MCINNES COOPER

Ben R. Durnford
Direct +1 (902) 444 8454
ben.durnford@mcinnescooper.com

1969 Upper Water Street
Suite 1300
McInnes Cooper Tower - Purdy's Wharf
Halifax NS
Canada B3J 2V1
Tel +1 (902) 425 6500 | Fax +1 (902) 425 6350

Our File: 181890
September 24, 2021

HAND DELIVERED

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

My Lord:

Re: In the Matter of the Notice of Intention to Make a Proposal of Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited, and LCB Rentals Limited
Hearing Scheduled For September 29, 2021 at 3:00 p.m.
Hfx No. 507069

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

BMO is a Judgment creditor of the three above-captioned companies, 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 section 50.4 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("**BIA**") on or about June 4, 2021.

On June 29, 2021, one of the Debtors, LCB Rentals Limited ("**LCB**") obtained an Order pursuant to Section 65.13 of the BIA approving the sale of certain real property located at 280 Grandview Avenue, Saint John, New Brunswick (the "**Warehouse**"), in accordance with an Agreement of Purchase and Sale reached months beforehand (the "**First Sale Approval Order**"). For reference, a copy of the First Sale Approval Order is appended hereto as Schedule "A".

Although the transaction approved on June 29, 2021 was not completed, BMO was among the creditors of LCB which saw its pre-existing recorded charge against the Warehouse and its eventual proceeds (provisionally) protected by the First Sale Approval Order, with a Court-ordered charge under Section 65.13(7) of the BIA being granted to BMO, and other s. 65.13(7)-listed charge holders on that date. Also on June 29, 2021, the Debtors received an Order extending their respective NOI stay of proceedings periods to and including August 18, 2021; since further extended to October 1, 2021.

The stalking horse sale process which was conducted in September 2021, following procedural approval of this method granted on August 19, 2021, resulted in a competitive auction and a successful proponent for the assets of the three Debtors (assets being sold *en bloc*), including the Warehouse. The *en bloc* sale price presently before the Court is $1,357,000, however the purchase price component attributed to the Warehouse has not been disclosed, as

Schedule "F" of the Agreement of Purchase and Sale now submitted for approval has been left blank. Although this was also the case on August 19, 2021 when the Stalking Horse Agreement of Purchase and Sale came before the Court, we note that what was approved on August 19, 2021 was not a definitive sale transaction, but simply a sales process, and thus the allocation was less important at that stage. Nevertheless, the failure to value the Warehouse was opposed by BMO at that time, as it is again today.

To ease any potential confusion, BMO is not opposing the sale of the assets (including the Warehouse) for the *en bloc* price of $1,357,000, and advances no claims against the Purchaser of those assets. BMO's interest in this matter, as has been the case throughout, is limited to the proceeds derived from the sale of the Warehouse; proceeds now being held by the NOI Administrator.

As was the case at prior junctures of this unusual proceeding however, informed objection is difficult because critical explanation is lacking as to the reasonableness and fairness of the price at which the Warehouse is being sold (no allocation has been provided). Although adherence to the BIA has been imperfect in this matter to date, this continued failure to disclose the purchase price for this valuable asset *in specie* prevents a proper sale approval analysis under Section 65.13.

We are now back into a Section 65.13 analysis, just as we were on June 29, 2021 when the First Sale Approval Order was granted (regarding the then $500,000 sale of the Warehouse).

Leaving aside, for the moment, the extraordinary fact that the Debtors have proceeded 7/8^{ths} through an NOI process without seeking leave of the Court to substantively consolidate their assets and affairs, absent disclosure of the allocated Warehouse purchase price, we submit the approval of this transaction pursuant to Section 65.13 is technically not possible.

We must remind ourselves, as the distinction has perhaps been lost by repetition estoppel, that presenting a Motion today is not an amalgamated enterprise, *but three separate NOI Debtors.* These insolvent enterprises are not in any legal manner consolidated (as such is an extraordinary remedy reserved for rare cases), and thus it is not proper to consider their individual assets as functionally interchangeable within any sort of collective. That logic follows into the proceeds from their individual assets, the Warehouse in particular. In the alternative, if these enterprises and their assets are to be *consolidated in substance for these purposes*, then theoretically any Section 65.13(7) charge in favour of BMO can alight on *any proceeds realized by this "collective debtor"* up to the market value of the charged Warehouse, not just whatever proceeds are arbitrarily attributed to the Warehouse.

Section 65.13(4) non-exhaustively sets out the criteria a reviewing Court must assess before granting approval of a sale under this provision, which is a rather unique (and only twelve year old) statutory device, given its ability to impose Court-ordered charges on various asset proceeds of the conveyancing Debtor in the context of a free and clear sale outside of the ordinary course, by a non-bankrupt insolvent enterprise, without ever presenting a Proposal.

In addition to considering the impacts the sale will have on creditors, the BIA (at Section 65.13(4)(f)) gives a nod to the fact that the monetary consideration accepted by the NOI debtor cannot depart drastically from the *market value* of that asset being sold. This is one of the rare instances in the BIA where the phrase "*market value*" is used (i.e. no mention of liquidation or

forced sale value is used, because Parliament understood that *this sort of sale is not a liquidation, but most often (as here) a competitive going concern sale based on market value measure*).

The subsection provides:

> "(4) **Factors to be considered**- In deciding whether to grant the authorization, the court is to consider, among other things,
>
> ...
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value." (emphasis added)

We had set out BMO's concerns before the August 19, 2021 hearing regarding the lack of valuation then provided for the Warehouse. BMO was not alone that day in expressing concern over this intentional vagueness on the Warehouse valuation front. BMO made a few comments in our written submissions filed at that time, upon which we continue to rely, as the situation has not changed:

> "What we do know for sure is that a sale of the LCB Warehouse (standing alone) was agreed to at a price of $500,000 and was approved by the Court on June 29, 2021. That transaction has since been scuttled, apparently without complaint by either of the parties involved, but it potentially provides some insight into the present value of the Warehouse, which is arguably the most valuable individual asset under discussion. While agreed to before the NOI was filed, the original Warehouse sale was ultimately presented as a Section 65.13 transaction, meaning that it was to be concluded within the "liquidation context", with the purchaser's full knowledge. To say that $500,000 is an unrealistic value for the Warehouse at this stage is therefore somewhat dubious. This is an industrial space capable of generating considerable rental or other revenues for its owner. Determination of its present value must reflect this fact, and it is too early to sell the Warehouse for raw land value, as if it was an empty field.
>
> Has an appraiser provided an opinion in the matter? With respect, the *ad hoc* liquidation estimate prepared by MNP noted at paragraph 13 of Mr. Miner's latest Affidavit (which report is required as a bankruptcy comparator in any Proposal process) lacks the scientific authority of an accredited expert valuation, and we are not in a bankruptcy or receivership situation. We suspect the liquidation estimates therein were not prepared in *specific contemplation of this en bloc asset sale*, but in relation to a potential *Proposal vs. Bankruptcy* sales pitch to creditors. Every prospective Proposal Trustee must prepare a liquidation estimate of this nature, which is typically appended to the Report on the Proposal which is tabled at a meeting of creditors called to consider it; the purpose of it being a caveat-like demonstration of the creditors' alternative recovery potential, in the event the Proposal is not accepted and a bankruptcy results. Six weeks ago, if the evidence was accurate, a willing purchaser would have paid $500,000 for the Warehouse. We suggest that is a prudent price target to maintain, and the market has not fundamentally changed over the short time since that purchaser presented before this Court. The parlance of "*liquidation and forced sale value*" need not necessarily enter the equation. *This is not a forced sale*; LCB is in command of this process, and is publicly offering its demonstrably valuable (and encumbered) Warehouse for sale." (emphasis in original)

While we suspect a *market value appraisal* was provided to the Applicants, and will (or should) inform the value figure ultimately placed on the Warehouse, BMO once again has

concerns that we are in for an arbitrarily settled-upon figure, perhaps one which is overly reduced and presented as a fire sale or "liquidation amount". Subsection 65.13(4) is clear, and a *market value* analysis is apropos here. We are also concerned that the Debtors (LCB in this case) and the NOI Administrator are content to simply let the successful purchaser arbitrarily select the value of the Warehouse, for instance in a bid to keep deed transfer taxes low.

With respect, this is not the exercise the Court must undertake to assess the *reasonableness and fairness* of the consideration received. That analysis is meaningful to affected creditors with charges against the assets being sold, such as BMO, given that all encumbrance-related rights against the subject property are forevermore exchanged for the same interests in the proceeds of that property. Under the robust new wording of the draft Sale Approval and Vesting Order, these interests against the Warehouse are to be "foreclosed and forever barred". That's understandable vis a vis the asset being sold to a bona fide purchaser, but we must not undermine the charge which follows that asset upon conversion into proceeds.

How can this trade-off be considered palatable, let alone "fair and reasonable", absent clarity as to what proceeds are actually under discussion? A dollar amount is needed for purposes of critical assessment before this asset can be approved for sale under Section 65.13.

We submit BMO is free once again to pose this question, and while it may be confusing to some, BMO is free to object to the non-valuation being submitted for approval (steps taken by the Debtors and the NOI Administrator) without opposing the sale to Hercules SLR itself.

The Draft Sale Approval and Vesting Order

We've attached the First Sale Approval Order of June 29, 2021 as Schedule "A" to these submissions for illustration purposes. That First Sale Approval Order followed established Nova Scotia Supreme Court precedent for Section 65.13 matters, such as the *Seaforth Energy* example previously filed with the Court.

Upon review of the current draft Sale Approval and Vesting Order alongside the First Sale Approval Order, the reader sees immediately the marked differences between the two. Added to the current draft Order is a definitional distinction between Claims (affecting the Debtors themselves) and Encumbrances (affecting the property of the Debtors), and some new paragraphs have been added pertaining exclusively to what was therein defined as the "New Brunswick Real Property" (meaning the Warehouse). It is unclear why that real property-related sub-definition was made by the Debtor LCB (its owner), but no attempt was made to carve New Brunswick Real Property out of the broader definition of "Purchased Assets", and because no individual allocation of the total deal proceeds across assets is given, one cannot meaningfully comment on its impact on subsequent creditor claims to proceeds of that Warehouse. The LCB asset sale (i.e. the Warehouse sale) cannot be approved until its itemized purchase price is known and assessed for market value-referable fairness under Section 65.13(4)(f).

Consideration by the Court of the actual price achieved for assets up for sale approval is fundamental, and cannot be bypassed. The BIA is a technical statute, and we practitioners are its stewards. Observing these review criteria is not optional, and that observance can't simply be glossed over (as has been done on the substantive consolidation issue). Practitioners making use of the BIA are involved in a game of inches. To turn a double play under this statute, one must actually *step on second base* before making the throw to first, not simply brush a foot somewhere behind the bag and then seek to earn credit for full performance.

Language of foreclosure was added to the current draft Order, a remnant of the awkward recent era where traditional vesting orders (at least in the Receivership context) were temporarily not available in Nova Scotia. Vesting in the traditional manner in the context of Section 65.13 is of course expressly available under that federal statute, and it would thus appear that foreclosure language was not required. The concept of vesting (under Section 65.13(7) or otherwise by Order of a BIA or CCAA Court) is predicated on the continuation of existing creditor rights against proceeds of conveyed assets. BMO naturally expects this continuation to occur here, notwithstanding the notable deletion of the phrase "*including but not limited to the Judgment of the Bank of Montreal referenced in Schedule "B" hereof*", which appeared in the First Sale Approval Order, but is not located in this version.

We anticipate further efforts by the Debtors, through this curious wordsmithing, to place the charge of BMO against the Warehouse proceeds into some sort of inconsequential legal (or practical) box, be it through postponing, yet again, the oft-promised distribution phase of this proceeding (a plan now believed by BMO to be abandoned completely, in favour of a bankruptcy distribution which requires no such hearing), denying or delaying the rights activation step of the *issuance of a Trustee's Certificate*, or by other means, such as a strategically low Warehouse valuation/allocation which makes pursuit of proceeds net of the BDC mortgage a futile exercise. The wording of the latest draft Sale Approval and Vesting Order, relative to the known and well-understood precedent of the First Sale Approval Order, is conspicuous, and has not been explained.

Midway down the lengthy paragraph 4 of the current Sale Approval Order, appears the wording *"(i) any encumbrances or charges created by Order of this Court in this proceeding."* The Debtors appear to be asking the Court to strip from the Purchased Assets (and presumably as against their proceeds also) not only any existing Encumbrances such as BMO's *Land Titles Act*- registered Judgment, *but also those charges available as against proceeds within the suite of the BIA's interim remedies*, including (perhaps exclusively) any continuing charge to be granted by this Court under Section 65.13(7) in BMO's favour. Such are lumped into the broadly defined term "Encumbrances", and while we can appreciate the need to free up the Purchased Assets (Warehouse included) and its *bona fide* purchaser from any continuing BMO recourse, one could easily construe these words as *also targeting any claim by BMO into proceeds of those assets*. Denial of that charge would rupture the spirit and intent of Section 65.13(7), and could not stand.

The Sale Approval and Vesting Order, which goes on to create charges of this nature, would contradict itself immediately upon issuance, if that same Order earlier purported to wash such charges away.

This remarkable sub-paragraph, which could also (in respect of proceeds standing in lieu of sold assets) theoretically cover things like Debtor in Possession Lender charges, Administrative Charges, and a host of other super-priority charging devices available to a BIA Judge to do justice among the parties, *should be removed in our respectful submission*. It appears that the intention of these words (and others within the draft Order) is to undermine any available continuing statutory protection of BMO's registered Warehouse charge, even before such charge is confirmed by Order (and/or to provide comfort to the Debtor that any charge in BMO's favour granted on June 29, 2021 within the frustrated First Sale Approval Order is forevermore ineffective).

It is the Court which holds the power to grant (or deny) that charge, not the preparer of the draft Order. Continued rights into proceeds is mandatory (not optional) if the Court orders a free and clear sale of assets under Section 65.13. If vesting is ordered, the granting of continuing charges against not just proceeds of the sale, but "*other assets of the insolvent person*" must carry that charge into the future. This is the rights trade-off devised by Parliament, and it cannot be undercut.

As the three Debtors have (on their own) procedurally and substantively pooled their assets and undertaking to date, arguably one could play along, and seek a continuing Section 65.13(7) *charge against any of these $1,357,000 sale proceeds (not just those attributable to the Warehouse), representing the fair market value of the Warehouse*, to the extent its value is eventually made artificially low, for reasons of deed transfer tax or other convenience. Section 65.13(7) permits such a charge, over not just the item sold, but other assets of that "debtor".

Such an argument probably sounds absurd when raised by BMO, but it follows the same misguided logic of substantive consolidation (presumed without threshold leave, or creditor impact analysis) which has underpinned the Debtors' position in this matter from the start. One sometimes gets what one wishes for.

Distribution of Sale Proceeds

Recent updates received from the NOI Administrator, including the final paragraphs of the Third Report, confirm BMO's earlier-stated belief that no Proposals are likely to be forthcoming from these individual Debtors, nor any effort made to obtain leave to consolidate and jointly present one. The reality is that this NOI phase has not become a Proposal situation (the BIA definition of Proposal is one which has *actually been prepared and filed, not merely an NOI*), and the matter will likely never become a Proposal situation.

It is becoming clearer that the future of the Debtors, post-sale of all or substantially all of their assets and undertaking, is voluntary or deemed bankruptcy in triplicate, with the proof of claims submission process to follow in the usual manner.

Tactically, one can frustrate challengers by indefinitely postponing a contest where the enforcement of rights is to occur. Notwithstanding the fact that, by the current language in the draft Sale Approval and Vesting Order (challenged lines within paragraph 4 notwithstanding), BMO's charge against the Warehouse would be recognized and continued as a charge against proceeds (as they might someday be revealed to be) even in the event of LCB's bankruptcy, we question whether a proper distribution hearing will ever come before the Court.

While BMO remains eager to make its case in the matter, the hosting of such a distribution hearing is not BMO's idea, and never has been. From almost day one of these proceedings, in early June of 2021, the Debtors have represented the intention of permitting creditors claiming entitlement to proceeds (in BMO's case, Warehouse proceeds) the opportunity to assert that argument. At each juncture subsequent to June 29th however, the concept of an eventual distribution hearing has drifted further into the future and become less likely. Overt hints are now being given that such a thing might be achieved post-bankruptcy, not through any reference to the Court, but by a proof of claims submission process administered by the Trustee in the first instance, and only appealable to the Registrar (individually, not amongst interested creditors *inter se*) upon rejection of that proof of claim by the Bankruptcy

Trustee. That offers hollow comfort, and is a major departure from the plan initially shared with the Court and creditors.

In an email received by all creditors on the Service List from the NOI Administrator on September 10, 2021, a hint was given that the distribution hearing (as represented throughout) may never occur. It was noted by MNP:

> "Depending on the ultimate quantum of the highest bid, the ACMH Group, or the individual entities making up the group, will either submit a proposal(s), or they won't, in which case automatic bankruptcies will occur for each entity at the expiry of the current stay period. In the event of bankruptcies occurring, there will be a fair and familiar framework to manage the distribution process." (emphasis added)

Paragraph 55 of the Third Report of the NOI Administrator contains the comment, "*...there will be no proposals forthcoming.*"

The memorandum of law submitted by the Debtors makes a faint effort to suggest proposals are going to be presented in the matter, noting (on page 4):

> "...Funds will be retained by the Trustee. Whether distribution will be by way of a proposal, a distribution order or a bankruptcy is yet to be determined."

With respect, and with the history of these proceedings being a guideline, we do not suspect a proper distribution hearing will ever follow, and the claim of BMO (referable to Section 65.13(7) or otherwise...a charging provision which could be undermined by this very draft Order), might be reduced to the contents of a proof of claim filed in LCB's bankruptcy. That proof of claim would be adjudicated in the first instance by a Trustee which has already communicated its view that BMO's recorded judgment was undermined on day one of the NOI process by Section 70 of the BIA. That is a point on which we disagree. In Schedule "B" attached hereto, BMO's basis of disagreement is explained in a summary memorandum.

As we may never get the chance to address the Court on that particular issue (and BMO's position is perhaps intended by the Debtors to forever remain "premature"), we attach some explanatory comments on the subject at Schedule "B" of these submissions. While this theme is premature yet again, and not today *squarely before the Court* (and may remain so); and our Schedule is not submitted as a brief complete with attached authorities, to assist the Court it is important for BMO to explain its position in the matter in response to previous written submissions filed by the Debtors on these subjects. At issue today are the continued charges BMO has against net Warehouse proceeds, such as these interests are, and to the extent any allocation is ever delivered and we learn what those net proceeds may be.

The nature and extent of BMO's charge against Warehouse proceeds is therefore relevant today, even in the continued absence of a distribution hearing.

BMO does not oppose the Debtors' stay extension request.

All of which is respectfully submitted this 24th day of September, 2021.

Ben R. Durnford
Solicitor for Bank of Montreal

(36847304_1)

Schedule "A"

SUPREME COURT
OF NOVA SCOTIA
JUN 2 9 2021
HALIFAX, N.S.

2021

Hfx. No. 507069
Estate No. 51-2743163
Court No. 44783
District of Nova Scotia
Division No. 01-Halifax

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY & INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF
ATLANTIC CRANE & MATERIAL HANDLING LIMITED, LABRADOR CRANES 2005 LIMITED and LCB RENTALS LIMITED

APPROVAL & VESTING ORDER
(Section 65.13 of the *Bankruptcy and Insolvency Act*)

Sgd. JPB, J.

Before the Honourable Justice John Bodurtha, in Chambers:

UPON Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited, and LCB Rentals Limited (**"LCB"**) (collectively the **"Atlantic Crane Group"**) having made Motion pursuant to Section 65.13 of the *Bankruptcy and Insolvency Act,* and Section 3 of the *Bankruptcy and Insolvency General Rules* for an Order:

(i) approving the transaction (the **"Transaction"**) between LCB, as Vendor, and 3309713 Nova Scotia Limited (the **"Purchaser"**), as Purchaser of the real property known as 280 Grandview Avenue, St. John, New Brunswick, with PID No. 00036236, which is more particularly described in Schedule "A" hereof (the **"Purchased Lands"**), in accordance with the terms and conditions of an Agreement of Purchase and Sale executed by the Purchaser and LCB on March 12, 2021 (the **"Agreement of Purchase and Sale"**); and

(ii) vesting in the Purchaser, or the Purchaser's assignee, nominee or designate, as the case may be, LCB's right, title and interest in and to the Purchased Lands;

AND UPON reading the Affidavit of Jack Miner sworn on June 17, 2021, together with the First Report of MNP Limited in its capacity as Trustee under the Notice of Intention to Make a Proposal of the Atlantic Crane Group, (the **"Proposal Trustee"**) dated June 22, 2021, on file herein;

AND UPON IT APPEARING that the Proposal Trustee has given its approval of the Transaction and has recommended its approval by the Court;

AND UPON hearing from counsel to the Atlantic Crane Group, and such other counsel as appeared on the Motion;

NOW UPON MOTION IT IS HEREBY ORDERED THAT:

SERVICE

1. To the extent necessary and required, notice periods with respect to this Motion be and are hereby abridged.

2. Any lack or deficiency in service of this Motion be and is hereby waived and excused.

3. Service of notice of this Motion by Atlantic Crane Group was sufficient.

SALE OF PURCHASED LANDS

4. The Transaction is hereby approved. LCB is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction in accordance with the Agreement of Purchase and Sale and for the conveyance of the Purchased Lands to the Purchaser, or to the Purchaser's assignee, nominee or designate, as the case may be.

5. That upon the closing of the Transaction in accordance with the Agreement of Purchase and Sale, all of LCB's right, title and interest in and to the Purchased Lands described in Schedule "A" hereof shall vest absolutely in the Purchaser, or the Purchaser's assignee, nominee or designate as the case may be, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, with the exception of a first mortgage made in favour of Business Development Bank of Canada (collectively, the **"Claims"**) including, without limiting the generality of the foregoing, all charges, security interests or claims evidenced by registrations pursuant to the *Land Titles Act* (New Brunswick), the *Registry Act* (New Brunswick), the *Enforcement of Money Judgments Act* (New Brunswick), the *Personal Property Security Act* (New Brunswick), or any other real property registry system (all of which are collectively referred to as the **"Encumbrances"**) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Lands, including without limitation those Encumbrances listed in Schedule "B" hereof, be and are hereby expunged and discharged as against the Purchased Lands.

6. For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Lands shall stand in the place and stead of the Purchased Lands, and that from and after closing of the Transaction in accordance with the Agreement of Purchase and Sale, all Claims and Encumbrances, including but not limited to the Judgment of the Bank of Montreal referenced in Schedule "B" hereof, shall attach to the net proceeds from the sale of the Purchased Lands with the same priority as they had with respect to the Purchased Lands immediately prior to the sale, as if the Purchased Lands had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. The net proceeds from the sale of the Purchased Lands shall be deposited with the Proposal Trustee for the credit of LCB, and the Proposal Trustee shall retain same pending further order of this Court made after receiving submissions and argument from all parties claiming an interest in said net proceeds

GENERAL

8. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Atlantic Crane Group or any one of them, and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of Atlantic Crane Group or any one of them;

the vesting of the Purchased Lands in the Purchaser, or the Purchaser's assignee, nominee or designate as the case may be, pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Atlantic Crane Group or any one of them and shall not be void or voidable by creditors of Atlantic Crane Group or any one of them, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist Atlantic Crane Group and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully

requested to make such orders and to provide such assistance to the Atlantic Crane Group and/or the Proposal Trustee as may be necessary or desirable to give effect to this Order or to assist the Atlantic Crane Group and its agents in carrying out the terms of this Order.

10. This Order and all of its provisions are effective as of 12:01 a.m. local time on the date of this Order.

11.

DATED at Halifax, Province of Nova Scotia, this 29th day of June, 2021.

Deputy Registrar

LAUREL PAUL
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document, identified by the seal of the court, is a true copy of the original document on the file herein.

JUN 2 9 2021

Deputy Prothonotary

SCHEDULE "A"

Parcel Information

PID:	00036236	County:	Saint John
Status:	Active	Active Date/Time:	
Land Related Description:	Land	Management Unit:	NB1107
Area:	2641	Area Unit:	Square Metres
Date Last Updated:	2020-12-18 09:33:53	Harmonization Status:	Harmonized
Land Titles Status:	Land Titles	Land Titles Date/Time:	2016-04-25 15:26:31
Date of Last CRO:	2020-12-18 09:33:58	Manner of Tenure:	Not Applicable
Land Gazette Information:	No		
Description of Tenure:			

Public Comments:
MAP / CARTE 06P08SE

View Parcel Description | PID Report | Land Gazette

Parcel Interest Holders (1 record(s))

Name	Qualifier	Interest Type
LCB Rentals Limited		Owner

Assessment Reference (1 record(s))

PAN	PAN Type	Taxing Authority Code	Taxing Authority
05889734		550	City of/Cité de Saint John

Parcel Locations (1 record(s))

Civic Number	Street Name	Street Type	Street Direction	Place Name
280	Grandview	Avenue		Saint John

County / Parish (1 record(s))

County	Parish
Saint John	City of/Ville de Saint John

Documents (18 record(s))

Number	Registration Date	Book	Page	Code	Description
40805708	2020-12-16			5400	Judgment
36103902	2016-07-07			6100	Discharge, Release or Satisfaction
36102912	2016-07-07			6110	Discharge of Mortgage

Back • Home • Problem Report

Parcel Information :

35895516	2016-05-03			5100	Mortgage
35895409	2016-05-03			1100	Deed/Transfer
35871558	2016-04-25			3800	Land Titles First Notice
35871541	2016-04-25			3720	Land Titles First Order
35871335	2016-04-25			3900	Land Titles First Application
25536807	2008-05-13			3200	Change of Name or Amalgamation
415579	1997-06-19	1907	54	114	Agreement
327059	1986-01-03	1130	136	102	Lease
286778	1979-11-06	895	122	103	Debenture, Voluntary Charge
271108	1977-01-01	826	422	104	Mortgage
267224	1977-01-01	809	751	107	Discharge
264969	1976-10-27	799	397	104	Mortgage
238942	1972-12-19	685	973	101	Deed
238943	1972-01-01	685	977	104	Mortgage
207291	1966-01-01	550	1	101	Deed

Plans (2 record(s))

Number	Suffix	Registration Date	Code	Description	Lot Information	Orientation
25239105		2008-02-27	9050	Subdivision & Amalgamations		Provincial Grid
16	F52	1972-06-09	9050	Subdivision & Amalgamations	Lot 1-C	Magnetic

Parcel Relations (1 record(s))

Related PID	Type of Relation	Lot Information
55190102	Infant	Parcel A

Assessment Data : Page 1 of 1

PAN Information

PAN:	5889734	Status:	Open
Assessed Owner(s):	LCB RENTALS LIMITED	Mailing Address:	70 NEPTUNE CRES DARTMOUTH NS
Assessment Year:	2021	Postal Code:	B2Y 0B6
Current Assessment:	$324,600	Current Levy:	$15,849.90
Location:	280 GRANDVIEW AVE	County:	St. John
Property Description:	OFFICE,WAREHOUSE & LOT	Tax Class:	Fully Taxable
Property Type Code:	332	Property Type Name:	Warehouse/Office - Combination
Taxing Authority Code:	550	Neighborhood Code:	18
Taxing Authority Description:	City of/Cité de Saint John	Neighborhood Description:	INDUSTRIAL PARKS (MCALLISTER,GRANDVIEW)
Sequence Number:	B001	Sub Unit:	0
Harmonization:	COMPLETED (One to one match of parcels)	Farm Land Identification Program:	No
PID:	00036236	PID (2nd):	
More PID(s):	No		

Sale Price Information

Price:	$335,000	Date:	2016-05-03

PAN Report

Back • Home • Problem Report

SCHEDULE "B"

Judgment in favour of Bank of Montreal registered under each of the New Brunswick *Land Titles Act*, *Enforcement of Money Judgments Act* and *Personal Property Security Act* on December 16, 2020, and with respect to the *Land Titles Act* having document number 40805708.

Schedule "B"

The Nature of BMO's Warehouse Charge Explained

As set forth in the Affidavit of Andrew Rygh (the "**Rygh Affidavit**") sworn and filed in these proceedings on June 22, 2021, 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 Rentals Limited ("**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) ("**PPSA**").

Records generated following a post-recording search under the LTA in respect of the 280 Grandview Avenue, Saint John, N.B. property (the "**Warehouse**"), which are appended to the Rygh Affidavit as Exhibit "C", show that there were then 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.

Position of BMO:

The First Sale Approval Order (of June 29, 2021), as well as the current draft Sale Approval and Vesting Order are sought pursuant to Section 65.13 of the BIA, and thus address the fate of any relevant "*security, charge or other restriction*" affecting the Warehouse, including the BMO Judgment, in the manner availing to the Court pursuant to Section 65.13(7).

Section 65.13(7) speaks prospectively in relation to the proceeds to be realized from a Court-approved sale in which a "free and clear" vesting component is included. The provision reads 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)

Paragraph 6 of the current draft Sale Approval and Vesting Order (which is a heavily modified version of the June 29, 2021 First Sale Approval Order), provides as follows:

> "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 that 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 of 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." (emphasis added)

The equitable tradeoff therefore, regarding a Court-ordered sale by an NOI debtor such as LCB, is that whatever charges, security, and other restrictions affected the subject assets being sold *before the sale was approved*, shall *continue as a Court-ordered charge* manifesting not only on the proceeds of that sale but, in the interests of ensuring fairness to the affected creditors, also potentially upon "*other assets of the insolvent person*". It is therefore submitted that BMO, being the holder of a pre-sale LTA-registered charge against the Warehouse, is given by the Sale Approval and Vesting Order a continuing charge against the proceeds therefrom. All further events are, by the express wording of the Sale Approval and Vesting Order, made subject to that Order, and its vesting/charging language, which was said to continue to operate notwithstanding even the subsequent bankruptcy of LCB.

The *sine qua non* of vesting is the commensurate impression of proceeds with the same charges as previously existed against the conveyed asset. One cannot have one without the other, so the apparent attempt by the Debtors at paragraph 4 of the draft Sale Approval and Vesting Order to neutralize any BIA-related charges imposed by the Court is inconsistent with the fundamentals of vesting.

The senior priority of a Court-ordered charge which is confirmed under federal legislation in the insolvency context, be it arising under the BIA or in a *Companies' Creditors Arrangement Act* ("**CCAA**") proceeding, was recognized by the Supreme Court of Canada on July 28, 2021 in the case of ***Canada v. Canada North Group Inc.*** 2021 SCC 30, where various Court-ordered priority charges were found to be superior to even Her Majesty's deemed trust claims. Courts in this context have authority and broad discretionary power to order priority and super-priority charges to facilitate a restructuring. Such was already done by this Honourable Court under Section 65.13(7) of the BIA on June 29, 2021 within the First Sale Approval Order, which recognized the existence of BMO's LTA-registered charge, which had not been supplanted by Section 70 of the BIA to that stage (and still has not been), and continued to affect the subject real property.

The current draft Sale Approval and Vesting Order must recognize also that certain of these *en bloc* proceeds are, and always will be, proceeds from the *sale of the Warehouse*, which is an item of real property which was subject to LTA-recorded charging instruments. These terms of vesting are binding into the future, constituting as they do a charge ordered by a BIA Court, and persist even notwithstanding a subsequent bankruptcy of LCB. These land proceeds are not merely "cash" or some other form of personal property belonging to LCB, and as directed, they are to be held by MNP pending further Order of the Court as to their ultimate creditor destination.

"Security or Charge":

Much has been made in this matter of the distinction between a secured and an unsecured creditor. With respect, a distinction such as this, as a means of disqualifying relief to creditors seeking a distribution of assets conveyed during a Division 1 NOI period under Section 65.13, is not made by that provision, and any suggestion to the contrary promotes an overly narrow reading of its subsection 7. Plainly respected by that provision are not only the holders of "security", but also "charges" and "*other restrictions in favour of the creditor whose security, charge or other restriction is to be affected by the order.*" The BIA does not define the terms

"security" or "charge", leaving for the affected creditors themselves the onus of establishing their rights in this respect.

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 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 New Brunswick's LTA. Both are worthy of respect, and must count for something, even in the NOI context, just as PPSA-related interests still count for something in relation to the personal property they address.

BMO thus need not demonstrate itself to be a *secured creditor* in this instance at all; though in passing it is noted that the BIA's definition of "secured creditor" also uses the word "charge", alongside the word "lien", *and the Sale Approval and Vesting Order itself creates a Section 65.13(7) Court-ordered charge/lien against LCB's asset proceeds, which continues an earlier LTA-recorded charge.* Rather, BMO simply must demonstrate that under applicable law at the time of the Court-approved sale under Section 65.13, it was the holder of a *charge* over that asset, or in the alternative, the holder of a monetizable *restriction on a free and clear sale.*

To understand BMO's entitlement to the net proceeds of the Warehouse requires, firstly, a review of the applicable laws of New Brunswick real property. These are the rights which are spoken to by any Order under Section 65.13 of the BIA, and are the rights ordered under that federal statute to *continue,* with the BIA's galvanizing effects, as against proceeds standing in lieu of the Warehouse.

This Honourable Court, MNP, as well as affected creditors of LCB, now must take these proceeds as they find them; impressed by charges recorded against them in the appropriate registries prior to the sale, which are continued as a *Court Order* under the Sale Approval and Vesting Order, which even addresses future eventualities affecting LCB, including its now certain bankruptcy.

Section 65.13(7) is not a mandatory provision of the BIA, but its use is often necessary where parties have agreed during an NOI period upon a sale "free and clear" of encumbrances, as was the case (twice) with the Warehouse. When Section 65.13(7) is utilized, the continuing charge benefitting existing charge-holders is a Court-ordered confirmation of that charge (the wording is: "*if it does*" [i.e. if the court makes use of the discretionary vesting provisions], "*it shall also order that the other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge, or other restriction...*" (emphasis added).

With respect, it would appear the intention of this Honourable Court at the time the First Sale Approval Order was granted in respect of the Warehouse was that the rights of charge holders, as they stood at the time the sale was approved, should continue into its proceeds, without future impairment or alteration. The current draft Sale Approval and Vesting Order, while drastically modified with some new language, still seeks to achieve that end.

The Charge BMO Holds:

BMO's Judgment was recorded pursuant to the terms of the *Enforcement of Money Judgments Act* (New Brunswick), 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.

The Warehouse is land registered under the LTA. Interests in registered land are perfected by LTA registration alone, and the date of registration determines priority as between recorded interests.

The LTA confirms that registered interests such as BMO's Judgment bind the land. One must register that interest before the land is bound, but once done, undoubtedly this is a *charge on the land.* It is the fact of registration which confirms the impression upon the lands.

Section 15 of the LTA provides:

> "15(1)Except as against the person making the instrument, no instrument shall, until registered, pass any estate or interest in registered land or render the land liable as security for the payment of money."

Subsection 3 of Section 15 of the LTA goes on to confirm the range of things that an instrument which is registered in New Brunswick can do to lands:

> "15(3) Every 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."

As a registered instrument, a Judgment is naturally not something that "surrenders" or "discharges" anything, so we submit it must be something which either "creates" or "charges" the lands and interests to which it relates. Such recording "creates" an interest and "charges" the lands.

In ***Kent Building Supplies v Bourque (Laurie) Construction Ltd,*** 1988 CanLII 8070 (NB QB), it was noted by Creaghan J. at paragraph 15:

> "Accordingly, I have determined that the principle that a judgment creditor, pursuant to the registration of a judgment, cannot obtain a charge on the judgment creditor's property other than on the interest which the judgment debtor had at the time the judgment was registered should be applied. Further, in this case the charge can only be applied to the equity of redemption where the judgment debtor mortgaged the property was registered and the mortgage was registered within three months of the date of its execution, albeit subsequent to the registration of the judgment." (emphasis added)

The equity of redemption remaining after a prior mortgage charge is paid out, is fully impressed by the interest of the Judgment creditor which has made its LTA registration of that interest. It is an interest pertaining to real property, not personal property, and its registration home is in the LTA.

While there is nothing within New Brunswick's LTA which expressly compares with Nova Scotia's *Land Registration Act* Section 66, which provides, "*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*", we suggest the effect in New Brunswick is the same, and the continuing respect of LTA charges against land in the vesting context is formally recognized under Section 65.13 of the BIA.

The *Registry Act,* RSNB 1973, c R-6 (which still applies in New Brunswick to lands under the registry system) also speaks of judgments as being a charge against land at Section 57, by confirming that registered judgments may be discharged, with the effect that they, *release the land charged by the registration of the judgment*:

> "57. A registered judgment or certificate or memorial of judgment may be discharged or partially discharged by the person entitled to discharge the same, by certificate executed and registered in the same manner as a certificate of discharge of mortgage, and such certificate, when registered, shall have the effect of releasing the land charged by the registration of the judgment, certificate or memorial, or such portion thereof as may be specially mentioned in such discharge."

A "charge" under the LTA is an instrument that creates an interest in land for payment of a debt or obligation. It amounts to a charge on the equity of redemption that remains if there is a prior mortgage.

In ***Carr v. Bank of Nova Scotia*** 1988 CanLII 5662 (N.B. C.A.) ("***Carr***"), Stratton C.J.N.B. summarized the law with respect to memorials of judgment in New Brunswick, dating back to the *Statute of Westminster* 1285, 13 Edw. I, c.1 in support of the concept that a recorded judgment creates a lien on lands. His Lordship held (at para 20) that, "*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*".

In ***Carr***, *supra*, Chief Justice Stratton relied on ***Deveber v. Austin*** 1875 CarswellNB 30 (Sup. Ct.), where Allen J. (at para 12) found that a registered memorial of judgment, "*becomes a kind of statutory mortgage on the debtor's land*".

That BMO holds an existing and valid charge against the Warehouse and its net proceeds cannot reasonably be denied. To get rid of it would require a *discharge*, and by consent on June 30, 2021, BMO agreed to provide to LCB's counsel a partial release of

judgment, in LTA-recordable form, to be held in escrow until closing of the June 29, 2021 approved sale, in reliance upon the ongoing protection of BMO's rights to charged proceeds assured by the First Sale Approval Order's paragraph 6. Although that transaction was scuttled, the partial release was delivered promptly to LCB's counsel on July 5, 2021, in good faith that the vendor and purchaser actually intended to close their sale transaction. BMO has since rescinded, and now seeks the return of that escrowed Release.

LCB has taken a peculiar interest in selecting *which of its creditors* recovers the proceeds of the Warehouse, and when this distribution takes place. In the mean time, it delayed the closing of the first Court-approved transaction, and followed a convoluted procedural track which has adversely impacted creditors such as BMO. Such tests the continuing duty of good faith expected from all actors in this BIA-created process. As judge in its own cause, LCB would have the Court bypass BMO's duly recorded LTA interest (*as reinforced by this Court's own directed charge on June 29, 2021, and set up to be so reinforced again*), presumably in favour of certain of its other creditors, which hold registered charges under New Brunswick's inapplicable *personal property security* regime. Thankfully, the final word on the issue does not belong to any of the Debtors, their NOI Administrator, or any singular creditor of LCB for that matter; it belongs to this Honourable Court.

Opponents of BMO to date have contended that BMO is an *unsecured creditor* and should be dismissed accordingly. In effect, as noted above, an LTA-recorded interest holder in lands (as later recognized *with a Court-ordered charge under Section 65.13*) *does comparably impress* that land, as the BIA's definition of "secured creditor" is broad and includes the holders of charges or liens which might lever payment, yet BMO is not even *purporting to be a secured creditor, and clearly need not demonstrate itself to be*, because Section 65.13 is not so limiting in its scope.

BMO is the holder of a valid charge against the Warehouse under the LTA which was once superseded by an even broader charge under Section 65.13(7) issued by this Court, which qualifies it for relief above those who do not hold such charges against that same land and its proceeds. The delay in closing the initially approved Warehouse sale, and corresponding lag in setting down a distribution hearing have not weakened or frustrated BMO's rights.

To the extent that, in the ordinary course, the Warehouse could not be sold on the "free from encumbrances" basis which the applicable Agreement of Purchase and Sale mandates without BMO's Judgment being released or otherwise discharged, we submit the same was also a "restriction" on such sale, as contemplated by Section 65.13(7).

The Court-approved removal of a right must, to the extent possible, leave available a remedy. Regarding the sale of real estate charged by the interests of creditors, the value of the property is a finite thing which does not always meet the claims of all attachment creditors. In this case, that is also true, as BMO's Judgment against LCB in excess of $1,000,000 would only marginally be satisfied through the net proceeds availing (assuming we someday learn what allocation has been given to the Warehouse). Generally a "restriction" on sale is a reference to a restrictive covenant, or a statutory requirement such as shareholder approval or some other factor which the BIA Court interpreting Section 65.13 must overrule to facilitate the deal which has been reached. These are therefore not *always monetizable restrictions*, and their holders are often left without a remedy sounding in compensation. That is not the case for BMO in this instance, unless the Warehouse proceeds are denied to it, or diminished to an unreasonably low assessed amount.

BMO's interest in the Warehouse and its proceeds is distinct from any interest (secured or otherwise) in respect of LCB's personal property, because the Warehouse proceeds are the

yield resulting from the sale of real 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 under Section 65.13 of the BIA), due provision has been made for these recorded interests in proceeds, as and how they appear, in return for the ordered expungement of the charge.

We therefore 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 money derived from the commercial use or liquidation of real property. That said, it bears noting (as MNP has not vetted any security in this matter), that a PPSA registration purporting to encumber all of the Debtors' (and LCB's) New Brunswick personal property was registered on June 17, 2021, during the pendency of the stay of proceedings, and is thus ineffective to elevate that creditor over other unsecured (or unperfected) creditors of LCB.

It is for a 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 of proceedings had descended, not continue existing rights in that jurisdiction.

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 proceeds shall stand in lieu of the conveyed assets, 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 by the result *inter se,* as against fellow creditors.

The Sale Approval and Vesting Order has continuing effects which must be seen through to their just and intended conclusion, namely that BMO receive the net proceeds of the Warehouse.

BMO should not lose rights in this exercise due to the stalling of a distribution hearing (which is in LCB's hands to schedule), and the BIA's processes should not be gamed. Section 65.13(7) was the appropriate mechanism to preserve these rights, but the matter does not end with the Sale Approval and Vesting Order, which must be given due effect after issuance.

Section 70 of the BIA:

Mr. Hill, in his brief of June 23, 2021, had argued on behalf of LCB that Section 70 of the BIA was activated on or about June 4, 2021, the moment LCB filed its NOI pursuant to Section 50.4 of the BIA. A similar stance was taken by MNP by email to BMO's solicitor (copying Mr. Hill) on June 18, 2021, wherein it was written by Mr. Findlay, *"It's always been our practice and experience that s. 70(1) applies to Proposals and that judgment creditors are reduced to the status of unsecured creditors. Is this also BMO's understanding?"*

Notwithstanding what might become of LCB and the Warehouse proceeds before a distribution hearing is finally set down, to succeed with this argument, LCB will need to demonstrate that *Section 70 applies in the context of an NOI period*, and specifically, applied at the time of the Sale Approval and Vesting Order's issuance, being the situation prevailing at the time the Court-ordered charges under Section 65.13(7) protected those with existing rights in the Warehouse. We are not debating the difference between secured creditors and unsecured creditors holding charges. Both are separately respected by the relevant BIA provision.

It is suggested by LCB that Section 70, by which a *Trustee in Bankruptcy* might assert priority over judgments or other execution processes in progress upon the *registration of an Assignment or Certificate of Bankruptcy or a Bankruptcy Order in the relevant public registry* (in accordance with Section 74 of the BIA), has somehow descended in the matter to pre-empt or dash the LTA-registered charge of BMO as it stood during the NOI period. The argument has, predictably, been joined in by PPSA-registered creditors of LCB, which also wish to collect the Warehouse proceeds, notwithstanding their lack of prior-rights to the real estate it stands in lieu of. With respect, we disagree with the position taken by LCB and those other challengers, which features Section 70 of the BIA as its centerpiece.

It is helpful to review Section 70, so we can best understand what it does, and, perhaps more importantly, *what it does not do.*

Section 70 currently reads as follows:

> **"Precedence of bankruptcy orders and assignments**
>
> **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." (emphasis added)

This is one of the few examples in the BIA where a Trustee in Bankruptcy obtains higher rights than those which were enjoyed by a bankrupt debtor before its bankruptcy. It is a provision which makes available to a Trustee standing priority, upon the *happening of a bankruptcy*, but it is *not a right with effects so automatic that it undermines or supersedes existing provincial property registration formalities, requirements and laws.*

The holder of a Judgment is just that; but the holder of *a Judgment which it has taken the time and expense to record in the proper registries*, is accorded further charging status at law in relation to affected real property of the judgment debtor. The BIA does not abrogate or supersede provincial laws unless a conflict presents.

Section 72 of the BIA sets this out in plain language:

> **"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." (emphasis added)

Section 74 of the BIA expressly confirms that the rules of local property registries (such as that maintained under the LTA) apply when it comes to a Trustee confirming its priority interest over judgments pertaining to a *bankrupt's affected real property*. Its continuing application to land titles priority assertion has thus been "*otherwise provided in this Act*" per Section 72(2).

Any provision which creates rights in real property, or confers priority over other interests in real property, must cross the threshold of the applicable registry where such recorded interests (and contests over their priorities) find their home. Here that is the registry created under the LTA. Section 74 of the BIA clearly confirms that the need for any would-be priority charge holder to assert priority (*even a bankruptcy trustee*) to formally record that interest, persists notwithstanding Section 72(2). While things may change before the September 29, 2021 hearing as tactics evolve, at least as of 11:00 a.m. on September 24, 2021, nothing other than BMO's Judgment is recorded against the Warehouse.

When it comes to real estate which was owned by a *bankrupt* debtor, Section 70 is relatively worthless on its own, without the cross-reference of Section 74. Section 74 confirms that the Bankruptcy Order or Assignment referred to in Section 70(1) must be recorded at the proper registry before the trustee rights-elevating effects of Section 70 take hold in respect of that real property; i.e. the taking by the Trustee of an interest in the real property which is *superior to that of the judgment creditors holding registered charges*. In particular, the following is provided for in Section 74:

> **"Registration of bankruptcy order or assignment**
>
> **74 (1)** Every bankruptcy order, or a true copy certified by the registrar or other officer of the court that made it, and every assignment, or a true copy certified by the official receiver, may be registered by or on behalf of the trustee in respect of the whole or any part of any real property in which the bankrupt has any interest or estate, or in respect of the whole or any part of any immovable in which the bankrupt has any right, in the registry office in which, according to the law of the province in which the real property or immovable is situated, deeds or transfers of title and other documents relating to real property, an immovable or any interest or estate in real property or any right in an immovable may be registered.
>
> **Effect of registration**
>
> **(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)." (emphasis added)

Section 70 is an ancient provision, with its closest root extending to Section 50 of the former *Bankruptcy Act*, R.S.C 1970, c. B-3. The section is far older that this however, and has for generations required the registration of a Bankruptcy Order or Certificate of Assignment before the provision is activated. Indeed it all used to be blended into the same section of the statute.

Section 29 of the *Bankruptcy Act* R.S.C. 1927, c. 11 provides (in part) as follows:

> "29. Every receiving order and every authorized assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the Official Receiver therein named) shall be registered or filed by or on behalf of the custodian or trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which it has any interest or estate is situate.
>
> 2. The proper office in this section referred to shall be the land titles office, land registration office, registry office, or other office wherein, according to the law of the province, deeds or other documents of title to real or immovable property may be or ought to be deposited, registered, or filed.
>
> 3. From and after such registration or filing or tender thereof in the proper office to the registrar or other proper officer, such order or assignment shall have precedence over all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed in such proper office their judgments, executions or attachments." (emphasis added)

Formal 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.*

It still is.

Section 70 on its own therefore, while only speaking directly to Assignments of Bankruptcy (s. 49) and Bankruptcy Orders (s. 43) themselves, and by no means to an NOI period or sales under Section 65.13(7), does not address the Trustee's interest in real property such as the Warehouse. To get there, we must arrive by way of Section 74. We have certainly not gotten there, and indeed during the NOI period in which the First Sale Approval Order was granted and crystalized rights of charge-holders like BMO, and also now, as the current Sale Approval and Vesting Order is being proposed, there is nothing which the Administrator under a Notice of Intention to Make a Proposal *even can record* under the LTA, or elsewhere.

This is not the end of the dissimilarities however between Section 70 and the NOI situation LCB finds itself in. There are many other points BMO wishes to raise in the matter.

We are aware of no case law interpreting whether Section 70 of the BIA applies to a Division 1 NOI period, and/or to the unique modern interim Court approved sales device of Section 65.13, which is available only under Division 1 of the BIA.

While Section 70 of the BIA would render inferior to the interests of a *Bankruptcy Trustee* judgments and other executions in progress, Section 70 has not been activated here, given that it depends upon a recorded Bankruptcy Order or Certificate of Assignment before becoming applicable. We have neither.

So what do we have?

The NOI Period:

Before one makes the extraordinary leap from Section 70 of the BIA to the NOI period in which we presently sit (and in which the earlier Section 65.13(7) First Sale Approval Order was made, crystalizing rights to Warehouse proceeds), it is necessary to fully understand what an NOI period is, what it means for a debtor and to stay-suspended creditors, and what it does to the debtor's property, relative to the suggested comparators of a Bankruptcy Assignment or Bankruptcy Order.

A debtor which has filed an NOI is not rendered bankrupt by that bid for creditor protection. By design, the NOI, which is available only to commercial actors under Division 1 of the BIA, is intended to provide the restructuring insolvent enterprise with relief from creditor enforcements, while it formulates a path forward, ideally one which does not result in its bankruptcy or the divestiture of its assets to a Trustee, for division amongst creditors.

An "NOI debtor" retains full title to and control over its assets and corporate levers, unlike a bankrupt which relinquishes all of those assets and functions to a Trustee, which Trustee also takes newfound priority over the interests of judgment and other creditors of the debtor.

An NOI debtor is able, during the pendency of an NOI, to sell all or some of its own assets under Court supervision, which can pass to a third party purchaser without ever having touched the hands of the Administrator under the NOI. A bankrupt may not do that, and any sale in the context of bankruptcy is brokered by the Trustee (with Inspector approvals as required), and not by the bankrupt debtor itself.

An NOI debtor may ultimately avoid bankruptcy and all of its consequences, which include the ceding of corporate control and title to property to a Trustee. Not so for a bankrupt.

Unlike a bankrupt, an NOI debtor can even (if it qualifies) convert its NOI proceedings to proceedings under the CCAA, which avenue then could lead to a restructuring under an approved Plan of Arrangement without bankruptcy, a comprehensive liquidation of assets (with or without a bankruptcy to follow), share divestiture complete with a "reverse vesting order", and all manner of other potential outcomes. Such CCAA proceedings also do not involve automatic bankruptcy if a Plan is refused.

Why then should something with the gravity and irreversible impacts of Section 70 on a debtor's property become activated during an NOI? The answer is: it need not become activated, and *has not become activated*. Such is not appropriate where the debtor retains title to and control over its own assets and business affairs.

We openly question why, if Section 70 had truly swept into effect on the day LCB filed its NOI, could LCB only sell the Warehouse *free and clear of all charges* with the aid of Section 65.13 and the vesting provisions of subsection 7 thereof (addressing for continuation against proceeds BMO's LTA recorded Judgment charge), and not simply by way of a Trustee's Deed? This fact alone suggests that Section 70 has not descended into play during an NOI period, which in the law of debtor-rehabilitative insolvency is comparable only to a stay-insulated CCAA process of indefinite length, which exists in advance of the filing of a CCAA Plan.

It cannot be denied that Section 70's effects on a bankrupt's real property, once activated by the LTA-recording of a Bankruptcy Assignment Certificate or Bankruptcy Order pursuant to Section 74, are profound and permanent. By contrast, the NOI period is one involving great flexibility for the debtor making use of it, which can pivot in any number of

directions. There is no reasonable comparison between a Bankruptcy Order or Assignment (with its irreversible consequences for a debtor and its assets) and an NOI period, which is a time for negotiation with creditors, with a view to avoiding bankruptcy.

Mutatis Mutandis:

It may be said by other claimants of the proceeds (or by LCB, which seems unusually concerned) that Section 66 of the BIA renders other provisions of the legislation, "*with such modifications as the circumstances require*", applicable to "*proposals made under this division.*"

With respect, we must not unduly expand the Section 66 language by which Proposals can be made the subject of other BIA provisions *with necessary modifications*. No modification can be so bold as to *equate creditor protection with bankruptcy*, and Section 66 was not written as a license to call an apple an orange.

Just as a Receivership Order made under Section 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 Section 65.13, which respect the rights of existing charge-holders. If it was intended that a Trustee's interest at all times *hovered above* a Section 65.13 sale, sweeping proceeds away from the holders of charges or other monetizable restrictions on sale, we suggest that such would be made express in one or both of Section 70 or 65.13, or (more to the point) *such would remove the need for Section 65.13 in the first place*, as a Trustee's Deed would presumably control the matter. Such is simply not the case.

Even if this language was held to draw in Section 70 to situations outside of Bankruptcy Assignments or Bankruptcy Orders (which wording was never added to this longstanding provision), we note that we are not in a "Proposal" setting anyway, simply by being at this NOI stage (or *were not at least,* at the time the September 22, 2021 Motion was filed, to the extent LCB files a Proposal before this matter is heard). We may never reach that stage either, and the *NOI phase is not to be conflated with a proposal.* A proposal must be "made" before it *is a proposal*.

The BIA defines a "proposal" as follows at Section 2:

> *"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;" (emphasis added)

The definition of a Proposal is clear that the condition of being *involved in the Proposal context* is not activated until a Proposal is actually filed. This is meaningful, and among other things means that an NOI (during which period no Proposal has been "made") is not enough to trigger, for instance, Crown claim subordination under Section 86 of the BIA, which is activated only "*in relation to a bankruptcy or proposal*". Parliament understands the difference between NOIs and proposals, and also the difference between NOIs and bankruptcies.

So must we, as stewards of the BIA and its important processes.

We suggest Parliament was intentional in defining proposals as it has done, and has distinguished the NOI period from the proposal period, as it has also done between Section 69 (stay of proceedings for NOI period only) and 69.1(stay of proceedings arising upon filing of a proposal). There is a clear distinction to be drawn between the two conditions in which an insolvent debtor finds itself under Division 1. By nature, the NOI period is a mid-station between various other process avenues, which could even include a springboard to CCAA proceedings. The NOI phase alone is by no means comparable to a bankruptcy, or even a proposal situation.

Section 70 does not mention proposal situations at all (let alone NOI periods which may precede them), however, *so to shoehorn that consequential provision of the BIA into an NOI situation requires two separate speculative leaps*.

On the one hand, it involves the reading into the ancient Section 70 (which has stood unchanged through and after the 1992 introduction of the Division 1 proposal mechanism without being amended to capture proposals) of the words "*or a proposal*"; and secondly would involve (failing clarity in the wording of Section 70) a strained interpretation of Section 66, which also must twist the definition of "*proposal*" beyond its four corners, to *include an NOI*...a state of play existing *before* a "proposal is made" (i.e. the BIA's definition of a proposal). In this context, "made" means prepared, filed with the Office of the Superintendent of Bankruptcy Canada, and presented to creditors.

Opponents of BMO therefore need to make two giant leaps of interpretation to succeed. They must: (a) have the Court read into Section 70 the words "or a proposal"; and failing that, via Section 66, (b) they must have the Court agree to expand the defined term "proposal" to mean not just one which has been "made", but one which might someday be made...or not (an NOI). That's a bridge too far (or two bridges).

Again, Section 66 was not intended to support gymnastic statutory interpretation. Not every provision of the BIA can be applied to a proposal situation, *let alone* to an NOI situation.

The *Phillips* Case:

Challengers also argue, because Section 70 has been applied to a vastly different Division 2 Consumer Proposal situation (where a proposal is in fact "made" on day one, without exception under that device), the same should also apply to the Division 1 NOI period. In particular, the case of ***Toronto-Dominion Bank v. Phillips*** 2014 CarswellOnt 11878 (Ont. C.A.) ("***Phillips***") has been cited as an example of Section 70 finding application to a Consumer Proposal, which was made under Division 2.

BMO points out the following:

(a) *LCB is not in any kind of Proposal situation*; No Proposal has yet been filed and none may ever be filed, this is an NOI phase. Division 2 of the BIA for Consumer Debtors offers no NOI period, involves an immediately presented Proposal, and offers no access to s. 65.13 sales of assets. These points alone render the comparison thin.

(b) It is an unduly broad interpretation of the BIA to equate a "*Bankruptcy Assignment or Bankruptcy Order*" with the filing of an NOI. Assuming one is ever "made" to creditors, a Proposal which is approved by creditors and the court avoids a bankruptcy and its impacts on a debtor, it doesn't create those conditions.

(c) Assets under an NOI which becomes a presented Proposal do not vest in the NOI administrator, as they do in a trustee in bankruptcy, unless the Proposal ultimately

presented so provides. The NOI period is unique to a Division 1 Proposal, and creates a stasis period of up to 6 months where a debtor has not filed a Proposal, is not bankrupt, can sell its assets with permission, and could even move matters up to a CCAA if it so qualified (though, notably, it is too late to do so after a Proposal is filed). It is a temporary condition in which a host of other avenues avail to a debtor, bounded only by the creativity of counsel and the supervising Court. Division 2 offers none of that, and Parliament was clear that it is not cross-referable with Division 1.

(d) From and after 1992, when Divisions 1 and 2 were added to the BIA, Parliament had open to it to include within the scope of Section 70 items broader than a bankruptcy situation, for instance a "proposal" or, looking even further afield, an NOI filing, and chose not to do so.

We suggest this non-amendment of Section 70 is meaningful, where other key BIA provisions (such as Section 86) were so amended to make them specifically applicable to proposal situations. It bespeaks a recognition that the drastic consequences of Section 70 ought to be reserved for bankruptcies.

(e) If Parliament had intended for Section 70 to flatten charges recorded by judgment creditors against lands upon filing an NOI, it not only could have said so, but would not have in 2009 introduced Section 65.13(7), which expressly preserves interests against proceeds of charged assets which are sold, either during an NOI period *or after a proposal is filed*. The Court should resist the comparison of the sort made in a Division 2 context in ***Phillips***.

(f) The Trustee has, pursuant to Section 74 of the BIA (as a qualifier of Section 70) no freestanding immunity from the registration provisions of provincial real property laws of general application. This is a priority conferred upon a Trustee only after conditions are met for its activation (a bankruptcy), which has no impact on real property in any event, until the applicable Assignment Certificate or Bankruptcy Order is formally recorded at the land registry.

An interest in real property must be publicly *evidenced* to stand against third parties, as with any other purported priority registration against land. With an NOI alone, there is *nothing to register with the Land Titles Registrar*, as there is when a Bankruptcy Assignment Certificate or Bankruptcy Order is issued. The trigger for Section 70 (by way of s. 74), is *the act of recording a Bankruptcy Assignment or Order*. There is nothing so recordable in an NOI setting.

The Ontario Court of Appeal decision in ***Phillips*** did not involve a Division 1 NOI situation or consideration of Section 65.13 sale approval and vesting concepts, as we have here, but a Division 2 Consumer Proposal. The two devices cannot simply be blurred into one, as is being urged by BMO's opponents. It's another scuffle in the dirt, inches behind second base, in a lazy bid to turn two.

A Consumer Proposal case and an NOI case are not comparable regarding Section 70 of the BIA, a provision which is not effective here, as reinforced by the survival of charges such as that of BMO under Section 65.13 of the BIA. In sum:

- An NOI is not a bankruptcy scenario, *and may never become one.*
- An NOI is not a Proposal scenario, *and may never become one.*

- Division 2 Proposals do not involve an NOI period of up to 6 months where a debtor retains possession and can liquidate assets, without ever filing a Proposal. Rather, a Division 2 Consumer Proposal "is made" on day one (because it has to be filed at the opening of the process), and thus one could rightfully call a Division 2 situation a "proposal scenario" immediately.

- An NOI interim sale is a unique device, comparable to nothing other than a Section 36 CCAA sale process during an Initial Order stay period.

- Division 2 Proposals have no access to Section 65.13, and Parliament added that section in recognition of the fact that an NOI debtor, unlike a consumer debtor, *can do all sorts of things with its assets*, is not bankrupt and may never become bankrupt, has not yet and may never file a Proposal, and can even convert its own proceedings to a CCAA restructuring.

- The comparison between the two BIA Proposal Divisions so as to shoehorn the ***Phillips*** *case* into relevance is inappropriate. Division 1 and Division 2 have *no dialogue with one another and are not proper comparators.* To draw that connection would unduly strain the intentions of Parliament.

- We noted up ***Phillips*** and confirmed that it has *never been applied by extension to a Division 1 situation involving an NOI or a Division 1 Proposal,* and has never been cross-referenced with Section 65.13(7).

- If the intentions of Parliament are in doubt, *which we say they are not*, then one must look to compare the effects of Section 70 with the effects of Section 65.13 head to head to see which system was intended to prevail during an NOI. Clearly, Section 65.13(7) expressly preserves security, charges and other restrictions on encumbered assets being sold during an NOI period. The draft Sale Approval and Vesting Order (like the June 29, 2021 First Sale Approval Order which came before it) is even expressly binding in this regard on a Trustee in Bankruptcy, should LCB suddenly become bankrupt.

- If those *charges had already been relegated to junior status by Section 70 at the start of the NOI period*, such would be inconsistent with the very existence of Section 65.13(7), which confirms the continuing effectiveness of them against converted proceeds. If there was such a disconnect between the two BIA sections, proper statutory interpretation suggests we are to be governed by the most recently enacted statutory provision. Section 65.13 is only 12 years old, added in 2009, and Section 70 (formerly s. 50 of the 1970 *Bankruptcy Act*, and Section 29 of the 1927 iteration of that statute) is ancient by comparison.

  Section 70 never evolved to expand its scope, and because Parliament is a deliberative body which must be taken to mean both what it says, and *what it does not say*, we must defer to the wording as it stands and not drastically re-style it to suit a claimant's wishes or convenience.

Section 70 was not intended to be stretched so far, and the gap-filling provision of Section 66 is best reserved for situations where there are *actual gaps to fill.*

Parliament was clear in its wording, and clear in its design. If a distribution hearing were ever to be held in this matter, BMO would urge that adjudicator to *refrain from doing the remarkable* in this case; which would (to the best of our knowledge) be to become the first Court

in Canada to expand the reach of Section 70 not only to a Division 1 Proposal (which must be "*made*" to exist), but to an NOI period, which may or may not ever lead to a Proposal. The position urged upon the Court by BMO's opponents to date promotes an interpretation of the BIA which is unduly strained. That sort of logic, if accepted, might create unhelpful jurisprudence, to say nothing of the 1,000 insolvency academic scholars'-ships it would launch.

Section 65.13's very existence at all stands as evidence that Section 70 does not apply to an NOI situation. If a Trustee's senior interest in lands of an NOI debtor had already descended under that provision simply upon the NOI being filed (as MNP believes to be the state of the law), a mere Trustee's Deed would be all that was required to sell the subject lands, "as is and where is". There would be no need for the vesting mechanism of Section 65.13 and its clear (and disjunctive) respect for "security", "charges" and "other restrictions" affecting property to be sold, which is comparable only to a CCAA s. 36 situation or the Receivership Sale Approval and Vesting Order situation.

Those charges have been preserved by Order of this Court once already, and stand to be re-confirmed. To do justice by those recognized charge-holders, no subsequent actions after the Sale Approval and Vesting Order should undermine this recognized priority against the proceeds. The *status quo* which should govern is that as it stands during this NOI period featuring the use of Section 65.13.

Life goes on for a corporate debtor which has filed an NOI. Business as usual, under the supervision of an NOI Administrator, continues during this unique period of strategic negotiations. This is nothing like the case of a bankruptcy, where the reins of corporate control shift to the Trustee, along with proprietary interests in all of the bankrupt's real, personal, and intellectual property.

The wording of paragraph 11 of the draft Sale Approval and Vesting Order is also important in this regard. The vesting component of the transaction (being *free and clear title to the purchaser, conditional upon ongoing protection of the interests of defeated encumbrancers in the resulting proceeds*) was made binding upon a Trustee in the event of the subsequent bankruptcy of LCB. The terms and conditions of the vesting which are made binding on the NOI Administrator (even if it becomes a Bankruptcy Trustee in respect of LCB) would include a surviving charge in favour of BMO against the proceeds. The Sale Approval and Vesting Order, which purports to galvanize party rights as they stood "*...immediately prior to the sale, as if the Purchased Assets had not been sold...*" is immutable until qualified by further Order of the Court, and cannot be defeated by a bankruptcy (which arguably could permit the invocation of Section 70) or any Proposal which might be filed in the interim by LCB.

It is somewhat unusual in a vesting situation involving an insolvent enterprise for net proceeds to trickle down beyond the satisfied interests of mortgagees, but this is the anticipated result of the sale of the Warehouse, if fair and reasonable consideration has been allocated to this valuable asset in accordance with Section 65.13(4)(f) of the BIA.

We hope it will be.