

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

OPTRUST JOYCE FINANCING CORP.

PETITIONER

AND:

5055 JOYCE HOLDINGS INC. and 5055 JOYCE PROPERTY INC.

RESPONDENTS

APPLICATION RESPONSE

Application Response of: Heidelberg Materials Canada Limited (“HMC”)

THIS IS A RESPONSE TO the Notice of Application of AlixPartners Restructuring Inc. in its capacity as court-appointed receiver and manager, filed September 4, 2026 (the “**Application**”).

HMC estimates that the application will take 1 hour.

Capitalized terms used and not otherwise defined in this Application Response have the meanings given to them in the Application.

Part 1: ORDERS CONSENTED TO:

HMC consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: **none**

Part 2: ORDERS OPPOSED:

HMC opposes the order sought at paragraph 1(c) of Part 1 of the Application.

In the alternative, HMC seeks an order that the Receiver shall not distribute pre-receivership statutory holdback funds selectively to Critical Suppliers unless all lien and holdback claimants, including HMC, presently asserting an entitlement to participate in the applicable holdback are provided with a concurrent distribution in accordance with their respective rights under the *Builders Lien Act*, S.B.C. 1997, c. 45 (the “**BLA**”).

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN:

HMC takes no position on the orders sought at paragraphs 2 and 3 of Part 1 of the Application.

Part 4: FACTUAL BASIS:

Timing of Service and Procedural Prejudice

1. The Application and supporting materials were served around 4:30pm on Friday, September 4, 2026, immediately prior to the Labour Day long weekend.
2. As a practical matter, effective service occurred on Tuesday, September 8, 2026, being the first business day following the long weekend.
3. On September 9, 2026, the Receiver filed its application index notwithstanding that affected creditors had not yet had a meaningful opportunity to review the materials, investigate the relief sought, prepare responding evidence, or file responsive materials.
4. On September 10, 2026, counsel for HMC attempted to contact counsel for the Receiver to discuss the application and the relief sought but counsel was not available by telephone.
5. The application is scheduled to be heard on September 11, 2026, only three business days following effective service and two business days after the first opportunity for affected parties to respond. The compressed timetable has materially prejudiced the ability of affected stakeholders to assess the proposed payments and holdback distributions and to prepare a complete response to the relief sought.

The Parties

1. At all material times, 5055 Joyce Property Inc. (“**5055 JP**”) was the registered legal owner of the Project.
2. Pursuant to an agreement between 5055 Joyce Holdings Inc. and HMC, HMC supplied ready-mix concrete to the Project prior to the Receivership Order and remains unpaid for the sum of \$60,958.50.

3. Accordingly, HMC filed a claim of lien against the Project on March 10, 2026 under No. CB2668179 for the sum of \$60,958.50 (the “**HMC Lien**”) and further claims against the Holdback.

4. HMC is not performing post-receivership work for the Receiver and is not presently understood to be one of the Critical Suppliers that will receive an early distribution from the Holdback.

The Holdback

5. The Receiver's review of Westbank's records identified recorded BLA holdback obligations of approximately \$4,140,589.96, inclusive of GST (the “**Holdback**”).

6. At the Receivership Date, the Holdback Account contained approximately \$3,245,309.26, resulting in an identified deficiency of approximately \$895,280.70.

7. OPTrust has committed to advance approximately \$1,119,100.88, consisting of sufficient funds to address the identified Holdback Shortfall together with an additional contingency of approximately \$223,820.18.

8. The Receiver has not establish the aggregate amount of lien and holdback claims that may compete for the Holdback.

Proposed Selective Distributions

9. The Receiver has identified certain trades, consultants and suppliers whose continued participation is considered necessary to complete the remaining construction work as “Critical Suppliers”.

10. The Receiver seeks authority to pay up to \$3 million of pre-receivership amounts to Critical Suppliers where it considers such payments commercially necessary to complete the Project.

11. Separately, the Receiver seeks authority to distribute statutory holdback funds to Critical Suppliers where the requirements of the BLA for release of the applicable holdback have been met.

12. The Receiver does not presently propose to distribute the applicable holdback to all lien and holdback claimants. Rather, the Receiver states that the claims of the remaining trades will be dealt with in due course.

13. HMC does not oppose the Receiver entering into commercially reasonable arrangements to pay the ordinary pre-receivership accounts of Critical Suppliers from receivership funds.

14. HMC opposes the selective distribution of statutory holdback funds to Critical Suppliers while the claims of other persons having rights against the same holdback are deferred.

Known and Potential Claims against the Holdback

15. The Application does not disclose the complete list or aggregate amount of the lien and holdback claims that may compete for the statutory Holdback.

16. The Receiver states that it does not anticipate additional material holdback claims because more than four months have passed since its appointment. However, the passage of time and the expiry of the period for registering liens against the Lands do not limit the ability of further claims being asserted against the statutory Holdback.

17. In *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238, affirmed 2003 BCCA 193, Tysoe J. held and the Court of Appeal confirmed, that Section 4(9) of the *Builders Lien Act* created an independent lien against the holdback and all claimants to the holdback are entitled to a rateable share of the holdback (the “Shimco Lien”).

18. The Court of Appeal in *Wah Fai Plumbing & Heating Inc. v. Ma*, 2009 BCSC 1914 affirmed 2011 BCCA 26 confirmed that you can advance a Shimco Lien by way of a Supreme Court lawsuit provided that the entity required to retain a holdback pursuant to s. 4 of the *Builders Lien Act* retained a holdback and that holdback has not been paid out.

19. A lien against the holdback recognized in *Shimco* does not depend upon registration of a claim of lien against title and may survive notwithstanding that the claimant's lien against the land has expired or been extinguished.

20. Accordingly, the expiry of the period for filing liens against the Lands or a lien claimant's failure to enforce their lien does not provide certainty that no further claims against the Holdback may be advanced.

21. Potential Shimco Liens may continue to be asserted while the applicable statutory holdback remains in existence. The Receiver therefore cannot determine the total valid claims to the Holdback at a future date.

Prejudice to the Remaining Lien Claimants

22. If the Receiver distributes part of the statutory holdback now to selected Critical Suppliers, those claimants will receive their recovery before any further Shimco Liens are asserted.

23. If further valid claims against the Holdback are subsequently advanced, those claims will compete against the reduced Holdback remaining after the Critical Suppliers have already been paid.

24. The Critical Suppliers who received early distributions will thereby be insulated, in whole or in part, from the dilution caused by subsequently asserted claims, while HMC and other lien claimants whose distributions were deferred will bear that dilution.

25. The proposed process therefore creates the possibility that lien claimants having equivalent statutory rights against the Holdback will receive different proportional recoveries solely because one claimant was considered commercially necessary for completion of the Project and another was not.

26. The additional funding proposed by OPTrust does not, on the present evidence, eliminate that risk. The proposed funding addresses the identified accounting deficiency and provides an additional contingency of approximately \$223,820.18, but does not establish that sufficient funds will exist to satisfy all valid claims to the Holdback that may ultimately be asserted.

27. The Receiver asserts that the Required Holdback Funding ensures that distributions to Critical Suppliers will not prejudice other parties with valid claims to holdback funds. However, without disclosure of the known lien and Shimco Liens, the proposed distributions and the

resulting balance of the holdback, HMC cannot determine the effect of the proposed distributions on its ultimate recovery and therefore would be prejudiced if the order was granted.

28. HMC submits that the equitable and legally appropriate result is that the Receiver either:

- (a) distribute the applicable statutory Holdback concurrently among **all lien and holdback claimants** presently entitled to participate, including HMC, in accordance with their respective rights under the BLA and with an appropriate mechanism or reserve to address disputed existing claims; or
- (b) refrain from making distributions from the statutory Holdback to the Critical Suppliers as it prejudices the other class of lien claimants, including HMC.

Part 5: LEGAL BASIS:

The Statutory Holdback is Charged with Payment of Lien Claimants

29. Section 4(1) of the BLA requires the person primarily liable on each contract under which a lien may arise to retain a holdback equal to 10% of the greater of the value of the work or materials actually provided under the contract and the amount of any payment made on account of the contract.

30. Section 4(9) provides that each required holdback is subject to a lien and is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

31. Where a statutory holdback account is required, section 5(2) provides that the amounts in the account are charged with payment of all liens arising under the contractor from whom the holdback was retained and, subject to those liens, are held in trust for that contractor.

32. The Receiver itself acknowledges that holdbacks are a creation of statute and one of the central concepts of the BLA.

33. The statutory holdback is therefore fundamentally different from unrestricted receivership funds available to the Receiver to satisfy selected pre-receivership liabilities for commercial reasons.

Shimco Creates a Separate Lien against the Statutory Holdback

44. In *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238, affirmed 2003 BCCA 193, Tysoe J. held and the Court of Appeal confirmed, that Section 4(9) of the *Builders Lien Act* created an independent lien against the holdback and all claimants to the holdback are entitled to a rateable share of the holdback (the “Shimco Lien”).

45. The claimant in Shimco had lost its lien against the land by failing to commence an action and register a certificate of pending litigation within the time required by the BLA. The Court nevertheless held that the claimant's separate lien against the required holdback survived.

46. The Court of Appeal upheld the conclusion that the section 4(9) lien is distinct from the lien against the land and is not dependent upon the registration or continued validity of the land lien.

47. The Court of Appeal in *Wah Fai Plumbing & Heating Inc. v. Ma*, 2009 BCSC 1914 affirmed 2011 BCCA 26 confirmed that you can advance a Shimco Lien by way of a Supreme Court lawsuit provided that the entity required to retain a holdback pursuant to s. 4 of the *Builders Lien Act* retained a holdback and that holdback has not been paid out.

44. Accordingly, the expiry of the statutory period for filing or perfecting liens against the Lands does not establish the totality of claims against the statutory holdback.

45. A potential Shimco claimant need not appear on title. The risk of additional valid claims against the holdback therefore remains while the holdback remains available and has not been lawfully released.

46. This feature of the BLA is directly relevant to the Receiver's proposed selective distributions. The Receiver cannot eliminate the risk of subsequently asserted Shimco Liens simply by waiting until the ordinary land-lien filing periods have expired or relying upon the liens presently registered against title.

Selective Distributions Improperly Transfer the Risk of Additional Claims

50. The BLA establishes the statutory rights of competing lien claimants to the applicable holdback. Where the amount available is insufficient to satisfy the claims entitled to participate in the applicable fund, the BLA provides for the distribution of the available funds among the applicable classes of lien claimants.

51. The statutory scheme does not contemplate that one otherwise equally ranking lien claimant should obtain a greater recovery merely because it is commercially necessary to the continuation or completion of the Project.

52. If selected Critical Suppliers are paid their holdback claims now, any subsequently asserted Shimco Liens will affect only the reduced fund remaining for the unpaid lien claimants.

53. The practical effect is to allocate the risk of unknown Shimco Liens exclusively to those lien claimants who are not selected as Critical Suppliers.

54. That risk is particularly material in the instant case as the Receiver has not publicly disclosed the aggregate quantum of the known lien claims competing for the Holdback or demonstrated that the Holdback will be sufficient to satisfy all such claims.

55. The Court should not authorize a distribution mechanism that may alter the proportional recovery of lien claimants based upon considerations unrelated to their rights under the BLA.

The Receiver's Commercial Need for Critical Suppliers

56. The Receiver's commercial need for Critical Suppliers can be addressed without prejudicing the holdback

57. Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 authorizes the Court, where it considers it just or convenient to do so, to appoint a receiver to exercise such control over the debtor's property and business as the Court considers advisable and to take any other action the Court considers advisable.

58. Courts have authorized receivers to make payments of pre-filing liabilities where necessary to preserve or maximize the value of an insolvent estate, including payments to suppliers whose continued services are critical to ongoing operations.

59. HMC does not challenge that jurisdiction or oppose the Receiver making commercially necessary payments to Critical Suppliers from receivership funds.

60. The Receiver seeks separate authority to make up to \$3 million in payments in respect of pre-receivership obligations to Critical Suppliers.

61. There is therefore no need to alter the relative exposure of lien claimants to competing claims against the statutory holdback in order to achieve the Receiver's commercial objective.

62. If an additional payment is required to induce a Critical Supplier to return to the Project, that commercial cost should be borne by the receivership estate or the party funding completion of the Project, rather than indirectly imposed upon the other lien claimants by insulating the Critical Supplier from the risk of subsequent claims against the statutory holdback.

Part 6: MATERIAL TO BE RELIED ON:

1. Affidavit #1 of Monisha Goddard made April 7, 2026;
2. The First Report of the Receiver and Manager dated September 4, 2026;
3. The Receivership Order granted April 27, 2026.
4. The pleadings and proceedings filed herein; and
5. Such other materials as counsel may advise.

HMC has filed in this proceeding a document that contains HMC's address for service.

Dated: September 10, 2026



Signature of Benjamin Lorimer,
Lawyer for HMC

THIS **APPLICATION RESPONSE** was prepared by Benjamin Lorimer of the law firm of Baker Newby LLP, whose place of business and address for service is #200 – 2955 Gladwin Road, Abbotsford, BC, V2T 5T4, Tel: (604) 852-3646, Email: blorimer@bakernewby.com.