Jurisdiction and broad discretion of insolvency court upheld

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On June 17, 2021, the Alberta Court of Appeal (ABCA) dismissed two companion appeals in the receivership proceedings of Accel Canada Holdings Limited (Holdings) and Accel Energy Canada Limited (Energy and together with Holdings, Accel). In the unanimous decision *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226 (Accel Decision), the ABCA affirmed the jurisdiction of a supervising insolvency judge to order the relative priorities of various borrowings charges, and approve the sale and vesting of a debtor's assets free and clear of such charges, without repayment in full of the amounts secured by said charges and absent the consent of the party in whose favour the charges were made.

Background

While the background to the Accel receivership proceedings is complex, the relevant facts at issue on appeal were as follows. In October 2019, each of Holdings and Energy filed Notices of Intention to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). Shortly thereafter, in November 2019, the NOI proceedings were converted and continued as one under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA). Additionally, the Court approved an interim financing facility and granted an Interim Lenders Charge in the Amended and Restated Initial Order (ARIO). Pursuant to the terms of the interim financing term sheet, the facility was a "super-priority (debtor-in-possession), interim, revolving credit facility".

A syndicate of three lenders provided the interim facility: two affiliates of Third Eye Capital Corporation (TEC) as to 53.33%, and a numbered company 228139 Alberta Ltd. (222) as to 46.67%. Additionally, the interim lenders were also parties to an agency agreement whereby TEC as appointed as administrative agent on behalf of all interim lenders. The agency agreement authorized TEC to exercise all rights and remedies under the interim financing term sheet on behalf of the interim lenders, and all powers reasonably incidental thereto. Subsequently, on June 10, 2020, DGDP-BC Holdings Ltd. (DGDP) took an assignment of 222's interest in the interim facility and agency agreement.

Through the course of Accel's CCAA proceedings, approximately $38 million in borrowings were advanced and secured by way of the Interim Lenders' Charge. While

under the terms of the interim financing term sheet, the obligations of the borrowers, being Holdings and Energy, were joint and several, the actual advancements were allocated to either Holdings or Energy, depending upon which company used the funding. The Interim Lenders' Charge was a single charge attaching to the assets of both Holdings and Energy. However, the ARIO required the interim lenders to seek recovery of amounts advanced to one borrower from that borrower's assets before seeking recourse against the other borrower's assets.

Also during Accel's CCAA proceedings, the Court approved a sales and investment solicitation process respecting Accel and its assets, and then subsequently approved an *en bloc* sale to TEC (the TEC Bid). The TEC Bid as originally contemplated was an *en bloc* sale of substantially all of the assets of each of Holdings and Energy to TEC in exchange for a cash payment of all priority amounts, including the amounts outstanding under the Interim Lenders' Charge, and a credit bid of TEC's approximately $320 million pre-petition indebtedness.

In order to consummate this transaction, amongst other reasons, TEC applied for and was granted a Receivership Order over Accel on June 12, 2020. As part of the Receivership Order, the Court authorized a Receiver's Borrowings Charge and granted such charge priority over the previously granted Interim Lenders' Charge, despite the opposition of the co-interim lender DGDP. DGDP sought and was granted leave to appeal the provision of the Receivership Order, which subordinated the Interim Lenders' Charge to the Receiver's Borrowings Charge.

Later in the Receivership proceedings, the Receiver brought an application to approve the sale of only Energy's assets to a TEC nominee purchaser, due to various unresolved issues respecting the sale of Holdings' assets. The Energy transaction was intended to be part one of a two-phased transaction, the end result of which would result in the consummation of the *en bloc* TEC Bid. The Energy transaction resulted in the interim lenders receiving a cash repayment in full satisfaction of the amounts outstanding under the Interim Lenders' Charge and allocated to Energy. As part of that sale approval motion, the Receiver sought and was granted a sale approval and vesting order (SAVO) which vested the purchased Energy assets in the purchaser free and clear of all claims and encumbrances, including the Interim Lenders' Charge, again over the objections of the co-interim lender DGDP. The Interim Lenders' Charge remained fully secured against the Holdings assets; however, there were suggestions made by DGDP that it may not be repaid the balance of the interim lending facility advanced to Holdings, and rather its remaining debt might be converted to equity in the purchaser or satisfied by some other non-cash consideration. DGDP again sought and was granted leave to appeal the provision of the SAVO, which vested out the Interim Lenders' Charge against the purchased Energy assets without its consent.

Notably, as part of the leave to appeal proceedings, TEC and its nominee purchaser sought an order lifting the automatic stay of proceedings, which was imposed, pursuant to section 195 of the BIA as a result of DGDP being granted leave to appeal. DGDP did not oppose that application and the ABCA granted TEC's application and lifted the stay. The purchaser and the Receiver closed the Energy transaction in February 2021 and the interim lenders, including DGDP, received the sums owing to them under the Interim Lenders' Charge and allocated to Energy.

ABCA Decision

The ABCA heard the two appeals together. The two central questions the ABCA was asked to determine were:

1. Whether the Court has jurisdiction to grant a Receiver's Borrowings Charge priority over a previously granted Interim Lender's Charge in CCAA proceedings; and
2. Whether the Court similarly has jurisdiction to grant a sale approval and vesting order, which vests off the Interim Lender's Charge without payment in full of such charge and without the consent of the holder of the Interim Lender's Charge.

For the reasons that follow, the ABCA answered each of these questions in the affirmative.

First, the appellant argued that due to section 11.2(3) of the CCAA, the supervising insolvency judge in this case lacked the jurisdiction to grant the Receiver's Borrowings Charge priority over the Interim Lenders' Charge without its consent, which it did not give. This provision provides that subsequent interim financing charges in CCAA proceedings require that the consent of the first lender be given. However, as affirmed by the ABCA in the Accel Decision, that consent is not required where a charge is made through other sources of jurisdiction, such as a Receiver's Borrowings Charge under the BIA. The ABCA specifically recognized the wide jurisdiction given to supervising insolvency judges under the BIA to set priorities. Further, the ABCA noted that this jurisdiction arises from section 243(1)(c) of the BIA, which authorizes the supervising judge to "take any other action that the court considers advisable". The ABCA made it clear that this provision creates a "plenary and open-ended jurisdiction in the court", is a form of residual statutory jurisdiction, and is not an exercise of the Court's inherent jurisdiction. The purpose of section 243(1)(c) according to the ABCA is to give "supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise". Lastly, the ABCA affirmed that section 31(1) of the BIA also authorized the Court to grant the Receiver's Borrowings Charge.

Before turning to the next question on appeal, the ABCA paused to caution that just because they found that jurisdiction exists to subordinate a previously granted Interim Lenders' Charge, does not mean it should be routinely done. The ABCA recognized the importance and necessity of providing interim financing to restructuring proceedings, as well as the need to give such funding a super-priority charge. However, they also recognized the discretion given to a supervising judge to subordinate that priority if the circumstances of the particular insolvency proceedings so warrant.

Second, the appellant argued that the supervising judge did not have jurisdiction to bifurcate the Interim Lenders' Charge and vest the purchased Energy assets free and clear of the charge, without their consent. The appellant's argument in this respect was premised in part on their argument respecting section 11.2(3) of the CCAA, but also due to the terms of the interim financing term sheet (which provided that obligations of Holdings and Energy were joint and several thereunder) and that the Interim Lenders' Charge was a single charge attaching to all of Accel's assets (*i.e*. both Holdings and Energy). The appellant further argued that even if such jurisdiction did exist, it was not exercised reasonably.

The ABCA summarized three key aspects of receivership sale transactions which bear repeating:

1. The assets of the insolvent corporation can be sold free and clear of encumbrances, even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors: *Dianor Resources*.
2. If the insolvent corporation has more than one asset, individual assets can be sold free and clear of all encumbrances, again even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors. Any unpaid debts remain in place, and can be satisfied by subsequent sales of other assets.
3. When assets are sold free and clear of all encumbrances that could include encumbrances related to debtor-in-possession financing, even if the sale does not generate sufficient funds to pay out those encumbrances. Security and priority given to debtor-in-possession lenders provide no assurance that the loans will actually be repaid.

Again in reliance upon the broad jurisdiction conferred on a court by section 243(1)(c) of the BIA, the ABCA held that the supervising judge had the jurisdiction to grant the SAVO, notwithstanding the fact that the Interim Lenders' Charge was only partially satisfied.

Implications

The Accel Decision has several important implications for insolvency practitioners and lenders alike. At its most basic level, it affirms the jurisdiction of a supervising insolvency judge to order the relative priorities of various borrowings charges, and approve the sale and vesting of a debtor's assets free and clear of such charges, without repayment in full of the amounts secured thereby, and absent the consent of the party in whose favour the charges were made.

Looking at the decision more broadly, it is also an affirmation of the very broad jurisdiction conferred by section 243(1)(c) of the BIA upon a supervising judge in receivership proceedings to "take any other action that the court considers advisable in the circumstances". This decision accords with other recent affirmations of such broad jurisdiction from the Ontario Courts from Chief Justice Morawetz (*Re Urbancorp Cumberland 1 GP Inc*, 2020 ONSC 7920) and Justice Pepall of the Ontario Court of Appeal (*Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508).

The Accel Decision is also a reminder for lenders to restructuring and insolvency proceedings that while they likely will be the beneficiary of a super-priority court-ordered charge, such charges are not sacrosanct. The circumstances of an insolvency proceeding may evolve such that that charge may ultimately be primed or not repaid in full. These are the practical realities of lending into a high risk endeavour such as a restructuring or insolvency proceeding. Lenders should continue to consider this heightened risk profile in negotiating the terms of such financing. As the ABCA noted in the Accel Decision, and also recently in *Wilks Brothers LLC v 12178711 Canada Inc*, 2020 ABCA 430, all stakeholders are allowed to operate with an eye to one's own best interests and this is not necessarily "bad faith".

Lastly, through the Accel Decision the ABCA again demonstrated the level of deference that an appellate court will show to a supervising insolvency judge.

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