



No. S-244252
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
and AMERICAN HOME ASSURANCE COMPANY

PETITIONERS

AND

SCREO I METROTOWN INC., and SCREO I METROTOWN L.P.

RESPONDENTS

APPLICATION RESPONSE

Filed By: Timbercreek Mortgage Servicing Inc. (“**Timbercreek**” or the “**Application Respondent**”).

THIS IS A RESPONSE TO the Notice of Application of Alvarez & Marsal Canada Inc. in its capacity as receiver (in such capacity, the “**Receiver**”) of SCREO I Metrotown Inc. (the “**Metrotown Legal Owner**”) and SCREO I Metrotown L.P. (the “**Metrotown Beneficial Owner**” and, collectively, “**Metrotown**”) filed on March 5, 2025 (the “**Notice of Application**”).

The Application Respondent estimates that the application will take no more than one day.

PART 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: **1**

PART 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: **NONE**

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: **2 and 3**

PART 4: FACTUAL BASIS

1. Capitalized terms that are not defined herein have the same meaning as defined in Affidavit #1 of Scott Rowland made on May 7, 2025.

Introduction and Overview

2. Timbercreek is a secured creditor of Metrotown pursuant to two Assignments of Proceeds for net sale proceeds from the sale of the Capital Point Towers. Timbercreek's security interest is valued up to \$17,000,000.
3. The Receiver and GVWD have both acknowledged that Timbercreek has a valid, enforceable and perfected security interest in the Net Sale Proceeds pursuant to the *Personal Property Security Act*, RSBC 1996, c 359 (the "**PPSA**"). Metrotown has no other secured creditors, apart from Timbercreek.
4. At present, the Receiver is holding approximately \$11,400,000 of net sale proceeds from its sale of the Capital Point Towers (the "**Net Sale Proceeds**").
5. It is well-established that ordinary, non-insolvency priority rules, such as the *PPSA*, govern distributions in a receivership and the only process before the Court is a receivership of Metrotown. Hence, Timbercreek's undisputed security interest under the *PPSA* entitles Timbercreek to the Net Sale Proceeds.
6. Nevertheless, the Receiver has asked the Court whether Metrotown should be put into bankruptcy, and if so, whether Timbercreek would be a "secured creditor" as defined under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") and maintain its priority in a bankruptcy distribution pursuant to Section 136 of the *BIA*.
7. It is Timbercreek's position that there is no basis to bankrupt Metrotown, and the existing receivership process should be followed to its completion. Additionally, there has been no application by GWVD to lift the stay of proceeding to petition Metrotown into bankruptcy nor has GVWD made a bankruptcy application. Bankrupting Metrotown would ultimately provide a windfall to GWVD and would be contrary to the only process in existence.
8. Further, or in any event, Timbercreek is also entitled to the Net Sale Proceeds since:
 - (a) Timbercreek would be a "secured creditor" under the *BIA* for bankruptcy purposes. The Assignments of Proceeds, on a proper interpretation, having regard to the plain language of the agreements, the commercial realities, and their commercial purpose, fairly and reasonably create both a security interest *and* a debt in favour of Timbercreek. Thus, even if Metrotown was bankrupted, Timbercreek would still have priority to the Net Sale Proceeds pursuant to Section 136 of the *BIA*.

- (b) It is trite law that bankruptcy is for *insolvent* entities. If Timbercreek's claims under the Assignments of Proceeds are not construed as "debts" owed to Timbercreek by Metrotown pursuant to the *BIA* (as GVWD suggests), Metrotown would be *solvent* and have net assets after paying all of its obligations of approximately \$2 million. This invariably leads to the conclusion that Timbercreek is entitled to the Net Sale Proceeds.
- (c) Finally, GVWD has put forth insufficient evidence to substantiate its unsecured claim, further supporting Timbercreek's position that it is entitled to the Net Sale Proceeds.

Parties and Factual Background

Metrotown, Slate CREO Fund and Slate Affiliates

9. Metrotown are special purpose vehicles that are affiliated with Slate CREO Fund. Specifically, Slate CREO Fund is the indirect shareholder of Metrotown. Slate CREO Fund is also an indirect shareholder of SCREO 700/585 and SCREO Gill. Consequently, Slate CREO Fund, Metrotown, SCREO 700/585 and SCREO Gill are all affiliates.

**First Report of the Receiver dated October 30, 2024 at paras 3.1-3.3.
Affidavit #1 of Scott Rowland made on May 7, 2025 ["Rowland Affidavit"] at paras 6, 9 and 12.**

The Timbercreek Loan Agreements and the Assignments of Proceeds

10. Pursuant to the Timbercreek Loan Agreements, Timbercreek, as lender, advanced to SCREO 700/585 and SCREO Gill, as borrowers, the Timbercreek Loans.

**Notice of Application filed March 5, 2025 ["Application"] at para 13.
Second Report of the Receiver dated March 5, 2025 ["Second Report"] at para 4.2, Appendices "A" and "B".
Rowland Affidavit at paras 13-14.**

11. Pursuant to the December Renewals, Timbercreek agreed to extend the maturity date for the Timbercreek Loans from December 1, 2022 to September 1, 2024, in exchange for, among other things, Metrotown providing the Assignments of Proceeds.

**Second Report at Appendix "C" paras 3.1(b) and 6.1(e)(iii) and Appendix "D" paras 3.1(b) and 5.1(f)(iii).
Rowland Affidavit at paras 17-18.**

12. Although Metrotown was not a party to the December Renewals, it agreed to provide the Assignments of Proceeds to backstop the obligations of its affiliates.

**Second Report at Appendix "E", preamble and paras 3 and 6 (for both Assignments of Proceeds).
Rowland Affidavit at para 27.**

13. Pursuant to the Assignments of Proceeds and the December Renewals, Timbercreek has an aggregate secured claim in the Net Sale Proceeds of up to \$17,000,000. Timbercreek duly perfected its security interest with the British Columbia Personal Property Registry in September 2023.

The Receivership and Sale of the Capital Point Towers

14. On or about November 7, 2024, the Receiver was granted an Approval and Vesting Order (the “**Approval and Vesting Order**”), which approved the sale of the Capital Point Towers to the City of Burnaby. The Capital Point Tower sale was completed in late November 2024, and the Receiver repaid the indebtedness owed to the Petitioners in full, as well as the Receiver’s borrowings.

Order Made After Application filed November 7, 2024.
Application at paras 7-8.
Second Report at paras 1.3-1.4.

15. Therefore, according to the Receiver, there now remains the Net Sale Proceeds of approximately \$11,400,000, which are being held in trust by the Receiver in accordance with the Approval and Vesting Order to be distributed to Metrotown’s remaining creditors. In its Notice of Application, the Receiver seeks direction as to which stakeholder should receive the Net Sale Proceeds.

Application at paras 10 and 24.
Second Report at paras 1.4 and 5.3.

PART 5: LEGAL BASIS

A. TIMBERCREEK IS ENTITLED TO THE NET SALE PROCEEDS UNDER RECEIVERSHIP LAW

16. Unlike distributions in a bankruptcy, which are governed by the distribution regime set out in Section 136 of the *BIA*, the *BIA* does not prescribe a distribution scheme for receiverships. Rather, distributions in receiverships are to be “determined according to ordinary non-insolvency law principles”. In other words, receivership distributions are determined by the priorities set out by applicable provincial laws, such as personal property security legislation or real property legislation.

Bankruptcy and Insolvency Act, RSC 1985, c B-3 [*BIA*], s 136.
R. Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Irwin Law, 2015) [Wood] at p 516.

17. Further, the absence of a prescribed scheme of distribution for receiverships is not a “gap” in the *BIA* which can be filled by the Court imposing the bankruptcy scheme of distribution on a receivership. Rather, Section 72(1) of the *BIA* requires Courts to apply applicable provincial property and civil rights law, unless there is a clear conflict with the *BIA*. Since there is no receivership distribution scheme prescribed by the *BIA*, there is no conflict with the Receiver applying the distribution regimes governed by provincial law, and provincial law priorities govern.

BIA, s 72(1).
Railside Developments Ltd. (Re) [Railside], 2010 NSSC 13 at paras 71 and 86.

18. Given that both GVWD and the Receiver have acknowledged that Timbercreek has a valid, enforceable and perfected security interest in the Net Sale Proceeds pursuant to the *PPSA*, and Timbercreek is the only secured creditor of Metrotown, it is entitled to receive the Net Sale Proceeds as a matter of receivership law.

Application at paras 40-41.
Application Response filed April 17, 2025 ["GVWD Response"] at para 17.

19. While GVWD now seeks to have Metrotown put into bankruptcy in order to “reverse” the existing receivership priorities, the Court should not accede to that invitation. Timbercreek has participated in, and has not opposed steps in these receivership proceedings, on the reasonable expectation that the receivership process would be brought to its completion and its valid and enforceable security interest under the *PPSA* would be given effect.

GVWD Response at paras 35 and 43.

20. Fairness “permeates Canadian insolvency law and practice” and it would not be fair or equitable for this Court to disregard the current process, which is well underway, in favour of a different process that has never been formally sought by Metrotown’s unsecured creditors, where the objective would be solely to invalidate Timbercreek’s security interest.

9354-9186 Québec Inc v Callidus Capital Corp, 2020 SCC 10 at para 75.

B. ALTERNATIVELY, TIMBERCREEK IS A SECURED CREDITOR UNDER THE *BIA* FOR BANKRUPTCY PURPOSES

21. Irrespective of the result mandated by applicable receivership law, GVWD argues that Metrotown should be assigned into bankruptcy. GVWD further argues that, since the *BIA* bankruptcy scheme of distribution would then apply, Timbercreek would lose its priority because it is not a “secured creditor” within the meaning of the *BIA*.

GVWD Response at paras 23 and 35.

22. The Receiver’s position appears to be that Timbercreek is not a “secured creditor” within the meaning of the *BIA*, but the Receiver is unsure which distribution scheme should apply.

Application at paras 44 and 57(b).
Second Report at para 5.2.

23. Timbercreek’s position is that, even if Metrotown was placed into bankruptcy, Timbercreek would be a “secured creditor” within the meaning of the *BIA*, and entitled to a priority distribution in a bankruptcy.

The Assignments of Proceeds Create Both a Security Interest and a Debt

24. To begin, as indicated above, Section 136(1) of the *BIA* governs distributions “from the property of a bankrupt” and affords “secured creditors” (as defined under the *BIA*) first priority in a bankruptcy distribution.

BIA, s 136(1).

25. Section 2 of the *BIA* defines “secured creditor” as meaning “a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor ...” (underlining added).

BIA, s 2 “secured creditor”.

26. The *BIA* does not define “debt” or “debt due or accruing due” and Canadian Courts have interpreted the concept of “debt” broadly, including as meaning a contractual obligation to pay money or “other valuable thing”. Canadian courts have also described legal proceedings to enforce assignment of agreements as being actions in “debt”.

Central Capital Corp., Re, 1996 CarswellOnt 316 (CA) at paras 99-101.

Lee v Chang, 2024 ONSC 580 at para 82.

Irving Oil Ltd. v Canada, 1984 CarswellNat 137 (CA) at para 49.

27. In this case, neither GVWD nor the Receiver dispute that the Assignments of Proceeds created security interests (e.g. a mortgage, pledge or charge) in favour of Timbercreek. Rather, their position is that the Assignments of Proceeds only secure debts of SCREO 700/585 and SCREO Gill, but not debts owed by Metrotown to Timbercreek. The basis for this position is that the Assignments of Proceeds are the only contracts between Timbercreek (via Computershare) and Metrotown, and there is no separate contract of guarantee signed by Metrotown creating a “debt”. Thus, both GVWD and the Receiver assert Timbercreek would not be a “secured creditor” under the *BIA* for the purpose of a bankruptcy distribution.

Application at paras 18 and 42.

GVWD Response at paras 15-16 and 26.

28. Yet, a proper interpretation of the Assignments of Proceeds, having regard to the words used by the parties, and surrounding circumstances and commercial purpose, the Assignments of Proceeds should be construed as *both* security agreements and contractual obligations on the part of Metrotown to pay “money or some other valuable thing” to Timbercreek (i.e., a “debt”).
29. Among other things, the Assignments of Proceeds were granted by Metrotown as part of broader complex secured lending transactions amongst Timbercreek, SCREO 700/585, SCREO Gill, Slate CREO Fund and Metrotown. While the Assignments of Proceeds did not use the term “guarantee”,

nor were any other contracts of guarantee executed by Metrotown, the commercial purpose and objective intent was for Metrotown to guarantee the obligations of its affiliates, up to the extent of the net sale proceeds it may receive from the sale of the Capital Point Towers.

**Second Report at Appendix “C” para 5.1 and Appendix “D” para 4.1.
Rowland Affidavit at paras 26-27.**

30. Further, there is authority holding that a person who pledges their property for the debt of another *becomes* a guarantor as a matter of law, up to the value of the pledge.

***Re Conley*, [1938] 2 All ER 127 (CA), per Sir Wilfred Greene MR [*Conley*] at p 131.
K. McGuinness, *The Law of Guarantee*, 3rd ed (LexisNexis Canada, 2020) at para 3:22, citing *Conley*.**

31. Simply stated, interpreting the Assignments of Proceeds as creating both a security interest *and* a debt in favour of Timbercreek not only allows the complex transactions to be given commercial efficacy and their intended effect, but also promotes the economic and legal substance of the transactions, rather than a formalistic or unduly technical interpretation. It is trite law that the *BIA* is a “businessperson’s statute” and practical and commercially reasonable outcomes, namely that Timbercreek is a “secured creditor” under the *BIA*, ought to be preferred over interpretations that favour form over substance.

***National Telecommunications Inc, Re*, 2017 ONSC 1475 at para 33.**

Alternatively, the Assignments of Proceeds Include an Implied Guarantee

32. In the further alternative, if the Assignments of Proceeds are found to not create a debt owed by Metrotown to Timbercreek (which is denied), then this Court should nevertheless imply a covenant of guarantee into the Assignment of Proceeds thereby making Timbercreek a “secured creditor” under the *BIA*.
33. At common law, a court may imply a term into a commercial contract on the “basis of the presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the ‘officious bystander test’”.

***Schindler v DFIV Corp.*, 2025 ONSC 2180 at paras 53-58.**

34. Additionally, Section 59(6)(a) of the *Law and Equity Act*, RSBC 1996, c 253 (“*LEA*”) only requires a guarantee obligation to be evidenced by some writing and does not require any particular formalities. Section 59(7) of the *LEA* also states that “writing can be sufficient...even though a term is left out or is wrongly stated”.

***Law and Equity Act*, RSBC 1996, c 253, ss 59(6)(a) and 59(7).
Fleetwood Corp v Imperial Investment Corp, 1965 CarswellBC 197 (CA) at paras 5 and 19.
Georgilas v Merit Gas and Oil Inc., 1982 CarswellBC 1417 (SC) at para 9.
Trio Ready-Mix (1971) Co. v Tub City Excavating Ltd., 1990 CarswellBC 2638 (SC) at para 7.**

35. Here, the purpose of the Assignments of Proceeds was to provide Timbercreek additional recourse, up to certain limits, to entice Timbercreek to agree to extend the Timbercreek Loans. Put otherwise, the commercial purpose was for Metrotown to be a guarantor.

Rowland Affidavit at para 27.

36. Accordingly, if the Assignments of Proceeds did not create a debt, then this Court should imply such an obligation as being necessary to give commercial efficacy to the transactions with Metrotown. On this alternative basis too, Timbercreek would be a “secured creditor” within the meaning of the *BIA* and have priority to the Net Sale Proceeds.

C. IN ANY EVENT, THERE IS NO BASIS TO BANKRUPT METROTOWN UNLESS TIMBERCREEK IS A SECURED CREDITOR FOR *BIA* PURPOSES

37. It is trite law that bankruptcy proceedings are for *insolvent* persons. For example, only an “insolvent person” may be assigned into bankruptcy. Similarly, when a creditor seeks to petition a debtor into bankruptcy, the Court “shall dismiss” the application if the debtor proves it is “able to pay their debts” and is solvent.

BIA, ss 49(1), 43(1), and 43(7).
Braich v Clarke, 2023 BCCA 305 at paras 27, 37-48 and 50.

38. In the instant case, GVWD states that Metrotown should be assigned into bankruptcy because the Metrotown debtors “are insolvent”.

GVWD Response, paras 35-36.

39. Yet, the record before this Court demonstrates that (i) the Receiver is holding approximately \$11,400,000 of Net Sale Proceeds on behalf of the Metrotown estate; (ii) the Receiver believes Metrotown's total unsecured creditors are \$9,300,000 (including GVWD's claim), and (iii) Timbercreek has a claim of \$17,000,000.

**Application at paras 10 and 20-23.
Second Report at para 1.5.**

40. This math is simple. Unless Timbercreek's claim is viewed as a debt to be paid by the Metrotown estate, then Metrotown is not insolvent. Put differently, if no payment obligation or debt is owed to Timbercreek, Metrotown would have surplus assets of over \$2 million based on the Receiver's information.
41. It follows that there is no outcome in which Timbercreek’s first-ranking secured claim is “reversed” in favour of GVWD. Either:

- (a) GVWD is correct, and the Assignments of Proceeds created only a security interest, with no payment obligation owed to Timbercreek by Metrotown, and thus Metrotown can pay all of its debts and is solvent. Consequently, there is no basis to assign Metrotown into bankruptcy and the normal *PPSA* priorities apply, meaning Timbercreek has first priority;
or
- (b) Metrotown indeed owes a debt to Timbercreek, as part of its obligations under the Assignments of Proceeds. Consequently, Metrotown is insolvent, may be assigned into bankruptcy, and Timbercreek is a “secured creditor” within the *BIA* with first priority.

42. This is yet a further and complete response to the Notice of Application.

D. GVWD HAS NOT PROVEN ITS CLAIM

43. Finally, GVWD’s evidence is insufficient to establish it has an unsecured claim against Metrotown, which is yet a further basis for this Court to find that Timbercreek is entitled to the Net Sale Proceeds.
44. The evidence provided by GVWD in connection with the Notice of Application is the Affidavit of Robert Kates made on April 16, 2025 (the “**Kates Affidavit**”), attaching the Seismic Upgrade Variance Guarantee dated March 12, 2019 (the “**GVWD Guarantee**”), between, *inter alia*, GVWD and Metrotown.

Affidavit #1 of Robert Kates made on April 16, 2025 [Kates Affidavit].

45. While unclear, the Kates Affidavit appears to indicate that GVWD is owed \$9 million from Metrotown, because Metrotown failed to obtain a building permit for seismic work as required by the GVWD Guarantee.

Kates Affidavit at para 7.

39. Yet, GVWD has failed to provide any evidence of, among other things, (i) when Metrotown was required to provide the building permit to GVWD, or (ii) whether or when GVWD ever took any steps to enforce the debt, after Metrotown did not provide the building permit.
40. Without such information, it is impossible for this Court to confirm whether GVWD’s claim is valid and enforceable. Further, it may be that the debt to GVWD arose as early as March 2021, meaning, assuming no civil claim has been filed, GVWD’s claim would now be barred by the *Limitation Act*, SBC 2012, c 13, and could not be a provable claim in Metrotown’s bankruptcy in any case.

41. In short, GVWD's failure to establish that it has a valid and enforceable unsecured claim is yet further reason to permit the Net Sale Proceeds to be paid to Timbercreek. Not only has GVWD never applied to petition Metrotown into bankruptcy, but it has also failed to establish it is owed any debt or would even be a claimant in a bankruptcy.

PART 6: MATERIALS TO BE RELIED ON

42. Affidavit #1 of Chelsea Denton made on October 25, 2024.
43. Affidavit #2 of Chelsea Denton made on March 5, 2025.
44. Affidavit #1 of Robert Kates made on April 16, 2025
45. Affidavit #1 of Scott Rowland made on May 7, 2025.
46. The First Report of the Receiver dated October 30, 2024.
47. The Second Report of the Receiver dated March 5, 2025.
48. The Order Made After Application (Receivership Order) entered July 8, 2024.
49. The Order Made After Application (Approval and Vesting Order) entered November 7, 2024.
50. The pleadings and proceedings had and taken herein.
51. Such other materials or documents as this Honourable Court may permit.

Date: May 7, 2025



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