

Construction Issues in Insolvency Law

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CONSTRUCTION ISSUES IN INSOLVENCY LAW

Introduction

In recent months, there have been a significant number of insolvency proceedings with respect to construction companies. These have taken the form of receiverships, *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings and bankruptcies. Insolvencies typically involve land developers, but in recent months, head and sub-contractors have also made filings.

Insolvency proceedings impose significant issues for construction lawyers, since the law with respect to insolvencies is often at odds with what construction lawyers expect under the *Builders' Lien Act* ("**BLA**") and related commercial litigation. Some significant issues arise in respect of process and procedure to establish lien claims, both of the insolvent company and/or its creditors, priority among those creditors and, especially Canada Revenue Agency ("**CRA**") and how to best advise clients as to the most favourable path for recovery for all parties. As opposed to bringing lien claims or terminating contracts, rights and remedies are often constricted in insolvency proceedings.

The following paper discusses some of these issues, particularly in reference to the recent and ongoing bankruptcy of the Plumb-Line Group of Companies ("**Plumb-Line**"). Plumb-Line was a group of companies involved in numerous construction contracts throughout Alberta, primarily as a subcontractor. It was assigned into bankruptcy in mid-October, 2013. The Trustee identified various outstanding accounts receivable under the Plumb-Line subcontracts and registered builders' liens for these accounts receivable in October and November 2013. Many of Plumb-Line's subcontractors also registered builders' liens on the projects. CRA claimed for unremitted withholding tax. As the Plumb-Line entities had abandoned their subcontracts, the owners and head contractors had to retain other contractors to complete the Plumb-Line work. The liens were discharged by Consent Order and payment of security to stand in place of the lands as per Section 48 of the BLA. One of the issues in the Plumb-Line matter was priority to the security paid into court or trust as between the Plumb-Line entities and its creditors, including CRA, and the sub-subcontractors, and the interplay between the BIA and the BLA.

Insolvency Proceedings

Insolvency proceedings generally fall under two categories: liquidation or restructuring.

In liquidation proceedings, a Receiver or Trustee in bankruptcy is appointed to simply recover the assets of the company, sell them, and distribute the proceeds in order of priority at law. However, a Receiver or Trustee is entitled to operate the company for some time in order to perform its duties,