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Our File: 181890

June 22, 2021

HAND DELIVERED

The Honourable Justice in Chambers
The Law Courts
Supreme Court of Nova Scotia
1815 Upper Water Street
Halifax NS B3J 1S7

My Lady/Lord:

Re: In the Matter of the Proposal of Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited, and LCB Rentals Limited
Hfx No. 507069

We are counsel for BMO Bank of Montreal ("**BMO**") in connection with this matter.

BMO is a Judgment creditor of the three above-captioned debtors, Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited, and LCB Rentals Limited (below either referenced individually, or collectively as the "**Debtors**").

The Debtors collectively filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("**BIA**") on or about June 7, 2021.

Within a Notice of Application in Chambers received by BMO via email at 1:25 p.m. on Monday, June 21, 2021, BMO learned that the Debtors have scheduled two (2) Applications to be heard on short notice in Chambers in Halifax, on Thursday, June 24, 2021 at 2:00 p.m.

The Applications seek the following:

(a) An Order pursuant to Section 50.4(9) of the BIA extending the time for the Debtors to file a Proposal from July 7, 2021 to and including August 21, 2021 (the "**Stay Extension Application**"); and

(b) An Order pursuant to Section 65.13 of the BIA approving the sale by one of the Debtors, LCB Rentals Limited ("**LCB**"), of certain real property located at 20 Grandview Avenue, Saint John New Brunswick (the "**Warehouse**"), pursuant to a February 18, 2021 Agreement of Purchase and Sale (the "**Sale Approval Application**").

Please accept what follows as the written submissions of BMO in respect of these Applications. BMO has filed the June 21, 2021 Affidavit of Andrew Rygh (the "**Rygh Affidavit**") in support of these submissions.

Background

We wish to provide some background in the matter from the perspective of BMO, given that BMO's interest in these proceedings was not described by the Debtors within the filed Application documents served upon BMO yesterday afternoon. As of the date and time of writing these submissions (2:40 p.m. on June 22, 2021), BMO has not received a copy of the Report of MNP Limited (the "**Trustee**"), in its capacity as Trustee under the NOI filed by the Debtors, though this Report was referenced within the Debtor's Notice of Application in Chambers. As the Applications are being presented with apparent urgency, BMO reserves the right to update these submissions when it receives the Trustee's Report.

As set forth in the Rygh Affidavit, BMO is a judgment creditor of each of the Debtors, by virtue of separate Orders issued by this Honourable Court on March 4, 2020.

As evidenced by Exhibit "B" of the Rygh Affidavit, the Judgment debt owing by LCB to BMO was recognized as a Judgment of the Court of Queen's Bench for the Province of New Brunswick in the amount of $1,067,509.97 on or about December 4, 2020 pursuant to the *Canadian Judgments Act* (New Brunswick), and was thereafter recorded on behalf of BMO as an interest against the real property of LCB, in particular the Warehouse, pursuant to the *Enforcement of Money Judgments Act* (New Brunswick) and the *Land Titles Act* (New Brunswick) (the "**LTA**") on December 16, 2020, the day on which BMO also registered the Judgment under the *Personal Property Security Act* (New Brunswick).

Records generated following a post-recording search under the LTA in respect of the Warehouse, which are appended to the Rygh Affidavit as Exhibit "C", show that there are two (2) recorded interests in the Warehouse pursuant to the LTA, a Mortgage which was recorded on May 3, 2016 by Business Development Bank of Canada, and the recorded Judgment of BMO.

BMO wishes to address the two Applications, in turn, below.

Application 1: The Stay Extension Application

BMO takes no position on the Stay Extension Application, only to note that BMO reserves its right, should the opportunity subsequently present in these proceedings, to oppose any Motion by the Debtors for an Order directing the substantive consolidation of their individual NOI estates for purposes of filing a singular Proposal, unless it could be clearly demonstrated that this extraordinary outcome would not cause prejudice to any individual creditor(s) of these three separate companies. To operate along an assumption that this extraordinary relief will eventually be granted, without that scenario being fully analyzed by the Trustee and explained to the Court, is premature and, we submit, goes to the elements of good faith and due diligence.

Application 2: The Sale Approval Application

BMO opposes the Sale Approval Application, because while it is framed pursuant to Section 65.13 of the BIA, the Application and draft Order fail to address the fate of any relevant "*security, charge or other restriction*" presently affecting the Warehouse, including the BMO Judgment, in the manner availing to the Court pursuant to Section 65.13(7). Rather, what is proposed is an *ad hoc* interim arrangement whereby proceeds are parked with the Trustee,

presumably pending some interpleader Motion, while these recorded interests in the real property of LCB face an uncertain fate.

While the Agreement of Purchase and Sale plainly (at Article 2.5) contemplates the conveyance to the purchaser being free and clear of applicable encumbrances, as much is not provided for in the draft Sale Approval Order proposed by the Debtors (LCB). It was not explained adequately or at all within the Debtors' Application materials why this is so, and BMO has concerns that its recorded interest in LCB's land and proceeds of that land, stand to become somehow compromised after Court approval, such that BMO's interest in them is defeated, through some process or another beyond the spirit and intent of Section 65.13.

While some comfort is offered by the notion that proceeds from the sale might be held "in trust" by the Trustee pending a resolve of entitlements down the road, *presumably meaning that LCB would not be the owner of those proceeds (and they would neither be assets of the bankrupt divisible amongst creditors if LCB was bankrupted, nor available to LCB under a Proposal offering*), BMO sees this manner of proceeding as being unduly complicated, when the Court has (right now) the discretion to direct that proceeds from the approved sale shall stand in lieu of the Warehouse, and remain subject to the only two interests in the Warehouse and its proceeds which appear, being the BDC Mortgage and the BMO Judgment. The proposed draft Order also does not deliver to the Purchaser the "free and clear" Warehouse it bargained for.

Other creditors, with purported *personal property* security interests, do not hold rights to the proceeds of the Warehouse which are superior to those of BMO, as the *Personal Property Security Act* (New Brunswick) does not extend to interests in real property, including proceeds therefrom, which do not simply morph into personal property in this particular context, given the relevant LTA interests charging them.

BMO's Judgment was recorded pursuant to the terms of the *Enforcement of Money Judgments Act*, which provides at Section 30(1):

> "30(1) Registration of a judgment under the *Land Titles Act*
> (a) binds the interests against which the judgment is registered, and
> (b) has priority over, or is subordinate to, other interests as provided in the *Land Titles Act*."

Section 41 of the LTA, under which statute the Judgment was ultimately recorded by BMO, provides:

> **"Effect of registration of memorial of judgment**
> **41** While a judgment is registered and remains in force it 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*."

Section 19(1) of the LTA provides:

> **Priority on registration**
> **19**(1) 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.

We point out that the term "instrument" as it appears in the LTA, *"means any document for which provision is made under this Act for filing or registration and includes any document issued or made under the authority of an Act of Canada or the Province that is permitted thereby to be filed or registered in a land titles office*, and thus is a term which encompasses both mortgages and judgments. While not a Mortgage, the BMO Judgment is nevertheless a recognized interest in the real property of LCB.

BMO's interest in the Warehouse and its proceeds is distinct from any interest (secured or otherwise) in respect of LCB's personal property. In the usual course, free and clear title to real property cannot pass without a release of recorded instruments such as BMO's Judgment. In the context of an insolvency proceeding where the debtor is not bankrupt, has not presented a Proposal, and remains the owner in possession of its assets (such as a Receivership involving a Vesting Order or (as here) an NOI interim asset sale outside of the ordinary course of the debtor's business, referable to Section 65.13 of the BIA), provision must be made for these recorded interests, as and how they appear, in order for justice to be done for those affected by the expungement of interests.

It is a fundamental component of any insolvency process-related interim sale of assets that proceeds stand in lieu of the asset being conveyed, and recorded interests in respect of that real property *alight on proceeds* in the same manner and in the same priorities in which they affected the real property beforehand.

Section 65.13(7) offers discretion to this Honourable Court to do right by the affected charge-holders, by directing that the proceeds shall stand in lieu of the conveyed asset, and remain subject to the same interests, security or charges as affected them before the sale. The stay of proceedings protecting an insolvent NOI debtor is a two way proposition; the privilege of creditor protection is assured during the stay if applicable good faith and due diligence criteria are met, but only if creditors affected by the stay are, themselves, not prejudiced in the result *inter se,* as against fellow creditors.

BMO should not lose rights in this exercise, and it is submitted Section 65.13(7) is a mechanism to preserve these rights. The subsection provides as follows:

> "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." (emphasis added)

The provision is disjunctive, and *by no means addresses only secured creditors*. BMO submits this reflects Parliament's due recognition that there may exist other recorded interests in subject property being sold which do not fit neatly into the definition of "security", and that provincial laws are not abrogated by the operation of the BIA with respect to property rights, barring any operational or spirit and intent-related conflict. Interests in the Warehouse (in this case each of BDC's Mortgage and BMO's Judgment), are subsumed within the definition of "instruments" in the LTA. Both are worthy of respect, and must count for something, even in this context, just as PPSA-related interests count for something in relation to the personal property they address.

BMO is suspicious of the form of Sale Approval Order being suggested by the Debtors, and fears an attempted end-run around the vesting provisions of Section 65.13(7) which typically prevail where an NOI debtor seeks approval of any Agreement of Purchase and Sale which is premised on conveying lands free and clear of recorded encumbrances.

From what little BMO knows about LCB's ultimate NOI agenda, it is understood that LCB seeks on very short notice to conclude a Court-approved sale (outside of the ordinary course of business) of the Warehouse, which is subject to only two real property encumbrances, the BDC Mortgage and BMO's recorded Judgment. Promised to the prospective purchaser by Article 2.5 of the Agreement of Purchase and Sale placed before the Court was a conveyance free and clear of encumbrances. The context in which we find ourselves therefore, is a sale referable to Section 65.13. BMO is concerned that this valuable BIA provision not be selectively used by LCB, or effectively *used at all by the other two Debtors regarding the Warehouse and its proceeds*, which entities are *not owners of the Warehouse*, and *have their own books of business and bases of creditors.*

The use of Section 65.13(7), while not a mandatory proposition, is nevertheless within the discretion of this Honourable Court to do, and we urge that usage on the Court in respect of the Sale Approval Application. We submit the interest BMO has in the proceeds of the real property it encumbers (a "charge" as understood by the disjunctive wording of s. 65.13(7)) should descend undisturbed onto the net proceeds after BDC's first-recorded instrument (a Mortgage) is paid out.

We do not see this as a contest over "money" (personal property) with LCB's PPSA-secured creditors, as the PPSA does not extend to the coverage of interests in, or yields from real property. For that reason, it is not necessary to address, other than in passing, the fact that a PPSA registration purporting to encumber all of the Debtors' (and LCB's) New Brunswick property was registered on June 17, 2021, during the pendency of the stay of proceedings, and is thus is ineffective to elevate that creditor over other unsecured (or unperfected) creditors of LCB. It is for the Trustee to address such issues however, not BMO, but creditors are generally unable to jockey for position during the stay of proceedings, and that PPSA registration purported to create new rights after the stay descended, not continue existing rights in that jurisdiction.

In terms of the elements of Section 65.13 on the whole, BMO and other affected creditors lack any clear understanding of the situation, and at the time of our response to this urgent Application have not had the benefit of any Trustee's Report which might make matters clearer.

In particular, BMO has seen no appraisal or other market data to suggest that the $500,000 accepted offer is reasonable or bears a resemblance to the fair market value of the Warehouse. We submit the measure here should be something akin to fair market value, as opposed to liquidation value, as the Agreement of Purchase and Sale was struck several months before the NOI was filed by LCB and the two other Debtors.

BMO and other creditors are not aware of the sale process particulars, other than the commentary provided that the Warehouse was listed with a realtor, and an arm's length sale resulted from that effort. It is uncertain how long the listing was posted, what opportunity third parties had to explore the opportunity to purchase the Warehouse before the February-March

2021 offer was accepted, and how the list price was derived. Such content may be contained within the Trustee's Report, which BMO should have the benefit of reviewing before the hearing on Thursday.

As to consultation of creditors and affected stakeholders, BMO first learned the particulars of this proposed sale on June 21, 2021 and had not been previously consulted in the matter. While plainly given the "invisible ink" treatment in the Debtors' Application materials and perhaps given notice of this Application as a courtesy, BMO is nevertheless is a significant creditor which is very interested in this transaction, being one of only two creditors with a recorded interest in the Warehouse and its net proceeds.

While the elements (non-exhaustive) of Section 65.13(4) are important to BMO, and little concrete information exists to inform BMO's position on them, far more troubling than these elements being thinly described is the prospect of the Debtors being able to park proceeds somewhere in the ether (presumably while the Warehouse departs to the purchaser, free and clear), to be contested at a later date by unknown challengers. This costly and unnecessary exercise, which is a clear shortcut around Section 65.13's pith and substance (vesting, but only in return for the survival of rights), is something which can be avoided. Section 65.13(7) permits a discretion to be exercised on June 24, 2021, which offers protection of the interests of proven creditors in the subject asset being sold. While the Debtors have refused to invoke it by name, the use of this subsection is open to the Court on its own Motion, or is open to an affected creditor such as BMO to seek activation of.

We do.

BMO is unaware of the Trustee's position on the sale being submitted for approval, but BMO would take issue with the suggestion that *no creditor stands to be prejudiced by this sale and the manner in which proceeds are to be addressed* (being outside of Section 65.13's constructs). BMO questions why this is. It seems to be an inconvenient, and costly method of determining rights in the proceeds which, we submit, are already determined by the property and civil rights regime of the Province of New Brunswick, which have not been dislodged by the BIA, and are in fact embraced by the BIA at Section 65.13(7). BMO is concerned that an effort will be made, perhaps continuing along the lines of the presumptive consolidation of these distinct insolvent estate, to use these net proceeds to either finance a Proposal (addressing distinct debts of separate companies, such as Atlantic Crane & Material Handling Limited's exclusive indebtedness to Canada Revenue Agency), or otherwise be lost to BMO, which is entitled at law to see this interest either continue in the Warehouse itself, or against net proceeds standing in lieu of the Warehouse.

It is somewhat unusual in a vesting situation involving an insolvent enterprise for net proceeds to trickle down beyond the mortgagees, but this would be the result of the sale, as the Trustee has advised BMO that BDC's registered Mortgage stands at $230,000. Motions referable to Section 65.13 of the BIA are typically presented on notice only to secured creditors, and in most cases mortgagees and senior lienholders are the beneficiaries of all proceeds, but that is not the case here, and Section 65.13 is not restricted in its scope to secured creditors. The provision respects the holders of "charges" and other monetizable "restrictions" which exist under applicable law.

BMO cannot therefore simply be ignored in the matter (any longer), nor pushed to the side as others with lesser entitlement to these proceeds rise and improve their lots under the

stay of proceedings. The order of priority in respect of the proceeds of real property (an asset which falls outside of any personal property security interest) is clear, and BMO rejects the notion that it later must line up to participate in some sort of interpleader sweepstakes, at its expense, to wrest the money from other claimants or prevent it's blending into the NOI/Proposal estates of unrelated enterprises with their own assets, liabilities and issues. We submit nothing short of Section 65.13(7)'s protection of BMO's charge over proceeds will be satisfactory in the circumstances. The suggestion that funds will be held in trust (presumably away from the grasp of LCB or the other Debtors, but perhaps to be spun into a consolidation effort) offers only hollow comfort and puts two entitled creditors (BDC and BMO) to undue expense and delay. It is a creative way to reverse engineer *something akin to Section 65.13(7) absent its promise of fair treatment for those affected,* yet such an exercise is unnecessary, because we have the real thing right in front of us at subsection 7.

We must think also of the prospective purchaser's reasonable expectations in the matter. To "approve" this transaction, of necessity, means approving Article 2.5 of that Agreement of Purchase and Sale, by which the conveyance is to be free and clear of encumbrances against the Warehouse. We submit the only fair way to do this is to engage Section 65.13(7) and direct that net proceeds be directed to BMO once the BDC Mortgage is discharged. Such would have been the outcome if the February 18, 2021 sale took an orderly path to completion, and such should be the path during this NOI period if Section 65.13 is to be fully observed.

As noted, typically, as is the case in comparable Receivership Vesting Order situations, there is nothing remaining for the judgment creditors with recorded interest in subject property. These creditors therefore usually see their interests vested out, with no net proceeds of sale availing to stand in lieu of the sold property. A harsh outcome, but reflective of the fact that an asset is only worth what someone in a reasonably formed market will pay for it. In this case, while BMO knows little about how the $500,000 price was derived, and whether it is fair in the circumstances, it does stand to generate net proceeds beyond the BDC mortgage of $270,000 less closing costs, which offers the promise of a return to BMO under its recorded land interest.

The purchaser was promised free and clear title to the Warehouse, which looks like a job for Section 65.13(7). The vesting power doesn't extinguish a right without offering a remedy (where possible). Here, with freestanding proceeds net of the BDC Mortgage, it is a very real proposition that both chargees of this real property (BDC and BMO) might see something in return for their LTA-recorded instruments being extinguished on sale.

There is no Trustee-recorded bankruptcy assignment, bankruptcy order, submitted proposal, or creditor/court approved proposal in respect of LCB. This is the NOI phase, LCB is the seller in possession of its assets, nothing has vested in the Trustee, and there may never be a proposal filed or a bankruptcy outcome in the matter. Section 65.13 currently controls the completion of the sale. Had this deal been concluded before the NOI, BMO would be paid residual proceeds in exchange for its release of Judgment in the usual manner. If a bankruptcy trustee were to conclude the sale of this asset, a release would still be required before it could be sold free and clear to this purchaser. Our concern is that parties are exploring a third option which stands to prejudice BMO.

If the intention of LCB is to bypass BMO with these proceeds, based either on some promises made to creditors of substantive consolidation downstream, tactical interpretations of the BIA which stretch the central organizing principle of good faith, or by other pre-arrangement,

we suggest that should be reconsidered. BMO is quite apprehensive about that arrangement, which in the interim puts BMO's recorded judgment interest and the state of encumbrances on the Warehouse in limbo

We have had limited time to respond to these Applications, and reserve the right to supplement these submissions as further information becomes known. At the time of writing, 2:40 p.m. on June 22, 2021, BMO has not yet seen the Trustee's Report.

The order is unusual as s. 65.13 matters go, and lacks clear dispositive comment on the subject of encumbrances. For BMO, that raises concerns as to what is intended here. The Order must preserve status quo concerning existing rights of creditors. Either it truly does not sell free and clear (and the Judgment continues as a recorded interest against the Warehouse in the new owner's hands), or its proceeds stand in lieu of the asset along the lines of 65.13(7), which applies not just to security but also to other charges and monetizable restrictions on sale. Given that the Agreement of Purchase and Sale contemplates a sale free and clear of encumbrances, and Section 65.13 is LCB's available method of sale in this context, we suggest Section 65.13(7) is the path of least resistance to that outcome.

We invite the Court to make use of s. 65.13(7), and direct that net proceeds ought to be distributed to BMO pursuant to its recorded New Brunswick Judgment.

While not presently a matter before the Court, as noted above, BMO reserves the right to continue its opposition to any prospective effort to obtain a substantive consolidation of the three Debtors' estates (beyond the procedural consolidation which as allowed the Debtors to reach this point). The three companies are distinct, have different assets, operations and liabilities, and are not, in our respectful submission, proper candidates for substantive estate consolidation, should that become a topic of open conversation. BMO has Judgments in excess of $1,200,000 against each of the Debtors, not a $1,200,000 Judgment against a selectively blended amalgam of the trio. Some estates (such as LCB) have real property and other valuable assets which the others do not, and we understand that the creditor profiles for the companies are not uniform.

BMO has alerted the Trustee, as well as counsel to BDC and TD of its concerns in this regard.

All of which is respectfully submitted.

Ben R. Durnford

Solicitor for Bank of Montreal