



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.

FORMERLY DOING BUSINESS AS ODENZA HOMES LTD.

**THIRD REPORT OF G. POWROZNIK GROUP INC.
OF G-FORCE GROUP
AS CLAIMS ADMINISTRATOR OF THE
TRUST CLAIM SETTLEMENT PROGRAM**

JUNE 2, 2015



Background and Purpose of this Report

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* (“**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 project owners (“**Owners**” and individually an “**Owner**”).
2. On December 16, 2013, G. Powroznik Group Inc. of G-Force Group 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 (the “**First Meeting of Creditors**”).
3. In its report to this Honourable Court dated December 18, 2013 (the “**Trustee's First Report**”), the Trustee provided its rationale for the authorization of the Trust Claim Settlement Program (“**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* (“**BLA**”). 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. On December 19, 2013, the Court made an Order authorizing the TCSP (the “**December 19 Order**”) and appointing G. Powroznik Group Inc. as Claims Administrator (“**Claims Administrator**”) of the TCSP.
4. In February 2014, the Court made 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. The Claims Administrator has continued to adjudicate on 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 will be provided in this report.
5. At the time of Bankruptcy, the Trustee seized the cash in Odenza's two operating bank accounts at HSBC Bank Canada (“**HSBC**”) totalling \$527,506.22 (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 Claims Administrator retained counsel to advise on these legal issues. The Initial Cash Balance has been held in trust in the Consolidated Trust Account established in the December 19 Order pending a final determination of the funds' ultimate treatment as directed by this Honourable Court.
6. The Claims Administrator initially made a Court application with respect to the Initial Cash balance in June 2014. The matter was initially adjourned generally pursuant to the

reasons for judgment dated June 30, 2014 (the “**June 2014 Reasons**”), and was revisited again in a hearing that occurred in March 2015 (the “**March 2015 Hearing**”). On April 14, 2015, Mr. Justice Grauer (“**Grauer, J.**”) issued his reasons for judgement (the “**April 2015 Reasons**”) which are attached hereto as **Appendix "A"**. In the April 2015 Reasons, Grauer, J. requested the Claims Administrator to submit additional evidence so that the proper legal treatment of the Initial Cash Balance can be determined.

7. The purposes of this Report are:
 - a) to provide additional analysis and evidence with respect to the Initial Cash Balance to this Honourable Court in response to the April 2015 Reasons;
 - b) to respond to specific legal issues raised in the April 2015 Reasons, and for the Claims Administrator to make recommendations on those issues in consideration of points of law as well as practical issues at hand in the TCSP; and
 - c) to seek the final direction of, and a declaration from, this Honourable Court on the treatment of the Initial Cash Balance or individual components of it.

8. This report should be read in conjunction with the Trustee’s First Report and the Claims Administrator's First Report dated February 16, 2014 (the “**First Report**”) as there is a significant amount of background information presented in those documents on Odenza, BLA issues and the projected or recommended outcomes of the TCSP generally for the benefit of the trust and lien claimants. More specifically, this report should be read in conjunction with the Claims Administrator's Second Report dated June 6, 2014 (the “**Second Report**”) which addressed, among other issues, the specific legal issues surrounding the treatment of Initial Cash Balance and provided analysis around the background and composition of the Initial Cash Balance.

Update on TCSP Generally

9. The focus of this Third Report is on the very specific legal issues surrounding the Initial Cash Balance. Generally speaking, the TCSP has been a very complicated, difficult, lengthy and costly process that requires the submission of a separate, detailed report that will update the Court and stakeholders on the many issues faced by the Claims Administrator in its attempt to maximize recoveries and on the progress and status of the TCSP. The Claims Administrator will submit a Fourth Report to the Court sometime after a ruling is given on this current application in order to provide a thorough update on the status of the TCSP.

Reasons for Judgment

10. The Claims Administrator has reviewed the April 2015 Reasons and respectfully summarizes what are, in its opinion, the key points of the judgment:
 - a) Grauer, J. has ruled that the trust provisions contained in section 10 of the BLA indeed survive the Bankruptcy of Odenza;

- b) Grauer, J. has raised a similar issue as raised in the June 2014 Reasons, and as discussed as the March 2015 Hearing, namely that section 10 of the BLA seemingly creates a separate trust for the subtrades of each homeowners' project (i.e. a "silo approach"). The effect of this approach is that if there are identifiable funds from a particular Owner in the Initial Cash Balance then they should be available for that Owner's unpaid trust claimants and if all of the subtrades on a project are paid, then any identifiable payment in excess of that total by the homeowner is no longer in trust and by necessity belongs to the Trustee (see paragraphs 31 to 34 of the April 2015 Reasons); and
 - c) The March 2015 Hearing was adjourned on the basis that Grauer, J. wishes to see the evidence which might otherwise establish that some of the amounts paid are not subject to the BLA trust but may belong to the Trustee in the Bankruptcy.
11. The Claims Administrator will herein provide additional analysis with respect to the Initial Cash Balance and address the issues raised in the April 2015 Reasons.

Further Analysis of Initial Cash Balance

Bank Accounts

12. As outlined in the Second Report, Odenza had two separate operating bank accounts relating to its operations. One bank account was for Odenza's main line of business which was home construction. There was a second bank account for Jack of All Trades (“**JOAT**”) which was a brand name for the home renovation arm of Odenza. JOAT was not a separate legal entity but was run like a separate branch. However, for the sake of segregating record keeping, JOAT had its own accounting system and also had its own operating bank account. For JOAT home renovation projects, cash relating to the JOAT projects' revenue and expenses would typically flow through the JOAT bank account although in a few cases deposits would be made to the Odenza bank account then transferred to the JOAT account. In their respective accounting systems, Odenza and JOAT each had intercompany general ledger accounts to record any activity between Odenza and JOAT (e.g. for costs paid by Odenza to be recovered from JOAT).
13. The Claims Administrator has conducted its analysis using two different assumptions, namely:
- a) the cash balances and transactions originating in each of the Odenza and JOAT bank accounts are separate to those two accounts (“**Assumption A**”); or
 - b) notwithstanding the fact there were two different bank accounts, all of the cash and transactions in the two accounts really comprises one "pool" of cash in that it belonged to the corporate entity Odenza (“**Assumption B**”).
14. The Claims Administrator takes no position with respect to which of the above two assumptions is the correct one for determining the ultimate treatment of the Initial Cash

Balance; we simply provide the analysis under the two different options for the consideration of this Honourable Court.

Updated Analysis - Background

15. The Claims Administrator has prepared an analysis (the “**Updated Analysis**”) of the Initial Cash Balance which is attached hereto as **Appendix "B"**.
16. The Updated Analysis is conducted on the basis that cash is treated on a first in, first out (“**FIFO**”) basis; in other words, the Updated Analysis only considers the cash deposits from homeowner payments that equal or exceed the amount of the Initial Cash Balance as at the date of Bankruptcy. Cash deposits that occurred earlier than a certain date are assumed to have been dispersed on a FIFO basis, and then replenished by future deposits¹. Another way to view the FIFO approach to the remaining cash at the time of Bankruptcy would be, to use a simplistic term, "last in, still there"; in other words, the most recent cash deposits, to the extent cash was not otherwise dispersed between the time the cash was deposited and the Bankruptcy, would still remain in the bank accounts at the time of Bankruptcy. The Claims Administrator's view is that a FIFO approach is the most logical way to assess the remaining cash at the time of Bankruptcy. In fact, the Claims Administrator cannot logically recommend any other way of examining the cash remaining at the date of bankruptcy.
17. On a FIFO basis, any cash deposits made prior to December 1, 2013 do not appear to be relevant, as the Updated Analysis shows that none of those deposits remain in the Initial Cash Balance. In other words, sufficient cash was dispersed between the time of the deposit and December 16, 2013 to eliminate the deposit from whatever cash remains at the time of Bankruptcy. In the view of the Claims Administrator, and based on evidence provided in the Second Report, it cannot be said that any earlier funds can even exist anymore on any analysis.
18. Assuming a FIFO basis is indeed the most correct one to use, the Updated Analysis sets out the following information under each of the scenarios explained in paragraph 13 above:
 - a) the date and amount of cash deposits made after December 1, 2013, as well as the party that paid these amounts and for what project amounts were paid;
 - b) the bank balance after the payment was made (column labelled as "A" in the Updated Analysis);
 - c) the amount of cash from any specific deposit that remained in the Odenza bank accounts at the time of Bankruptcy on a FIFO basis (i.e. the Initial Cash Balance - labelled as "B");

¹ Note 5 to Appendix "B" further qualifies this statement, by assuming that for those projects that do not have trust/lien claims against them, any cash received would have been distributed first as those funds would have been true "surplus funds" of Odenza and would first be used before other project funds with trust or lien claims against them.

- d) the amount of approved (and unpaid) creditor claims on those projects based on the TCSP claims adjudication process (labelled as "C");
- e) a calculation of whether the amount of creditor/sub-trade claims (the “**Sub-trade Claims**”) on those individual projects is greater than (i.e. a cash deficiency) or less than (i.e. a cash surplus) the amount of cash remaining that is attributable to that project (labelled as "D");
- f) for those projects where no trust claims exist, an adjustment to "back out" those funds from the Initial Cash Balance because it is assumed those funds would have been disbursed first (labelled as "E");
- g) where there is a surplus of cash over claims, a calculation of the net surplus after the adjustment noted above (labelled as "F");
- h) a calculation of the revised Initial Cash Balance relating to the project after the adjustment from column E (labelled as "G");
- i) the total job costs attributable to the project up to the time of Bankruptcy (labelled as "H");
- j) the job costs that result from parties that could have a true or lien claim (“**Lienable Job Costs**”) attributable to the project up to the time of Bankruptcy, i.e. those costs that result from sub-trades and third party claims and that do not include Odenza's internal charges against the project such as management fees, wages, or other internal overhead amounts (labelled as "I");
- k) the total owner payments that were made to Odenza on account of the project prior to the Bankruptcy (labelled as "J"); and
- l) a calculation of whether the owner payments on the project are greater than or less than the Lienable Job Costs for the project (labelled as "K").

Updated Analysis - Summary of Findings

- 19. The Claims Administrator has provided two different calculations for each project that has a balance of cash remaining in the Initial Cash Balance, summarized as follows:
 - a) the amount of Sub-trade Claims on those individual projects is compared to the amount of cash remaining that is attributable to that project. If the amount of claims is less than the cash, there is a theoretical² "surplus" of cash after satisfying the claims. If the amount of claims is greater than the cash, there is a theoretical² "deficiency" of cash to satisfy the claims; and

² The term "theoretical" is used because this analysis is without respect to the Claims Administrator's charge on the assets granted by the TCSP Order.

- b) the total owner payments on the project are compared to the Lienable Job Costs to determine if the owner has paid more than there are Lienable Job Costs (i.e. a "surplus" of payments) or whether the owner has not paid enough to satisfy the Lienable Job Costs (i.e. a "deficiency" of payments).

20. A summary of findings under each method of calculation follows.

Comparing Amount of Creditor Claims on a project to that project's amount of cash remaining in the Initial Cash Balance

21. The following jobs appear to have surplus of payments over Lienable Job Costs, and no remaining creditor claims at the time of Bankruptcy:
- #102 - 5056 Manor (\$1,561.22);
 - 1777 W. 38th (\$422.48);
 - 895 E. 27th (\$7,500.00);
 - 3950 W. 37th (\$451.50); and
 - 3737 W. 11th (\$12,355.23).
22. The Claims Administrator has been consistent in its view, going back to its June 2014 report, that Odenza should be assumed to have spent first those funds that did not have Trust and Lien Claims against them, because they were true "surplus funds" that Odenza could use on either overhead (non-trust) or other trust items, for example, paying sub trades on other projects. Accordingly, the five projects listed in paragraph 21 are assumed to have no amounts remaining in the Initial Cash Balance as it is assumed those funds were spent before any other funds were disbursed. This adjustment is made in column "E" of the Updated Analysis and reflects the fact there is nothing remaining in the Initial Cash Balance for those five projects³.
23. In Assumption A, with respect to the JOAT bank account, on a FIFO basis and after the adjustment discussed above, at the date of Bankruptcy there are two individual projects which have cash remaining as a component of the final cash balance at the time of Bankruptcy, or \$92,069.13. However, there does not appear to be a surplus of available cash over outstanding claims for either of these two projects.
24. Again in Assumption A, with respect to the Odenza bank account, on a FIFO basis and after the adjustment discussed in paragraph 22, at the date of Bankruptcy there are five individual projects which have cash remaining as a component of the final cash balance at the time of Bankruptcy or \$435,437.09. For two of these individual projects, there is a greater sum of cash remaining than there are Sub-trade Claims against those projects (the "**Odenza Surplus Amounts**"). The total of the Odenza Surplus Amounts is \$167,873.75.
25. If the two bank accounts are viewed as one "pool" of funds (Assumption B), on a FIFO basis, at the date of Bankruptcy there are nine individual projects which have cash

³ Also refer to Note 5 on the Updated Analysis.

remaining as a component of the final cash balance at the time of Bankruptcy or \$527,506.22. For three of these individual projects, there is a greater sum of cash remaining than there are Sub-trade Claims against those projects (the “**Global Surplus Amounts**”). The total of the Global Surplus Amounts is \$177,460.94.

26. The Claims Administrator anecdotally notes that the Global Surplus Amounts of \$177,460.94 (Assumption B) is very similar to the Odenza Surplus Amounts of \$167,873.75 (Assumption A).
27. The main difference between Assumption A and Assumption B is as follows. In Assumption B, the cash is viewed from a global perspective, i.e. from the perspective that there is one legal entity, Odenza Homes, without respect to the two separate bank accounts that the company used. The only item that changes in Assumption B is the 3887 St. Georges (D'Souza) deposit on December 5, 2013 becomes the final item on a FIFO basis to still have some cash remaining in the Initial Cash Balance. This is known because the HSBC bank statements used in part to prepare the Updated Analysis show the dates and times at which transactions occurred. The deposit relating to the project at 3887 St. Georges occurred after the deposits relating to 3939 Heather St. project (deposited earlier on that day, Dec. 5) and #530-1501 W. Broadway (deposited Dec. 4). Accordingly, in Assumption B, the amount of the Initial Cash Balance relating to the project at 3887 St. Georges is \$92,069.13 higher than it is under Assumption A, and the amount of the Initial Cash Balance relating to the 3939 Heather St. and #530-1501 W. Broadway projects become nil in Assumption B.
28. The two most significant individual surplus amounts appear to arise on the project located at 2645 King Edward Ave. (\$62,966.86) and the project located at 1525 Acadia Road (\$104,906.89). The reason for each of those two surpluses appears quite different.
29. It is not clear how the surplus on the 2645 King Edward project arose. The Claims Administrator speculates that the trust claimants on that job could have been paid from earlier funds paid by the owner or out of general trust representing payments from all owners, which is the most likely scenario. It may have been "luck of the draw" that the Sub-trade Claims on that project happened to be paid earlier using cash from other sources. When the homeowner ultimately paid its final invoice, all trust claims except \$4,033.14 had already been paid from other available funds. In the opinion of the Claims Administrator, this in itself adds a complication to attempting to segregate funds in a "silo approach" because it is clear along the way Odenza had been paying Sub-trade Claims of one job with funds received from other jobs.
30. With respect to the 1525 Acadia project, the Claims Administrator's view is that the homeowner on this project simply overpaid Odenza on December 11, 2013 before the amount of Sub-trade Claims incurred could "catch up" to the estimated draw Odenza had billed its client at the time. Had the Bankruptcy not occurred five days after the payment, it is likely sufficient sub-trade work would have occurred and been billed (or charged against the draw) in order to eliminate this surplus amount.

Comparing Amount of Owner payments on a project to that project's Lienable Job Costs (Column K)

31. Under this approach, there are several "surpluses" of owner payments as compared to the Lienable Job Costs for those projects. However, the Claims Administrator struggles to view these as true surpluses since the payments by the owners reflected in Column J include amounts pursuant to the construction contracts for Odenza's overhead and management fees. Odenza was entitled to recover certain costs and to bill a fee and attempt to make a profit on each job. If Odenza made a profit on certain jobs, it simply would have gone to pay the creditors on other jobs where losses had been incurred or to pay overhead expenses. It is clear that Odenza had suffered mounting operating losses in at least the two years prior to the Bankruptcy, and possibly even before then, so there were no recent distributions to the principal of Odenza (i.e. dividends or other shareholder distributions).
32. To cite a specific example, the Claims Administrator refers to the project located at 3887 St. Georges Ave. On this project, the owner had paid roughly \$115,000 more to Odenza than there were Lienable Job Costs at the time of Bankruptcy. However, of the \$312,891.17 in Lienable Job Costs, there is \$99,139.21 of unpaid trust and lien claims of Sub-Trades. Therefore, it is clear that not all of the owner's payments were applied to paying Sub-trade Claims on this project. The same scenario exists for the projects located at #530-1501 W. Broadway, 2645 King Edward, 1522/1528 W. 68th, and 1525 Acadia Road. The Claims Administrator has shown there were not separate bank accounts set up for each construction project. Therefore, going back to the start of Odenza, or at least some point many years ago, it is very likely that funds received from one project have always been used to pay claims on other projects.
33. The projects located at 2645 King Edward and 1525 Acadia Road also emphasize another factor. The "surplus" (in Column K) on account of Lienable Job Costs on these two projects is greater than the amount of the final payment made by the Owner which comprises the Initial Cash Balance. It is the Claims Administrator's opinion that there is no rationale for using the Lienable Job Costs surplus to determine what amount, if any, would be payable to the Trustee as the Odenza surplus since this would result in an amount being paid to the Trustee as surplus being more than the amount paid by the Owners on 2645 King Edward and 1525 Acadia Road in the days prior to Bankruptcy. It is the Claims Administrator's opinion that the most that could be payable to the Trustee would be the amount paid by the Owner less the amount of proven trust claims at the date of Bankruptcy in respect of that Owner's project, and the proportion of the Claims Administrator's costs, which are significant, related to the recoveries in the TCSP.
34. In the case of Owners with outstanding Trust and Lien Claims at the date of Bankruptcy who made payments to Odenza prior to December 1, 2013, such as the Mergens, there were no funds remaining in the Odenza bank accounts as of the date of Bankruptcy. Accordingly, in order to avoid unnecessary costs, the Claims Administrator did not calculate the Total Job Costs, the Lienable Job Costs, the Total Payments by Owners and the surplus or deficiency of payments to Lienable Job Costs for any project that had outstanding Trust and Lien Claims for which any payments had been made prior to

December 1, 2013. However, at the request of counsel for the Mergens, the calculation for their project is attached hereto as **Appendix "C"**.

Conclusions and Recommendation

35. Respectfully, in the opinion of the Claims Administrator, some methodology must be used in order to determine what projects had cash remaining in the Initial Cash Balance at the time of Bankruptcy. The Claims Administrator believes that a FIFO approach is the only method that can logically be applied.
36. Using a FIFO approach, based on the timing of owner payments to Odenza, there are only a few projects that will have cash remaining in the Initial Cash Balance. The composition of those projects and amounts can change using either Assumption A or Assumption B in the Updated Analysis. Using FIFO, any payments that occurred prior to December 5, 2013 (under either Assumption) are assumed to have been disbursed by Odenza prior to its Bankruptcy. In addition, non-trust funds are assumed to have been disbursed before trust funds.
37. The Claims Administrator has displayed two ways of calculating potential surplus funds on those projects where cash remained in the Initial Cash Balance under each of Assumptions A and B. Under those Assumptions, the surplus is approximately \$167,873.75 (under Assumption A) or \$177,460.94 (under Assumption B).
38. Since Odenza and JOAT maintained separate bank accounts, it is the Claims Administrator's opinion that Assumption A is the appropriate assumption for calculating the surplus. Under this alternative, there is no surplus in the JOAT accounts. The only surplus is the overpayments by the Owners of 2645 King Edward and 1525 Acadia Road, totalling \$167,873.75 (Column F), subject to applying the Claims Administrator's costs, which are significant, to recoveries in the TCSP. This is consistent with the Claims Administrator's suggested mechanism for distributions that was presented on page 16 of its June 2014 report to Court (the "**Second Report**"). The balance of the funds, representing funds not held in trust, should be distributed in accordance with the recommendations contained in the Second Report.
39. Regardless of which assumption is used to determine the composition of the Initial Cash Balance, the issue remains of determining whether the amounts in Column G should be:
 - a) applied against the unpaid trust and lien claims in Column C; or
 - b) applied to all trust and lien claims for all projects.
40. As Odenza maintained all surpluses received in the JOAT and Odenza bank accounts, and had a practice of paying sub-trades from those accounts without regard for trust claims, Odenza seemingly in effect replenished prior breaches of trust on other accounts by using the subsequent surpluses on those other projects. Accordingly, the Claims Administrator again raises the question of whether whatever cash was held by Odenza at the time of Bankruptcy was held in trust for all of the trust and lien claimants and should

be distributed, after the costs of the Claims Administrator and its legal counsel, on a pro rata basis to all trust and lien claimants.

All of which is respectfully submitted this 2nd day of June, 2015.

G. Powroznik Group Inc. of G-Force Group
In its capacity as Claims Administrator
for the Trust Claim Settlement Program

Per: Mr. Gary Powroznik
Managing Director

Appendix "A"

**Reasons for Judgment
April 14, 2015
The Honourable Mr. Justice Grauer**

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

Citation: *0409725 B.C. Ltd. (Bankruptcy of)*,
2015 BCSC 561

Date: 20150414
Docket: B131552
Estate No. 11-820752
Registry: Vancouver

In the Matter of the Bankruptcy of

0409725 B.C. Ltd.

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Claims Administrator:

Geoffrey Dabbs

Counsel for the Respondent Owner:

Jeremy West

Place and Date of Hearing:

Vancouver, B.C.
March 18, 2015

Place and Date of Judgment:

Vancouver, B.C.
April 14, 2015

INTRODUCTION

[1] This is an application for an order and directions in relation to the distribution of funds (the “initial cash balance”) held by the bankrupt at the date of bankruptcy.

[2] The bankrupt had carried on business as a construction company, involved primarily in building new single-family homes and in undertaking residential renovations. At the time of its assignment into bankruptcy on December 16, 2013, some 17 home building projects and a number of renovation projects in and around Vancouver were underway. Left in the lurch were both the owners of the projects under construction, and all of the unpaid suppliers and subcontractors — the latter being lien claimants under the provisions of the *Builders Lien Act*, SBC 1997, c 45 (the “BLA”).

[3] This application came on before me initially on June 20, 2014. The background is set out in my Reasons for Judgment released June 30, 2014, indexed at 2014 BCSC 1196. I found myself unable to grant the relief requested and adjourned the application pending the development of further evidence.

[4] When the matter returned before me on March 18, 2015, counsel for the claims administrator quite properly brought to my attention some recent developments in the law potentially affecting the outcome of his application, and reframing the issue to be decided. This raises the sustainability of the entire basis upon which this matter has to date been administered.

[5] The question presently before me for decision is whether the initial cash balance consists of trust funds pursuant to the provisions of section 10 of the *BLA* and so constitutes trust property under section 67(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “BIA”). If so, the money falls to be distributed among the lien claimants; there will be nothing left over for the unsecured creditors including the owners. If not, the money falls into the bankrupt estate to be distributed among all unsecured creditors including the lien claimants.

[6] Although one of the owners appeared by counsel on both applications, that appearance was in relation to a different issue. Neither that owner nor anyone else opposed the position of the claims administrator that the initial cash balance comprises funds imposed with a trust arising under the *BLA* and forms no part of the bankrupt estate.

STATUTORY PROVISIONS

[7] The *BLA* provides, in part, as follows:

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

- (a) performs or provides work,
- (b) supplies material, or
- (c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

- (d) the interest of the owner in the improvement;
- (e) the improvement itself;
- (f) the land in, on or under which the improvement is located;
- (g) the material delivered to or placed on the land.

...

4 (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.

(2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.

(3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.

...

(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.

...

10 (1) 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.

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

(3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.

...

[8] By sections 67 and 72 of the *BIA*:

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person;
- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

...

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
 - (i) is not subject to the operation of this Act, or
 - (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[9] The question, then, is whether the trust created by section 10(1) of the *BLA* over the initial cash balance in favour of the lien claimants survives the company's bankruptcy, so that the funds constitute property held by the bankrupt in trust under section 67(1) of the *BIA*.

DISCUSSION

[10] To support his position, the claims administrator relies on the decision of the Supreme Court of Canada in *John M.M. Troup Ltd v Royal Bank of Canada*, [1962] SCR 487, distinguishing it from the so-called "quartet" of Supreme Court of Canada cases dealing with the "deemed trust" situation of the sort currently contemplated by section 67(2) of the *BIA*: *Deputy Minister of Revenue v Rainville*, [1980] 1 SCR 35; *Deloitte Haskins & Sells v Workers' Compensation Board*, [1985] 1 SCR 785; *Federal Business Development Bank v Québec (CSST)*, [1988] 1 SCR 1061; and *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24.

[11] These cases concern the question of paramountcy. *Troup* itself stands for the proposition that the trust provisions of *The Mechanics' Lien Act*, RSO 1950, c 227, essentially equivalent to section 10 of the *BLA*, are not unconstitutional, and do not conflict with federal legislation on banking and bankruptcy. The context, however, is somewhat different from the situation before me and the Court notes that, as with any other trust, "the ordinary principles must apply" (at p 494).

[12] As we have seen, section 72(1) of the *BIA* specifically contemplates the coexistence of that Act with property and civil rights legislation enacted by the

provinces. The courts have, however, resisted attempts through provincial legislation to alter the order of the priority of creditors' claims under section 136(1) of the *BIA*. Thus the Supreme Court of Canada declined to give effect to such attempts in the context of the Québec *Retail Sales Act (Rainville)*, the Alberta *Workers' Compensation Act (Deloitte)*, and the British Columbia *Social Service Tax Act (Henfrey)*.

[13] In *Henfrey*, the court considered a statutory trust created by the B.C. legislation in favour of the provincial government for unpaid sales tax. The question was whether that created property held in trust by the bankrupt for the provincial government in accordance with section 47(a) of the *Bankruptcy Act*, RSC 1970, c B-3 (now section 67(1)(a) of the *BIA*).

[14] Justice McLachlin, as she then was, for the majority, clarified that in order for property to be excluded from the bankrupt estate as trust property, it must meet the common law attributes of a trust (at p 33):

[15] To interpret s. 47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

[15] McLachlin J then went on to analyze the nature of the legal interest created by the legislation. She noted that at the moment of collection of the tax, there was a deemed statutory trust, that the trust property was then identifiable, and that the trust thus met the requirements under the principles of trust law. The difficulty was that the trust property soon ceased to be identifiable when the tax money was mingled with other money in the hands of the merchant and converted to other property so that it could not be traced. Notwithstanding that the legislation deemed it to be held separately, the statutory trust bore no resemblance to a true trust once the conversion occurred. Given that no specific property impressed with the trust could be identified, section 47(a) was not to be construed as extending to the province's claim.

[16] To the argument that the province could define “trust” however it pleased, Justice McLachlin responded (at p 35) that the only definition of “trust” that was operative for the purpose of an exemption under the *Bankruptcy Act* was that of the federal Parliament, not the provincial legislatures.

[17] In *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, a divided Supreme Court again considered the question of the effect of provincial legislation that intruded into the jurisdiction of the federal Parliament in bankruptcy matters. The majority distilled six propositions from its review of the quartet (paras 32 and 39):

1. provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;
2. while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;
3. if the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
4. the definition of terms such as “secured creditor”, if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for the purposes of the *Bankruptcy Act*;
5. in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly; and
6. there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

[18] None of these propositions would render section 10(1) of the *BLA* ineffective in creating a trust that is exempt under section 67(1) of the *BIA* so long as the purported trust satisfied the common law requirements for a trust. This is consistent

with *Troup*, which has never been expressly overruled, and with the Supreme Court's decision in *Henfrey*, as approved in *Husky Oil*.

[19] It would appear, however, to be inconsistent with the decision of the Court of Queen's Bench of Alberta in *Iona Contractors Ltd (Re)*, 2014 ABQB 347, which held at para 34 that:

[O]nly common law trusts are exempt under s 67 (1)(a) of the *BIA* – not provincially created statutory ones. In my view, to the extent *Troup* says otherwise, it has in effect been overruled by the Supreme Court in *Husky* and *Henfrey Samson*.

[20] If this was intended to indicate that a statutory trust cannot meet the common law requirements for a trust, I respectfully disagree. In *Henfrey*, Justice McLachlin quite explicitly stated that a statutory trust could do so, and would then be exempt. That was also the thrust of the reference in *Troup* as quoted above. This was recognized in the dissenting judgment of Justice Cory in *Henfrey* at p. 41.

[21] The common law requirements, of course, are certainty of intention, certainty of subject matter, and certainty of objects: see, for instance, *Bassano Growers Ltd v Price Waterhouse Ltd*, 1998 ABCA 198 at para 16, and D.W.M. Waters, *Law of Trusts in Canada*, 4th ed. (Toronto: Carswell 2012) at 140.

[22] Applying the analysis of McLachlin J in *Henfrey*, certainty of intention is sufficiently provided by the statute in the circumstances of this case. That conclusion in no way intrudes into federal jurisdiction, and indeed, all parties conducted themselves on that basis.

[23] Certainty of objects exists where the intended beneficiaries of the trust are ascertainable, and that is the case here.

[24] As Justice McLachlin noted, the problem in *Henfrey* arose in connection with certainty of subject matter. This certainty disappeared when the money collected as sales tax was mingled with other money in the hands of the merchant, and could not be traced. Consequently, when the bankruptcy occurred, there was no longer any property that could be identified with certainty as being subject to the trust.

[25] That was the problem also in *Royal Bank of Canada v Atlas Block Co Limited*, 2014 ONSC 3062. There, Justice Penny concluded that a trust under the *Construction Lien Act*, RSO 1990, c C-30 (“CLA”) should not be treated differently from any other provincial statutory deemed trusts for the purposes of section 67(1)(a) of the *BIA*, so that the question became whether the trust allegedly created by the *CLA* met the requirements of a trust at common law. I respectfully agree with that analysis.

[26] The question then turned on the certainty of subject matter requirement. That certainty, the judge concluded, was not met because of the failure of the bankrupt to segregate payments appropriately.

[27] In the case before me, I am satisfied that the certainties of intention and objects have been established. But is there certainty of subject matter?

[28] On the evidence, all of the money that made up the initial cash balance was money “received by a contractor or subcontractor on account of the price of the contract or subcontract” and thus, *prima facie*, constituted a trust fund or funds under section 10(1) of the *BLA*. This is the approach followed by the claims administrator, who has treated all of the initial cash balance as one pool of money received by the bankrupt on account of its contracts, proposing to distribute it *pro rata* to all of the lien claimants on all of the projects.

[29] If that is the correct approach, then, in my view, the three certainties would be established and the initial cash balance would be exempt from the bankrupt estate. While the funds paid by different owners were co-mingled, which is permissible under the *BLA*, they were not mingled with funds from other sources that would not be subject to a *BLA* trust. Consequently, the situation is distinguishable from those considered in *Henfrey* and *Atlas Block*.

[30] But is that sufficient? Is the approach followed by the claims administrator the correct one under the provisions of the *BLA*? This brings us back to the questions I raised in paras 19 and 20 of my previous Reasons.

[31] The problem, which has yet to be addressed before me, is whether section 10 of the *BLA* permits this approach, as opposed to a “silo” approach, project by project, notwithstanding that it allows the mingling of trust funds. Section 10 appears to refer to funds received on a particular project, constituting them a trust fund for the benefit of persons engaged in connection with that project — not for the benefit of persons engaged by the same contractor on other projects. By section 10(2), it is arguable that if, on the evidence, all of the beneficiaries of that particular trust fund have been paid, then the contractor is free to use the remaining part of the fund for his own purposes. In the present context, it would follow that the balance would then not be subject to a trust, and would fall into the bankrupt estate for distribution to the unsecured creditors. Whether such a balance exists in relation to any project has not been established before me. If the lien claims on each project exceed the money received by the bankrupt on each project, the difficulty disappears.

[32] The accounts available to the claims administrator, as I understand it, would allow this question to be determined. I do not, however, have such evidence before me at this stage, and I am accordingly unable to ascertain whether, in relation to any project, the relevant lien claimants, as trust beneficiaries, have in fact been paid all that is owed to them, potentially leaving a balance of money that may not be affected by the trust.

[33] Whichever interpretation of the *BLA* is correct (I have yet to hear submissions on the question and so do not decide it), the issue of certainty of subject matter is an evidentiary one. On one interpretation, the entirety of the initial cash balance is identifiably subject to a *BLA* trust as money received by a contractor, and would be exempt from inclusion in the bankrupt estate. On the other interpretation, the evidence may or may not establish that all or portions of the initial cash balance are identifiably subject to *BLA* trusts.

[34] It follows that until this question is addressed, and the appropriate evidence is adduced, I cannot conclusively determine whether all or a portion of the initial cash

balance comprises property that was held in trust by 0409725 B.C. Ltd. at the date of bankruptcy, and forms no part of the bankrupt estate.

[35] I should not leave this discussion without reference to two decisions of the Saskatchewan Court of Queen's Bench: *Duraco Window Industries (Sask) Ltd v Factory Window & Door Ltd (Trustee of)*, [1995] 9 WWR 498, and *Roscoe Enterprises Ltd v Wasscon Construction Inc* (1998), 161 DLR (4th) 725, which followed the *Duraco* case. Both concluded that a trust established under the applicable builders' lien legislation was not a valid trust under the *BIA*.

[36] I consider them both distinguishable, however, and respectfully agree with the conclusion in this regard of the learned authors of *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: Thomson Reuters Canada Limited, 2012) at F§17, and of Justice Barclay in *D & K Horizontal Drilling (1998) Ltd (Trustee of) v Alliance Pipeline Ltd*, 2002 SKQB 86, affirmed on other grounds, 2002 SKCA 145. Both these authorities distinguish the *Roscoe Enterprises* and *Duraco* cases on the ground that they omitted to consider *Troup*. I would distinguish them further on the factual basis that they appear to find the common law requirements of a trust could not be established. That is not necessarily the case here.

[37] In this matter, I can only conclude at this stage that to the extent the evidence will allow me to find certainty of subject matter, then that property will be "property held by the bankrupt in trust for [another] person" within the meaning of section 67(1) of the *BIA*.

[38] The application is accordingly adjourned for further evidence and submissions. I invite the participation of counsel for the Trustee.

"GRAUER, J."

Appendix "B"

**Analysis of owner payments for the period December 1 to December 16, 2013,
Initial Cash Balance and Job Costs**

ASSUMPTION "B": notwithstanding the fact there were two bank accounts, all of the cash is simply part of a single pool of funds

Date of deposit	Deposit Amount	Paid by	Project address	Bank balance after payment	A	B	C	D (derived from B-C)	E	F (derived from D + E, must be greater than 0)	G	H	I	J	K (derived from J-I)	
					Amount of cash remaining in Dec 16 balance (Note 5)	Amount of creditor claims on project (per TCSP)	Surplus/(deficiency) on the project	Assume surplus funds spent if no trust claims exist (Note 5)	Net surplus funds	Revised amount of cash remaining in Dec 16 balance after adjusting for surpluses paid out (Note 5)	Total Job Costs for work performed to Dec 16, 2013 (Note 2)	Lienable Job Costs (Note 2)	Total Owner Payments as of Dec 16, 2013	Surplus/ (deficiency) of payments to lienable job costs		
03-Dec-13	13,000.00	C. Boyd (JOAT job)	1008 Beach Ave													
03-Dec-13	428.87	M. Brown (JOAT job)	850 W 33rd Ave													
03-Dec-13	70,995.61	Bryan Robertson	773 E 53rd													
04-Dec-13	116,426.14	Rong Tian	3819 W 22nd Ave													
04-Dec-13	34,335.10	Sierra Health	#530 - 1501 W Broadway													
05-Dec-13	75,929.53	R. Bon and A. Lynch	3939 Heather St.													
05-Dec-13	154,791.00	D'Souza	3887 St. Georges		108,726.40	99,139.21	9,587.19	9,587.19		9,587.19	132,988.23	408,091.17	312,891.17	428,255.10	115,363.93	
09-Dec-13	7,500.00	A. Jacobsen (Note 4)	895 E 27th	Note 3	7,500.00	-	7,500.00	-	7,500.00	-	-	-	-	7,500.00	7,500.00	
09-Dec-13	70,000.00	R. Nizamov	3539 W 10th		70,000.00	207,727.63	-	137,727.63	-	-	70,000.00	674,037.56	587,787.56	496,139.10	91,648.46	
09-Dec-13	67,000.00	Angel Moy	2645 King Edward		67,000.00	4,033.14	-	62,966.86	-	62,966.86	67,000.00	962,027.18	840,527.18	932,486.64	91,959.46	
10-Dec-13	64,685.12	Chang Cheng Investments	1522 w 68th		64,685.12	131,010.10	-	66,324.98	-	-	64,685.12	878,645.47	723,054.60	751,173.91	28,119.31	
10-Dec-13	1,561.22	Terry Cheng	102 - 5056 Manor		1,561.22	-	1,561.22	-	1,561.22	-	-	1,115.07	-	1,561.22	1,561.22	
11-Dec-13	192,832.87	X. Li & N. Cao	1525 Acadia Road		192,832.87	87,925.98	-	104,906.89	-	104,906.89	192,832.87	503,749.46	434,499.46	652,167.13	217,667.67	
13-Dec-13	451.50		3950 W 37th (JOAT job)		451.50	-	451.50	-	451.50	-	-	451.50	451.50	451.50	-	
13-Dec-13	14,749.11	P. Robertson (JOAT job)	3737 W 11th		14,749.11	-	14,749.11	-	14,749.11	-	-	39,283.67	25,144.44	37,499.67	12,355.23	
Final "Global" bank balance at date of bankruptcy					527,506.22	527,506.22	TOTAL SURPLUS-->	201,722.77	-	24,261.83	177,460.94	527,506.22				

Notes:

Note 1 - This sum was deposited, presumably in error, into the Odenza bank account on December 5 and then properly transferred to the JOAT account on December 11 as it was on account of a renovation project. When transferred in, the JOAT bank balance Dec. 11, 2013 was \$103,098.86

Note 2 - "Total Job Costs" reflect all items charged to the project from the Odenza accounting system and including adjustments for the Claims Administrator's subsequent claims adjudication, all of which relates to work performed on the project prior to Odenza's bankruptcy. The "Lienable Job Costs" column reflects only the claims of sub-trades (i.e. trust and lien claims against the project) and thus deducts any "internal" Odenza costs that were charged to the project and that would not be lienable such as:
 -Odenza's Management Fee
 -Odenza's design and architectural fees relating to work performed by internal resources (i.e. not third party claims)
 -Any internal wages and related deductions charged against the job

Accordingly, in all cases, the "Lienable Job Costs" are either equal to or less than the "Total Job Costs".

Note 3 - Individual bank balances are tracked on bank statements for the two accounts but are not tracked on a global basis by the bank.

Note 4 - There do not appear to be any job costs relating to this project. It appears the \$7,500 paid on December 9, 2013 was a true "deposit" for work to be done later.

Note 5 - For those projects that have cash remaining on a "FIFO" basis in the Initial Cash Balance, the Claims Administrator assumes that, on the projects where there are no outstanding trust claims, that cash would have belonged to Odenza and thus would have theoretically been spent first before any other funds were expended. This specifically relates to the following deposits for projects against which there are no trust claims:
 -1777 W38th (\$10,000 deposited to JOAT account on Dec. 4, 2013)
 -#102 - 5056 Manor (\$1,561.22 deposited to JOAT account on Dec. 10, 2013)
 -895 E 27th (\$7,500 deposited to Odenza account on Dec. 9, 2013)
 -3950 W 37th (\$451.50 deposited to Odenza account on Dec. 13, 2013)
 -3737 W 11th (\$14,749.11 deposited to Odenza account on Dec. 13, 2013)

The Claims Administrator confirms that there were sufficient expenditures in each of the JOAT and Odenza bank accounts that occurred after the date of each of these deposits above that would eliminate the surplus funds relating to these deposits, again assuming that those funds would have been disbursed before any other funds as there are no trust claims relating to those projects.

Appendix "C"

Analysis of Mergens' November 27, 2013 payment and Job Costs

In the matter of the bankruptcy of Odenza Homes
 Analysis of Mergens' November 27, 2013 payment and Job Costs (Note 1)
 Prepared as at May 25, 2015

Odenza Homes bank account (#050-289012-001)				A	B	C	D (derived from B-C)	E	F (derived from D + E, must be greater than 0)	G	H	I	J	K (derived from J-I)
Date of deposit	Deposit Amount	Paid by	Project address	Bank balance after payment	Amount of cash remaining in Dec 16 balance (Note 3)	Amount of creditor claims on project (per TCSP)	Surplus/(deficiency) of initial cash to creditor claims	Assume surplus funds spent if no trust claims exist (Note 3)	Net surplus funds	Revised amount of cash remaining in Dec 16 balance after adjusting for surpluses paid out (Note 3)	Total Job Costs for work performed to Dec 16, 2013 (Note 2)	Lienable Job Costs (Note 2)	Total Owner Payments as of Dec 16, 2013	Surplus/(deficiency) of payments to lienable job costs
27-Nov-13	156,877.98	J. & V. Mergens	3572 E 48th Ave	407,785.37	-	86,394.78	- 86,394.78	n/a	n/a	n/a	308,233.50	251,133.50	434,029.12	182,895.62

Notes:

Note 1 - This analysis is for the Mergens' project and provides the same information as is provided in Appendix "B" for all other owner payments that occurred after December 1, 2013. This analysis is provided at the request of the Mergens' counsel.

Note 2 - "Total Job Costs" reflect all items charged to the project from the Odenza accounting system and including adjustments for the Claims Administrator's subsequent claims adjudication, all of which relates to work performed on the project prior to Odenza's bankruptcy. The "Lienable Job Costs" column reflects only the claims of sub-trades (i.e. trust and lien claims against the project) and thus deducts any "internal" Odenza costs that were charged to the project and that would not be lienable such as:

- Odenza's Management Fee
- Odenza's design and architectural fees relating to work performed by internal resources (i.e. not third party claims)
- Any internal wages and related deductions charged against the job

Accordingly, the "Lienable Job Costs" are less than the "Total Job Costs".

Note 3 - As set out in the main body of this report, the Claims Administrator used a FIFO approach to assess what cash from owner deposits was remaining in Odenza's bank accounts at the time of its bankruptcy. On a FIFO basis, any funds deposited on November 27, 2013 relating to the Mergens' project would have been disbursed prior to December 16, 2013.