labourers International Union of North America (LIUNA) and the International Union of Operating Engineers (IUOE) also claimed for wages owed totaling \$511,949.

The Royal Bank argued that because the moneys from four jobs were "co-mingled" into the trust account, it couldn't be described as a trust account for this purpose.

The dispute drew the Attorney



PHOTOS COURTESY OF SHUTTERSTOCK

**There will be no Supreme Court of Canada appeal in the recent decision for *The Guarantee Company of North America v. Royal Bank of Canada*.**

General of Ontario as an intervener in support of the Guarantee Company and the unions. The initial decision was that the funds in the trust fund were open for distribution to all creditors, including the Royal Bank and were to be shared pro rata.

Block Co., 2014 ONSC 3062, which set that standard. It also rejected RBC's argument that its standing as a creditor should take precedence over the others. The court also awarded costs of \$75,000 against RBC for both hearings.

cases brought to it.

Indeed, the Supreme Court declined to hear a similar case from Alberta, *Iona Contractors Ltd. v. Guarantee Company of North America*, 2015 ABCA 240.

In a similar matter, the Alberta Court of Appeal upheld an earlier decision that the provincial legislation validated the trust with the federal legislation notwithstanding. As a result any money paid to Iona should be paid to Guarantee which was the bonding company.

Tara Wishart, vice-president of claims at Guarantee's Toronto office says the decision is an important one for the entire construction sector.

"Really it's about ensuring the people who earned that money by doing the work, the tradespeople, get paid," she says. "They were paid for the work performed only to be told that the money belonged to someone else (the bank)."

Bonding companies insure that the contractor and supplier hold up their end of the bargain and perform the work. The commissioning entity pays them for the work — or in the case of insolvency — pays the receiver.

"It ensures that the money will continue to flow for the benefit of the people who performed the work," she says. "We're happy about the decision but also in that the Ontario Attorney General joined and was aligned with our case and all the other organizations in the construction industry and assurance sector were also supportive and aligned."

With this decision as well as the Alberta decision and the Supreme Court of Canada's option not to review it, she says, the construction industry is in a much better position.

"There certainly was a sense of elation across the industry," says Ian Cunningham, president of the

Council of Ontario Construction Associations (COCA). "There was a pervasive sense of surprise that RBC didn't appeal. Some thought they're waiting for a different case with different facts and not up against a deep-pocketed opponent."

Still, COCA was prepared to build a coalition of stakeholders to take the case to the Supreme Court if that body had given leave to appeal.

He said there was already a pool of \$80,000 to \$90,000 pledged to fund the battle, given the crucial importance of the ruling to the construction sector.

"We hadn't even really asked for money at that point," he says. "But we were engaging very serious construction lawyers to take this to the Supreme Court if required. The industry really coalesced behind this issue."

Going forward, he says, there are no immediate plans for action other than to see how this ruling plays out in tandem with the new Ontario Construction Lien Act provisions and the prompt payment protocols.

"We're a provincial association, so we don't do a lot of lobbying at the federal level," he says. "It might be something to look at trying to get the federal Bankruptcy Act changed though."

However, given the October federal election, it's probable that nothing will change in terms of legislation until well into next year if at all. "Meanwhile, there's a strong and unanimous decision from the Ontario Court of Appeal which will stand and be the guiding principal at least until it's struck down."

Cunningham says the banks however are going to have to price in the risk involved in funding projects since they won't automatically get priority disbursement of assets and payments.

**"Really it's about ensuring the people who earned that money by doing the work, the tradespeople, get paid,"**

Tara Wishart  
The Guarantee Company of North America

The Guarantee Company appealed. The Ontario Court of Appeal panel rejected the issue of "co-mingling" because the money was traceable and secure. Further, it rejected the previous case of guidance, *Royal Bank of Canada v. Atlas*

The decision was handed down in January of this year but it wasn't until March that it became clear that RBC would not appeal to the Supreme Court of Canada, a long shot given that Canada's highest court declines to hear 75 per cent of

