SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.:	CV-24-00722386-00CL CV-24-00722700-00CL CV-24-00722799-00CL	**DATE:**	**July 9, 2024**

NO. ON LIST: 1

TITLE OF PROCEEDING: Atlas Global Brands Inc. et al. v. The Attorney General of Canada on behalf of His Majesty the King in Rightof Canada as represented by the Minister of National Revenue

BEFORE: Justice Penny

PARTICIPANT INFORMATION

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WRITTEN REASONS OF JUSTICE PENNY (Released July 11, 2024):

Overview

[1] On July 9, 2024 I granted the motion of GreenSeal seeking a third amended and restated order under the CCAA dealing with the GreenSeal business. I adjourned the applications of GreenSeal's secured creditors, Stoke and the YNCU, for the appointment of a receiver over the GreenSeal business. Those orders were made with written reasons to follow. These are the reasons.

Background

[2] The principal business activity of the Atlas group is the production, distribution, and sale of cannabis internationally and in Canada. Atlas Global Brands Inc. is a publicly traded company, although its shares have been cease traded for many months. Atlas owns the companies which operate in two principal business lines. AgMedica is a licensed producer of cannabis and owns a production and distribution facility in Chatham-Kent, Ontario. AgMedica principally operates in the international market. GreenSeal Cannabis Company, Ltd. is a licensed producer of cannabis operating out of a facility owned in Stratford, Ontario. It principally operates in the domestic market.

[3] In the face of growing pressure from its secured creditors, Atlas brought this application for a stay and an initial order under the CCAA.

[4] My second amended and restated initial order of July 5, 2024 recognized that the circumstances of AgMedica and GreenSeal are distinct in material ways: they own different assets, they carry on somewhat different businesses operating in different markets, and, importantly, they have distinct creditor pools.

[5] The SARIO, which was not opposed, approved the appointment of the Monitor over the AgMedica business and granted various orders including super-priority Administration, Directors' and DIP Lending Charges. The DIP financing included paying out the indebtedness of AgMedica's first in priority secured creditor, Hillmount (which had previously opposed the CCAA order). Under the AgMedica branch of these proceedings, it is contemplated that the Applicants will come forward with a SISP proposal later in July, with a view to concluding a transaction by the end of September 2024. The Applicants and the Monitor indicate that that the SISP proposal, depending on the outcome of the July 9 dispute over the GreenSeal branch of these proceedings, would preserve the option of marketing AgMedica and GreenSeal as opportunities to be considered both separately or *en banc*.

[6] The SARIO adjourned the application under the CCAA in respect of GreenSeal as well as the competing receivership applications of GreenSeal's secured creditors. Stoke Canada Finance Corp. and Your Neighbourhood Credit Union Limited. This adjournment was to allow those parties and the Applicants more time to engage in negotiations over the GreenSeal business and how it should be managed (and financed) going forward.

[7] By the return date, July 9, negotiations had broken down. Stoke and YNCU opposed any further order under the CCAA regarding GreenSeal and sought the appointment of PwC as Receiver of the GreenSeal business.

GreenSeal, in an effort to address some of the creditors' concerns, made significant changes to its proposal and draft order (the third amended and restated initial order, or TARIO). These changes attempt to address various risks that the CCAA proceedings might pose for GreenSeal's secured creditors pending the proposed SISP process contemplated under the CCAA.

[8] It was those two competing proposals for how the GreenSeal business would be managed going forward that were argued on July 9, 2024.

Receivership or CCAA?

[9] The opposition of secured creditors to restructuring proceedings under the CCAA (where the operations of the debtors remain in management's hands, under the supervision of a court appointed monitor) is not uncommon. In these circumstances, the court has identified a number of factors or considerations to be taken into account when analyzing competing CCAA and receivership applications. The articulation of these factors takes different forms and various cases and/or articles and commentaries list them slightly differently, but a useful account of the basic considerations reduces them to six[1]:

1. The relationship between the debtor and the creditor
2. Value maximization and cost minimization
3. Availability and source of financing during the process (and beyond)
4. The nature of the competing proposals and their effect on the stakeholders
5. The behaviour of the parties, and
6. The need for the greater discretionary latitude available under the broad powers granted to the court under the CCAA.

[10] I will structure my analysis of the parties' competing positions around these six factors.

The relationship between the debtor and the creditor

[11] The secured creditors both say they have lost faith in GreenSeal management. When they assess the risks and benefits of debtor-lead CCAA proceedings versus creditor-lead receivership proceedings, they prefer the traditional receivership approach.

[12] It is well established that claims of loss of confidence are, on their own, insufficient to lend weight to this factor, especially when the debtor's efforts to restructure are in their early stages. However, here the creditors' concerns are more than fanciful or merely petulant. Atlas shares have been cease-traded. This is not Atlas and AgMedica's first journey down the CCAA road. There is some evidence to support concerns that GreenSeal has been less than transparent about its financial problems with its creditors and, in the case of Stoke, that assets (in this case, accounts receivable) over which Stoke claims an ownership interest have been appropriated for general working capital purposes to keep GreenSeal's (and, by way of intercompany transfer, AgMedica's) operations going.

[13] As I will set out in more detail in other sections of these Reasons below, some of these concerns would, in the ordinary course, be addressed by the supervision of the court-appointed Monitor over GreenSeal's business

[1] Emma Newberry, Liam Byrne and Valerie Cross, Should I CCAA Stay or Should I BIA Go: A Review and Analysis of Judicial Treatment of Competing CCAA and BIA Applications, 2023 21 Annual Review of Insolvency Law, 2023 CanLIIDocs 3088

and the need for the Monitor to report regularly to the court. GreenSeal's proposal goes further and would provide specific protections meant to address some of these concerns directly. These measures, it is conceded, nevertheless involve an element of uncertainty, the risks of which can be assessed differently by different players acting reasonably.

[14] On balance, I regard the loss of confidence as one factor leaning in favour of a receivership over a debtor-lead proposal under the CCAA.

Value maximization and cost minimization

[15] In my view, this is one of the two or three most important factors at play in these proceedings.

[16] I will deal with cost minimization first, as it is the simpler of the two. It is often said that CCAA proceedings tend to be more expensive, and involve more court attendances, than receiverships. That may well be, in general, true. However, an important feature of these proceedings is that there is already a CCAA proceeding approved and underway involving Atlas and the AgMedica business.

[17] It is important to acknowledge early on in this analysis that the proposals of both the debtor and the creditors for how to achieve value maximization are generally the same. GreenSeal is proposing a SISP run over the July to September time frame in an effort to sell the business, separately or *en banc* with AgMedica, to a third party purchaser. The creditors are proposing that a receiver would do exactly the same thing, over the same time frame, with one exception. Under a SISP run by a receiver, the GreenSeal business would be marketed and sold separately. Even here, however, the creditors say the receiver could co-operate with the Monitor and AgMedica's management and offer the two asset groups on a joint, as well as a separate, basis.

[18] It seems intuitively the case that two parallel processes attempting to achieve the same thing run by two different professional teams and their counsel would cost more than if it were overseen by one professional team and its counsel. This is borne out by the numbers put forward by Stokes' consultant, Mr. Steinberg, at B-1-1599. The receivership proposal will result in professional costs almost $300,000 in excess of the GreenSeal proposal. This was, ultimately, conceded by Stoke's counsel.

[19] The more important, and more controversial, issue arises from the parties' conflicting assessments of which proposal will result in greater net maximization of value with respect to net realization on accounts receivable. This is entirely based on two cash flow presentations, which use different assumptions: one from GreenSeal management, vetted by the Monitor; the other from Mr. Steinberg. Both sides take the position that at least some of the other sides' assumptions and inputs are unreasonable or unrealistic.

[20] For example, Mr. Steinberg opines that GreenSeal's proposal fails to take necessary measures to reduce payroll and other costs. Continuing to run this "fat" operational structure will continue to undermine net recoveries. Mr. Steinberg's cash flows reflect what he considers urgently needed cost reduction measures. GreenSeal responds by pointing out that Mr. Steinberg, while cutting back on staff and supplier costs, nevertheless continues to reflect highly optimistic revenue numbers in his cash flow analysis. GreenSeal says these revenue numbers cannot be maintained without the suppliers supplying and the employees working to do the work necessary to generate those revenues. This was just one of many areas which was not explained and which could not be resolved on the present record and in the limited time available for oral argument.

[21] I accept as balanced and accurate what the Monitor says in para. 19 its Third Supplement.

> The Monitor understands that Stoke and YNCU's concerns with the Proposal include skepticism around the ability to generate the forecasted GS A/R that the Stoke Receivables Charge would apply to and a general loss of confidence in the management of GreenSeal. The Monitor believes that the forecasted GS

A/R represents a conservative estimate of the potential GS A/R that may be generated during the relevant period based on historical trends. That said, the level of confidence in the GS A/R forecast is ultimately a matter of business judgment on which GreenSeal and its secured creditors have divergent views. There is of course the potential that the GS A/R generated and collected will be less than forecasted, which could result in a funding and collateral shortfall.

[22] The cash flow projections of GreenSeal have been endorsed as reasonable by the Monitor. The Monitor's point, that the revenue numbers are "conservative" is demonstrably correct. For example, the revenue numbers used in the GreenSeal cash projections are materially less than historical average monthly receipts.

[23] Cash flow projections are just that -- projections. There is a risk, utilizing either set of projections, that things do not evolve in the way assumed and that the financial outcomes are different, perhaps even materially different, than what was projected. However, the Monitor, as the court's appointee, has a level of independence and objectivity not shared by the parties or their retained consultants. I find the GreenSeal revenue projections to be conservative and reasonable. They show Stoke better off by the end of September than under the receivership option.

[24] Further, as I will discuss in greater detail below, recognizing that the cash flow projections reflected in the GreenSeal proposal represent a level of uncertainty, and therefore risk, to Stoke, the GreenSeal proposal includes several features that will limit or mitigate that risk.

[25] I also note the Monitor's observation that receivership sales may tend to produce lower realizations than CCAA Monitor-supervised sales and that there is value in having one professional team oversee the process in circumstances which preserve, and maximize, the options for recovery both on a separate basis and on an *en banc* basis.

[26] Regarding YNCU, the evidence is, and the proposal contemplates, that YNCU's debt payments is now, and will remain current throughout the July to September period. The defaults relied on are not non-payment of obligations owed to YNCU. YNCU holds a first mortgage on GreenSeal's real property asset in Stratford. There is evidence in the form of a 2023 appraisal to the effect that the value of that property exceeds the amount of GreenSeal's indebtedness to YNCU. There is no direct evidence that YNCU will be prejudiced, from a value maximization point of view, under the GreenSeal proposal.

[27] This factor favours the CCAA proposal.

Availability and source of financing

[28] Neither proposal contemplates traditional "new money, DIP-like financing" for the proposal period. GreenSeal was unable to obtain DIP financing for the GreenSeal business. It proposes to utilize a portion of accounts receivable as working capital to finance operations until the proposal can be implemented. Importantly, however, it also proposes to pay a material amount of those accounts receivable to Stoke through July, August and September.

[29] Stoke objects to GreenSeal's use of the accounts receivable as working capital to fund ongoing operations and the insolvency process. Stoke is a factoring company. It advances a percentage of the potential accounts receivable represented by ongoing purchase orders from GreenSeal's customers. Upon advancing funds, it "owns" the applicable accounts receivable and is entitled to those amounts as they are paid. From these receipts, it theoretically "reimburses" to GreenSeal amounts recovered in excess of the amount actually advanced (plus interest and costs) on the strength of the purchase orders. Stoke's position is that because it owns the accounts receivable, they are not available to GreenSeal to use as working capital during the proposal process.

[30] That said, under the creditors' receivership proposal, the accounts receivable are, in effect, going to be used in the same way as under the CCAA proposal, with the exception that the creditors proposal does not contemplate any payments to Stoke until there is a post-transaction distribution. Stoke says it will fund the receivership and cash flow shortfalls effectively utilizing the account receivable payments in the same way as proposed under the CCAA proposal.

[31] This factor tends toward neutral in the comparative analysis, as it is functionally the same under both scenarios. To the extent that the GreenSeal proposal contemplates ongoing payments to Stoke and would place limits on the ability of GreenSeal to utilize the balance of outstanding accounts receivable (discussed below), this factor leans in favour of the CCAA proposal.

The competing proposals and their effect on stakeholders

[32] Stoke complains that it is being deprived of its proprietary ownership rights in the accounts receivable which secure GreenSeal's indebtedness to it. It further complains that the GreenSeal proposal effectively forces Stoke to be a DIP lender without the protection of a super-priority. As well, Stoke and YNCU object to their security and financial position being put at risk, while operations remain in the control of GreenSeal management during the time it will take to implement the GreenSeal proposal.

[33] This factor has a significant overlap with the value maximizing analysis set out above because of the importance of the cash flow projections to the ultimate impact of the outcomes on the parties.

[34] What I would add to that prior analysis is a consideration of the risk mitigation features of the GreenSeal proposal.

[35] Para. 46 of the proposed TARIO provides for payments to be made to Stoke, up to a maximum of over $500,000, from accounts receivable payments received between now and the end of September. Further, para. 47 of the draft order would allow GreenSeal to use remaining accounts receivable to fund working capital, but only if the remaining accounts receivable balance stays at a level 1.25 times the amount of the recoveries sought to be utilized as working capital.

[36] In addition, in para. 49 of the draft order, GreenSeal proposes that Stoke's consultant, Steinberg Advisory Corp., would be appointed to act as information liaison of the GreenSeal accounts receivable with the ability to: (i) monitor the accounts receivable; (ii) monitor GreenSeal's inventory including its quality; and (iii) make recommendations to GreenSeal regarding profitably monetizing GreenSeal's inventory. Under that scenario, as I alluded to briefly in my endorsement approving the GreenSeal proposal under the CCAA on July 9, 2024, this would provide transparency to the secured creditors during the next two and a half months. If, during that time, it becomes apparent that the GreenSeal projections referred to in these Reasons are materially off, to the prejudice of the secured creditors, they would have the ability to return to court to renew their applications for the appointment of a receiver.

[37] Looking at this factor as a whole, I start with the observation that there is much to be said for Stoke's objection that their property is being used to finance ongoing operations and that GreenSeal's proposal is, in effect, forcing it to be a DIP lender against its will and without the protection of a super-priority charge.

[38] It is important context, however, to know that how GreenSeal proposes to treat the accounts receivable until the end of September is precisely how they have been utilized for months in practice prior to these proceedings being instituted. In other words, although in theory the accounts receivable are payable to Stoke, which then reimburses GreenSeal for the amount of the payment which exceeded actual advances, that is not how the factoring agreement was applied in practice. In practice, Stoke permitted GreenSeal to replace paid accounts

receivable with new accounts receivable, such that the payments were in fact used by GreenSeal as working capital for its ongoing operations.

[39] This is not a waiver or estoppel argument. It is certainly true that Stoke's pre-filing indulgences in this regard cannot be said to bind Stoke to continue that practice. That was then, this is now. However, when I look at: past practice together with the Monitor-supported, conservative cash flow projections and weight the balance of outcomes reflected in those projections; the immediate and ongoing payments to Stoke until September; the limitations on the use of additional accounts receivable as working capital; the additional transparency afforded by the appointment of an information liaison; and the ongoing payments to service the YNCU debt and to reduce property and excise tax arrears, I conclude that the relative impact on the parties of the GreenSeal CCAA proposal does not weigh in favour of a receivership in the circumstances.

Behaviour of the parties

[40] As noted earlier, I accept that the secured creditors have legitimate concerns.

[41] What has changed, of course, is that the behaviour of which the creditors complain was pre-Monitor and pre-information liaison behaviour. To the extent, for example, that intercompany transfers may have been of concern or prejudicial to the creditors, such transfers: a) have been represented to the court as not presently necessary or contemplated; and b) are subject to the express consent of the Monitor in any event.

[42] The behaviour of the parties is a relevant factor *prima facie* favouring the creditors position, but in the circumstances, I find that these concerns over past behavior have been reasonable mitigated.

Need for greater discretionary latitude under CCAA

[43] Both parties agree that this factor is inapplicable in the circumstances of this case.

Other Matters

[44] As noted in my July 9 endorsement, there was no indication in the material that Steinberg would consent to its appointment as information liaison. It was not my purpose in raising this to give a veto to the creditors based on the Steinberg consent. If the creditors do not want an information liaison role, that is their prerogative. The point is that the possibility is there, if they want to make use of it. My purpose in raising the point was only that I am not prepared to order someone to fill a court sanctioned role in these proceedings which they do not want or do not consent to filling.

Conclusion

[45] As will be apparent from the analysis set out above, I am, in effect, concluding that it is reasonable for GreenSeal to have one shot at its proposal under the CCAA, while being kept on a short lease and with the ability of the secured creditors to renew their receivership applications if the CCAA proposal starts to go materially off the rails.

[46] For the forgoing reasons, I approve the Green Seal proposal under the CCAA and adjourn the receivership applications *sine die*.

Penny J.

Penny J.