District of British Columbia
Division No. 03 – Vancouver
Court File No.
Estate No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
SCREO I METROTOWN INC. and SCREO I METROTOWN L.P.

PETITION TO THE COURT

This is the Petition of:

Greater Vancouver Water District
c/o Gehlen Dabbs Cash LLP
1201 – 1030 West Georgia St.
Vancouver, BC V6E 2Y3

ON NOTICE TO:

SCREO I Metrotown Inc.
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5

SCREO I Metrotown L.P.
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5

Alvarez & Marsal Canada Inc., in its capacity as court-appointed receiver of SCREO I Metrotown Inc. and SCREO I Metrotown L.P.
c/o Dentons Canada LLP
250 Howe St., 20th Floor
Vancouver, BC V6C 3R8
Attention: Jordan Schultz & Cassandra Federico

Timbercreek Mortgage Servicing Inc.
c/o Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC V7X 1T2
Attention: Jack Maslen & Jennifer Pepper

Office of the Superintendent of Bankruptcy
300 West Georgia St., Suite 2000
Vancouver, BC V6B 6E1

The address of the registry is:

800 Smithe Street
Vancouver, B.C. V6Z 2E1

The petitioner estimates that the hearing of the petition will take one day.

This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below by Greater Vancouver Water District (the petitioner).

(1) The ADDRESS FOR SERVICE of the petitioner is:

c/o Gehlen Dabbs Cash LLP
1201 - 1030 West Georgia Street
Vancouver, BC V6E 2Y3
Fax number address for service of the petitioner: N/A
E-mail address for service of the petitioner: gd@gdlaw.ca and lm@gdlaw.ca

(2) The name and office address of the petitioner's lawyer is:
Gehlen Dabbs Cash LLP
1201 - 1030 West Georgia Street
Vancouver, BC, V6E 2Y3
Attention: Geoffrey H. Dabbs & Lee J. Marriner

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The stay of proceedings against SCREO I Metrotown Inc. and SCREO I Metrotown L.P. in the Order Made After Application entered on July 8, 2024 in court file no. S-244252, Vancouver Registry, is lifted and the petitioner is granted leave to bring this application *nunc pro tunc*.

2. SCREO I Metrotown Inc. and SCREO I Metrotown L.P. are adjudged bankrupt by virtue of a bankruptcy order.

3. Alvarez & Marsal Canada Inc., of 925 West Georgia St., Suite 902, Vancouver, British Columbia, is appointed as trustee of the estate of the bankrupts.

4. The costs of the petitioner are to be paid out of the estate of the bankrupts on taxation of the estate.

Part 2: FACTUAL BASIS

The parties

1. The petitioner, Greater Vancouver Water District ("**GVWD**"), is a corporation created under the *Greater Vancouver Water District Act*, SBC 1924, c 22.

2. SCREO I Metrotown Inc. and SCREO I Metrotown L.P. (together, the "**Debtors**") are a corporation and a limited partnership affiliated with Slate Canadian Real Estate Opportunity Fund I L.P. ("**Slate CREO Fund**").

Sale of property from GVWD to the Debtors

3. GVWD is the former owner of lands located at 4330 Kingsway and 5945 Kathleen Avenue in Burnaby, British Columbia (the "**Lands**").

4. On or around November 8, 2018, GVWD and Slate Acquisitions Inc. entered into a contract for the purchase and sale of the Lands, buildings and improvements on the Lands, and other property associated with the Lands (the "**CPS**").

5. The CPS was subsequently amended by agreement between GVWD and Slate Acquisitions Inc. on December 21, 2018, January 4, 2019, and January 25, 2019. In the third amendment to the CPS, dated January 25, 2019, GVWD and Slate Acquisitions Inc. agreed among other things that:

    a. the closing date for the transaction would be March 12, 2019; and

    b. GVWD would provide Slate Acquisitions Inc. with a $9,000,000 credit on account of the purchase price for recommended seismic upgrades to the buildings on the Lands. If the seismic upgrades cost less than $9,000,000, Slate Acquisitions Inc. was required to remit the difference to GVWD within 24 months of the receipt of the building permit for the seismic upgrades.

6. On or around March 12, 2019, Slate Acquisitions Inc. assigned its interest in the CPS and the Lands to the Debtors, with SCREO I Metrotown Inc. to be the registered owner of the Lands as bare trustee and agent for the beneficial owner of the Lands, SCREO I Metrotown L.P.

The Seismic Upgrade Variance Guarantee

7. On March 12, 2019, GVWD, Slate Acquisitions Inc., and the Debtors entered into a Seismic Upgrade Variance Guarantee (the "**Guarantee**").

8. In the Guarantee, the parties agreed, among other things, that if no building permit for the seismic upgrades to the buildings on the Lands was obtained within two years after the March 12, 2019 closing date (the "**BP Issuance Date**"), Slate Acquisitions Inc. and the Debtors (collectively, the "**Buyers**") would remit $9,000,000 to GVWD within five

business days.

9. The parties also agreed that the BP Issuance Date would be extended for further one-year periods, up to an aggregate of three years (i.e. to March 12, 2024), subject to the Buyers acting in good faith and providing GVWD with proof of commercially reasonable efforts to expeditiously obtain the building permit for the seismic upgrades.

Extensions of the BP Issuance Date

10. After the CPS closed, the Buyers began to send GVWD written updates regarding their efforts to obtain a building permit for the seismic upgrades to the buildings on the Lands.

11. The BP Issuance Date was extended for three further one-year periods, to March 12, 2024. The Debtors' obligation to pay $9,000,000 to GVWD arose on March 12, 2024 and the Debtors were required to pay GVWD within five business days.

12. In and around March of 2024, the Buyers confirmed that they:

    a. had not and would not obtain a building permit for the seismic upgrades to the buildings on the Lands;

    b. had no ability to pay the $9,000,000 due to GVWD pursuant to the Guarantee; and

    c. anticipated paying the full $9,000,000 due to GVWD from the proceeds of a sale of the Lands that was expected to close in mid-August of 2024.

13. To date, GVWD has not received any portion of the $9,000,000 that was due and payable under the Guarantee from any party. Accordingly, the Debtors continue to owe GVWD $9,000,000.

The Receivership

14. On June 21, 2024, The United States Life Insurance Company in the City of New York and American Home Assurance Company filed a Petition to the Court with court file no. S-244252, in the Vancouver Registry, seeking the appointment of a receiver (the "**Receivership Proceeding**").

15. On July 8, 2024, an order (the "**Receivership Order**") was granted in the Receivership Proceeding, appointing Alvarez & Marsal Canada Inc. (the "**Receiver**") as receiver of the Lands and all of the assets, undertakings and property of the Debtors located at, relating to or used in connection with the Lands. The Receivership Order created a stay of proceedings against the Debtors and their property.

16. The Receiver commenced a sales process for the Lands on August 9, 2024. On November 7, 2024, the Receiver obtained an order, among other things:

a. approving the sale of the Lands to the City of Burnaby; and

b. empowering and authorizing, but not obligating, the Receiver to file an assignment in bankruptcy on behalf of the Debtors or to consent to the making of a bankruptcy order against the Debtors.

17. The sale of the Lands to the City of Burnaby closed on November 22, 2024.

18. The proceeds of the sale of the Lands paid the petitioners in the Receivership Proceeding in full. After the repayment of some other disbursements, the remaining proceeds totaled approximately $11.4 million (the "**Proceeds**").

19. The Receiver's First Report in the Receivership Proceeding had identified registrations in the Personal Property Security Registry on behalf of Timbercreek Mortgage Servicing Inc. ("**Timbercreek**") and noted that the Receiver had not ascertained the validity or quantum of Timbercreek's claim.

20. On March 5, 2025, the Receiver filed a notice of application in the Receivership Proceeding, seeking directions as to:

a. whether Timbercreek has a security interest in the Proceeds pursuant to the *Personal Property Security Act*, RSBC 1996, c 359 (the "***PPSA***");

b. whether Timbercreek would be a "secured creditor" under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***"); and

c. whether the Receiver should assign the Debtors into bankruptcy in order to distribute the Proceeds under the *BIA*.

21. On the second question, the Receiver noted that the Debtors did not owe a debt obligation to Timbercreek, and that given the definition of "secured creditor" in the *BIA* requires a security interest to secure a debt due or accruing due from the debtor, on its face Timbercreek would not be a secured creditor of the Debtors under the *BIA*.

22. On May 20, 2025, the Receiver's application was adjourned generally.

23. The Receiver has not assigned the Debtors into bankruptcy.

Timbercreek's claim

24. Timbercreek claims it is a secured creditor pursuant to two assignment agreements with the Debtors (the "**Assignment Agreements**"), each dated July 11, 2023. In the Assignment Agreements, the Debtors assigned the net sale proceeds of the Lands as security for the debts of other parties, namely SCREO I Gill Inc. ("**Gill**"), SCREO I 700 2nd Inc. ("**700**"), and 58508 Alberta Ltd. ("**585**").

25. The debts of these other parties arose as follows:

a. Gill entered into a Loan Agreement with Timbercreek (the "**Gill Loan**") dated November 27, 2018. The 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.

b. On December 1, 2022, the Gill Loan was extended (the "**Gill Extension**"). The Gill Extension required Gill to make a partial repayment of the facilities in the Gill Loan of $6,500,000. One of the Assignment Agreements between Timbercreek and the Debtors assigned the net sales proceeds of the Lands as security for the principal repayments required in the Gill Extension.

c. 700 and 585 entered into a Loan Agreement with Timbercreek (the "**700 Loan**") dated November 27, 2018. The 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.

d. On December 1, 2022, the 700 Loan was extended (the "**700 Extension**"). The 700 Extension required 700 and 585 to make a partial repayment of the facilities in the 700 Loan of $30,000,000. One of the Assignment Agreements between Timbercreek and the Debtors assigned the net sales proceeds of the Lands as security for the principal repayments required in the 700 Extension.

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

27. Only the 700 Extension contemplated the Debtors providing a guarantee, and only in one specific circumstance, as follows:

a. in section 4.1(b), if "Tower 1" at the Lands (the tower at 4300-4330 Kingsway, Burnaby, BC) sold before "Tower 3" at the Lands (the tower at 5945 Kathleen Avenue, Burnaby, BC), then after the sale of Tower 1 700 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 700, 585 and Slate CREO Fund to cause the Debtors to provide an undertaking to provide a limited guarantee, mortgage and beneficial charge to Timbercreek with respect to Tower 3.

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

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

30. There is no debt due or accruing due to Timbercreek from the Debtors.

Other creditors of the Debtors

31. Beyond the debt of $9,000,000 owing to GVWD, the Receiver has in the course of the Receivership Proceeding identified a number of other unsecured creditors of the Debtor, with claims that total about $334,000.

32. One of these additional creditors, DIALOG BC Architecture Engineering Interior Design Planning Inc. ("**DIALOG BC**"), provided architectural and design services to SCREO Metrotown L.P. and has not been paid in full for five invoices issued between August 15, 2023 and January 15, 2024.

33. Another creditor, TK Elevator (Canada) Limited, has been owed $27,898 since about March 2024.

Part 3: LEGAL BASIS

Overview

34. GVWD seeks a bankruptcy order to permit the distribution of the Proceeds pursuant to the *BIA*.

35. The Debtors' sole asset has been sold, they have no further business or operations, and they are insolvent. In such circumstances, a distribution of the proceeds according to the scheme in the *BIA* is appropriate.

36. As Timbercreek is not a "secured creditor" as defined in the *BIA*, a bankruptcy of the Debtors will permit the distribution of the Proceeds among the Debtor's unsecured creditors, rather than allow Timbercreek to use its position under provincial law to collect the entirety of the Proceeds. It is well-established that it is not improper for a creditor to use the *BIA* to improve its position or reverse priorities.

The bankruptcy application provision

37. Section 43 of the *BIA* permits a creditor to file an application for a bankruptcy order:

> **43 (1)** Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
>
> **(a)** the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
>
> **(b)** the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.
>
> ...
>
> **(3)** The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the

application.

(4) If two or more applications are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on any terms that the court thinks fit.

...

(6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

(8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.

(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

...

GVWD is owed at least $1,000

38. As confirmed by the affidavit of Robert Kates, the Debtors owe GVWD $9,000,000 pursuant to the Guarantee.

39. The Debtors did not obtain a building permit for the seismic upgrade work by the "BP Issuance Date" of March 12, 2024, and the full $9,000,000 credit that GVWD had provided to the Debtors in connection with the sale of the Lands had to be repaid by the Debtors within five business days of that date.

40. In and around March of 2024, the Debtors' representative confirmed to Mr. Kates that the Debtors had no ability to pay GVWD the $9,000,000, but expected to be able to do so in mid-August of 2024 through a sale of the Lands.

41. The Debtors did not manage to sell the Lands, or to pay GVWD the $9,000,000 owing to GVWD, before the Receivership Order was granted on July 8, 2024.

42. GVWD's claim is not statute-barred pursuant to the *Limitation Act*, SBC 2012, c 13, because the $9,000,000 first became due and payable to GVWD in March 2024. The two-year basic limitation period has not expired.

The Debtors have committed acts of bankruptcy

43. The acts of bankruptcy that can ground an application for a bankruptcy order are listed in section 42(1) of the *BIA*. In this case, GVWD relies on the act of bankruptcy listed in paragraphs (j):

> **42 (1)** A debtor commits an act of bankruptcy in each of the following cases:
>
> ...
>
> **(j)** if he ceases to meet his liabilities generally as they become due.

i. The Debtors have ceased to meet their liabilities generally as they become due

44. Generally, an applicant creditor demonstrates that a debtor has ceased to meet liabilities generally by showing that there is more than one unpaid debt. This flips the onus to the debtor to show that despite the existence of more than one debt, its failure to pay does not demonstrate that it has generally ceased to pay liabilities.

ATB Financial v. Coredent Partnership, 2020 ABQB 587 at para 88 [*ATB*].

45. It is not necessary for the cessation of meeting liabilities to begin during the six months preceding the filing of the bankruptcy application. It is sufficient that the cessation occurred and has continued during the six-month period.

Solid Holdings Ltd. (Re), 2019 BCSC 126 at para 14 [*Solid*]
(appeal dismissed: *Solid Holdings Ltd. v. Grant Thornton Limited*, 2019 BCCA 231).
See also *Platt v. Malmstrom*, 2001 CanLII 24037 (ONCA) at para 17.

46. As described above, there is evidence from another creditor, DIALOG BC, that confirms it remains unpaid. The Receiver has also identified a number of unsecured creditors of the Debtors.

47. In such circumstances, the onus is on the Debtors to show that they have not ceased to meet their liabilities generally. As the Debtors remain in receivership, they cannot do so.

48. In any event, section 43(1) of the *BIA* expressly contemplates that a single creditor can apply for a bankruptcy order. While the Court must be vigilant to ensure the bankruptcy is not being used for collection purposes, a debt to a single creditor can be sufficient to constitute an act of bankruptcy where there are "special circumstances." The "traditional" special circumstances include:

a. repeated demands for payment made within a six-month period;
b. a significantly large debt and fraud or suspicious circumstances in the way the debtor has handled its assets, which requires the processes of bankruptcy to be set in motion; and
c. prior to filing the petition, an admission that the debtor is unable to pay creditors

generally, without identifying the creditors.

Solid at paras 15-17.

49. The categories of special circumstances are not closed. Even absent one of the "traditional" special circumstances, if other circumstances, or the circumstances as a whole, show that the debtor has ceased to pay its liabilities generally, it may be sufficient to cast the onus over to the debtor.

ATB at para 114.

50. In this case, the Receivership Proceeding itself demonstrates that the Debtors have ceased to meet their liabilities generally. The Debtors' secured creditors appointed the Receiver because the Debtors were unable to pay their debts. The Debtors have been unable to pay their debts, even after the sale of their sole asset, and the Receiver's reports confirm that the Debtors are presently unable to pay their various unsecured creditors.

51. Moreover, one special circumstance that justifies a bankruptcy order, even based only on the debt owing to the applicant creditor, is when the debt of the applicant creditor is large relative to other claims.

ATB at para 115.

52. Based on the Receiver's reports, GVWD's $9,000,000 claim represents about 96% of the Debtors' total unsecured debts of $9,334,003. In such circumstances, GVWD's claim is large relative to other claims and the failure of the Debtors to pay GVWD is sufficient proof that the Debtors ceased to meet their liabilities generally as they became due.

There is no sufficient cause to refuse a bankruptcy order

53. As set out above, under section 43(7) of the *BIA*, the Court must dismiss a bankruptcy application if a debtor is able to pay its debts, or if for another sufficient cause no order ought to be made.

i. The Debtors are not able to pay their debts

54. The Debtors are unable to pay their debts. The Debtors are in receivership and facing a claim of a secured creditor, Timbercreek, that claims it is entitled to be paid the entirety of the Proceeds. In the absence of evidence that the Debtors have other assets, there is no basis to refuse the application because the Debtors are able to pay their debts.

ii. A distribution according to the BIA is appropriate for the Debtors

55. As the Debtors are insolvent and have no further business or operations, the Proceeds should be distributed according to the scheme in the *BIA*.

56. 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 Oil Operations Ltd. v. Minister of National Revenue, 1995 CarswellSask 740 (SCC) at paras 7-8.

57. 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.

58. The fact that there is an existing proceeding – the Receivership Proceeding – is not a reason to refuse a bankruptcy order. There is no requirement that the Proceeds be distributed according to provincial law because the Receivership Proceeding pre-existed a bankruptcy. It is not improper for a creditor to use the *BIA* to change the distribution that would otherwise occur in an existing proceeding.

See e.g. *Ivaco Inc., Re*, 2005 CarswellOnt 3445 (SCJ);
Ivaco Inc., Re, 2006 CarswellOnt 6292 (CA).

59. Receivers themselves are able to make assignments in bankruptcy to permit the distribution of funds under the *BIA* that would otherwise be payable to one party in priority.

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

60. In this case, the Receiver was authorized to assign the Debtors into bankruptcy in the

November 7, 2024 order in the Receivership Proceeding. Timbercreek did not oppose that order. It is no answer to this application for Timbercreek to point to the existing Receivership Proceeding, particularly when the Court has already authorized the Receiver to bankrupt the Debtors.

iii. Timbercreek is not a secured creditor under the BIA

61. If Timbercreek is a secured creditor according to the definition of "secured creditor" in the *BIA*, it would have priority in a bankruptcy and a bankruptcy order would serve no purpose.

62. However, given that the Assignment Agreements expressly assigned the net proceeds of the sale of the Lands as security for the debts of other parties, and not as security for a debts of the Debtors, Timbercreek is not a secured creditor of the Debtors under the *BIA*.

63. Provincial law and the *BIA* are different in this respect.

64. Under provincial law, a secured creditor can take a security interest in collateral owned by someone other than the debtor. This is recognized in the *PPSA*, where the definition of "debtor" contemplates the owner of the collateral being someone other than the person who has the obligation that is secured:

> **"debtor"** means
>
> (a) a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral,
>
> ...
>
> (f) if the person referred to in paragraph (a) and the owner of the collateral are not the same person,
>
> (i) if the term debtor is used in a provision dealing with the collateral, an owner of the collateral,
>
> (ii) if the term debtor is used in a provision dealing with the obligation, the obligor, and
>
> (iii) if the context permits, both the owner and the obligor;

65. In the *BIA* definition of "secured creditor," however, the owner of the collateral and the person owing the debt must be the same person:

> ***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...

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

67. 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* at para 32.

68. Other provisions relating to secured creditors in the *BIA* are consistent with the requirement in the definition of "secured creditor" that there be a debt due or accruing due from the debtor.

69. 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.

70. 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.

71. 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.

72. 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.

73. The Assignment Agreements do not contain an implied debt obligation of the Debtors in favour of Timbercreek. A security interest in property to secure the debt of another party does not create an implied guarantee of the owner of the property to pay the debt, and the holder of the security interest is not a creditor of the owner of the property.

1587930 Ontario Inc., Re, 2006 CanLII 34422 (ONSC) at para 42.

74. The case law considering the *BIA* definition underscores what the express language of the definition requires: a bankrupt must owe money to the holder of a security interest in order for the holder of the security interest to be a secured creditor under the *BIA*.

75. 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.

76. 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 in order to pay an express debt obligation of the bankrupt of $1,830,000. The mortgage for that reason "secured money or money's worth" due from the bankrupt to the City.

Funtig at paras 60-61.

77. If the holder of a mortgage, charge, etc. is not owed a debt by the bankrupt, the holder is not a secured creditor.

78. 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.

79. 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.

80. In *Dutton, Massey & Co., Re*, [1924] 2 Ch. 199, the English Court of Appeal considered a definition virtually identical to the definition in the *BIA*. Individual partners had deposited

their property with a bank as security for the debt of the partnership. In these circumstances, the bank was not a secured creditor in the estate of the individual partners.

81. The definition of secured creditor considered was:

> ...a person who, by the interpretation clause (s. 167) of the Bankruptcy Act, 1914, holds "a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."
>
> *Dutton, Massey & Co., Re*, [1924] 2 Ch. 199 at 210.

82. The bank held security interests in the property of the individual partners, but were not secured creditors of the individual partners because the security interests secured a debt of the partnership, which in bankruptcy is treated as a separate estate.

> *Dutton, Massey & Co., Re*, [1924] 2 Ch. 199 at 211.

83. Similarly, here, the assignment of the net sale proceeds to Timbercreek secured a debt of Gill, 700, and 585, meaning Timbercreek is not a secured creditor of the Debtors under the *BIA*.

iv. The application has been brought for a proper purpose

84. It is well-established that it is not improper for a creditor to use the *BIA* to improve its position or reverse priorities.

85. 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, creditors can use the *BIA* to improve their position against non-government entities.

86. For example, bankruptcy proceedings are properly used to defeat the priority of a distraining landlord.

> *Bank of Montreal v. Scott Road Enterprises Ltd.*, 1999 CanLII 2726 (BCCA) at para 13.

87. In *Selox Inc., Re*, 1992 CarswellOnt 181, 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.

88. 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. In similar circumstances to this case, the Court explained:

> ...
> 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)).

89. Similarly, here, GVWD submits that it has met the test under section 43(1) of the *BIA* and that the Debtors cannot show a reason a bankruptcy order ought not to be made. As there is no prospect of the Debtors restructuring or continuing to operate, a bankruptcy order ought to be made to permit the distribution of the Proceeds under the *BIA*.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Robert Kates, made on May 30, 2025;

2. Affidavit #1 of Michael Markowski, made on June 2, 2025;

3. Affidavit #1 of Lorena Morales, made on June 2, 2025; and

4. Such other materials as counsel may advise.

Date: June 2, 2025

Signature of Lee J. Marriner
Lawyer for the petitioner

Issued at Vancouver, British Columbia on June ___, 2025.

Registrar in Bankruptcy

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this petition

[ ] with the following variations and additional terms:

.....

.....

Date: *[month, day, year]*

_____

Signature of

❒ Judge ❒ Associate Judge