SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantic Crane & Material Handling Limited (Re),* 2022 NSSC 342

Date: 20221129
Docket: Hfx. No. 507069
Registry: Halifax

In the Matter of:

The Proposal of Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited and LCB Rentals Limited

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DECISION

Judge:	The Honourable Justice John Bodurtha
Heard:	December 16, 2021, in Halifax, Nova Scotia
Written Decision:	November 29, 2022
Counsel:	Benjamin Durnford, Counsel for Bank of Montreal D. Bruce Clarke, K.C., Counsel for TD Bank Sara Scott, Counsel for BDC Capital Inc. Greg MacIntosh, Counsel for Department of Justice, Canada Eric Findlay, MNP Ltd.

By the Court:

Overview

[1] This motion concerns the disposition of part of the proceeds of the sale of the assets of three insolvent debtors pursuant to an order under section 65.13 of the *Bankruptcy and Insolvency Act* ("*BIA*"), RSC 1985, c. B-3. Bank of Montreal ("BMO"), a judgment creditor of one of the bankrupt companies, LCB Rentals Limited ("LCB"), claims priority outside the *BIA* distribution process to the proceeds of sale of a property owned by LCB. The property was sold with court approval through the supervised process permitted by section 65.13 of the *BIA* during the pendency of a Notice of Intention to File a Proposal to Creditors.

[2] I find that BMO has not established an entitlement to the proceeds in advance of the bankruptcy claims process. The proceeds of the sale of the warehouse were held in trust for LCB, pending either bankruptcy or a proposal to creditors. Based on the evidence, the most convincing explanation of what occurred is that, upon LCB's bankruptcy, the proceeds (which were already being held in trust by MNP Limited ("MNP") pending further order) vested in MNP, in its capacity as the trustee in bankruptcy pursuant to s. 70(1) of the *BIA*, for the purpose of distribution in accordance with the scheme of the *BIA*. BMO has not convinced me why its registered judgment gives it a priority status ahead of other creditors because the status it held at the time of the sale was that of an unsecured judgment creditor. Therefore, the proceeds should remain subject to the *BIA* proof of claims process. This is the only outcome that is consistent with the purpose of the *BIA*.

Notice of Intention Periods and the Sale of the Debtor's Property Under the *BIA*

[3] Three debtors, Atlantic Crane & Material Handling Limited ("Atlantic Crane"), Labrador Cranes 2005 Limited ("Labrador Cranes"), and LCB Rentals Limited ("LCB"), each filed a Notice of Intention ("NOI") to Make a Proposal pursuant to s. 50.4 of the *BIA*, in June 2021. The effect of a debtor filing an NOI is explained by Kelly J. Bourassa, *et al*, *Halsbury's Laws of Canada – Bankruptcy and Insolvency*, (2021 Reissue) at §HBI-202 and 220:

> The filing of the NOI gives the debtor breathing room to continue its affairs while determining the most viable means to restructure its debts. This is partly a result of the fact that the filing of the NOI (together with the other requisite materials, and subject to certain exceptions…) creates a stay of proceedings of rights and remedies (again, subject to certain exceptions, …) against the debtor and its property that could otherwise be initiated or continued by the debtor's creditors…
>
> Subject to the various exceptions …, the filing of a NOI, or of a proposal, has the effect of depriving creditors of a debtor of their right to exercise any remedy against such debtor, and also prevents creditors from commencing or continuing any action, execution or other proceeding for the recovery of a claim provable in bankruptcy...

[4] The effect of the stay is set out in s. 69(1) of the *BIA* and commented upon in *Bankruptcy and Insolvency Law of Canada*, 4th edition, at §4:7:

> The effect of filing a notice of intention is dealt with in s. 69(1). Generally speaking, after the filing of a notice, no unsecured creditor can proceed with any action against the debtor, and a secured creditor cannot seize the debtor's assets covered by a security agreement unless the use of or dealing with the assets would significantly prejudice the secured creditor. …

[5] A debtor that files an NOI does not transfer its assets to a trustee or third party. The debtor "remains in control of its assets and operations to the same extent as prior to the filing." (See *Halsbury's* at §HBI-239). The *BIA* permits a sale of assets by a debtor that has filed an NOI, "outside the ordinary course of business" and with court authorization, pursuant to s. 65.13. That section states, in part:

> Restriction on disposition of assets
>
> 65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[6] The (non-exhaustive) considerations relevant to the Court in deciding whether to authorize a sale under s. 65.13(1) are set out at s. 65.13(4):

> Factors to be considered
>
> (4) In deciding whether to grant the authorization, the court is to consider, among other things,

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
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> (b) whether the trustee approved the process leading to the proposed sale or disposition;
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> (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
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> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. [My emphasis.]

[7] Section 65.13(7) indicates that the sale may be authorized "free and clear" and the proceeds may be subject to a "security, charge or other restriction" in favour of an affected creditor:

> Assets may be disposed of free and clear
>
> (7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[8] As *Halsbury's* (at §HBI-263) summarizes, the Court "may authorize a sale or disposition free and clear of any security, charge, or other restriction. If it does so, the Court must order that either other assets of the debtor or the proceeds of the sale or disposition are subject to a security, charge or other restriction in favour of the secured creditor who was affected by the order."

The Section 65.13 Order and the Sale

[9] This Court issued a Sale Approval and Vesting Order pursuant to s. 65.13 on September 29, 2021. The Sale Order approved a sale under an Asset Purchase Agreement between the applicants and Russell Hercules SLR Inc. Hercules was vested with the applicants' interest in the property "free and clear of any Claims or Encumbrances …[,] security, charge or other restriction pursuant to Section 65.13(7) of the *BIA*…". The trustee, MNP, was directed to "receive and hold in trust" the proceeds of the sale. The order stated, *inter alia*:

> 6. For the purposes of determining the nature and priority of Claims and Encumbrances, from and after the delivery of the Trustee's Certificate, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and for greater certainty, from and after the delivery of the Trustee's Certificate, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale. The Trustee is hereby authorized and empowered to hold in trust the net proceeds from the sale of the Purchased Assets delivered to it pursuant to the APA pending further Order of the Court.
>
> 7. The Trustee, in addition to its prescribed rights and obligations under the *BIA* and the express powers provided to it under Orders issued by this Honourable Court in this proceeding, is hereby directed and empowered to receive and hold for the purposes set out herein, in the trust account of the Trustee, the net closing proceeds from the Transaction and to hold same in trust pending further order(s) of this Court… [My emphasis.]

[10] The order went on to stipulate that the sale would be binding on the trustee in bankruptcy:

> 11. Notwithstanding:
>
> (a) The pendency of these proceedings;
>
> (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *BIA* in respect of the Applicants and any bankruptcy order issued pursuant to any such applications; and
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> (c) any assignments in bankruptcy made in respect of the Applicants,
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> the entering into of the APA, the transfer of the Purchased Assets to the Purchaser's assignee, nominee or designate as the case may be, the foreclosure and barring of Claims as against the Purchased Assets, and the vesting of the Purchased Assets in the Purchaser, or the Purchaser's assignee, nominee or designate as the case may be, pursuant to this Order and the various subsections of Section 65 of the *BIA*, shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and shall not be void or voidable by creditors of the Applicants, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *BIA*, any other applicable federal or provincial legislation or otherwise at law or equity, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation. [My emphasis.]

[11] The sale closed on October 15, 2021. The stays of proceedings expired when none of the three debtors presented proposals by October 22, 2021, and they were deemed to have made assignments in bankruptcy, pursuant to s. 50.4(8).

[12] BMO had obtained judgments against each of the three debtors on March 4, 2020, more than a year prior to the filing of the NOIs. These judgments were registered in New Brunswick pursuant to the *Land Titles Act*, SNB 1981, c. L-1.1 ("*LTA*"), and the *Enforcement of Money Judgments Act*, SNB 2013, c. 23 ("*EMJA*"). On the strength of its prior registered judgment against LCB, BMO says it is entitled to the entire proceeds of the sale of the warehouse. BMO seeks an order (1) declaring, for purposes of creditor distribution, the allocated value of the warehouse from the proceeds of the *en bloc* sale of assets; and (2) directing the manner of distribution of certain residual proceeds of the asset sale approved by the September 29 order, which are currently being held in trust by MNP pursuant to the order.

Issue

[13] Whether BMO has a priority claim by virtue of its registered judgment to the proceeds of the sale of a warehouse previously owned by LCB.

Section 65.13 and the Sale Order

The New Brunswick Registration

[14] BMO argues that the Sale Order addressed any relevant "security, charge or other restriction" affecting the warehouse – including BMO's New Brunswick judgment against LCB – with "free and clear" effect pursuant to s. 65.13(7), as described in paragraph 6 of the Sale Order. According to BMO, the proceeds recognized in the Sale Order of September 29, 2021 were not "property of the bankrupt" pursuant to s. 67(1)(a) of the *BIA*, but were placed in trust for creditors, whether secured or unsecured. BMO cites *Canada v. Canada North Group Inc*, 2021 SCC 30, where court-ordered charges were found to be superior to deemed Crown trust claims, in support of the notion that Courts in this context have authority and broad discretionary power to order priority and super-priority charges to facilitate a restructuring.

[15] BMO states that it need only establish that, at the time of the sale, it held a "charge" for the purposes of s. 65.13(7). This status, it says, is accomplished by the registration of the judgment under the New Brunswick *Land Titles Act*

("*LTA*"). There is no question that the *LTA* registration impacts the priorities as between registered interests under that Act (ss. 19(1) and 30(1)). The registered judgment "binds the interest of the judgment debtor who is an owner of the land or an estate or interest therein against which it is registered as provided in the *Enforcement of Money Judgments Act*" (*LTA* s. 41). Section 15(3) provides that "[e]very instrument shall be registered according to its tenor and intent and the registration thereupon creates, transfers, surrenders, charges or discharges, as the case may be, the land, estate or interest therein described." According to BMO, since a judgment does not "transfer", "surrender", or "discharge" anything, it must "create" an interest and "charge" the lands. As a result, BMO says, the equity of redemption remaining after the prior mortgage is paid out is subject to a charge in favour of a subsequently-registered judgment. BMO agrees that there is no express statement equivalent to s. 66(1) of the Nova Scotia *Land Registration Act*, SNS 2001, c. 6, by which a judgment is "a charge as effectually and to the same extent as a recorded mortgage upon the interest of the judgment debtor in the amount of the judgment." However, BMO says the effect of the New Brunswick *LTA* is equivalent to this, and this effect is "formally recognized" by s. 65.13 of the *BIA*. BMO also notes that the New Brunswick *Registry Act* refers, at s. 57, to land being "charged" by the registration of a judgment. BMO insists that the priority it says arises from its "charge" is confirmed by s. 65.13 of the *BIA* and by the sale order.

[16] Toronto-Dominion Bank of Canada ("TD") agrees that the New Brunswick *LTA* registration bound the interest of the judgment debtor to the extent of the equity of redemption under the prior BDC Capital Inc. ("BDC") mortgage. For instance, a judgment registered after a mortgage does not have priority over the mortgage, given s. 19(1) of the *LTA*, which provides that "Instruments and interests or claims thereunder in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the order of the registration numbers, dates and times assigned to the instruments by the registrar and not according to the date of their execution."

[17] In *Carr v. Bank of Nova Scotia* (1988), 86 NBR (2d) 145, the New Brunswick Court of Appeal said, "when a memorial of judgment is properly registered it creates a charge upon the judgment debtor's lands and although he or she continues to be the legal owner, the judgment debtor cannot dispose of the lands except subject to the payment of the judgment during its currency." (See para. 20). The Court cited *Deveber v. Austin* (1875), 16 N.B.R. 55, where the Court examined the nature of the lien of a judgment created by the registry of a memorial and said in effect it "becomes a kind of statutory mortgage on the

debtor's land, which binds it for five years, at all events, and may be continued beyond that time by re-registering the memorial, if the judgment creditor does not wish to enforce it." (see *Carr*, at para. 11).

[18] TD argues the effect of *LTA* registration is to create a "restriction" within the meaning of s. 65.13 of the *BIA*, not a "charging order", preserving the judgments creditor's rights at the time of the sale, but not expanding them – rights that were subject to the stay of proceedings under the NOI, and after the assignment. That restriction was then overridden by the effect of s. 70 of the *BIA* upon bankruptcy. This would be the same for a Nova Scotia judgment under the *Land Registration Act*.

[19] According to TD, the Sale Order preserves the judgment creditor's rights at the time of the sale; it does not expand them. The Court commented in *Carr* that, where a creditor was enforcing an order of seizure and sale pursuant to a registered "memorial of judgment", the sheriff's deed conveyed "not the judgment debtor's interest in lands at the time the sale was first advertised but the interest the judgment debtor had in lands at the time the memorial was first registered." (See para. 19). Those rights were subject to the stay of proceedings under the NOI, which remained in effect upon the deemed assignment in bankruptcy.

[20] TD argues the Sale Order did not insulate that beneficial interest from the effect of the bankruptcy, as BMO appears to argue. Paragraph 11 of the order protects only certain actions from the effects of a future bankruptcy: the sale, the foreclosure of claims, and the vesting of assets in the purchaser (see para. 11(c)). There is no reference to "security, charges or other restrictions" being transferred from the asset to the funds. Paragraph 11 is concerned with protecting the transaction from being overturned as a reviewable transaction by an insolvent party, not with adjusting the priorities otherwise applicable in the event of bankruptcy.

[21] In summary, TD's position is that para. 11 of the Sale Order does not impact the subsequent operation of the *BIA* bankruptcy provisions. The restriction held by BMO does not take precedence over the *BIA* bankruptcy process and was, in fact, overridden by the operation of s. 70. It is not entirely clear by what mechanism BMO's alleged charge would effectively remove the proceeds from the bankruptcy estate; that effect is not apparent from the language of s. 65.13(7). As I read it, that section simply means that, in the event of a court-approved sale, the Court must

substitute other assets or the proceeds to protect the position of a creditor that held a "security, charge or other restriction"; it does not expand the rights of a creditor.

[22] I agree with BDC's submission that BMO's theory "has an unsupported legal foundation and is contrary to the well-established principles of insolvency law." Any charge or security-like interest held by BMO arising from the New Brunswick judgment was terminated by LCB's bankruptcy and the effect of s. 70(1) of the *BIA*, and the warehouse proceeds should be distributed among the creditors in accordance with the *BIA* bankruptcy distribution scheme.

[23] As will be discussed below, I have reached the conclusion that the law indicates provincial legislation cannot alter the priorities otherwise set by the *BIA*. The court orders from the NOI timeframe do not indicate that the sale would result in the removal of the proceeds from a future bankruptcy estate. The Court did not order that the proceeds would be distributed directly out of the NOI process, ousting any subsequent *BIA* proof of claim procedure.

No Vesting in the Trustee

[24] According to BMO, the proceeds of the sale of the warehouse were held in trust for the creditors, and did not vest in the trustee as divisible property of the bankrupt at the time of the bankruptcies. BMO relies on the exclusion of property held in trust from the debtor's divisible property pursuant to s. 67(1) as a basis for arguing that the warehouse did not vest in the trustee. While the divisible property of the bankrupt presumptively includes "all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge" (see s. 67(1)(c)), there are categories of excluded property, including "property held by the bankrupt in trust for any other person…" (see s. 67(1)(a)).

[25] BMO says MNP was acting as a trustee of the funds, not as a trustee in bankruptcy having vested ownership of the funds. It is notable that the property would only vest in the trustee in bankruptcy on a bankruptcy order being made or an assignment being filed, pursuant to s. 71. According to BMO, this was effectively a "no asset" bankruptcy; the November, 2021 proof-of-claim process was a formality; and orders made during the NOI period continue to bind the trustee after the bankruptcy.

[26] TD argued, LCB, not the trustee MNP, sold the property, with the proceeds held in trust, not ownership, by MNP. LCB – not its creditors – was a beneficiary

of that trust, holding a beneficial interest in the proceeds on the date of its bankruptcy. This was not a "no asset" bankruptcy. LCB's beneficial interest in the proceeds would have vested in the bankruptcy estate upon the company's deemed assignment in bankruptcy. Section 67(1)(a) excludes from the bankruptcy estate property held in trust by **the bankrupt**, not a third party.

[27] It follows from TD's argument that the proceeds did not form a new entity that was insulated from the effects of a subsequent bankruptcy. TD argues that it is implicit in s. 65.13(8) that the proceeds from a sale authorized under s. 65.13 are not insulated from a subsequent *BIA* distribution; for instance, s. 65.13(8) requires the Court to be satisfied that an insolvent employer "can and will" make payments that would have been required to employees and pension plans, pursuant to ss. 60(1.3)(a) and 60(1.5)(a)). According to TD, the intention was always for these funds to form part of the main body of any future proposal by the debtor companies.

[28] TD argues that a s. 65.13 order is premised on the expectation of an eventual *BIA* proposal or bankruptcy. Nothing in s. 65.13 suggests that the *BIA* does not apply to the proceeds of a sale authorized under that section. The factors listed in s. 65.13(4) presume that creditors – including unsecured ones – "are better off in a s. 65.13 sale than in a sale in bankruptcy." This implies that the proceeds of such a sale are not isolated from unsecured creditors in a separate trust accessible only to holders of a "security, charge, or restriction …".

[29] BDC likewise submits that the relief sought is contrary to the purpose of the *BIA*: to give BMO a priority claim to the warehouse proceeds would be contrary to the rights of unsecured creditors under the *BIA* proposal provisions, and contrary to the reasonable expectations of LCB's creditors during the NOI period pursuant to Division 1 of the *BIA*. When LCB filed the NOI, creditors could expect either there would eventually be a proposal or a bankruptcy. Instead, BMO claims a priority right to the proceeds of the warehouse ahead of the other unsecured creditors, which was never approved by the creditors under a proposal. Any priority BMO held in the proceeds was lost in the bankruptcy.

[30] BDC argues that neither *BIA* s. 65.13(7) nor the Sale Order are contravened by a finding that BMO's priority interest in the warehouse proceeds was lost due to the bankruptcy. Section 65.13(4) permits the disposition of a debtor's assets if this is more beneficial to the creditors than a bankruptcy. Further, s. 65.13(7) (and related provisions of the Sale Order) have the effect of preserving the relative

interests of creditors in the proceeds (in place of the assets), pending the outcome of eventual proposal proceedings. Sections 65.13 and the Sale Order did not crystallize the manner and priority of the distribution of assets.

[31] In my view, as TD and BDC argue, s. 65.13 is premised on the expectation of an eventual proposal or a bankruptcy. BMO's position, by contrast, is premised on the idea that the proceeds of a court-ordered sale during an NOI period under s. 65.13(7) are somehow removed from the presumptive *BIA* distribution process. In view of the overall scheme of the legislation and the variety of reasons canvassed by TD and BDC, I find BMO's position untenable. Therefore, the status of those proceeds must be assessed as at the time of the bankruptcy.

BIA Section 70(1)

[32] Section 70(1) of the *BIA* states:

> Precedence of bankruptcy orders and assignments
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> 70. (1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

[33] Section 70(1) and its predecessors have been considered in several decisions. In *Canadian Credit Men's Trust Association Ltd. v. Beaver Trucking Ltd.*, [1959] SCR 311, the respondent, Beaver Trucking, had obtained default judgment against a company, Cleary Drilling, which subsequently made a voluntary assignment in bankruptcy. Prior to the default judgment and Cleary's assignment, Beaver Trucking obtained a garnishment order, which was served on a debtor of Cleary, with the relevant funds paid into court. The issue was whether that money should be paid to the respondent or to the trustee, for distribution among the creditors. The trustee relied on s. 41(1) of the *Bankruptcy Act*, RSC 1952, c. 14, which was substantively identical to the current s. 70(1) of the *BIA*. The respondent argued that it was a secured creditor within the meaning of s. 41(1), by virtue of having served the garnishing order on the third party prior to Cleary's assignment in bankruptcy, and therefore had priority over the trustee's claim.

[34] The majority of the Supreme Court of Canada rejected the argument that a judgment creditor which had served a garnishee order was a secured creditor. Judson J. said, at para. 20:

> Only the plainest language could compel an interpretation which produces this conclusion and I do not think that this compulsion exists in the present case. With all respect to the majority opinion in the Court of Appeal, I agree with the dissenting opinion expressed by Adamson C.J., that the provisions of the section are clear and that even a literal interpretation does not lead to the conclusion reached by the majority. To me the compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor, whose position has already been fully dealt with. The intention that I find plainly expressed is to ensure the distribution of the debtor's property in accordance with the *Bankruptcy Act* and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment. [My emphasis.]

[35] Judson J. noted several subsequent provisions that would be without meaning if the interpretation of the majority of the Manitoba Court of Appeal was correct, noting that there was "provision in s. 42(2) for delivery to the trustee of any property of the bankrupt under execution or attachment, and finally, by s. 43(2), the trustee is enabled to have himself registered as the owner of any land 'free of all the encumbrances or charges mentioned in s. 41(1)'." (See para. 21). He cited, with approval, *Royal Bank of Canada v. Larue*, [1928] A.C. 187 (JCPC), and *Re Sklar and Sklar (Bankrupt)*, (1958), 15 D.L.R. (2d) 750 (Sask CA), for the proposition that "the priority of the trustee in bankruptcy, established by the section, attached for all purposes, including distribution of the proceeds according to the priorities established by the *Bankruptcy Act*." (See para. 23).

[36] Locke J., concurring in *Beaver Trucking*, said:

> 11 In my opinion, the meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. The moneys were paid into court to the credit of the cause and remain there.
>
> …
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> 13 If there were ambiguity in the language of the first subs. of s. 41, and I think there is none, it would be necessary for us to construe it in the manner directed by s. 15 of the *Interpretation Act*, R.S.C. 1952, c. 158, and to give to it such interpretation as will best ensure the attainment of the object of the Act according

> to its true intent, meaning and spirit. The purpose of the *Bankruptcy Act* and of all bankruptcy legislation in Canada and in England is to assure that, in the case of insolvent debtors, their assets shall be divided fairly among their creditors, having due regard to the position of persons such as mortgagees who, having advanced moneys upon the security of assets of the debtor, are to be afforded the rights of secured creditors, and to those claims which are by statute entitled to preference.
>
> 14 Section 86 and those sections immediately following it declare the position of secured creditors and define the extent to which they are entitled to priority. Subject to such rights and to preferences to which other claims such as those of the Crown may be declared to be entitled and the costs and expenses of the trustee, it is the purpose of the Act that the creditors shall rank *pari passu* upon the estate. The construction of the Act contended for by the respondent in the present matter would mean that a creditor sufficiently alert to bring an action and attach moneys owing to a debtor on the brink of insolvency may thereby obtain preference over other creditors who refrain from bringing actions, for the amount of his claim in full and not merely for his costs, as provided by s. 41(2). This, in my opinion, is directly contrary to the intent and purpose of the *Bankruptcy Act*, and any such contention should be rejected unless the language of the Act should require it in the clearest terms. [My emphasis.]

[37] As a result, the Supreme Court of Canada unanimously allowed the appeal.

[38] In *Re Oxley* (1997), 5 CBR (4th) 258 (Alta QB), an execution creditor had commenced execution proceedings before the debtor filed an NOI, having a car seized and sold. However, the proceeds could not be distributed, due to the stay triggered by the NOI. The execution creditors successfully applied to lift the stay in respect of the proceeds. Affirming this decision on appeal, the Court held that it would be equitable to allow the creditors to collect. The authors in *Bankruptcy and Insolvency Law of Canada* criticize this outcome as inconsistent with intentions of s. 70(1), remarking that "this decision seems to be contrary to the purpose of the Act, which contemplates the equal distribution of the debtor's assets among unsecured creditors and accords no priority to execution creditors who have not received payment of their claims prior to the date of bankruptcy ...". (See §4:55)

[39] In *Toronto-Dominion Bank v. Phillips*, 2014 ONCA 613, BMO obtained default judgment against the appellant and the respondent, who were then spouses. BMO later obtained a writ of seizure and sale. The appellant and respondent also had a mortgage on their property with TD, on which they subsequently defaulted. TD commenced power of sale proceedings. The appellant and respondent separated, and the appellant filed a Division II *BIA* consumer proposal. Her proposal did not refer to any interest in the real property, as the appellant did not

believe there would be any equity in it. The consumer proposal was approved. TD later sold the property in the power of sale proceeding, leaving a surplus after the payment of the mortgage and costs. The proposal administrator notified the creditors of the surplus, but none of them sought to have the proposal amended. TD applied to pay the surplus of about $52,000 into court, whereupon the appellant and respondent consented to paying out BMO from the fund in the amount of about $19,000, without prejudice to the determination of the proper allocation. The respondent argued that the balance after the payment to BMO (about $32,000) should be divided equally; the appellant argued that the entire surplus of $52,000 should be divided, with the entire BMO payment coming out of the respondent's share. Ruling in favour of the respondent, the motions judge ruled that BMO was a subsequent encumbrancer of land pursuant to the Ontario *Mortgages Act* by virtue of its writ of execution under the provincial *Execution Act*, and therefore had to be paid before any residue would be available to the appellant and respondent (see paras. 4-16).

[40] The appellant took the position that BMO's claim against her was stayed by operation of s. 69.2(1) of the *BIA*, so that "BMO could only realize against the respondent's share of the residue remaining after payment of the mortgagee, TD." (See para. 17). Pepall J.A., for the court, noted the general principles governing the stay arising on a proposal pursuant to s. 69.2(1), which "includes a prohibition against the commencement or continuation of any action, execution or other proceeding for the recovery of a claim." (See paras. 19-24). She went on to discuss the position of execution creditors such as BMO:

> [27] In bankruptcy, it has long been established that an execution creditor is not a secured creditor... Rather, unless the execution has been completed by payment to the creditor, the debt of the execution creditor is treated rateably with other unsecured debt. (case citations omitted)
>
> [28] This jurisprudence relies in part on the need to treat unsecured creditors equally under the bankruptcy regime and on s. 70 of the *BIA* and its predecessor, s. 50 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3…

[41] Pepall J.A. noted the priority created by s. 70(1) of the *BIA*, and said:

> [29] This sub-section speaks of the precedence of bankruptcy orders and assignments. Arguably a proposal or an order approving a proposal is not a bankruptcy order or assignment and does not fall within the ambit of that provision. However, s. 66.4(1) of the *BIA* provides that:

> All the provisions of this Act, except Division I of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to consumer proposals.

[30] In my view, s. 66.4(1) directs that certain general provisions of the *BIA*, including s. 70(1), should be read to apply to consumer proposals even though there is no such express reference. Moreover, quite apart from the statutory language, the policy rationale of treating unsecured creditors equally applies to the proposal regime: see *Forest v. Hancor Inc.*, [1995] F.C.J. No. 1411, 37 C.B.R. (3d) 117 (C.A.), at p. 72 C.B.R. In short, I would conclude that the hierarchy reflected in s. 70(1) applies with equal force to consumer proposals.

[31] Section 27 of the *Mortgages Act* therefore could not serve to elevate BMO's status to achieve priority over the appellant's other unsecured creditors...

[32] At the time the proposal was filed and approved, BMO was an execution creditor and its debt was unsecured. Consistent with this characterization, BMO filed a proof of its unsecured claim in the appellant's proposal proceedings. Its debt was paid only after TD commenced its court application, BMO appeared and made submissions, and the parties consented to payment.

[42] As to the effect of the stay of proceedings, Pepall J.A. said:

> [33] Pursuant to s. 69.2(1)(a), BMO's claim against the appellant was stayed once the proposal was filed. The stay of proceedings is akin to the stay imposed in a bankruptcy, which is designed to prevent creditors from gaining an unfair advantage and to allow for an orderly restructuring or liquidation…
>
> [34] Accordingly, I would find that BMO was precluded from executing any remedy against the appellant or her property by virtue of the operation of the statutory stay of proceedings.

[43] The Ontario Court of Appeal allowed the appeal.

[44] In *Skyrider Holdings Ltd. (Trustee of) v. Canada (Revenue Agency)*, 2022 ABQB 320, the issue was whether a writ of enforcement under the Alberta *Civil Enforcement Act* created a priority over the secured creditors. The writ had been registered before the debtor's bankruptcy. The trustee argued that, while the writ holder had lost the right to enforce the writ upon the bankruptcy, this right was not abolished, but simply passed to the trustee on behalf of the unsecured creditors. The Court noted that the order sought by the trustee would effectively make the writ-holders secured creditors (see paras. 20-21). The trustee argued that the "binding effect" of writs under the Alberta legislation did not conflict with the *BIA* (see paras. 29-30). The Court held that this argument misapprehended the meaning of section 70(1):

> 33 This provision substitutes a steered-by-trustee collective process for gathering and realizing the debtor's assets for the each-creditor-on-its-own process reflected in the individual writs registered against title: *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 33 ("the equitable distribution of [the debtor's] assets, is achieved through a single proceeding model").
>
> 34 Subsection 70(1) effectively says to judgment creditors: "Unless you reached the finish line of your enforcement process (e.g., received the net proceeds of an enforcement sale), your judgment-enforcement efforts are done, replaced by the trustee's steps on behalf of all creditors": *Toronto Dominion Bank v 1287839 Alberta Ltd*, 2021 ABQB 205 (paras 22-29).

[45] The Court took the view that the continued operation of the "binding interest" post-bankruptcy would in fact conflict with the *BIA* "in many respects" and would "up-end the *BIA*'s ladder of priorities" by conflicting with the *BIA*'s express ranking of claims (see paras. 39-40). The Court cited *Orphan Well Association v. Grant Thornton Ltd*, 2019 SCC 5, where Wagner C.J. said, for the majority:

> 115 The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.
>
> 116 It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* - such was the conclusion in *Husky Oil*, at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*. [My emphasis.]

[46] Therefore, the trustee's interpretation of s. 70(1) was "plainly at odds with its express wording and that of other judgment-creditors-sidelined provisions of the *BIA*, as recognized by a long line of authoritative decisions." (See *Skyrider*

Holdings, at para. 42). As a result, the secured creditors retained their priority, in accordance with the *BIA* scheme (see *Skyrider Holdings*, at paras. 70-75).

[47] TD submits that provincial legislation dealing with judgments cannot override the effect of s. 70(1). BDC likewise says that any "security-like interest" arising from BMO's registration of its judgment pursuant to the New Brunswick legislation was rendered ineffective by LCB's bankruptcy and by s. 70(1). According to BDC, s. 70(1) rendered any priority claim arising from a registered judgment an unsecured claim. BDC cites *Beaver Trucking*, pointing to the conclusion that even if the garnishing creditor had the status of a secured creditor, the then-equivalent of s. 70 precluded recognizing that status in the bankruptcy proceeding. As noted earlier, the majority in *Beaver Trucking* also approved *Re Sklar*, where it was held that a judgment creditor under provincial enforcement legislation is not thereby treated as a secured creditor for bankruptcy purposes.

[48] BMO maintains that s. 70 was not triggered by LCB's NOI and relies on sections 72 and 74 of the *BIA*. Section 72 reads:

> Application of other substantive law
>
> 72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
>
> Operation of provincial law re documents executed under Act
>
> (2) No bankruptcy order, assignment or other document made or executed under the authority of this Act shall, except as otherwise provided in this Act, be within the operation of any legislative enactment in force at any time in any province relating to deeds, mortgages, hypothecs, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges on real or personal property or immovables or movables.

[49] Section 74(1) provides that the trustee in bankruptcy may register a bankruptcy order or assignment in respect of "any real property in which the bankrupt has any interest or estate" in the relevant provincial real property registry. The effect of such registration is described at s. 74(2):

> (2) If a bankrupt is the registered owner of any real property or immovable or the registered holder of any charge, the trustee, on registration of the documents referred to in subsection (1), is entitled to be registered as owner of the real

> property or immovable or holder of the charge free of all encumbrances or charges mentioned in subsection 70(1)…

[50] BMO maintains that s. 70 did not apply during the NOI period, when the sale order (September 29, 2021) and the trustee's certificate (October 15, 2021) were issued. BMO argues that s. 72 indicates that the *BIA* does not supersede provincial law unless there is a conflict and that s. 74 indicates that provincial land registration law applies to a trustee's priority interest over judgments pertaining to the bankrupt's real property. The priority created by s. 74 is "otherwise provided in this Act" as contemplated by s. 72(2). In other words, BMO's argument is, s. 74 confirms that a "would-be priority charge holder" – including a trustee in bankruptcy – must record that interest, notwithstanding s. 72(2) and that "[f]ormal recording of a certificate of bankruptcy, or an order of bankruptcy, has always been the activation trigger for the Trustee's precedence over a judgment when it comes to interests in real property."

[51] Accordingly, BMO says s. 70 can only affect interests in real property – such as the warehouse – with registration of the order or assignment as contemplated by s. 74. In this case, however, BMO views the issue as academic. There would have been nothing to register at the time of the bankruptcy, since the sale of the warehouse had already "crystallized rights of charge-holders like BMO…". Having been sold already, BMO says, the warehouse did not become divisible property of the bankrupt, and the proceeds were held in trust by MNP pursuant to para. 11 of the Sale Order authorized by s. 65.13. After filing a Notice of Intention, BMO notes, the debtor "retains full title to and control over its assets" and can sell assets under Court supervision, without those assets passing through the hands of the administrator, in contrast to the situation arising out of a bankruptcy. BMO submits, this further supports the view that real property disposed of during the NOI period is not caught by section 70.

[52] I agree with the submissions of BDC and TD that there is no apparent authority for BMO's argument that s. 70(1) is only effective upon registration of the assignment or bankruptcy order under s. 74. In addition, I find that because the warehouse was sold before the bankruptcy, the trustee was never in a position to register the assignment in bankruptcy against the property pursuant to s. 74(1).

[53] I am not persuaded by BMO's position. It is based on the erroneous premise that TD and BDC are arguing for the application of s. 70(1) to the NOI period, which is not the case. Rather, TD and BDC are simply arguing that there is no

basis to hold that the proceeds of the warehouse sale were not impacted by s. 70 at the time of LCB's deemed assignment in bankruptcy.

BIA Section 66

[54] Section 66(1) of the *BIA* provides that "insofar as they are applicable" all provisions of the *BIA* apply to Division I proposals, with the sole exception of Division II (ss 66.11-66.4), which deals with consumer proposals:

> Act to apply
>
> 66. (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

[55] BMO says s. 66 should not be used to apply s. 70 beyond bankruptcy assignments or orders and extend it to proposals. BMO submits that just as a receivership order under s. 243 of the *BIA* is "not comparable" to a bankruptcy order or assignment, "neither is an NOI period comparable, where similar vesting orders avail under [s. 65.13], which respect the rights of existing charge-holders." Further even if the s. 66 language drew in situations beyond bankruptcy orders and assignments, LCB was in any event never in a "proposal" setting merely by virtue of being in the NOI stage when the sale closed. According to BMO, the definition of "proposal" at s. 2 of the *BIA* indicates that a proposal must actually be filed to have effect. The definition states:

> "proposal" means
>
> (a) in any provision of Division I of Part III, a proposal made under that Division, and
>
> (b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III
>
> and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement…

[56] BMO says the definition intentionally distinguishes the NOI period from the proposal period (similarly, sections 69 and 69.1 make this distinction by imposing a stay of proceedings for the NOI period only (s. 69) and a stay arising from a proposal (s. 69.1)). BMO asserts that to apply s. 70 to the NOI period using s. 66 would require "two … speculative leaps": reading into s. 70 the words "or a proposal", and expanding the word "proposal" in s. 66 to include an NOI. BMO says this "gymnastic statutory interpretation" should be rejected.

[57] BDC argues that if LCB had in fact filed a proposal, it is not certain that BMO would have retained a priority interest in the warehouse proceeds. *Bankruptcy and Insolvency Law of Canada* states at §4:142, that the "determination of what provisions of the Act are applicable to proposals is to be done on a case-by-case basis." BDC submits that the debtor's selling of their assets before making a proposal was "akin to a bankruptcy" given the limited assets, so that the application of s. 70(1) would be reasonable in the circumstances. Further, there is no assurance that BMO's claim would have been treated as a secured one, or that it would have been approved by the required majority of creditors.

[58] As noted earlier, in *Phillips*, s. 70 was applied to a Division 2 consumer proposal by way of s. 66. BMO says *Phillips* should be distinguished on the basis that a Division II proposal "is in fact 'made' on day one," unlike a Division I NOI situation like the present case. I disagree and quote, Pepall J.A. who added a second ground for applying s. 70 in the circumstances: "… quite apart from the statutory language, the policy rationale of treating unsecured creditors equally applies to the proposal regime …" (see para. 30).

Personal Property

[59] Lastly, BMO says the proceeds are not "personal property" and, therefore, the *Personal Property Security Act* ("*PPSA*") does not apply. It argues the *PPSA* does not apply to the creation or transfer of an interest in land, or of an interest in a right to payment arising in connection with an interest in land, other than "an interest in a right to payment evidenced by investment property or an instrument": *Personal Property Security Act*, SNB 1993, c. P-7.1, at ss. 4(e) and (f). The definition of "instrument" excludes "a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing": *PPSA* s. 1(1). BMO says its judgment falls within this exclusion. The proceeds are identifiable in the hands of the trustee. The s. 65.13 sale approval order must prevail, notwithstanding the co-mingling of the proceeds with the other companies' assets.

[60] There is no indication that the other parties are taking the position that the *PPSA* would apply in these circumstances. In any event, I agree with BMO that the *PPSA* does not apply.

Conclusion

[61] BMO's application is dismissed with costs to the Respondents. I find that the proceeds from the sale of the warehouse should be made available to the benefit of all creditors. Any priority interest BMO held in the warehouse property or the warehouse proceeds is of no further effect by virtue of the bankruptcy of LCB. Upon LCB's bankruptcy, the proceeds vested in MNP in its capacity as the trustee in bankruptcy pursuant to s. 70(1) of the *BIA*. The proceeds shall be paid to the Trustee to be distributed in accordance with the scheme of the *BIA*. The Trustee shall determine the appropriate amount of proceeds held by MNP constitute an LCB asset.

[62] I would ask counsel for the Respondents to prepare the Order.

[63] If the parties are unable to agree on costs, I will receive written submissions as follows. The Respondents shall file their briefs by December 23, 2022. The Applicant shall file its brief by January 13, 2023. The Respondents shall file a reply, if any, by January 27, 2023.

Bodurtha, J.