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

Application response of: Greater Vancouver Water District ("GVWD")

THIS IS A RESPONSE TO the notice of application of Alvarez & Marsal Canada Inc., in its capacity as court appointed receiver of the real property and all of the assets, undertakings and property, both real and personal, located at, relating to or used in connection with the real property of SCREO I Metrotown Inc. and SCREO I Metrotown L.P. (the "Receiver") filed on March 5, 2025.

The application respondent estimates that the application will take one day.

PART 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in paragraphs 1 and 2 of Part 1 of the notice of application.

PART 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in none of the paragraphs of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in paragraph 3 of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

1. GVWD adopts the definitions used by the Receiver in its Notice of Application filed on March 5, 2025.

GVWD's claim

2. GVWD is a creditor of and claimant against the Debtors.

3. GVWD's claim relates to a seismic upgrade variance guarantee, dated as of March 12, 2019 (the "Guarantee") that GVWD entered into with the Debtors and Slate Acquisitions Inc. ("SAI").

4. GVWD is the former owner of the Property and entered into an agreement to sell the Property to SAI on November 8, 2018, which SAI later assigned to SCREO Metrotown L.P. GVWD agreed to provide SAI/SCREO Metrotown L.P. a credit of $9,000,000 on account of the purchase price to contribute to the costs of seismic upgrades to the buildings on the Property.

5. In the Guarantee, SAI and the Debtors agreed to remit up to the $9,000,000 amount to GVWD on the occurrence of certain events, including the failure to obtain a building permit for the work.

6. The full $9,000,000 plus interest is payable to GVWD pursuant to the Guarantee.

7. In addition, GVWD's position is that it is also entitled to assert an unpaid vendor's lien or equitable lien against the sale proceeds of the Property.

Timbercreek's claim

8. As set out in greater detail in the Receiver's Notice of Application and Second Report, each filed on March 5, 2025, Computershare Trust Company of Canada as agent, nominee and bare trustee for Timbercreek Mortgage Servicing Inc. ("Timbercreek") is the assignee in the Assignment Agreements with the Debtors, each dated July 11, 2023.

9. In the Assignment Agreements, the Debtors assigned the net sale proceeds of the Property as security for partial principal repayments required in the Gill Extension and the SCREO 700 Extension, each dated December 1, 2022. The net sales proceeds are defined in each extension as the aggregate gross proceeds of the sale, net of repayments of financing relating to the property, reasonable legal fees, real estate commission and closing costs.

10. The Gill Extension required Gill to make a partial repayment of the facilities in the Gill Loan of $6,500,000. The initial Gill Loan provided Gill with a facility of up to $30,200,000 for the acquisition of land with two towers in Calgary, Alberta, secured by, among other things, a first mortgage on that land.

11. The SCREO 700 Extension required SCREO 700 and 585 to make a partial repayment of the facilities in the SCREO 700 Loan of $30,000,000. The initial SCREO 700 Loan provided facilities totaling up to $161,300,000 in relation to land with a shopping mall in Calgary, Alberta, secured by, among other things, a first mortgage on that land.

12. The Debtors are not parties to the Gill Loan, the SCREO 700 Loan, or any amendments, including the Gill Extension and the SCREO 700 Extension.

13. Only the SCREO 700 Extension contemplated the Debtors providing a guarantee in one specific circumstance, as follows:

    a. in section 4.1(b), if "Tower 1" at the Property (the tower at 4300-4330 Kingsway, Burnaby, BC) sold before "Tower 3" at the Property (the tower at 5945 Kathleen Avenue, Burnaby, BC), then after the sale of Tower 1 SCREO 700 and 585 had an obligation to cause Timbercreek to be granted a collateral mortgage on Tower 3; and

    b. in that case, section 5.1(f)(v) required SCREO 700, 585 and Slate CREO Fund to cause the Debtors to provide an undertaking to provide a limited guarantee, mortgage and beneficial charge with respect to Tower 3.

14. In the Gill Extension, there are no similar provisions requiring a guarantee from the Debtors if Tower 1 sold before Tower 3.

15. Moreover, as the Receiver sold the Property and both towers together, the Debtors were never required to provide any guarantee to Timbercreek.

16. As the Debtors have not provided a guarantee of the obligations of Gill or SCREO 700/585 and have not agreed to indemnify Timbercreek, there is no debt due or accruing due to Timbercreek from the Debtors.

PART 5: LEGAL BASIS

1. Does Timbercreek have a security interest in the Proceeds?

17. Unless Timbercreek has been repaid $6,500,000 for the Gill Loan and $30,000,000 for the SCREO 700 Loan after December 1, 2022, either from the sale of Dixie Outlet Mall or otherwise, GVWD accepts that Timbercreek has enforceable security interests in the remaining Proceeds under provincial law.

18. Timbercreek's security interests secure part of debts due by entities other than the Debtors, namely Gill, SCREO 700, 585, and Slate CREO.

2. Is Timbercreek a "secured creditor" under the *BIA*?

19. GVWD submits that Timbercreek is not a "secured creditor" under the *BIA*. The relevant part of the definition in s. 2 of the *BIA* is as follows (with emphasis added):

> ***secured creditor*** means 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, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable...

20. In the context of a bankruptcy, the definition of "debtor" refers to the bankrupt:

> ***debtor*** includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

21. Timbercreek having an enforceable security interest under provincial law does not affect the analysis under the *BIA*.

22. The interpretation of the definition of "secured creditor" in the *BIA* is not affected by provincial law:

> ...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 purposes of the Bankruptcy Act.
>
> *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 SCR 453 at 482.

23. As there is no debt due or accruing due to Timbercreek from the Debtors, in a bankruptcy of the Debtors Timbercreek would not be a secured creditor.

24. The clear language requiring a debt due or accruing due in the definition of secured creditor means that without a debt, the holder of security is not a secured creditor under the *BIA*:

> The key to this definition is that the mortgage, charge, etc. be held "as security for a debt due or accruing due to the person from the debtor." In the absence of a debt, the language of the definition suggests that the hold[er] of a mortgage or charge cannot be a secured creditor.
>
> *S. Funtig & Associates Inc. v. Windsor (City)*, 2008 CarswellOnt 4624 (SCJ) ("*Funtig*") at para 45.

25. In *Funtig*, the Court found that the City, the holder of a mortgage over the bankrupt's property, had a debt due from the bankrupt because the City had provided a conditional grant that required the bankrupt to transfer the property to the City on insolvency or when operations ceased. The mortgage for that reason "secured money or money's worth" due from the bankrupt to the City.

Funtig at paras 60-61.

26. In this case, the assignments in favour of Timbercreek do not similarly secure an obligation of the Debtors to pay money or money's worth and instead secure debts due from separate entities to Timbercreek.

27. In *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600, an administrator appointed for two pension plans of a bankrupt claimed to be a secured creditor on the basis of a lien held over the bankrupt's assets for unpaid pension contributions under the *Pension Benefits Act*, R.S.O. 1990, c. P.8. The administrator's argument failed as there was no debt due or accruing due from the bankrupt to the administrator as required by the definition of secured creditor in the *BIA*:

[26] For this argument to succeed, however, the first step is that, as holder of a s. 57(5) statutory lien, the Administrator must meet the definition of secured creditor in the *BIA*.

[27] In my view, it cannot do so. The Administrator does not hold a charge or lien as security for a debt due or accruing due to the Administrator from the debtor GCCL.

...

[29] Section 55(2) sets out the employer's obligation to make contributions under a pension plan. It reads as follows:

> (2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,
>
> (a) to the pension fund; or
>
> (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

[30] None of these provisions suggest that the contributions owed by GCCL are a debt due to the Administrator. Rather, GCCL's legal obligation was to make the contributions to the pension funds that were required under the pension plans. Nor is there even any indication that the contributions are owed to the Administrator to be held in trust for the pension funds. Rather, the legislation contemplates that those contributions are owed to the pension funds pursuant to the pension plans and are not the property of the Administrator.

[31] The Administrator's right to commence legal proceedings simply permits it to seek to compel the employer to pay the contributions to the pension funds due under the pension plans.

[32] The consequence of this is that the lien and charge accorded to the Administrator secures the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. It does not secure a debt owed to the Administrator. Hence s. 57(5) does not qualify the Administrator as a secured creditor for the purposes of the *BIA*.

Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd., 2007 ONCA 600.

28. Similarly, in *Anthony Capital Corporation (Re)*, 2021 NLSC 91, the Court considered a lien of an administrator under the Newfoundland and Labrador *Pension Benefits Act*. While the administrator had a secured claim under provincial law, the secured claim did not "survive" the bankruptcy of the employer because the administrator does not hold the lien for any debt due or accruing due by the bankrupt to the administrator.

Anthony Capital Corporation (Re), 2021 NLSC 91 at paras 39-46.

29. A creditor who holds security against the property of partners for a debt owed by the partnership is a secured creditor in the partnership estate, but not in the individual partner's estate.

Pike v. Bel-Tronics Co., 2000 CarswellOnt 3540 (SCJ) at para 20
(referring to *Re Dutton Massey & Co.*, [1924] 2 Ch. 199 (Eng. C.A.))

30. The requirement in the definition of "secured creditor" that there be a debt due or accruing due from the bankrupt is also illustrated in other provisions relating to secured creditors in the *BIA*.

31. For example, in s. 127 of the *BIA*, a secured creditor can prove for the balance due after realizing the security, or surrender the security and prove the whole claim:

> **Proof by secured creditor**
>
> **127 (1)** Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized.
>
> **May prove whole claim on surrender**
>
> **(2)** Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim.

32. It is only a person with a debt due from the bankrupt, as required by the definition of "secured creditor" in the *BIA*, who could prove a claim in the bankruptcy after realizing on security or surrendering security.

33. Similarly, in s. 43(2) of the *BIA*, a secured creditor can apply for a bankruptcy order by either surrendering security, or estimating the value of the security and being an applicant to the extent of the balance of the debt due:

> **If applicant creditor is a secured creditor**
>
> **(2)** If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

34. A person without a debt due from the debtor could not surrender security or value it and use the unsecured balance to apply for a bankruptcy order.

3. Which distribution regime should govern?

35. GVWD submits that the Receiver ought to be directed to assign the Debtors into bankruptcy, to permit the distribution of the proceeds under the scheme set out in the *BIA*.

36. As the Receiver has indicated, the Debtors are insolvent.

37. The federal bankruptcy system aims to ensure the equitable distribution of assets to the creditors of an insolvent entity:

> At the outset, it is useful to remember that our bankruptcy system serves two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se*. As one commentator has noted (Aleck Dadson, "Comment" (1986), 64 *Can. Bar Rev.* 755, at p. 755):
>
> > Bankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery)....
> >
> > The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies.
>
> See also Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 25-3. The second goal of the bankruptcy system is the financial rehabilitation of insolvent individuals (Dadson, *supra*, at p. 755). This goal is furthered through the opportunity for an insolvent individual's discharge from outstanding debts.
>
> It has long been accepted that the first goal of ensuring an equitable distribution of a debtor's assets is to be pursued in accordance with the federal system of bankruptcy priorities.

Husky at 470-471.

38. Bankrupting insolvent parties to permit the distribution of their assets according to the scheme in the *BIA*, even if the bankruptcy re-orders priorities, creates consistency in the distribution of the assets of an insolvent party across different provinces.

> *Federal Business Development Bank v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1998] 1 S.C.R. 1061 at 1072.

39. But for the receivership order in this case, which creates a stay of proceedings against or in respect of the Debtors and their property, GVWD would be entitled to apply for a bankruptcy order under s. 43 of the *BIA* and have the Proceeds distributed by the trustee in bankruptcy according to s. 136 of the *BIA*.

40. It is well-established that it is not improper for a creditor to use the *BIA* to improve its position or reverse priorities. While bankruptcy proceedings are often used to subordinate the deemed trust claim of the Crown under the *Excise Tax Act*, R.S.C. 1985, c. E-15 or the priority provided to a landlord in distress proceedings, creditors can use the *BIA* to enhance their position versus the claims of other parties.

41. In *Selox Inc., Re*, 1992 CarswellOnt 181, for example, the Court found that it was not improper for a secured creditor to use bankruptcy proceedings to enhance its priority position and to subordinate the claims of two other creditors who had failed to perfect security interests:

> ...I am of the opinion that the motion brought by the trustee and Jonesco is not an improper use of bankruptcy proceedings in that it is brought as a legitimate challenge to claims of priority by secured creditors for the purpose of obtaining an equal distribution of the assets of Selox Inc. among its creditors and in addition has the potential to be of benefit to the estate of Selox Inc.
>
> *Selox Inc., Re*, 1992 CarswellOnt 181 at para 24.

42. In *Ivaco Inc., Re*, 2005 CarswellOnt 3445 (SCJ), the Court considered debtors involved in *CCAA* proceedings, and whether to distribute proceeds of their property pursuant to a pension deemed trust valid under provincial law, or to bankrupt the debtors pursuant to a request of other creditors wishing to reverse priorities. The Court permitted the bankruptcies to proceed:

> ...
> Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith — and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:
>
> > One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.
>
> See also *Black Brothers (1978) Ltd., Re* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.); *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 73 C.B.R. (N.S.) 273 (B.C. C.A.); *Beverley Bedding Corp., Re* (1982), 40 C.B.R. (N.S.) 95 (Ont. Bktcy.); *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this — see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, *only* relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.
>
> 14 Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is this type of

situation of the nature envisaged at para. 12 of *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.
>
> There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

Ivaco Inc., Re, 2005 CarswellOnt 3445 (SCJ) at paras 13-14
(affirmed in *Ivaco Inc., Re*, 2006 CarswellOnt 6292 (CA)).

43. A receiver can assign a debtor into bankruptcy to reverse priorities and enhance the estate of insolvent parties.

2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONSC 199 at paras 113-123.

44. For the foregoing reasons, GVWD submits that it is appropriate in this case to direct the Receiver to assign the Debtors into bankruptcy to permit a distribution of the Proceeds under the *BIA*.

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Robert Kates sworn April 16, 2025.

The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE IS:

Gehlen Dabbs Cash LLP
1201 – 1030 West Georgia St.
Vancouver, BC V6E 2Y3
Attention: Geoffrey Dabbs & Lee Marriner
Email: gd@gdlaw.ca & lm@gdlaw.ca

Date: April 16, 2025

Signature of Geoffrey Dabbs,
Lawyer for Greater Vancouver Water District