



COURT NO. B131552
ESTATE NO. 11-1820752
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY**

**IN THE MATTER OF THE BANKRUPTCY OF
0409725 B.C. LTD.**

NOTICE OF APPLICATION

Name of applicant: G. Powroznik Group Inc. of G-Force Group (the "Applicant")

To: The Creditors of 0409725 B.C. Ltd.

TAKE NOTICE that an application will be made by the Applicant to Mr. Justice Grauer in chambers at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on Friday, June 20, 2014 at 10:00 a.m. for the order set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order in the form attached as Schedule "A".

Part 2: FACTUAL BASIS

1. 0409725 B.C. Ltd. formerly doing business as Odenza Homes ("**Odenza**") made an assignment in bankruptcy (the "**Bankruptcy**") pursuant to section 49 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "**BIA**") on December 16, 2013 and ceased its operations. Odenza operated a home building and renovation business in Vancouver, B.C. and in most cases was the general contractor under contracts with owners (the "**Owners**" and individually an "**Owner**").
2. On December 16, 2013, the Applicant was appointed as Trustee in Bankruptcy (the "**Trustee**") for the estate of Odenza. The Trustee's appointment was later ratified by the creditors at the first meeting of creditors on January 8, 2014.
3. In its report to the Court dated December 18, 2013 (the "**Trustee's First Report**"), the Trustee provided its rationale for the authorization of the Trust Claim Settlement Program (the "**TCSP**"), in order to attempt to minimize asset dissipation and costs while maximizing recoveries for the creditors of Odenza. A significant number of Odenza's creditors are also trust claimants and, or alternatively, lien claimants under the *Builders Lien Act*, S.B.C. 1997, c. 45 (the "**BLA**").
4. A significant amount of the assets in the possession of Odenza were (or upon receipt would be) impressed with a trust under the BLA, and would therefore not be part of the bankrupt estate; and accordingly, these trust claims and trust assets could not be dealt with under the BIA process. Similarly, holdback funds otherwise due to Odenza from Owners would be subject to lien claims and would not be dealt with under the BIA process.

5. On December 19, 2013, the Court made an Order authorizing the TCSP (the “**December 19 Order**”) and appointing the Applicant as claims administrator (the “**Claims Administrator**”) of the TCSP.
6. The Claims Administrator provided the Claims Administrator’s First Report to the Court dated February 16, 2014 (the “**First Report**”) in support of an application on February 18, 2014, for an order (the “**February 18 Order**”) authorizing several amendments to the December 19 Order (together the “**TCSP Order**”), most of which changes were administrative in nature with the goal of improving and streamlining the administration of the TCSP.
7. The Claims Administrator has continued to adjudicate the claims of trust and lien claimants and has done a significant amount of work to review many of Odenza's projects and to open dialogue with several Owners about what is owed on their project. A brief update on those efforts is included in the Claims Administrator’s Second Report to the Court dated June 6, 2014 (the “**Second Report**”).
8. At the time of Bankruptcy, the Trustee seized a sum of cash in the amount of \$527,506.22 that was in Odenza's two operating bank accounts at HSBC Bank Canada (the “**Initial Cash Balance**”). The Trustee and Claims Administrator identified two significant legal issues surrounding the Initial Cash Balance: first, who is entitled to those funds; and second, how should those funds be distributed. The Initial Cash Balance has been held in trust in the Consolidated Trust Account established in the December 19 Order pending analysis of the Odenza’s bank accounts, banking arrangements, business arrangements with its Owners and creditors and related matters.
9. The Trustee and the Claims Administrator anticipated that additional funds would be paid by Owners pursuant to the TCSP Order. Those funds included monies owed by the Owners on account of home construction or renovation contracts (the “**Projects**” and individually a “**Project**”) with Odenza (the “**Odenza’s Construction Contracts**”) after the Bankruptcy (the “**Potential Trust Funds**”) and holdback funds under the BLA (the “**Holdbacks**” and on a Project basis a “**Holdback**”).
10. The Second Report provides a summary of the composition of the Initial Cash Balance, the Potential Trust Funds and the Holdbacks. It further outlines the significant legal issues identified by the Claims Administrator that must be determined in order to proceed with the TCSP, namely:
 - (a) Who are the potential claimants to the Initial Cash Balance, the Potential Trust Funds and the Holdbacks;
 - (b) What are the potential methods of distributions of the Initial Cash Balance, Potential Trust Funds and the Holdbacks; and,
 - (c) How should costs be allocated in respect of the distributions to be made?
11. Accordingly, the Claims Administrator is seeking the order, direction and declaration from the Court in respect of these issues.
12. The Claims Administrator’s conclusions, which form its recommendations to the Court, are:

- (a) The Initial Cash Balance remaining at the date of bankruptcy comprised funds paid by Owners on account of improvements and was subject to a statutory trust created by Section 10(1) the BLA. As trust funds they are excluded from the property of the bankrupt, Odenza, by operation of section 67(1) of the BIA. The claimants to the Initial Cash Balance are the creditors who directly supplied materials, labour and/or services to an improvement (i.e. a construction or renovation project of Odenza) regardless of the Project (the “**Trust and Lien Claimants**”) and who have accepted claims under the TCSP (the “**Trust and Lien Claims**” and individually a “**Trust and Lien Claim**”).
- (b) The Potential Trust Funds received after the date of bankruptcy by the Claims Administrator from Owners or contractors are subject to a statutory trust created by Section 10(1) the BLA. As trust funds they are excluded from the property of the bankrupt, Odenza, by operation of section 67(1) of the BIA. The claimants to the Potential Trust Funds from a Project are the Trust and Lien Claimants in respect of the specific Project. Should all Trust and Lien Claimants in respect of the Project be paid in full, any remaining funds would be payable to the Trustee for the benefit of all creditors in the bankruptcy (the “**Bankrupt Estate**”) who will include all creditors who do not have a Trust and Lien Claim, including any Owner who has a claim against Odenza under its contract, and creditors who have a shortfall in collecting their Trust and Lien Claim on a Project.
- (c) The Holdbacks received after the date of bankruptcy by the Claims Administrator from Owners or contractors or obtained from the Court after payment by Owners or contractors under Sections 23 of the BLA in respect of a specific Project are subject to the provisions of BLA. The claimants to the Holdbacks for a Project are:
- i. The Trust and Lien Claimants in respect of the Project and those persons who do not have a direct claim against Odenza, and thus do not have a trust claim under the BLA, but supplied materials, labour and/or services to an improvement and thus would have a lien right under the BLA against the Holdback on the Project (the “**Holdback Only Claimants**”). At present there is only one creditor in this category with claims in respect of eight Projects. Those claims are duplicated in the claims made by a subcontractor on those same Projects; and,
 - ii. Odenza, to the extent that it remains unpaid in respect of the Project. Should Odenza be entitled to receive funds from the Holdbacks in respect of a Project, those funds would become Potential Trust Funds in respect of the Project to be dealt with as noted in b) above.
- (d) In respect of the Initial Cash Balance, due to the amount by which the total trust claims exceed the aggregate of the Initial Cash Balance, the Initial Cash Balance should be distributed on a pro rata basis to creditors with Trust and Lien Claims, except in the case of payments to subcontractors of Odenza. In those cases, payments by the Claims Administrator may be subject to holdback under section 4 of the BLA for the benefit of the suppliers to the subcontractor and, if so, will be dealt with in accordance with the BLA (the “**Subcontractor Holdback**”).

- (e) In respect of the Potential Trust Funds, the distribution should be on a pro-rata basis to creditors with Trust and Lien Claims in relation to the specific Project in respect of which the Potential Trust Funds were received, subject to the same qualification noted in respect of a Subcontractor Holdback noted in (d) above. Any surplus on the Project would be paid over to the Trustee for the general body of creditors in the Bankrupt Estate.
- (f) In respect of the Holdbacks, the distribution should be on a pro-rata basis to those creditors with Trust and Lien Claims, to the Holdback Only Claimants, and subject to the BLA priority provisions, to Odenza to the extent that it has a lien claim in relation to the specific Project in respect of which the Holdback was received in accordance with the provisions in the BLA. Any payment to Odenza on a particular Project would become Potential Trust Funds in respect of the Project and would be dealt with as provided in (e) above.
- (g) For the purposes of dealing with the costs associated with the distribution of the funds, the Claims Administrator proposes to allocate the costs to the approved Trust and Lien Claims which were entitled to share in actual receipts from the Potential Trust Funds and Holdbacks on each Project. In order to facilitate this, any allocation of the Initial Cash Balance approved by the Court to the creditors with Trust and Lien Claims will be allocated to each Project in the ratio of the Trust and Lien Claims on each Project to the total Trust and Lien Claims. For example, if Project 1 had a total of \$75,000 in Trust and Lien Claims and the total Trust and Lien Claims on all of Odenza's Construction Contracts and Projects is \$3 million, then Project 1 will receive $\$75,000/3,000,000 = 2.5\%$ of \$527,506.22 or \$13,187.66. The allocated amount of the Initial Cash Balance to each Project would be added to any other receipts from the Potential Trust Funds and Holdbacks on that Project, to form the gross receipts available for the creditors with Trust and Lien Claims on that Project (the "**Specific Project Receipts**").
- (h) The costs of administration in accordance with the priorities in the TCSP Order would be deducted resulting in a net balance to be distributed pro rata to the creditors with Trust and Lien Claims on all Projects up to a maximum of 100 cents on the dollar. Any surplus on any particular Project would be paid over to the Trustee for the general body of creditors which will include all creditors who do not have a Trust and Lien Claim including any Owner who has a claim against Odenza under its contract, and creditors who have a shortfall in collecting a Trust and Lien Claim on other Projects.
- (i) The costs of administration of the TCSP would include:
 - i. General costs for the benefit of all Trust and Lien Claims;
 - ii. Where applicable, specific costs that relate to a specific Project
(together the "**Specific Project Costs**"); and,
 - iii. Any specific costs that relate to a specific Trust and Lien Claim or Claims
(together "**Specific Attributable Costs**"),

The Specific Project Costs would be deducted from the Specific Project Receipts for that Project and the resulting net project receipts would be distributed to the Trust and Lien Claims for that Project on a pro rata basis, unless there are Specific Attributable Costs, in which case the distribution to the affected Trust and Lien Claims would be further reduced as appropriate.

- (j) The exception to the proposed method of distribution above would be if there are Holdback Only Claimants on a Project. In this case, the Claims Administrator would need to prepare two separate distributions for the Project, one involving non-Holdback trust funds and the other involving Holdback funds. The Holdback Only Claimants would bear their pro rata share of the costs of administrator on an equitable basis.

Part 3: LEGAL BASIS

1. By paragraph 6 of the TCSP Order, the Claims Administrator was prohibited from dealing with any of the funds subject the TCSP Order except as further directed by the Court.
2. By paragraph 39 of the TCSP Order, the Claims Administrator was permitted from time to time to apply to the Court for directions.
3. The Claims Administrator seeks direction of the Court with respect to the legal issues identified in the Second Report.

Statutory Provisions

4. Section 67(1)(a) of the BIA provides that property of the bankrupt does not include money held by the bankrupt in trust for another person.
5. Section 10(1) of the BLA provides that:

Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

6. Sections 4(1) and (9) of the BLA provide that:

(1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

(a) the value of the work or material as they are actually provided under the contract or subcontract, and

(b) the amount of any payment made on account of the contract or subcontract price.

(9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all

persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

7. Section 37 and 38 of the BLA address the priorities in respect of lien claimants which provisions will be applied by the Claims Administrator as required in any distribution of Holdbacks.

Entitlement to the Initial Cash Balance

8. Substantially all of the monies received into the bank accounts of Odenza in the month preceding the bankruptcy were received from Owners on account of improvements made by Odenza. The only exception to this is in relation to three payments by Owners totaling \$22,500.00 on account of deposits for which it appears no improvement was commenced. The funds in the Odenza accounts at the date of bankruptcy comprise the Initial Cash Balance.
9. The potential claimants to the Initial Cash Balance are the Trustee for the benefit of the Bankrupt Estate, the Trust and Lien Claimants and the Owners of the Projects who made payments to Odenza in the weeks preceding the bankruptcy, including Owners who paid deposits. Unless there is a trust in favour of the Trust and Lien Claimants or Owners, the Initial Cash Balance would be payable to the Bankrupt Estate.

(a) The Trustee and the Trust and Lien Claimants

10. A trust created by builders' liens legislation, such as the BLA, is a valid trust under the BIA. [See: *John M.M Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487]
11. Subsequent to *John M.M. Troup Ltd.*, the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, ruled that a statutory trust under provincial legislation did not override the distribution provisions of the BIA. *Henfrey* did not specifically overrule *John M.M. Troup Ltd.* The issue as to whether the trust under section 10(1) of the BLA is a trust under the BIA has not been specifically addressed in British Columbia.
12. In *Roscoe Enterprises Ltd. v. Wasscon Construction Inc. et al.* (1998), 169 Sask. R. 240 (Q.B.) the Court, following *Henfrey*, determined that the trust created in respect of construction funds under Saskatchewan's builder's lien legislation does not apply in a bankruptcy. That decision was not followed in a later decision of the same Court in *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.*, 2002 SKQB 86; affirmed 2002 SKCA 145, specifically due to the fact that the *John M.M. Troup Ltd.* decision was not considered.
13. In *D & K Horizontal Drilling* the trial court specifically noted at paragraphs 35 and 36 that:

The decision in *Troup* has not been overruled.

In *British Columbia v. Henfrey, supra*, Cory J., although dissenting on other grounds, affirmed the constitutional aspect of *Troup* as follows at p. 41:

This Court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In *John M.M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, at p. 494, the trust provisions of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, (now the *Construction Lien Act*) were found to be validly enacted....

14. A material aspect of the statutory trust considered in *Henfrey* and subsequent cases is that the trust was in favour of a government or government agency where there was a specific treatment of "Crown" claims under the BIA. The Court found that the relevant statute created a trust, but found that the trust could not override the priority scheme of the BIA in relation to Crown claims. Moreover, the Court found that there were no identifiable funds impressed with the trust. Accordingly, the statutory trust could not attach.

15. McLachlin, J., as she then was, stated:

If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47 (a). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(a). The province has a claim secured only by a charge or lien, and s. 107(1)(j) applies.

16. The funds in the Odenza accounts are attributable to payments by Owners on account of building projects (with the exception of the small amount for deposits) and are accordingly identifiable as trust funds generally. Even though there is co-mingling of the funds received from Owners, co-mingling of funds is not a breach of trust or a contravention of the BLA as provided by section 11(7) of the BLA.

17. The Claims Administrator seeks an order, direction and declaration that the Initial Cash Balance are subject to a trust in favour of the Trust and Lien Claimants as at the date of bankruptcy of Odenza and that as a result, the Trustee, on behalf of the Bankrupt Estate, has no interest in the Initial Cash Balance.

(b) Owners

18. None of Odenza's Construction Contracts provided that monies paid by Owners to Odenza were to be held in trust for the benefit of the Owner. Accordingly, there could be no express trust for the benefit of Owners.

19. Section 10(1) of the BLA does not include Owners as beneficiaries of the trust. The trust is "for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor." [See: *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248, paragraphs 61, 62 and 63.]

20. In *Columere Park Developments* the Court concluded that on the specific facts of that case there was a breach of a constructive trust in favour of an owner where monies paid to a contractor were wrongfully diverted by the contractors to another project for the benefit of a company related to the contractor. This finding was made in order to allow the plaintiff owner to trace the funds into the other project.

21. The test for a constructive trust as stated in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, identifies four conditions which must generally be satisfied for a constructive trust based on wrongful conduct:
 - (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
 - (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
 - (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
 - (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.
22. There are several factors which would make imposition of a constructive trust over the Initial Cash Balance in favour of any Owner unjust in all the circumstances:
 - (a) To the extent that there is an actually overpayment, the obligation of Odenza to the Owner is a debt obligation. [See: *Vancouver City Savings Credit Union v. Elliott and others*, 1991 CanLII 1897 (BCSC)]
 - (b) The funds were paid pursuant to the provisions of Odenza's Construction Contracts which provided for payments to be made when certain targets were met. To the extent that the value of the work and materials was less than the amount paid, but such payments were in accordance with the relevant contract, it cannot be said that there has been an overpayment.
 - (c) The funds received in the period preceding bankruptcy from all parties were co-mingled making it impossible to identify the funds paid by particular Owners. The BLA provides that co-mingling of funds does not defeat the trust in favour of the beneficiaries under the BLA, which trust does not include an owner.
 - (d) The balances in the Odenza accounts revolved in the period preceding the bankruptcy. For example, any monies received in the accounts 30 days prior to the date of bankruptcy would have been notionally spent by Odenza before the date of bankruptcy due to the co-mingling of the funds.
 - (e) The Trust and Lien Claimants, to the extent that they remained unpaid in respect of the Project, would arguably have priority claims to the trust funds over any individual Owner.
23. There is no provision in Odenza's Construction Contracts that monies paid by way of a deposit or any "overpayment" by an Owner would be subject to a trust. On the construction contracts where work was done the original deposit would have been earned.

24. In the case of the deposits totaling \$22,500.00 where there is no other documentation, no work appears to have been initiated by Odenza. Accordingly, there would be no trust in respect of those funds pursuant to the BLA.
25. While there may have been a notional “overpayment” by an Owner by reference to the amount of work that may have been done on a Project, there would not have been an actual overpayment. Payments were due under Odenza’s Construction Contracts based on meeting a threshold set out in the contract, not necessarily on the value of the work done. The Owner was contractually bound to make the payment on the basis that the payment had been earned by Odenza meeting the contract threshold. Accordingly, every payment made would have been Odenza’s to use, subject to the trust obligations of the BLA, and there would not have been an overpayment by an Owner.
26. Where a trustee has breached a trust in respect of monies co-mingled with the trustee’s own monies, the trustee is deemed to have spent his own money first and only after its own funds are depleted, does the law deem the trustee to have then spent the trust funds. [See: *In re Hallett's Estate* (1880), 13 Ch. D. 696]
27. If monies that were received by Odenza as a deposit or overpayment are not trust funds based on *Vancouver City Savings Credit Union v. Elliott and others*, such funds would have been paid out by Odenza based on *In re Hallett's Estate* before any actual trust funds were used. Based on the payments made by Odenza, such funds would have been paid out to creditors of Odenza prior to the date of bankruptcy. Accordingly, any claim that an Owner may have to an overpayment (should an overpayment have been made) or to a deposit in respect of a project which did not proceed would only give rise to an unsecured claim for such Owner in the bankruptcy.
28. The Claims Administrator seeks an order, direction and declaration that the Owners do not have a trust claim in respect of the Initial Cash Balance.

Entitlement to the Potential Trust Funds

29. The Potential Trust Funds are those amounts which were owed by Owners to Odenza pursuant to Odenza’s Construction Contracts, excluding Holdbacks, which would be paid by Owners after the date of bankruptcy. Any Owner making such payment, and thus the Project and the Trust and Lien Claimants in respect of the Project, will be identifiable.
30. Even if Odenza breached the trust obligations imposed by the BLA; neither the Trustee nor the Claims Administrator would be entitled to breach those same trust obligations in respect of such funds received after the date of bankruptcy. [See: *Anron Mechanical Ltd. v. L'Abbé Construction (Ontario) Ltd. (Trustee of)* (1991), 5 C.B.R. (3d) 133 (Ont. Gen. Div.)]
31. Accordingly, Trust and Lien Claimants in respect of each specific Project would be entitled to payment of the Potential Trust Funds that may be received from the Owner in respect of such Project.
32. However, if there are funds left over after all Trust and Lien Claimants have been paid in full, any remaining funds should be paid to the Trustee for administration in the Bankrupt Estate.

Entitlement to the Holdbacks

33. The Holdbacks are funds required to be retained by Owners for the benefit of all persons who provided work, materials or services in respect of an improvement and remain unpaid. Such persons will have a lien in respect of such funds pursuant to section 4(9) of the BLA.
34. The beneficiaries of the lien on the Holdback are: the Trust and Lien Claimants, who are the persons in direct privity of contract with Odenza; the Holdback Only Claimants, who are not in direct privity of contract with Odenza but provided work, materials or services in respect of the improvement and thus have a lien on the Holdback for a Project; and, Odenza for any unpaid amount in respect of the Project, subject to the distribution and priority provisions of sections 37 and 38 of the BLA.
35. Since the Project and potential claimants can be identified in respect of each of the Holdbacks received, only those Trust and Lien Claimants and the Holdback Only Claimants in respect of the Project, and Odenza to the extent that it remains unpaid in respect of the Project, would be entitled to payment from the Holdback received from the Project, subject to the distribution and priority provisions of sections 37 and 38 of the BLA..

Distribution of the Initial Cash Balance

36. The value of the Trust and Lien Claimants in respect of the Initial Cash Balance far exceeds the amount of the Initial Cash Balance.
37. Where funds in an account have been characterized as trust funds and there are multiple persons with trust claims in respect of the funds but insufficient funds to satisfy all claims, there have been three approaches for distribution considered by the Courts:
 - (a) First in, first out (“FIFO”). Under this approach, the Court will look at the account and work backwards to determine the interests of the beneficiaries. This approach works best in situations in which there are a limited number of claimants and discrete traceable transactions. There have been suggestions that FIFO should only apply in debtor-creditor situations.
 - (b) Lowest intermediate balance rule (“LIBR”). LIBR “states that a claimant to a mixed fund cannot assert a proprietary interest in that fund in excess of the smallest balance in the fund during the interval between the original contribution and the time when a claim with respect to that contribution is being made against the fund.” [See: *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42, O.R. (3d) 357 (Ont. C.A.)] This approach also works best in situations where there are a limited number of claimants. In effect, it is a modification of FIFO so that in a revolving account there can be some recovery for trust beneficiaries who might not recover under FIFO.
 - (c) *Pari passu ex post facto pro rata* or simply the pro rata approach. This is the most frequently applied approach in the more recent cases involving multiple claims against a mixed trust account. Under this approach all trust claimants are entitled to a pro rata share in the fund available.
38. Of the three approaches, the pro rata approach appears to be the one most favoured by the courts where there are multiple innocent claimants to a fund but insufficient funds to satisfy

all claims. The pro rata approach is applied in cases of default in relation to lawyers trust accounts and in respect of other trustees. The claimants are treated equally based on their pro rata entitlement. [See: *Re Ontario Securities Commission and Greymac Credit Corp.*, 59 O.R. (2d) 480 (Ont. C.A.); affirmed, [1988] 2 S.C.R 172 and *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42, O.R. (3d) 357 (Ont. C.A.)].

39. In British Columbia, while FIFO and LIBR have been recognized as possible approaches, the court concluded that the pro rata approach is appropriate in the case of multiple claims to limited trust funds by innocent claimants. [See: *The Legal Profession Act and Marlyene Joy O'Dwyer*, 2006 BCSC 328]
40. Also, when funds impressed with a BLA trust come into the possession of a party such as a trustee in bankruptcy there is a duty to distribute ratably. [See: *Anron Mechanical Ltd. v. L'Abbé Construction (Ontario) Ltd. (Trustee of)*]
41. The Claims Administrator seeks an order, direction and declaration that subject to the charges granted pursuant to the TCSP Order herein in favour of the Claims Administrator and its counsel, and the Trustee and its counsel (collectively the "Charges"), in respect of the Initial Cash Balance, the Claims Administrator shall distribute the Initial Cash Balance on a pro rata basis to those Trust and Lien Claimants whose claims have been accepted by the Claims Administrator, except in the case of payments to subcontractors of Odenza,.
42. In the case of subcontractors, the Claims Administrator will deal with the Subcontractor Holdback as required by the BLA.

Distribution of the Potential Trust Funds

43. Given that the Potential Trust Funds are Project specific, those funds would be payable on a pro rata basis to the Trust and Lien Claimants in respect of each Project in accordance with the provisions of the BLA.
44. The Claims Administrator seeks an order, direction and declaration that subject to the Charges in respect of the Potential Trust Funds, and subject to the provisions of the BLA for the Subcontractor Holdback, the Claims Administrator shall distribute the Potential Trust Funds received in respect of a Project on a pro rata basis to those Trust and Lien Claimants in respect of that Project. Any surplus funds available after payment of all Trust and Lien Claimants in respect of the Project shall be paid over to the Trustee for distribution to the general body of creditors in the Bankrupt Estate.

Distribution of the Holdbacks

45. Given that the Holdbacks are Project specific, those funds would be payable in accordance with the distribution and priority provisions of the BLA, in particular sections 37 and 38.
46. The Claims Administrator seeks an order, direction and declaration that subject to the Charges in respect of the Holdbacks, and subject to the provisions of the BLA, the Claims Administrator shall distribute the Holdbacks received in respect of a Project in accordance with the priorities of the BLA to the Trust and Lien Claimants, the Holdback Only Claimants, and Odenza to the extent that it remains unpaid on the Project, in respect of that Project. Any monies that would be distributed to Odenza shall form part of the Potential

Trust Funds in respect of the Project. Any surplus funds available after payment of all Trust and Lien Claimants and Holdback Only Claimants in respect of the Project shall be paid over to the Trustee for distribution to the general body of creditors in the Bankrupt Estate.

Allocation of Costs

47. The TCSP Order provides for the fees and expenses of the Claims Administrator and its counsel, and the fees and expenses of the Trustee and its counsel to the extent that they provide assistance to the Claims Administrator, to be paid from the funds administered by the Claims Administrator under the TCSP.
48. The Claims Administrator has proposed the manner for allocation of those costs in the Second Report.

Part 4: MATERIAL TO BE RELIED ON

1. Order of December 19, 2013;
2. Order of February 18, 2014;
3. First Report of the Claims Administrator dated February 16, 2014;
4. Second Report of the Claims Administrator dated June 6, 2014.

The Applicant estimates that the application will take 2 hours.

[Check the correct box.]

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: June 10, 2014



Signature of Geoffrey H. Dabbs,
Lawyer for the Applicant, G. Powroznik Group Inc.
of G-Force Group, Court Appointed Claims
Administrator

To be completed by the court only:

<p>Order made</p> <p><input type="checkbox"/> in the terms requested in paragraphs _____ of Part 1 of this notice of application</p> <p><input type="checkbox"/> with the following variations and additional terms:</p> <p>_____</p> <p>_____</p> <p>Dated: _____</p> <p style="text-align: right;">Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master</p>
--

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

SCHEDULE "A"

COURT NO. B131552
ESTATE NO. 11-1820752
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY**

**IN THE MATTER OF THE BANKRUPTCY OF
0409725 B.C. LTD.**

ORDER MADE AFTER APPLICATION

BEFORE)
) THE HONOURABLE MR.)
) JUSTICE GRAUER) 20/JUNE/2014
)

ON THE APPLICATION OF G. Powroznik Group Inc. of G-Force Group, the Court appointed claims administrator (the "Claims Administrator"), coming on for hearing at Vancouver, British Columbia on this day and on hearing Geoffrey Dabbs, counsel for the Claims Administrator; Magnus Verbrugge, counsel for G. Powroznik Group Inc. of G-Force Group, trustee in bankruptcy of 0409725 B.C. Ltd. (the "Trustee") and _____:

THIS COURT ORDERS, DIRECTS AND DECLARES that:

1. For the purposes of this Order, the terms: "Holdback Only Claimants", "Holdbacks", "Initial Cash Balance", "Owner", "Owners", "Project", "Potential Trust Funds", "TCSP Order", and "Trust and Lien Claimants" are as defined in the Claims Administrator's Second Report dated June 6, 2014 (the "Second Report").
2. The Initial Cash Balance, being the sum of \$527,506.22, is comprised of funds that were held in trust by 0409725 B.C. Ltd. ("Odenza") at the date of bankruptcy and form no part of the estate of Odenza in Bankruptcy (the "Bankrupt Estate").
3. The Owners have no trust claim in respect of the Initial Cash Balance.
4. The Potential Trust Funds that have been, or may be, received by the Claims Administrator from an Owner in respect of a Project are trust funds and form no part of the Bankrupt Estate.
5. The Holdbacks that have been, or may be, received by the Claims Administrator from an Owner in respect of a Project are trust funds and form no part of the Bankrupt Estate.

6. Subject to the charges granted pursuant to the TCSP Order herein in favour of the Claims Administrator and its counsel, and the Trustee and its counsel (collectively the "Charges"), in respect of the Initial Cash Balance, and subject to the provisions of section 4(1) of the *Builders Lien Act*, S.B.C. 1997, c. 45 (the "BLA"), the Claims Administrator shall distribute the Initial Cash Balance on a pro rata basis to those Trust and Lien Claimants whose claims have been accepted by the Claims Administrator.
7. Subject to the Charges in respect of the Potential Trust Funds, and subject to the provisions of section 4(1) of the BLA, the Claims Administrator shall distribute the Potential Trust Funds received in respect of a Project on a pro rata basis to those Trust and Lien Claimants in respect of that Project. Any surplus funds available after payment of all Trust and Lien Claimants in respect of the Project shall be paid over to the Trustee for distribution to the general body of creditors in the Bankrupt Estate.
8. Subject to the Charges in respect of the Holdbacks, and subject to the provisions of the BLA, the Claims Administrator shall distribute the Holdbacks received in respect of a Project in accordance with the priorities of the BLA to the Trust and Lien Claimants, the Holdback Only Claimants, and Odenza to the extent that it remains unpaid on the Project, in respect of that Project. Any monies that would be distributed to Odenza shall form part of the Potential Trust Funds in respect of the Project. Any surplus funds available after payment of all Trust and Lien Claimants and Holdback Only Claimants in respect of the Project shall be paid over to the Trustee for distribution to the general body of creditors in the Bankrupt Estate.
9. The proposed method for allocation of the costs in respect of administration of Initial Cash Balance, the Potential Trust Funds and the Holdbacks pursuant to the TCSP Order as provided in paragraphs 38 to 40 of the Second Report be and is hereby approved.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Geoffrey Dabbs,
Lawyer for the Claims Administrator

Signature of Magnus Verbrugge,
Lawyer for the Trustee

By the Court

Registrar