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# • TEMPERING *KITCO*: SCC CLARIFIES RIGHT TO PRE-AND POST-FILING SET-OFF UNDER THE CCAA •

By Adrienne Ho and Rachel Nicholson, Thornton Grout Finnigan LLP


**Adrienne Ho**

**Rachel Nicholson**

**In** its recent decision, *Montréal (City) v. Deloitte Restructuring Inc.* ("***SM Group***"),[1] the Supreme Court of Canada ("**SCC**") clarified the circumstances in which creditors can set-off claims against a debtor company that arose pre-filing with those claims that arose after an initial order has been granted under the *Companies Creditors' Arrangement Act* ("**CCAA**").[2]

Generally speaking, there are three types of set-off: legal, equitable, and contractual/statutory.[3] Insolvency legislation, including under the CCAA, explicitly preserve a party's set-off rights.[4] As the jurisprudence in this area has developed, two issues that have arisen include: (a) the supervising judge's right to stay a party's set-off rights in CCAA proceedings; and (b) the ability to set-off debt arising post-filing against claims that arose pre-filing.

The SCC's recent decision in *SM Group* has provided guidance on both matters. In doing so, the SCC has not only provided a framework for when courts can exercise their discretion to permit set-off rights but also has effectively overruled prior appellate jurisprudence from Quebec.

## BACKGROUND

SM Group, an engineering consulting firm, had conducted various construction work for the City of Montreal (the "**City**"). The Charbonneau Commission, which had been set up to investigate corruption in the construction industry, discovered a link between SM Group and certain parties implicated in the collusion. In August 2018, SM Group filed under the CCAA, but it continued to perform work for the City after its filing.

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**General Editor**
Adam M. Slavens, B.A., LL.B.
Firm: Torys LLP

Please address all editorial inquiries to:

**LexisNexis Canada Inc.**
Tel. (905) 479-2665
Fax (905) 479-2826
E-mail: nir@lexisnexis.ca
Web site: www.lexisnexis.ca



In November 2018, the City asserted that it did not have to pay SM Group for work done post-filing, as such amounts could be set-off against the City's claims against SM Group that arose pre-filing. The City's first pre-filing claim stemmed from a settlement agreement signed in 2017 between SM Group and Minister of Justice (who was acting on behalf of the City) pursuant to a government initiative known as the Voluntary Reimbursement Program (the "**VRP Claim**"). The second pre-filing claim relates to the City's proceedings against SM Group for alleged collusion in a tender for a water meter contact (the "**Water Contract Claim**").

The City asserted it could set-off both the VRP Claim and the Water Contract Claim against the amounts owed to SM Group for work done post-filing. The City's rationale was that: (a) the VRP Claim remained outstanding; (b) certain assets of the SM Group were intended to be sold to a third party shortly; and (c) neither the VRP nor the Water Contract Claims could be compromised in an insolvency process without the City's consent as they arose from fraud and a misappropriation of public funds. The Court-appointed Monitor, Deloitte Restructuring Inc. (the "**Monitor**"), sought a declaratory judgment that the City could not assert its set-off rights.

## JUDICIAL HISTORY

The Quebec Superior Court granted the relief sought by the Monitor. It held, amongst other things, that based on the Quebec Court of Appeal's ruling in *Quebec (Agence du revenu) v. Kitco Metals Inc.* ("***Kitco***"),[5] the set-off being sought here was not possible. The ruling was upheld by the majority of the Quebec Court of Appeal.

## SCC RULING

The majority of the SCC, in a 6-1 decision, dismissed the appeal. Chief Justice Wagner and Justice Côté, writing for the majority, started the analysis by analyzing whether the VRP Claim could be considered a claim related to a fraudulent debt under section 19(2)(d) of the CCAA, and thereby unable to be compromised without the City's consent. The majority determined that the VRP Claim was not a claim properly falling within the scope of section 19(2)(d).[6] With respect to the set-off issue, it held that this highly disruptive right ought to be stayed pursuant to the terms of the CCAA and Initial Order. Accordingly, the majority dismissed the appeal. The following provides an overview of the majority's decision.

### A) Interpretation of Section 21 of the CCAA

As noted above, insolvency legislation preserves a party's right to set-off. Section 21 of the CCAA states that "[t]he law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be."[7]

The SCC clarified the scope of section 21, holding that it provides a creditor with the right to set-off debt that arises before an initial order only against a claim that arose before the order was made (which the majority refers to as "pre-pre compensation"). This is only for the limited purpose of quantifying a creditor's claim at the date of the initial order. The SCC's rationale was that section 21 of the CCAA was found under the "Claims" section of the CCAA. In coming to this conclusion, the SCC's ruling is consistent in this respect with how the Quebec Court of Appeal interpreted section 21 in *Kitco.*[8]

The SCC, however, departs from *Kitco* by clarifying that though section 21 does not authorize parties to set-off pre- and post-filing debts, this section does not act as a bar either. Rather, it confirmed that the CCAA court has the discretion to either stay or authorize creditors to exercise their right to set-off, including with respect to pre- and post-filing debt.

### B) The Court's Discretion to Stay Parties' Set-Off Rights

The SCC's confirmation that an initial order can stay a party's set-off rights is consistent with prior case law. As the majority of the SCC recognized, it is already common practice to include a general prohibition against set-off in model CCAA initial orders.

The common law jurisprudence has also recognized the discretion afforded to CCAA's judges in this area. In *Air Canada*, Justice Farley of the Ontario Superior Court of Justice granted Air Canada's request to implement a temporal stay against any right to equitable set-off. Air Canada sought such relief, which was not opposed, on the basis that the CCAA proceeding needed to be stabilized.[9] Case law following *Air Canada* confirmed that a supervising CCAA judge has the discretion to stay or defer a party's right to exercise set-off against pre and post-filing debt during CCAA proceedings, including as recently as last year in the proceedings involving Just Energy Group Inc. and its related parties.[10]

### C) The Court's Discretion to Lift the Stay to Permit Set-Off

The SCC in *SM Group* also clarified that the CCAA court retains the discretion to lift the stay to permit set off of pre- and post-filing debt in rare instances, though the court must do so cautiously. The majority observed that permitting set-off right could be highly disruptive to a debtor's operations as without the payment of post-filing accounts receivable, a debtor's working capital could be affected along with its ability to obtain interim financing and resale value.

In *Air Canada*, Justice Farley had recognized that legal set-off was available for debts that arose before and after the date of the CCAA initial order.[11] However, over a decade later in *Kitco*, the Quebec Court of Appeal seemed to suggest that set-off of pre and post-filing debt was not possible.[12]

The SCC did not necessarily view *Kitco* to be in conflict with common law cases like *Air Canada.* Rather, the SCC distinguished the common law cases on the basis that the courts in such decisions did not need to consider the remedial objectives of the CCAA, nor did they set out the framework in which the rights of set-off would apply.

Regardless of whether *Kitco* was truly in conflict with *Air Canada*, the SCC's ruling in *SM Group* does provide welcomed clarity to the law. The majority not only held that the absolute prohibition to the set-off of pre and post-filing debt that was suggested in *Kitco* must be "tempered", but also discussed the factors that a CCAA court should consider in exercising its discretion to lift the stay of proceedings. The SCC noted that the court must do so cautiously, and should take into account (i) the appropriateness of granting such relief, (ii) due diligence on the claimant's part, and (iii) good faith on the applicant's part.

With respect to the first factor as to the appropriateness of such an order, the majority of the SCC explained that the court should consider the remedial objectives of the CCAA. These objectives include maximizing creditor recovery, preserving the going-concern value of the company, and protecting the public interest. The majority noted that the CCAA court can also consider whether the proceedings were a liquidating CCAA and the impact of permitting set-off.

In applying the first factor to whether the City seeking set-off of the VRP Claim was appropriate, the majority held that the City's claim should not be elevated just because it was a public body. Though the majority conceded that protecting the public interest might favour permitting a party who is a victim of fraud to exercise set-off rights, the majority noted that the City could not prove that SM Group engaged in fraud. The fact that SM Group participated in the Voluntary Reimbursement Program was not sufficient proof of fraud.

The second factor concerns the due diligence of the party seeking to assert the right of set-off. The majority found that the City waited anywhere from 47 to 58 days, after learning of the CCAA filing, before claiming a right to set-off. The majority held that the City gained an advantage from this delay, as it continued to receive the benefit of work performed by SM Group. The majority observed that had the City asserted its set-off rights earlier, it is likely that SM Group would have refused to perform further work.

Finally, given its ruling on the first two factors, the majority held it was unnecessary to consider the element of good faith.

As for the City's Water Contract Claim, the majority held that the City could not assert the right of set-off for similar reasons. The majority also noted that permitting the City to withhold amounts pending the outcome of the litigation concerning the Water Contract Claim would be inappropriate. It observed that this would place SM Group's third party purchaser at the "mercy of the outcome of lengthy and complex judicial proceedings".[13]

## TAKEAWAYS

The ruling in *SM Group* provides helpful guidance in the law concerning set-off. It clarifies any confusion that might have resulted from *Kitco* and it lays out factors that a CCAA court may consider before exercising its discretion to lift the stay in permitting creditors to exercise the right to set-off claims. It also provides a helpful tip that parties who wish to exercise their right to set-off cannot sit on their rights to do so.

What remains to be seen, however, is how such discretion will be applied in cases. For example, the SCC found that the City's decision to wait over 47 days to raise set-off rights to be too long given that the City was continuing to receive services from the SM Group. The SCC, however, did not specify what an appropriate time would be and whether going forward, creditors would be expected to raise their concerns at the comeback hearing.

Another area that will be of interest to practitioners would be the application of set-off rights in liquidating CCAAs. The majority in *SM Group* noted that a court can take into account whether the proceeding is a liquidating CCAA, but it did not comment on whether such a factor would necessarily favour lifting the stay to permit set-off, or how this may contradict the break in mutuality found in bankruptcy proceedings, in which pre- and post-filing set off is not necessarily permitted.

Justice Brown, in dissent, observed that in a liquidating CCAA, it would be unfair to creditors with certain, liquid and exigible claims to prevent them from exercising the right to set-off pre and post-filing claims. Justice Brown observed that once the sale occurs, those creditors' rights are stayed permanently since the debtor is an "empty shell" following the sale, nor are there any of the remedial considerations of set-off affecting the restructuring process as there is no restructuring.

The majority in *SM Group* noted that situations where the stay would be lifted would be rare. It remains to be seen if a CCAA court will more readily lift a stay to permit pre- and post-filing set off in a liquidating CCAA, in light of some of the factors raised by Justice Brown in dissent.

Finally, it will be interesting to see if this decision opens the door to more active appellate intervention in insolvency matters. Here, the majority cites the prejudice to third parties from the delays in this case as part of the reason for not remanding the case back the lower court. Instead, the majority substituted its own analysis of whether set-off would be permitted and dismissed the appeal. The majority held that even if the case were remanded, the outcome would have been the same.

Justice Brown, in dissent, would have allowed the appeal solely for the purpose of remanding the case back to the supervising judge at the lower court. He noted the SCC itself has recognized that in cases involving the exercise of discretion, the SCC's role is limited to a deferential one, and that the SCC should not step into the supervising court's shoes.[14] It has been recognized that there is a sense of urgency to CCAA proceedings.[15] Time will tell if following this ruling, appellate courts will more readily intervene in matters to avoid further delay if they view that a lower court would likely reach the same result.

[***Adrienne Ho*** *is a lawyer at Thornton Grout Finnigan LLP, a law firm in Toronto specializing in restructuring and commercial litigation. Her practice has a focus on both restructuring and insolvency as well as commercial litigation. She has experience with BIA, CCAA, and cross-border proceedings, as well as with complex construction disputes. Her article, "The Treatment of Ipso Facto Clauses in Canada," was cited by the Court of Appeal of Alberta and the Supreme Court of Canada in dissent in a case concerning the validity of the anti-deprivation rule. It was cited by the Supreme Court of India as well. Adrienne has also spoken at the Annual Review of Insolvency Law Conference.*

***Rachel Nicholson*** *is a lawyer at Thornton Grout Finnigan LLP, a law firm in Toronto specializing in restructuring and commercial litigation. Her practice has a focus on restructuring and insolvency, including the enforcement of creditors' rights and security, receiverships, BIA and CCAA restructuring proceedings, shareholder disputes and creditor/debtor disputes. She has experience representing banks, lenders, debtors, receivers, trustees, court-appointed monitors and purchasers. She currently acts as the Chair of the Turnaround Management Association Toronto Chapter's Next Gen Committee, and previously served in various roles as a Director with the International Women's Insolvency and Restructuring Confederation (IWIRC) - Ontario Network. She also was the recipient of IWIRC's Semi-Finalist Rising Star Award (2018). She regularly speaks on panels on a broad range of insolvency topics. Rachel is a co-editor of the TGF Topline, a quarterly publication that keeps readers up to date on restructuring and litigation cases.*]

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1 2021 SCC 53.

2 R.S.C., 1985, c. C-36

3 See Robert Thornton, "Air Canada and Stelco: Legal Developments and Practical Lessons", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007). Robert Thornton is a founding partner of Thornton Grout Finnigan LLP.

4 See *Bankruptcy and Insolvency Act* ("**BIA**"), R.S.C., 1985, C. B-3, s. 97(3); the *Winding-up and Restructuring Act* ("**WURA**") R.S.C., 1985, C. W-11, s. 73(1), and CCAA, s. 21. The provisions in the CCAA, the BIA, and the WURA are similar though not identical.

5 2017 QCCA 268.

6 This article focuses on the SCC's analysis regarding a creditor's right to assert set-off for pre- and post-filing claims in insolvency proceedings rather than the section 19(2)(d) discussion, which is fairly fact specific.

7 CCAA, s. 21.

8 See *Kitco*, 2017 QCCA 268 at paras 81-82.

9 *Air Canada (Re),* 2003 CanLII 64234 (ON SC) ["*Air Canada*"]. See also *supra,* Robert Thornton, "*Air Canada and Stelco: Legal Developments and Practical Lessons*".

10 See *e.g., North American Tungsten Corp*., 2015 BCSC 1382 at paras 28-32, leave to appeal ref'd, 2015 BCCA 390 at paras 11-17 & 23 and *Re Just Energy Group Inc*., 2021 ONSC 1793 at para 102. Thornton Grout Finnigan LLP acts as counsel to the Court-appointed Monitor in the CCAA proceedings of Just Energy Group Inc. et. al.

11 See *Air Canada, supra,* 2003 CanLII 64234 at paras 23-24. See also *supra,* Robert Thornton, "*Air Canada and Stelco: Legal Developments and Practical Lessons*".

12 See *Kitco, supra,* 2017 QCCA 268 at paras 81-83.

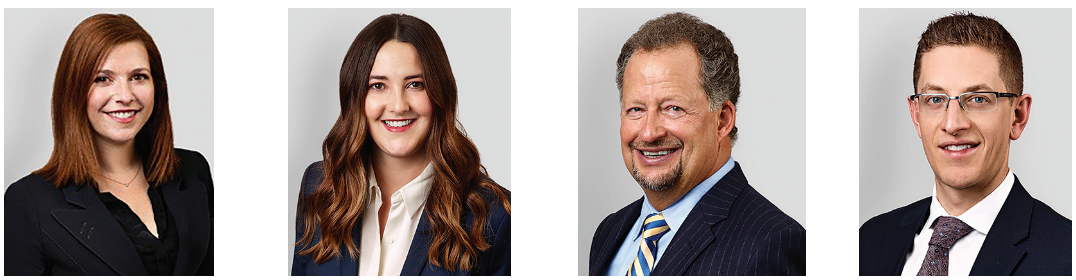
13 2021 SCC 53 at para 99.

14 See *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para 88.

15 See *Stelco Inc., Re*, 2005 CanLII 5394 at para 4.

## • WIDE DISCRETION AND JURISDICTION OF THE SUPERVISING JUDGE UPHELD IN THE *ACCEL* INSOLVENCY PROCEEDINGS •

By Robyn Gurofsky, Jessica Cameron, Josef Krüger, Q.C., and Jack Maslen,
Borden Ladner Gervais LLP

**Robyn Gurofsky** **Jessica Cameron** **Josef Krüger, Q.C.** **Jack Maslen**

**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 of *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226, 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

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 Alberta Court of Queen's Bench (the "Court") ordered that the NOI proceedings be converted and continued as one proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA"). As part of that application, 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, namely two affiliates of Third Eye Capital Corporation ("TEC") as to 53.33%, and a numbered company 228139 Alberta Ltd. ("222") as to 46.67%. The interim lenders were also parties to an agency agreement whereby TEC was appointed as administrative agent on behalf of the 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. On June 10, 2020, DGDP-BC Holdings Ltd. ("DGDP") took an assignment of 222's interest in the interim facility and agency agreement, thereby replacing 222 as the 46.67% interim lender.

During the CCAA proceedings, approximately $38 million in borrowings were advanced and secured by the Interim Lenders' Charge. Under the terms of the interim financing term sheet, the obligations of the borrowers, being Holdings and Energy, were joint and several. However, the actual advancements were allocated to either Holdings or Energy depending upon which company used the funding. Similarly, while the Interim Lenders' Charge was a single charge attaching to the assets of both Holdings and Energy, 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.

Over the course of the CCAA proceedings, the Court approved a sales and investment solicitation process, and then ultimately 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 (i) a cash payment of all priority amounts, including the amounts outstanding under the Interim Lenders' Charge, and (ii) a credit bid of TEC's approximately $320 million pre-petition indebtedness.

In order to consummate the sale transaction, among other things, TEC applied for and was granted a Receivership Order over Accel (*i.e.* both Energy and Holdings) 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 then sought, and was granted leave to appeal to the ABCA, in respect of the provision of the Receivership Order that subordinated the Interim Lenders' Charge to the Receiver's Borrowings Charge (the "Priorities Appeal").

Later, in December 2020, and before the Priorities Appeal was heard, the Receiver applied to the Court for approval of the sale of only Energy's assets to a nominee of TEC. The application pertained only to Energy's assets as various unresolved issues (including litigation) lingered regarding the Holdings' assets. However, the Energy transaction was intended to be part one of a two-phased transaction, the end result of which being in substance the consummation of the previously approved *en bloc* TEC Bid.

Notably, the Energy transaction resulted in the interim lenders receiving a cash repayment in full satisfaction of the amounts outstanding under the Interim Lenders' Charge which was 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 to the purchaser free and clear of all claims and encumbrances, including the Interim Lenders' Charge. This was again over the objections of the co-interim lender DGDP. The Interim Lenders' Charge remained fully secured against the Holdings assets. DGDP again sought and was granted leave to appeal to the ABCA the provision of the SAVO which vested out the Interim Lenders' Charge against the purchased Energy assets without its consent (the "SAVO Appeal").

## DECISION OF THE ALBERTA COURT OF APPEAL

In June 2021, the ABCA heard the Priorities Appeal and SAVO Appeal 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 Lenders' Charge in CCAA proceedings; and
2) Whether the Court has jurisdiction to grant a sale approval and vesting order, which vests off the Interim Lenders' Charge without payment in full of such charge and without the consent of the holder of the Interim Lender's Charge.

In reasons released later in June 2021, three Justices of the ABCA unanimously answered each of these questions in the affirmative (the "Accel Decision") and for several reasons.

To begin, the appellant argued that due to section 11.2(3) of the CCAA, the supervising insolvency judge had lacked the jurisdiction to grant the Receiver's Borrowings Charge priority over the Interim Lenders' Charge without its consent. That provision provides that subsequent interim financing charges *in CCAA proceedings* require that the consent of the initial lender be given. In respect of this submission, the ABCA reasoned that such consent is not required when 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. The ABCA further 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".[1] In any event, the ABCA affirmed that section 31(1) of the BIA had also authorized the Court to grant the Receiver's Borrowings Charge in the manner ordered.

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.

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

In analyzing these submissions, the ABCA summarized three key aspects of receivership sale transactions:

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.
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.[2]

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.

First, 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.

Second, the decision is a reminder for lenders participating in restructuring and insolvency proceedings that while they will likely 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 are best advised to be cognizant of the heightened risk profile when negotiating the terms of such interim financing and seek to protect their positions. As the ABCA noted in the Accel Decision, and also recently in *12178711 Canada Inc v Wilks Brothers, LLC,* 2020 ABCA 430, all stakeholders are allowed to operate with an eye to one's own best interests in insolvency proceedings and that is "not bad faith".[3]

Finally, the decision affirms 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).

Likewise, the wide discretion of a supervising insolvency judge was the essence of subsequent decision of the ABCA in the Accel proceedings, which was released in August 2021 after the Accel Decision. That decision, *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 284, concerned another application for leave to appeal of DGDP. By this time, (i) the Receiver had applied to the Court for an order approving the sale and vesting of the Holdings' assets (phase 2 of the *en bloc* TEC Bid), and (ii) the Court had granted the approval and vesting order sought by the Receiver, which contemplated the repayment of the remaining Interim Lenders' Charge by way of a gross-overriding royalty ("GORR") and not cash. This time, DGDP sought leave to appeal on the basis that repayment via the GORR constituted an "illegal preference" in circumstances where TEC was bidding its pre-insolvency secured debt as part of the consideration. A single Justice of the ABCA disagree and denied leave to appeal. The Justice held that the GORR amounted to a form of repayment, explaining that "This Court has already issued a decision in these proceedings indicating that the case management judge had wide discretion and jurisdiction to depart from the terms in the Interim Facility and the existing priorities if the circumstances warranted under s. 243(1) of the BIA. The Court's decision on jurisdiction is consistent with the Ontario Court of Appeal's decision in *Dianor*.

DGDP has not identified how the case management judge failed to comply with these authorities."[4]

As a result, stakeholders engaged in receivership proceedings should put their best foot forward, early in the proceedings, as the supervising judge has a wide and expansive discretion and appellate intervention will likely be limited.

[***Robyn Gurofsky's*** *practice focuses on insolvency and restructuring, banking and oil and gas related litigation and general commercial litigation. She advises companies, boards of directors, shareholders, lenders and accounting professionals with respect to all aspects of restructuring and insolvency proceedings, whether informal or formal proceedings under the Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act both within Canada and on a cross-border basis. Robyn also acts for clients involved in general commercial disputes, banking specific litigation and debtor creditor matters.*

***Jessica Cameron's*** *practice focuses on commercial litigation and arbitration, with an emphasis in insolvency and restructuring. She advises clients on general commercial disputes, all aspects of insolvency and restructuring matters, including cross-border proceedings, banking and oil and gas related litigation, and debtor creditor matters. She has acted for lenders, debtors and restructuring professionals, including trustees, monitors and receivers. Jessica has appeared before the Provincial Court, the Court of Queen's Bench and the Court of Appeal in Alberta, as well as in the United States on cross-border matters. Before joining BLG, Jessica clerked with the Alberta Court of Queen's Bench, where she was articled to one of the province's preeminent commercial justices.*

***Josef Krüger, Q.C.*** *focuses his practice on bankruptcy and insolvency, commercial litigation, and international arbitration. Josef's experience includes national and cross-border insolvency and restructuring, oil and gas litigation, the unravelling of commercial frauds, the recovery of assets across borders, Mareva injunctions and Anton Pillar Orders and defending auditors' liability claims. With more than 40 years' experience in commercial litigation and insolvency law, Josef is a veteran of more than 400 trials and arbitrations. He has extensive experience arguing matters on appeal, and has acted in numerous insolvency and bankruptcy proceedings, including cross-border restructurings. Prior to moving to Calgary in 1998 and joining one of BLG's founding firms, Howard Mackie, Josef articled and practised for 18 years as a barrister in South Africa.*

***Jack Maslen's*** *disputes practice focuses on insolvency and restructuring, debtor-creditor remedies, real estate, banking, securities, fraud and energy matters. Jack advises companies, directors, shareholders, lenders and accounting professionals with respect to all aspects of restructuring and insolvency proceedings under the Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act both within Canada and on a cross-border basis. Jack's commercial litigation practice focuses on insolvency, securities and oil & gas matters. Jack also has extensive experience in international commercial arbitration and has acted in UNCITRAL and ICC arbitrations. Prior to joining BLG, Jack worked internationally in Doha, Qatar and in London, U.K. Jack frequently appears before the Alberta Court of Queen's Bench (Commercial List), and has appeared before Alberta's other courts as well as the Supreme Court of Canada.*]

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[1] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226, paras 17-20.

[2] *Ibid,* para 30.

[3] *Ibid*, para 33; *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430 at para 72.

[4] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 284, para 49.