BOYNECLARKE
LAWYERS | LLP

DELIVERY VIA:
E-mail: Amanda.Hawboldt@courts.ns.ca
COURIER TO PROTHONTARY

Tim Hill, Q.C.
Direct Dial: (902) 460-3442
Facsimile: (902) 463-7500
E-mail: thill@boyneclarke.ca

FILE REFERENCE:
153597

June 24, 2021

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

My Lord:

Re Hfx. No. 507069: Atlantic Crane & Material Handling Limited ("Atlantic Crane"), Labrador Cranes 2005 Limited ("Labrador Cranes"), and LCB Rentals Limited ("LCB") (collectively the "Atlantic Crane Group").

The following submission filed on behalf of the Atlantic Crane Group is responsive to the somewhat lengthy arguments proffered in the Bank of Montreal ("BMO") submission of June 22, 2021, which submission culminates in an invitation for the Court to direct that "net proceeds ought to be distributed to BMO pursuant to its recorded New Brunswick judgment". In essence, BMO invites the court at this early stage to determine BMO's entitlement and order payment, prior to any claims process being initiated in the proposal.

It is submitted that such is clearly inappropriate.

The Atlantic Crane Group does not seek to in any way to compromise BMO's existing position at law in the proposal process which, notwithstanding the position of BMO, is that of an unsecured creditor.

The Atlantic Crane Group is prepared to agree to any order which provides for the sale and extinguishment of the existing mortgage and judgment. The Business Development Bank of Canada mortgage is not in issue, and it is suggested should be paid from the sale proceeds. BMO's entitlement as an unsecured creditor should await determination at a later date. In the meantime, the order can provide that BMO's entitlement as a creditor of LCB Rentals Limited ("LCB") shall be determined as same existed at the date of the sale. That should assuage BMO's anguish, with the issue of whether there should be a joint proposal of the Atlantic Crane Group or three individual proposals to be argued at a later date.

Section 70(1) of the *Bankruptcy and Insolvency Act*[1] has application here:

> 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)

The court's attention is respectfully drawn to *Toronto-Dominion Bank* v. *Phillips*[2] where the court commented as follows with respect to the position of registered judgment creditors in the context of a proposal process:

> 25 This appeal also involves a writ of execution held by BMO, the execution creditor.
>
> 26 Section 1 of the *Execution Act* defines "execution creditor" as including "a person in whose name or on whose behalf a writ of execution is issued on a judgment, or in whose favour an order has been made for the seizure and sale of personal property, real property or both real property and personal property."
>
> 27 In bankruptcy, it has long been established that an execution creditor is not a secured creditor: see *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), at p. 197; *Sklar, Re* (1958), 37 C.B.R. 187 (Sask. C.A.) at p. 194; *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1976), 12 O.R. (2d) 465 (Ont. C.A.), at p. 476; and *James Hunter & Associates Inc. v. Citifinancial Inc.* (2007), 40 C.B.R. (5th) 149 (Ont. S.C.J.), at para. 22. Rather, unless the execution has been completed by payment to the creditor, the debt of the execution creditor is treated rateably with other unsecured debt.
>
> 28 This jurisprudence relies in part on the need to treat unsecured creditors equally under the bankruptcy regime and on s. 70 of the *BIA* and its predecessor, s. 50 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. Section 70(1) of the *BIA* is found under the sub-heading *General Provisions* in Part IV of the *BIA*. It states:

---

[1] RSC 1985, c. B-3, as am ("*BIA*")
[2] 2014 ONCA 613 (attached)

> 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 in original.]

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

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

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

31 Section 27 of the *Mortgages Act* therefore could not serve to elevate BMO's status to achieve priority over the appellant's other unsecured creditors. The decisions of *National Bank of Canada v. Young*, [2002] O.J. No. 3823 (Ont. S.C.J.) and *Polsak, Re* (1978), 19 O.R. (2d) 570 (Ont. H.C.), do not assist. The former did not engage the provisions of the *BIA*, and the latter involved a secured creditor who clearly took priority over any claim of the mortgagors to residue.

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

It is submitted that it is clear and settled law that section 70(1) of the BIA has application in the proposal process, regardless of Division. BMO is an unsecured creditor, and its judgment no longer charges the New Brunswick property. If there are three individual proposals, and the LCB proposal fails resulting in a deemed assignment in bankruptcy, presumably the funds from the sale will be distributed by the trustee amongst LCB's

BOYNECLARKE
LAWYERS | LLP

creditors in accordance with the provisions of the *BIA*.

In summary, despite the length and tenor of BMO's submissions, there is no justiciable reason to elevate BMO's status to that long since determined for judgment creditors. BMO is unsecured, and the Court should not order that the "net proceeds ought to be distributed to BMO pursuant to its recorded New Brunswick judgment".

All of which is respectfully submitted.

BOYNECLARKE LLP

Tim Hill

cc. The Service List

MNP Limited
Attention: J. Eric Findlay, CIRP, LIT, CPA
Senior Vice President
1801 Hollis Street
Suite 1400
Halifax, NS B3J 3N4

eric.findlay@mnp.ca

BDC Capital Inc.
c/o Sara L. Scott, counsel
Stewart McKelvey
1741 Lower Water St Suite 600,
Halifax, NS B3J 0J2

sscott@stewartmckelvey.com

BOYNECLARKE
LAWYERS | LLP

Toronto Dominion Bank
c/o D. Bruce Clarke, Q.C., counsel
Burchells LLP
1801 Hollis St., Suite 1800
Halifax, B3J 3N4

bclarke@burchells.ca

Bank of Montreal
c/o Ben R. Durnford
McInnes Cooper
1969 Upper Water Street, Suite 1300
Halifax, B3J 2V1

ben.durnford@mcinnescooper.com

2014 ONCA 613
Ontario Court of Appeal

Toronto-Dominion Bank v. Phillips

2014 CarswellOnt 11878, 2014 ONCA 613, 122 O.R. (3d) 181, 17 C.B.R. (6th) 127, 243 A.C.W.S. (3d) 533, 325 O.A.C. 141, 376 D.L.R. (4th) 566, 46 R.P.R. (5th) 163

The Toronto-Dominion Bank, Applicant and Cindy Louise Phillips and Richard Joseph Phillips, Respondents (Appellant and Respondent, respectively)

J. MacFarland, S.E. Pepall, G.R. Strathy JJ.A.

Heard: April 15, 2014
Judgment: August 29, 2014
Docket: CA C58084

Proceedings: reversing *Toronto-Dominion Bank v. Phillips* (2013), 37 R.P.R. (5th) 234, 2013 CarswellOnt 15685, 2013 ONSC 7016, 7 C.B.R. (6th) 142, Gray J. (Ont. S.C.J.)

Counsel: Gustavo F. Camelino, for Appellant, Cindy Louise Phillips
Michael Odumodu, for Respondent, Richard Joseph Phillips

Subject: Civil Practice and Procedure; Constitutional; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.9 Consumer proposals

Real property
I Interests in real property
I.3 Co-ownership
I.3.d Termination of co-tenancy
I.3.d.iv Miscellaneous

Real property
VII Mortgages
VII.20 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Consumer proposals
Creditor bank B ("execution creditor") obtained default judgment against debtors CP and RP, and filed writ of seizure and sale — Bank T ("mortgagee") sold property jointly owned by debtors after default under power of sale, with surplus remaining — CP filed consumer proposal under Bankruptcy and Insolvency Act after default of mortgage but prior to sale — Mortgagee brought application to pay surplus of $52,295 into court, and debtors agreed that $19,324 would be paid out to execution creditor but disputed manner — Application judge held that execution creditor was to be paid before there was any residue owing to debtors, and remaining balance should be split equally between CP and RP, such that each was entitled to $16,108 — CP appealed — Appeal allowed; CP entitled to $25,772 and RP entitled to $6,445 — When CP's proposal was filed and approved, execution creditor's debt was unsecured and its claim against CP was stayed — Section 27 of Mortgages

Act could not elevate execution creditor's status as unsecured creditor to achieve priority over CP's other unsecured creditors — It was open to execution creditor to realize joint debt against RP, as any interest of RP was not affected by stay — Debtors consented to order authorizing payment to execution creditor, which completed execution and severed joint tenancy — Payment to execution creditor could only be from RP's share of surplus — Application judge erred in law in ignoring stay and in not finding severance of joint tenancy.

Real property --- Mortgages — Miscellaneous
Creditor bank B ("execution creditor") obtained default judgment against debtors CP and RP, and filed writ of seizure and sale — Bank T ("mortgagee") sold property jointly owned by debtors after default under power of sale, with surplus remaining — CP filed consumer proposal under Bankruptcy and Insolvency Act after default of mortgage but prior to sale — Mortgagee brought application to pay surplus of $52,295 into court, and debtors agreed that $19,324 would be paid out to execution creditor but disputed manner — Application judge held that execution creditor was to be paid before there was any residue owing to debtors, and remaining balance should be split equally between CP and RP, such that each was entitled to $16,108 — CP appealed — Appeal allowed; CP entitled to $25,772 and RP entitled to $6,445 — When CP's proposal was filed and approved, execution creditor's debt was unsecured and its claim against CP was stayed — Section 27 of Mortgages Act could not elevate execution creditor's status as unsecured creditor to achieve priority over CP's other unsecured creditors — It was open to execution creditor to realize joint debt against RP, as any interest of RP was not affected by stay — Debtors consented to order authorizing payment to execution creditor, which completed execution and severed joint tenancy — Payment to execution creditor could only be from RP's share of surplus — Application judge erred in law in ignoring stay and in not finding severance of joint tenancy.

Real property --- Interests in real property — Co-ownership — Termination of co-tenancy — Miscellaneous
Creditor bank B ("execution creditor") obtained default judgment against debtors CP and RP, and filed writ of seizure and sale — Bank T ("mortgagee") sold property jointly owned by debtors after default under power of sale, with surplus remaining — CP filed consumer proposal under Bankruptcy and Insolvency Act after default of mortgage but prior to sale — Mortgagee brought application to pay surplus of $52,295 into court, and debtors agreed that $19,324 would be paid out to execution creditor but disputed manner — Application judge held that execution creditor was to be paid before there was any residue owing to debtors, and remaining balance should be split equally between CP and RP, such that each was entitled to $16,108 — CP appealed — Appeal allowed; CP entitled to $25,772 and RP entitled to $6,445 — When CP's proposal was filed and approved, execution creditor's debt was unsecured and its claim against CP was stayed — Section 27 of Mortgages Act could not elevate execution creditor's status as unsecured creditor to achieve priority over CP's other unsecured creditors — It was open to execution creditor to realize joint debt against RP, as any interest of RP was not affected by stay — Debtors consented to order authorizing payment to execution creditor, which completed execution and severed joint tenancy — Payment to execution creditor could only be from RP's share of surplus — Application judge erred in law in ignoring stay and in not finding severance of joint tenancy.

Table of Authorities

Cases considered by *S.E. Pepall J.A.*:

Arnold Bros. Transport Ltd. v. Murphy (2013), 2013 MBQB 137, [2013] 12 W.W.R. 377, 2013 CarswellMan 374, 295 Man. R. (2d) 66, 34 R.P.R. (5th) 217 (Man. Q.B.) — distinguished

Cameron Estate, Re (2011), 10 R.P.R. (5th) 326, 2011 CarswellOnt 12323, 2011 ONSC 6471, (sub nom. *Cameron, Re)* 108 O.R. (3d) 117, 83 C.B.R. (5th) 272, 343 D.L.R. (4th) 370 (Ont. S.C.J.) — referred to

Cohen, Re (1948), 29 C.B.R. 111, [1948] O.W.N. 540, 1948 CarswellOnt 104 (Ont. S.C.) — referred to

Cohen, Re (1948), 29 C.B.R. 163, [1948] O.W.N. 781, [1948] 4 D.L.R. 808, 1948 CarswellOnt 109 (Ont. C.A.) — referred to

Dilollo, Re (2013), 2013 CarswellOnt 13607, 2013 ONCA 550, 6 C.B.R. (6th) 112, (sub nom. *Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd.)* 117 O.R. (3d) 81, (sub nom. *Dilollo (Bankrupt), Re)* 310 O.A.C. 282, 368 D.L.R. (4th) 1 (Ont. C.A.) — referred to

Hancor Inc. v. Systèmes de Drainage Modernes Inc. (1995), (sub nom. *Hancor Inc. v. 118353 Canada Ltée)* 191 N.R. 360, (sub nom. *Hancor Inc. v. 118353 Canada Ltée)* 106 F.T.R. 239n, 1995 CarswellNat 1539, 1995 CarswellNat 1275, 37 C.B.R. (3d) 117, (sub nom. *Forest v. Hancor Inc.)* [1996] 1 F.C. 725 (Fed. C.A.) — referred to

James Hunter & Associates Inc. v. Citifinancial Inc. (2007), 2007 CarswellOnt 8400, 40 C.B.R. (5th) 149 (Ont. S.C.J.) — referred to

Maroukis v. Maroukis (1984), [1984] 2 S.C.R. 137, 34 R.P.R. 228, 12 D.L.R. (4th) 321, 54 N.R. 268, 5 O.A.C. 182, 41 R.F.L. (2d) 113, 1984 CarswellOnt 268, 1984 CarswellOnt 803 (S.C.C.) — considered

National Bank of Canada v. Young (2002), 4 R.P.R. (4th) 79, 2002 CarswellOnt 3277 (Ont. S.C.J.) — distinguished

Ontario Development Corp. v. I.C. Suatac Construction Ltd. (1976), 12 O.R. (2d) 465, 22 C.B.R. (N.S.) 42, 69 D.L.R. (3d) 353, 1976 CarswellOnt 50 (Ont. C.A.) — referred to

Polsak, Re (1978), 1978 CarswellOnt 176, 19 O.R. (2d) 570, 27 C.B.R. (N.S.) 227, 85 D.L.R. (3d) 748 (Ont. H.C.) — distinguished

Power v. Grace (1932), [1932] O.R. 357, [1932] 2 D.L.R. 793, 1932 CarswellOnt 104 (Ont. C.A.) — considered

Quebec (Attorney General) v. Bélanger (Trustee of) (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue)* 8 C.B.R. 579 (Canada P.C.) — referred to

Royal & SunAlliance Insurance Co. v. Muir (2011), 2011 CarswellOnt 6852, 71 E.T.R. (3d) 37, 9 R.P.R. (5th) 104, 2011 ONSC 2273 (Ont. S.C.J.) — considered

Sirois v. Breton (1967), 62 D.L.R. (2d) 366, [1967] 2 O.R. 73, 1967 CarswellOnt 162 (Ont. Co. Ct.) — distinguished

Sklar, Re (1958), 26 W.W.R. 529, 15 D.L.R. (2d) 750, 1958 CarswellSask 4, 37 C.B.R. 187 (Sask. C.A.) — referred to

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3
s. 50 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. III, Div. I — referred to

Pt. III, Div. II — referred to

s. 66(1) — considered

s. 66.11 "consumer proposal" [en. 1992, c. 27, s. 32(1)] — considered

s. 66.12(3) [en. 1992, c. 27, s. 32(1)] — considered

s. 66.13 [en. 1992, c. 27, s. 32(1)] — referred to

s. 66.28(2)(a) [en. 1992, c. 27, s. 32(1)] — considered

s. 66.4(1) [en. 1992, c. 27, s. 32(1)] — considered

s. 69.2(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.2(1)(a) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.2(4) [en. 1992, c. 27, s. 36(1)] — considered

s. 70 — considered

s. 70(1) — considered

Execution Act, R.S.O. 1990, c. E.24
Generally — referred to

s. 1 "execution creditor" — considered

Mortgages Act, R.S.O. 1990, c. M.40
s. 27 — considered

Authorities considered:

Lem, Jeffrey W. and Rosemark Bocska, *Halsbury's Laws of Canada — Real Property*, 1st ed. (Markham, Ont.: LexisNexis Canada, 2012)

APPEAL by debtor from judgment reported at *Toronto-Dominion Bank v. Phillips* (2013), 2013 ONSC 7016, 2013 CarswellOnt 15685, 7 C.B.R. (6th) 142, 37 R.P.R. (5th) 234 (Ont. S.C.J.), dividing surplus funds after sale of property.

***S.E. Pepall J.A.*:**

1 This appeal addresses the interaction between a consumer proposal under s. 66.13 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *BIA*"), and a writ of execution registered against joint debtors, one of whom has filed a consumer proposal.

2 The appellant, Cindy Louise Phillips, the consumer debtor who filed the proposal, submits that after payment to the execution creditor, the application judge erred in ordering that the remaining sum of $32,217.64 be distributed equally between her and the respondent, her estranged husband, Richard Joseph Phillips.

3 For the reasons that follow, I agree with the appellant.

A. Facts

(1) Joint Indebtedness

4 The appellant and the respondent were spouses and owned residential property in Guelph, Ontario as joint tenants. In November 2008, they granted a mortgage on the property in the amount of $268,000 to the Toronto-Dominion Bank ("TD").

5 The appellant incurred debt using an overdraft facility on the parties' joint bank account with the Bank of Montreal ("BMO"). On April 6, 2011, BMO obtained a default judgment against the appellant and the respondent in the amount of $32,734.37 plus costs of $1,161.15.

6 On April 13, 2011, BMO filed a writ of seizure and sale with the Sheriff of the County of Wellington (Guelph).

7 The mortgage in favour of TD went into default. On November 5, 2012, TD commenced power of sale proceedings.

8 In December 2012, the appellant and the respondent separated.

(2) Consumer Proposal

9 On February 1, 2013, the appellant filed a Division II consumer proposal pursuant to s. 66.13 of the *BIA*. Hoyes, Michalos & Associates Inc. was appointed as the proposal administrator. Notice of the proposal was provided to the appellant's creditors, including BMO. The proposal contemplated payment of secured creditors and preferred claims and payment of $18,000 over five years for the benefit of unsecured creditors. Property would remain vested in the appellant. The appellant's statement of affairs did not mention any interest in the Guelph property. The appellant stated that at the time she filed her proposal, she was unaware that there would be any equity left in the Guelph property.

10 BMO filed two claims in the proposal proceedings.

11 BMO and the other creditors that participated voted in favour of the proposal. On March 18, 2013, the appellant's proposal was deemed to have been approved by the court. Under the proposal, BMO was entitled to a dividend of $3,682.79.

12 On April 4, 2013, TD sold the property. There was a surplus of $52,295.14 after payment of its mortgage and associated costs.

13 The proposal administrator advised the appellant's creditors of the surplus funds and gave them an opportunity to request a meeting of creditors in order to amend the proposal. No creditor responded.

(3) TD's Court Application

14 TD applied to pay the surplus funds into court less $750 on account of its costs of the application, leaving a surplus of $51,545.14. On the return of the application, the application judge heard submissions from the parties to the application and from BMO. The appellant and the respondent agreed that the sum of $19,327.50 would be paid out of the surplus to the Bank of Montreal, and the application judge so ordered. On payment, BMO withdrew its claim in the proposal proceedings. According to the appellant's oral submissions before this court, the payment to BMO was without prejudice to the positions of the appellant and the respondent on the proper allocation of the remaining balance of $32,217.64.

15 Before the application judge, the respondent argued that after TD and BMO had been paid, the remaining balance of $32,217.64 should be split equally between the appellant and the respondent. In contrast, the appellant argued that, due to the operation of the stay of proceedings imposed by s. 69.2(1) of the *BIA*, 50% of the remaining balance should be paid to her, and BMO's writ should be paid out of the respondent's 50% share. Under this proposed distribution plan, the appellant would receive $25,772.57 and the respondent would receive $6,445.07, which is the balance remaining after payment to the appellant and BMO.

16 The motion judge ordered distribution of the funds in accordance with the scheme proposed by the respondent. Applying s. 27 of the *Mortgages Act*, R.S.O. 1990, c. M.40, and provisions of the *Executions Act*, R.S.O. 1990, c. E.24, he determined that a writ of execution created a right to or an interest in land. As such, BMO was a subsequent encumbrancer within the meaning of s. 27 of the *Mortgages Act* and had to be paid before there was any residue owing to the appellant and the respondent.

B. Grounds of Appeal

17 The appellant submits that the application judge erred in finding that an execution creditor is a subsequent encumbrancer within the meaning of s. 27 of the *Mortgages Act* and erred in respect of BMO's right to enforce its writ against her. It is her position that BMO's claim against her was stayed as a result of s. 69.2(1) of the *BIA*. Accordingly, BMO could only realize against the respondent's share of the residue remaining after payment of the mortgagee, TD. As such, the respondent is entitled to $6,445.07 and the appellant is entitled to $25,772.57.

18 The proposal administrator is funding this appeal on behalf of the appellant, who has agreed that her interest in the surplus will be paid to the administrator to pay its fees and to fund payments due under the proposal. This would include any amendments that may be agreed upon between the appellant and her creditors as a result of the disclosure of the existence of

the surplus funds. In the event that there is a balance left over, it would be paid to the appellant.

C. Analysis

(1) Proposals

19 Under the *BIA*, insolvency may be addressed by proposals and by bankruptcy. In general terms, a proposal provides a debtor with an opportunity to restructure debt, whereas bankruptcy provides a mechanism for liquidation of assets.

20 Proposals enable debtors to make arrangements with their creditors, including settlement of debts and extensions of time for payment. They are available under Divisions I and II of Part III of the *BIA*. Division I proposals are available to an insolvent or bankrupt debtor, including a corporation. A Division II proposal, which is at issue in this appeal, is known as a consumer proposal. A consumer proposal is available to an insolvent or bankrupt individual who has indebtedness of not more than $250,000 (or any other prescribed amount) excluding debts secured by the individual's principal residence.

21 Consumer proposals are described in s. 66.11 and following of the *BIA*. A consumer proposal is to be made to the creditors of the debtor generally: s. 66.12(3). A consumer proposal that is accepted, or deemed to have been accepted, by the creditors, and approved, or deemed to have been approved, by the court, is binding in respect of all unsecured claims: s. 66.28(2)(a).

22 Unlike a bankruptcy where the debtor's property vests in the trustee in bankruptcy, in a proposal property may remain with the debtor. Like a bankruptcy, however, a stay of proceedings is available to a debtor on the filing of a consumer proposal. Section 69.2(1) of the *BIA* states:

> [O]n the filing of a consumer proposal under subsection 66.13(2) or of an amendment to a consumer proposal under subsection 66.37(1) in respect of a consumer debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until
>
> (a) the consumer proposal or the amended consumer proposal, as the case may be, has been withdrawn, refused, annulled or deemed annulled; or
>
> (b) the administrator has been discharged.

23 Section 69.2(4) exempts secured creditors from the stay, although in appropriate circumstances, the court may extend the application of the stay to secured creditors as well.

24 Section 69.2(1) therefore imposes a comprehensive prohibition on remedies against the debtor or the debtor's property once a consumer proposal has been filed. The stay includes a prohibition against the commencement or continuation of any action, execution or other proceeding for the recovery of a claim.

(2) Execution Creditor

25 This appeal also involves a writ of execution held by BMO, the execution creditor.

26 Section 1 of the *Execution Act* defines "execution creditor" as including "a person in whose name or on whose behalf a writ of execution is issued on a judgment, or in whose favour an order has been made for the seizure and sale of personal property, real property or both real property and personal property."

27 In bankruptcy, it has long been established that an execution creditor is not a secured creditor: see *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), at p. 197; *Sklar, Re* (1958), 37 C.B.R. 187 (Sask. C.A.) at

p. 194; *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1976), 12 O.R. (2d) 465 (Ont. C.A.), at p. 476; and *James Hunter & Associates Inc. v. Citifinancial Inc.* (2007), 40 C.B.R. (5th) 149 (Ont. S.C.J.), at para. 22. Rather, unless the execution has been completed by payment to the creditor, the debt of the execution creditor is treated rateably with other unsecured debt.

28 This jurisprudence relies in part on the need to treat unsecured creditors equally under the bankruptcy regime and on s. 70 of the *BIA* and its predecessor, s. 50 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. Section 70(1) of the *BIA* is found under the sub-heading *General Provisions* in Part IV of the *BIA*. It states:

> 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.]

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

> All the provisions of this Act, except Division I of this Part, in so far as they are applicable, apply, with such necessary modifications as the circumstances require, to consumer proposals.[1]

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

31 Section 27 of the *Mortgages Act* therefore could not serve to elevate BMO's status to achieve priority over the appellant's other unsecured creditors. The decisions of *National Bank of Canada v. Young*, [2002] O.J. No. 3823 (Ont. S.C.J.) and *Polsak, Re* (1978), 19 O.R. (2d) 570 (Ont. H.C.), do not assist. The former did not engage the provisions of the *BIA*, and the latter involved a secured creditor who clearly took priority over any claim of the mortgagors to residue.

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

(3) Stay of Proceedings

33 Pursuant to s. 69.2(1)(a), BMO's claim against the appellant was stayed once the proposal was filed. The stay of proceedings is akin to the stay imposed in a bankruptcy, which is designed to prevent creditors from gaining an unfair advantage and to allow for an orderly restructuring or liquidation: see *Cohen, Re* (1948), 29 C.B.R. 111 (Ont. S.C.), at pp. 113-14, aff'd [1948] 4 D.L.R. 808 (Ont. C.A.); *Dilollo, Re*, 2013 ONCA 550, 117 O.R. (3d) 81 (Ont. C.A.), at para. 40.

34 Accordingly, I would find that BMO was precluded from executing any remedy against the appellant or her property by virtue of the operation of the statutory stay of proceedings.

(4) Joint Tenancy

35 Having said the above, the appellant and the respondent held the real property as joint tenants. The judgment and execution in favour of BMO was also joint. As such, it would be open to BMO to realize the joint debt as against the respondent, as any interest of the respondent was unaffected by the stay. As Perell J. noted in *Royal & SunAlliance Insurance*

Co. v. Muir, 2011 ONSC 2273, 9 R.P.R. (5th) 104 (Ont. S.C.J.), at para. 23: "Joint tenants have identical undivided interests in the same property. Each joint tenant holds '*totum tenet et nihil tenet*' or '*per mie et per tout*' which means each holds everything and yet holds nothing."

36 The characteristics of a joint tenancy are succinctly described in Jeffrey W. Lem and Rosemark Bocska, *Halsbury's Laws of Canada — Real Property*, 1st ed. (Markham, Ont.: LexisNexis Canada, 2012), at HRP-37:

> There are four essential attributes of a joint tenancy, known as the four unities. A joint tenancy requires:
>
> (1) Unity of Interest — the interest of each joint tenant must be equal in nature, extent and duration;
>
> (2) Unity of title — the interests must arise from the same act or instrument;
>
> (3) Unity of Time — the interests must vest at the same time; and
>
> (4) Unity of possession — the interests must relate to the same piece of property.
>
> A joint tenancy depends on the continuance of the unity of interest, title and possession. The unity of time of vesting only applies to the original creation of the tenancy and cannot be affected by any subsequent act.

37 The continuance of a joint tenancy depends on the maintenance of the unities of title, interest and possession; a destruction of any of these unities leads to a severance: *Power v. Grace*, [1932] O.R. 357 (Ont. C.A.), at p. 360. Severance of a joint tenancy may occur: through the unilateral action of a joint tenant on his or her own share, such as selling or encumbering it; through a mutual agreement between the co-owners to sever the joint-tenancy; or through any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common: Lem and Bocska, at HRP-41.

38 Severance also may occur on bankruptcy. This is because the bankrupt's property vests in the trustee in bankruptcy, and the four unities are therefore not maintained: see *Cameron Estate, Re*, 2011 ONSC 6471, 108 O.R. (3d) 117 (Ont. S.C.J.), at fn. 9.

39 Severance by execution is not so straightforward. Lem and Bocska describe such severance, at HRP-42:

> Seizure of property through lawful execution procedures will sever a joint tenancy. However the mere filing of the writ is insufficient; it must be acted upon. Thus, where the sheriff holds a writ of execution against a joint tenant but does not execute it prior to that tenant's death, the surviving joint tenant inherits the property free from the execution.

40 The appellant argues that the joint tenancy in the surplus was severed such that BMO could only recover from the respondent's 50% interest in the surplus. The appellant submits that the joint tenancy was severed in either one of two ways: as a result of BMO's efforts to collect its debt, or as a consequence of her consumer proposal. She particularly relies on *Power*, *supra* and *Muir*, *supra* in support of her position.

41 The respondent counters with the following: there was no severance; the application judge's determination that the joint tenancy was not severed was a finding of fact; and in any event, the parties' interests are subject to an accounting and the equities of the case. He relies in part on *Arnold Bros. Transport Ltd. v. Murphy*, 2013 MBQB 137, 34 R.P.R. (5th) 217 (Man. Q.B.), and on *Sirois v. Breton*, [1967] 2 O.R. 73 (Ont. Co. Ct.) in support of his position.

42 In *Power*, this court determined that while advertisement of a sale was sufficient to constitute a seizure that severed a joint tenancy, the mere filing of a writ of execution with the sheriff was insufficient. In *Maroukis v. Maroukis*, [1984] 2 S.C.R. 137 (S.C.C.), at p. 143, the Supreme Court stated that *Power* "stands for the proposition that, where a writ of *fieri facias* is delivered to the sheriff covering the interest of one joint tenant in real property and no further steps are taken in the execution process, the death of that joint tenant will pass the whole estate to the survivor free of execution."

43 In *Muir*, Perell J. concluded that the execution creditor took sufficient steps to execute the judgment, severing the joint tenancy. The steps included advertising the sale of property by the sheriff. Perell J. stated, at para. 26:

> Severance may occur when an execution creditor takes sufficient steps to execute the judgment against the debtor's interest in the property, although the filing of the writ of execution does not by itself result in a severance.

44 The decision of *Sirois*, relied upon by the respondent, also determined that the mere filing or delivery of a writ to the sheriff was insufficient to effect a severance of a joint tenancy. This is of little assistance on this appeal. Similarly, *Arnold Bros.* is a very different case. The key issues were whether the sale of property by a mortgagee or property division negotiations between separated spouses served to sever the joint tenancy. Neither was found to sever the joint tenancy, and the creditor, who held an execution in the name of only one of the joint tenants, was entitled to be paid from the pool of funds prior to any distribution to the joint tenants.

45 The facts in the case under appeal are quite different and indeed, rather unusual. Here, there could be no execution against the appellant because execution against her was stayed. However, the debt was joint, and BMO therefore was at liberty to recover its debt against the respondent. The parties to the application and BMO appeared before the application judge and made submissions. The parties consented to, and the application judge granted, an order authorizing payment to BMO. The execution was completed and acted upon. In my view, in these circumstances, the joint tenancy was severed, and the payment to BMO could only be from the respondent's 50% share of the surplus.

46 I am also not persuaded of the respondent's other submissions. In my view, the application judge erred in law in ignoring the stay and in not finding a severance of the joint tenancy. Furthermore, in the face of a proposal, it is not open to the court to effect ostensible equitable readjustments to the allocation of the funds in issue. Lastly, I note that in oral argument, counsel for the appellant acknowledged that the respondent could seek redress under the provisions of the BIA however, I do not propose to address that potential eventuality.

D. Disposition

47 For these reasons, I would allow the appeal.

48 The issues raised were somewhat novel. In these circumstances, I would vacate the $4,500 costs order below in favour of the respondent and order both parties to bear their own costs of both the appeal and the application.

J. MacFarland J.A.:
I agree

G.R. Strathy J.A.:
I agree

Appeal allowed.

Footnotes

1 The counterpart provision for Division I provides to the same effect with necessary modifications: s. 66(1).)