CITATION: Atlas Global Brands Inc., 2024 ONSC 5570
COURT FILE NO.: CV-24-00722386-00CL
DATE: 20241007

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ATLAS GLOBAL BRANDS INC., GREENSEAL CANNABIS COMPANY, LTD., GREENSEAL NURSERY, LTD., AGMEDICA BIOSCIENCE INC., WELLWORTH HEALTH CORP., 5047346 ONTARIO INC., 8050678 CANADA INC. AND TAVIVAT NATURALS INC.

BEFORE: W.D. Black J.

COUNSEL: *Mary Paterson*, for Atlas Global Brands Inc.
Patrick Corney and Larry Ellis, for the DIP Lender
Leanne Williams, for Your Neighborhood Credit Union
Sharon Kour and Caitlin Fell, for Stoke Canada Finance Corp.
Edward Park and Kevin Dias, for Canada Revenue Agency
Trevor Courtis, for the Monitor, McCarthy Tétrault LLP
Karen Fung and Greg Adams, Court-appointed Monitor, Ernst & Young Inc.

HEARD: October 4, 2024

ENDORSEMENT

Overview

[1] There were two main matters before me today, relating to the two distinct aspects of the business of the applicants (the "Applicants" or the "Atlas Group"). In this endorsement I will from time-to-time use terms as defined in the materials.

[2] While the business activity of the Atlas Group generally is the production, distribution, and sale of cannabis internationally and in Canada, it owns companies operating in two different business lines.

[3] First, AgMedica Bioscience Inc. ("AgMedica") is a licensed producer of cannabis and owns a production and distribution facility in Chatham-Kent, Ontario. It operates primarily in the international market.

[4] Greenseal Cannabis Company Ltd. (“GreenSeal”) is also a licensed producer of cannabis. It operates out of a facility in Stratford, Ontario, and principally operates in the domestic market.

[5] Like many participants in the cannabis industry, the Atlas Group companies have experienced financial setbacks and related problems in recent years. Atlas Global Brands Inc., the “flagship” publicly traded company of the Atlas Group, has been subject to a “Cease Trade” order for well over a year.

Initial CCAA Order

[6] In the face of growing pressure from its secured creditors, Atlas brought this application for a stay and an initial protective order under the CCAA. That initial order was granted on June 20, 2024.

[7] While the CCAA order and stay encompassed all entities within the Atlas Group, it is instructive to note that the two different business lines, and the entities involved in those parallel pursuits, respectively, not only had distinct operations in largely different realms, but relied on different sets of creditors and arrangements to finance those operations. Counsel advised that GreenSeal was a fairly recent addition to the Atlas Group, by acquisition, and it appears that the GreenSeal business has not been (if it ever could be) fully integrated into the Applicants’ operations.

[8] The existence of different sets of creditors, with different and at times divergent interests, has complicated the progress of these proceedings.

Justice Penny’s July 9, 2024 Endorsement

[9] Justice Penny’s endorsement of July 9, 2024 (His Honour has to this point overseen the steps within these CCAA proceedings) exemplifies the nature and consequences of the competing interests at play.

[10] At that time, Penny J. granted GreenSeal’s motion for a third amended and restated order relative to the GreenSeal business. His Honour adjourned the application of GreenSeal’s secured creditors, Stoke Canada Finance Corp. (“Stoke”) and Your Neighborhood Credit Union (“YNCU”) for the appointment of a receiver over the GreenSeal business.

[11] In his endorsement for that hearing, Penny J. reiterated the differing circumstances of the two businesses within the Atlas Group, saying 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.”

[12] Justice Penny noted that his second amended and restated initial order of July 5, 2024 (the “SARIO”) had approved the appointment of the Monitor over the AgMedica business and granted related orders including super-priority Administration, Directors, and DIP Lending Charges.

[13] His Honour confirmed that the expectation was for the Applicants "under the AgMedica branch of these proceedings," to "come forward with a SISP proposal later in July, with a view to concluding a transaction by the end of September 2024."

[14] In addition, Penny J. noted that "The Applicants and the Monitor indicate 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 as opportunities to be considered both separately or en banc."

[15] His Honour explained that at the time he granted the SARIO, he had adjourned both the application under the CCAA in respect of GreenSeal, as well as the competing receivership applications of Stoke and YNCU (i.e. competing with the CCAA application, as opposed to competing inter se). The adjournment, Penny J. said, 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."

[16] Unfortunately, by the time of the attendance on July 9, those negotiations had broken down. Stoke and YNCU opposed any further order under the CCAA and revived their request to appoint PWC as Receiver of the GreenSeal business.

[17] In response to this renewed request to appoint a receiver, GreenSeal had in turn significantly revised its proposal and draft order (a third amended and restated initial order "(TARIO"), with a view to mitigating risks that the CCAA proceedings might pose for GreenSeal's secured creditors (i.e. Stoke and YNCU) pending the SISP process.

[18] Justice Penny undertook an analysis of the competing considerations driving a choice between CCAA and receivership applications, identifying significant factors emerging from caselaw and literature as important touchstones in the determination.

[19] I will not repeat Penny J.'s analysis here. Suffice to say that His Honour carefully weighed competing considerations, and came to a conclusion that was clearly, and was clearly stated to be, a result arising from the specific contextual and temporal factors at hand at that time. Justice Penny gave significant weight to GreenSeal's creditors' concerns, but was persuaded that GreenSeal should be given, in effect, one last chance to develop an acceptable proposal.

[20] To this end, in his discussion of the important factor weighing "The competing proposals and their effect on stakeholders" Penny J. wrote:

> "[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.

. . .

> [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, at 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…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."

[21] However, Penny J. observed that the way in which GreenSeal proposed to treat the accounts receivable until the end of September was precisely how they had been utilized for months in practice prior to the proceedings being instituted.

[22] Justice Penny hastened to add that this fact did not constitute a "waiver or estoppel" argument.

> "However", he concluded,
>
> "when I look at: past practices together with the Monitor-supported, conservative cash flow projections and weigh the balance of outcomes reflected in those projections; the immediate and ongoing payments until September; the limitations on the use of additional accounts receivables 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."

[23] Finally, Penny J. made it clear that his conclusion was not necessarily final, and that the outcome would depend on GreenSeal's ability to develop a proposal that would alleviate its secured creditors' concerns. He said:

> "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 leash and with the ability of the secured creditors to renew their

> receivership applications if the CCAA proposal starts to go materially off the rails….For the forgoing reasons, I approve the GreenSeal proposal under the CCAA and adjourn the receivership applications sine die."

July 26, 2024 Approval of SISP and Related Relief

[24] On July 26, 2024, the Applicants came back before Penny J., seeking approval of a SISP, a KERP, payment of a prefiling debt necessary to maintain the Applicants' ability to carry on business and an extension of the stay until September 30, 2024.

[25] The proposed SISP encompassed both the AgMedica and GreenSeal aspects of the Atlas Group business, although, as will be seen, the distinct attributes and operations of the respective business lines led to variations within the process and different responses from the market.

[26] The relief sought by the Applicants on July 26 was largely unopposed, with the exception that Stoke, in particular, sought a term requiring the Applicants and the Monitor to accept a credit bid if one was made (in certain prescribed circumstances). Justice Penny resolved this "imbroglio" by adding certain conditions which, if met, would allow, prima facie, for acceptance of such credit bid.

The Matters Before Me

[27] In the result, when the parties came before me on October 4 the SISP had resulted in a successful bid and proposed transaction on the AgMedica side of the business for which the Applicants sought an approval and reverse vesting order (the "AgMedica ARVO").

[28] At the time the Applicants submitted their materials for the hearing on October 4, the SISP had not resulted in a successful bid for GreenSeal. There were two non-binding term sheets, delivered fairly late in the SISP process (on September 20, 2024), which did not provide for full payment of GreenSeal's liability to Stoke.

[29] One of the term sheets was essentially rejected out of hand, as it was not capable of paying out either of GreenSeal's secured creditors. Discussions with the party that submitted the other term sheet continued, and indeed yielded a "Binding Letter of Intent" ("LOI") delivered on the eve of the hearing before me. While it is evident that the terms of the LOI reflected some improvement from the earlier term sheet, and might yet lead to an acceptable transaction, it is also clear that the current terms are not yet capable of comprising an executable agreement.

[30] I now turn to discuss the two aspects of the hearing. While there is some overlap between these two aspects, they are, in keeping with the ongoing duality of this matter, largely distinct from one another, and give rise to different and separate issues.

The Proposed AgMedica Transaction and the ARVO

[31] The AgMedica Transaction for which the ARVO is sought, is based on a bid from Shalcor (the DIP Lender) on behalf of the LP Purchaser, and 2596690 Ontario Inc. (AgriRoots, the first mortgagee) on behalf of the Facility Purchaser (together, the "AgMedica Purchasers") to acquire AgMedica, Greenseal Nursery, Ltd. ("Nursery"), a licensed cannabis nursery in Stratford that

owns and manages over 1000 cannabis plants' genetics, and 5047346 Ontario Inc. ("504"), which owns the Chatham Facility (together the "AgMedica Purchased Entities").

[32] In keeping with the proposed RVO structure, the Applicants also seek to add 2650751 Alberta Ltd. (the "AgMedica ResidualCo") as an applicant (to function as the residual entity to house unwanted aspects of the AgMedica business and liabilities).

[33] The Applicants also seek a further extension of the stay (to permit the Transaction), approval of a sealing order for a confidential affidavit, and certain releases (the "Releases") some of which attracted controversy, discussed below.

[34] With one significant exception, there is no opposition to the ARVO and AgMedica Transaction.

RVO as Extraordinary Relief

[35] It is important, in my view, always to start, when a reverse vesting order is sought, with a reminder that, despite its increasing proliferation in the last couple of years, a reverse vesting order is to be regarded as extraordinary relief, to be granted sparingly and only in limited and exceptional circumstances.

[36] It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start "from scratch" to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.

[37] These and related considerations have led to more frequent resort to RVOs, but it is important to keep in mind that the RVO, unlike an asset sale or a share sale, is not a pre-existing structure to be taken off the shelf and applied to a proposed transaction.

[38] Rather, it is a creature of the court which, in its exceptional deployment, obviates the need for choices and consequences traditionally faced by purchasers.

[39] That is, under a share deal, a purchaser acquires a corporation as it is, with all attendant assets and liabilities. Under an asset deal, a purchaser can pick and choose those assets of a corporation it wished to acquire and which it does not, avoiding liabilities but also forgoing benefits attached to owning the company.

[40] Typically and traditionally, a purchaser has had to choose (and negotiate) its preferred transaction structure, based on the advantages and disadvantages of either approach.

[41] The RVO, however, permits a purchaser to vest out the target's liabilities and unwanted assets and to acquire shares of the new entity created for the transaction. As such, the RVO structure is not simply a share deal, but a unique blend of a share deal and an asset deal through which, by court order, the purchaser enjoys some of the benefits of a share deal and some of the

benefits of an asset deal. It is a structure not available without the court's discretionary imprimatur and, unlike a share deal or an asset deal, cannot be done without the court's blessing.

Applicants' Rationale for RVO Here

[42] The Applicants posit a series of reasons why the ARVO should be approved.

[43] First, they emphasize the robust process engaged in the SISP, which thoroughly canvassed the market, and which resulted in the proposed AgMedica Transaction which "was the only binding offer received for AgMedica, Nursery and 504" and is "the only chance for a going-concern outcome for the benefit of employees, vendors, suppliers and customers."

[44] The AgMedica Transaction will not generate sufficient proceeds to satisfy claims with a priority lower than the DIP Loan and first secured mortgage demonstrating, the Applicants say, that there is no value to be realized beyond the AgMedica Transaction.

[45] The Monitor supports the requested approval of the AgMedica Transaction and the RVO structure. Both the Applicant and the Monitor emphasize that, as with other transactions in this sphere, the RVO structure is necessary to maintain and preserve the licenses required to operate the "highly regulated businesses of the AgMedica Purchased Entities."

[46] Finally, the Applicants and Monitor maintain that the relevant stakeholders are no worse off under the proposed reverse vesting structure than they would be under a traditional vesting order, and that there is no viable alternative that would produce a more favourable economic result.

[47] With the exception of the last of these propositions, there is effectively no opposition to the Applicants' positions (with the exception of some differences about the scope of related releases, discussed below).

[48] It is fair to emphasize the value of the licenses in the acquired entities, and the central importance of those licenses to the purchasers in the AgMedica Transaction. In order for the Transaction to work, a structure conveying those regulatory permissions is essential.

[49] It is also apt to point to the going-concern outcome as a laudable result, maintaining employment and business relationships.

Discussion of Case Law re RVOs

[50] In a recent decision (*MCAP Financial Corporation v. QRD (Willoughby) Holdings Inc.*, 2024 BCSC 1654) Walker J. of the Supreme Court of British Columbia, in considering a proposed RVO structure relative to the sale of development lands, made observations emphasizing the caution required in considering the use of RVOs.

[51] After noting that RVOs are a relatively recent but increasingly frequent phenomenon, and typically structured so that "unwanted" assets and liabilities are removed and vended to a residual company while the desired or "good assets" remain with the debtor whose shares are being acquired by the purchaser, Walker J. wrote:

> "RVOs are not routinely granted as they circumvent the processes established in insolvency legislation enacted by Parliament. RVOs may be granted where the applicant can demonstrate extraordinary circumstances exist, typically, e.g. where intangible assets such as licenses, permits, intellectual property, and tax attributes are difficult or impossible to transfer to the purchaser through an asset vending order. Close scrutiny of the proposed RVO is required to ensure that the restructuring is fair and reasonable having regard to the objectives and constraints of the statutory scheme in issue (in this case the BIA). An RVO is not to be granted merely because it may be more convenient or beneficial for the purchaser. There must be an evidence-based rationale for value in the proposed RVO transaction."

[52] Justice Walker went on to note that, in addition to establishing that extraordinary circumstances exist to justify consideration of an RVO structure, the applicant seeking approval must also satisfy the factors set out in Penny J.'s seminal decision in *Harte Gold Corp. (Re)*, 2022 ONSC 653, known, as Walker J. confirmed, as the "Harte Gold Factors."

[53] The Harte Gold Factors, consistent with factors set out in s.36(3) of the CCAA and largely corresponding to the *Soundair* criteria (as propounded in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R.(3d) 1), for approving an asset sale require the applicant to demonstrate:

> "(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
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> (b) whether the monitor approved the process leading to the proposed sale or disposition;
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> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
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> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
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> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value."

[54] In my view, subject to the argument advanced by the Attorney General of Canada discussed immediately below, the proposed RVO satisfies these criteria.

[55] As noted, the process leading to the proposed ARVO was extensive and robust, and was undertaken with the Monitor's input and approval.

[56] The consideration to be realized appears fair, particularly in a market in which many participants are in financial distress.

[57] While there is some debate about the extent to which GreeenSeal's secured creditors were consulted along the way, their positions have been advanced, certainly before Penny J., in the two hearings (July 9 and 26) discussed above, and in that sense their views have been taken into account.

[58] The issue from these criteria meriting further discussion is the question of the effects of the proposed transaction on the Attorney General, as creditor with respect to deemed trusts for source deductions.

Opposition from Crown

[59] In that regard, in this case, the concerns and opposition to the ARVO come from the Attorney General of Canada (speaking on behalf of the CRA, together, the "Crown").

[60] That opposition relates to the aspect of the AgMedica RVO which would vest out a source deduction deemed trust claim in the amount of $1,772,417.69. (I should note that there are also substantial Excise tax obligations outstanding, but these claims are not secured, and the Crown implicitly acknowledged that the opposition it presses before me is in relation only to the statutory deemed trust claims for source deductions).

[61] The Crown makes its argument emphatically, both in its written submissions and in the impassioned oral submissions its counsel made before me.

[62] The Crown asserts that "vesting out a trust claim through an RVO – in and of itself an extraordinary remedy – would be an extraordinary result."

[63] The argument urges the "sanctity" of the trust claims at issue, and says that issuing the RVO sought in this case would create inconsistency with subsection 6(3) of the CCAA, which requires payment in full of a source deduction of liability under a CCAA plan, along with subsection 37(2) of the CCAA which preserves the Source Deduction Deemed Trust in the CCAA.

[64] The Crown acknowledges that there is no plan of compromise or arrangement in the current case, but asserts that permitting a source deduction liability to be vested out through an RVO within a CCAA proceeding "would create disharmony and asymmetry between a CCAA plan and a CCAA RVO." The Crown maintains that the "transaction vehicle of choice should be "source deduction neutral" and that there should be equality of treatment of the source deduction liability between a CCAA plan and a CCAA RVO.

[65] The Crown goes on to argue that the test laid out in the Court of Appeal for Ontario's decision in *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, for assessing whether the interest of a third party should be extinguished through a vesting order, has not been satisfied, inasmuch as:

> "(i) a statutory trust claim is one of the highest claims known to the common law; and
>
> (ii) the Crown has not consented in any manner whatsoever to having its trust claim extinguished and, to the contrary, was expecting to be paid the exact same trust

> fund amounts that were used to keep the Atlas enterprise afloat prior to the initiation of the CCAA proceedings. The trust funds were effectively used as working capital by the Applicants, akin to a "Pre-CCAA DIP Loan", with the Crown acting as an involuntary creditor."

[66] In addition, and relevant to the third of the Harte Gold Factors in particular, the Crown alleges that it will be in a worse position under the proposed RVO than it would be under the presumed alternative, bankruptcy, in that recourse against the directors will effectively be foreclosed under the proposed RVO whereas the Crown would still have recourse against the directors in a bankruptcy scenario (subject to any due diligence defences). In making this submission, the Crown acknowledges that bankruptcy is not the preferred result here; it says that instead "Payment of the source deduction liability and affirmation of the sanctity of trust claims is the desired result."

[67] Finally, the Crown complains that the proposition imbedded in this motion that the court is being asked to approve a binding letter of intent pursuant to a "draft Purchase Agreement" to be executed at a later date "on substantially the same terms of the binding LOI" does not allow the court to "scrutinize the agreement on its final terms" which it alleges is "also unfair to the stakeholders."

[68] Dealing with this latter argument, again subject to the scope of releases, I do not perceive this as a significant concern. It was not pressed by the Crown in oral argument, and in any event, it is not unusual for peripheral terms to remain to be finalized, so long as the substantive terms are confirmed, and destined to remain "substantially the same."

[69] On the other hand, the Crown's arguments about the sanctity of the trust for source deductions, and its concern about statutory asymmetry merit serious consideration.

[70] Indeed, the Applicants concede the critical importance of these source deductions, which it agrees are, as stated by the Crown, to be "at the heart of public finance in Canada." They also do not dispute the Crown's contention that employee withholdings are not the property of an employer (here AgMedica), and that when "an employer utilizes withholdings to increase liquidity and working capital, the Crown becomes an involuntary creditor."

[71] The Crown also points out, again with no disagreement, that the central importance of source deductions is confirmed by companion deemed trust vehicles in legislation beyond the *Income Tax Act* to allow recovery of employee tax deductions that employers fail to remit (including the *Canada Pension Plan* and the *Employment Insurance Act*).

[72] As noted, the Crown argues that this comprehensive legislative effort to preserve the deemed trust for source deductions explicitly finds its way into the CCAA. Although subsection 37(1) of the CCAA expressly nullifies deemed trusts in CCAA proceedings, s. 37(2) explicitly preserves the deemed trust for source deductions under the ITA, EIA and CPP. The Crown asserts that s. 37(2) of the CCAA represents "the effort of Parliament, after many years of legislative evolution, to balance the competing policy goals of tax collection and corporate restructuring."

[73] Finally on this score, as noted, the Crown points out that under subsection 6(3) of the CCAA, the court may only sanction a compromise or arrangement if it provides for full payment

to the Crown, within six months, of all amounts that were outstanding at the time of the application included in the deemed trusts, which restriction can only be removed by consent of the Crown.

Applicants' Response to Crown: The CRA Claim Ranks Behind other Creditors

[74] Again, the Applicants acknowledge the overarching legislative scheme confirming the sanctity of deemed trust claims for source deductions. The Applicants argue, however, that in relation to the source deductions liability, the CRA's claim ranks behind the first-ranking claims of Shalcor, as DIP Lender, and of AgriRoots under the AgriRoots mortgage.

[75] As a credit bid, the Applicants note, the AgMedica Transaction does not provide cash proceeds to satisfy the lower-ranking CRA claim, and the Applicants aver that there is no basis on which a credit-bidding purchaser can be required to provide cash proceeds to satisfy lower priority claims; the credit bidder need only pay out higher ranking claims to obtain the secured assets in exchange for its debt. As such, the Applicants argue, the Crown's reliance on Osborne J.'s decision from *In the Matter of the Companies' Creditors Arrangement Act* and *In The Matter of CannaPiece Group Inc.*, 2023 ONSC 841, is misplaced. That is because, the Applicants argue, Osborne J. in *CannaPiece* "declined to approve an RVO that would have vested out the interest of a first-ranking secured creditor" and his decision is therefore distinguishable.

[76] The Applicants concede that when employers fail to withhold and remit source deductions, federal legislation gives statutory priority to such claims through mechanisms including a deemed trust. Thereby, in relation to withheld income tax, sections 227(4) and (4.1) of the ITA protect the Crown's interest by deeming unremitted amounts to be held in trust for His Majesty, notwithstanding any security interest in the amount or property deemed to be held in trust. The Applicants acknowledge that the CCAA generally recognizes the priority created for these amounts.

[77] However, the Applicants contend, despite the importance of these protective provisions, there are limited circumstances in which the deemed trust for unremitted source deductions must cede priority to other higher-ranking creditors. The Applicants cite the decision of the Supreme Court of Canada in *Canada v. Canada North Group Inc.*, 2021 SCC 30 in support of this proposition.

[78] The Applicants argue that the statutory deemed trust for the unremitted source deductions here is subordinate to the AgriRoots mortgage and Shalcor DIP Facility, which are being paid out first under the AgMedica Transaction.

[79] Concerning the AgriRoots Mortgage, the Applicants point to s. 227(4.2) of the ITA – as was discussed in *Canada North* – which provides that, for "purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest." A "prescribed security interest" is in turn defined by regulation, as follows:

> "2201(1) For the purpose of subsection 227(4.2) of the Act, prescribed security interest….means that part of a mortgage securing the performance of an obligation of the person, that encumbers land or a building, where the mortgage is registered pursuant to the appropriate land registration system before the time the amount is

deemed to be held in trust by the person (Income Tax Regulations, C.R.C., c. 945, s. 2201(1)."

[80] The AgriRoots Mortgage encumbers land (the Chatham Facility) and charges AgMedica's property in an amount up to $16.5 million. The Applicants assert, and the Crown does not contest, that $16 million of the charge was in place before AgMedica first failed to remit the source deductions.

[81] As such, the Applicants' argument continues, the AgriRoots charge was registered "before the time the amount is deemed to be held in trust by the person" such that the AgriRoots Mortgage constitutes a "prescribed security interest" for the purposes of s. 227(4.2).

[82] Since the AgriRoots Mortgage was registered prior to the existence of the deemed trust, the Applicants' argument on this point concludes, the deemed trust is not a higher-ranking claim that would have to be satisfied by AgriRoots before it could acquire the AgMedica Purchased Entities by means of a credit bid. Moreover, the Applicants add, the AgriRoots Mortgage would enjoy this priority position whether the Applicants were in a CCAA proceeding or a bankruptcy.

[83] Relative to Shalcor, the DIP Charge, by the terms of the TARIO, is a first-ranking claim over the assets of the AgMedica Purchased Entities. In *Canada North*, the Supreme Court of Canada recognized that a priority ranking DIP Charge order by a CCAA court, can, pursuant to the court's jurisdiction under the CCAA, take priority over deemed trusts for unremitted source deductions.

[84] In *Canada North*, the super-priority charges, which included a financing charge in favour of an interim lender, were granted using language substantially replicated in the TARIO with respect to the DIP Lender's Charge over AgMedica's property. In coming to that determination in *Canada North*, Karakatsanis J. wrote: "the CCAA generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts."

[85] Given the use of substantially the same language in the TARIO as in *Canada North*, the Applicants assert that Shalcor's claim as DIP Lender has priority over the CRA claim for unremitted source deductions.

[86] The Applicants also maintain that the CRA's consent is not required for the Applicants' transfer of the unremitted source deduction liability to ResidualCo as an excluded liability. The Applicants say that this step is equivalent to what occurs in a traditional asset sale, in terms of the purchaser choosing which assets it purchases and which assets it leaves behind, and argues that whether the transaction is structured as an AVO or an RVO, the AgMedica Purchasers cannot be required to increase their price or to provide cash proceeds to satisfy a lower-ranking claim.

[87] With respect to s. 6(3) of the CCAA, the Applicants say that it does not change this outcome. The Applicants observe, fairly, that what s. 6(3) says is that a CCAA court cannot sanction a plan of compromise or arrangement unless it provides for payment in full, within six months of any unremitted source deductions. On its plain wording, this provision applies specifically – and only – to plans of compromise or arrangement. There is no plan proposed for

the AgMedica Purchased Entities, and no economic basis on which such a plan could be viable (as the SISP has shown).

[88] The Applicants argue that therefore, contrary to the Crown's argument, there is no inconsistent result or asymmetry. The CCAA simply permits different approaches to achieving a restructuring. It is well-established that a debtor company can restructure by means of transactions other than a plan, such as an AVO or RVO. There is also no authority, the Applicants note, requiring that each approach be "source deduction neutral." Section 6(3) refers only to a plan, and not the well-entrenched alternative approaches, and it must be presumed, say the Applicants, that this was Parliament's intent.

[89] Finally on this front, the Applicants argue that, inasmuch as there are no other viable alternatives, the relevant comparison is whether the CRA would receive better treatment under a bankruptcy, which the Applicants say would not be the case.

Crown's Reply to Applicants' Arguments

[90] In its response to these arguments, the Crown effectively acknowledged the priority of the AgriRoots Mortgage and the Shalcor DIP Charge. Again in colorful and emphatic terms, counsel for the Crown urged that despite the technical priorities, given the sanctity and critical importance of the source deduction regimen, I ought nonetheless to uphold the primacy of the deemed trust to "send a signal to the market." To do otherwise, counsel insisted, would be to render the court "beholden to the tyranny of the market."

Conclusion re ARVO

[91] While I too acknowledge the critical importance of the deemed trust for source deductions, and the benefits of the Crown's interest prevailing in many if not most scenarios, I must also presume that Parliament intended the technical result yielded by the language of the relevant legislative and regulatory provisions and, subject to a change in that law, my task is to enforce those provisions as written, regardless of sympathies. I view this not as succumbing to the tyranny of the market, but rather to adhering to and enforcing the legislation as written.

[92] Addressing the Crown's concern about losing the ability to pursue claims against directors and officers, the Applicants note that under the proposed ARVO pre-filing arrears and refunds are vested in ResidualCo and post-filing arrears (if any) and refunds stay with the AgMedica Purchased Entities, and that, in response to the Crown's concern, any claims against the directors and officers in respect of unpaid taxes are channeled to insurance and the stay is lifted on a limited basis to permit the CRA to take steps to assert such claims. In my view this channeling of claims to insurance means the CRA is in no worse position than it would be in a bankruptcy scenario.

[93] In sum, the Applicants say that the ARVO mechanism does not harm the CRA, and that the CRA would be in the same position in a traditional asset sale scenario and in a bankruptcy.

[94] Overall, I agree.

[95] The ARVO will allow the Agmedica Purchased Entities to carry on business as a going concern, to the evident benefit of employees, vendors, suppliers, and customers.

[96] I accept that the RVO structure is necessary to transfer the required licenses to operate that going concern, and that therefore the extraordinary circumstances justifying the use of the RVO are in place.

[97] While it may be disheartening that the deemed trust asserted by the Crown relative to the source deductions cannot trump the interests of the AgriRoot Mortgage or the Shalcor DIP Charge, I find nonetheless that those priorities are clear and carry the day.

Resolution of Release Issue

[98] The remaining issue relative to the ARVO, as to associated releases, essentially worked itself out during the course of submissions.

[99] That is, there was a disagreement evident in the parties' materials, and in the initial submission of the Applicants, on one hand, as against those of Stoke and YNCU, on the other, as to whether the proposed releases should include the directors and officers of GreenSeal.

[100] However, and to her credit, once Applicants' counsel heard the submissions on behalf of Stoke and YNCU, and that they had not expected that a release of the GreenSeal directors and officers would be part and parcel of the AgMedica ARVO, she agreed to exclude GeenSeal from the post-filing release. She did not, in so doing, resile from the principled basis for her position, but did so in light of accepting that counsel opposite were taken by surprise. In his even-handed submissions, counsel for the Monitor also supported the removal from paragraph 31 of the proposed order the post-filing release of GreenSeal's directors and officers.

[101] In all other respects, the form of release was in my view appropriately and rationally connected to relevant aspects of the restructuring, and appropriately limited to the extent necessary, and should remain as written.

[102] As such, with necessary modifications (there were various aspects of the draft ARVO order in the materials to be completed) I grant the ARVO order sought by the Applicants. I also extend the current stay, as requested to the end of October, 2024.

The GreenSeal Issues

[103] I turn back now to address the issues relative to the other business line within Atlas, that of GreenSeal.

[104] As noted earlier on, the SISP, while yielding the AgMedica Transaction, did not produce an executable deal relative to the GreenSeal business.

[105] It did, on the eve of the motion, yield the LOI, which was improved from the earlier term sheet from the same bidder.

[106] However, it was not the case, and nobody suggested, that the LOI was yet the basis for a final and definitive transaction.

[107] In simple terms, in the circumstances, counsel for the Applicants argued that the Applicants, together with the Monitor, whose SISP had led to the LOI that is currently on the table, should continue the process of negotiating with that bidder with a view to getting to a transaction acceptable for all concerned.

[108] Stoke and YNCU, on the other hand, argued that the Applicants, and in particular GreenSeal had taken their "one shot" contemplated by Penny J.'s July 9 endorsement, and, in light of that "shot" having not led to a definitive deal, should now yield to Stoke and YNCU, and their proposed CRO, to take considerably increased control over GreenSeal's operations, and take the lead in the ongoing negotiations, if warranted, with the remaining bidder.

[109] Counsel for the Applicants argued that she understood that the bidder had expressed reservations, or even an unwillingness, for GreenSeal's secured creditors, and/or their proposed CRO to become directly involved, such that, Applicant's counsel suggested, their participation could put the one potential transaction at risk.

[110] Counsel for Stoke, in particular, advised that her information was different than that of Applicants' counsel, and that she understood that the bidder in fact welcomed the participation of the proposed CRO (who has been functioning as information liaison for the last couple of months) and the opportunity to deal more directly with the secured creditors. Moreover, she emphasized that the position of the secured creditors deteriorates with each passing day, and that they ought to be permitted to protect their interests.

[111] A way around this developing impasse was suggested in the submissions of counsel for the Monitor. Again in an even-handed fashion, he observed that, although the involvement of the secured creditors and their CRO may create risk of the one potential transaction going by the wayside, the secured creditors were now specifically aware of that risk and, as the parties with something to lose, should be entitled to elect to run the stated risk and take their chances.

Conclusion re GreenSeal Issues

[112] I am drawn to this position. I had expressed a concern during argument that it makes sense for Stoke and YNCU, whose funds are at stake, to be more directly involved in the negotiation or other process(es) to explore potential ways forward relative to GreenSeal, and that the appointment of the CRO on their behalf would facilitate this more direct involvement. It is clear that the risk to the secured creditors is not nominal or theoretical; the evidence indicates that GreenSeal's current funding is precarious and likely short-lived.

[113] I note that the "ask" from the secured creditors at this stage is short of the receivership for which they were vying before Penny J. earlier on, and that in any event, as the parties with interests remaining at risk, appointing the CRO, with significant powers vis-à-vis the operation of GreenSeal's business, provides more direct information, considerably better control over those operations and an appropriate role and say in the outcome for the GreenSeal side of the business.

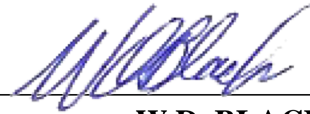
[114] I also find that the Charge included in the proposed order appointing the CRO is reasonable and appropriate in the circumstances, as is the fee to be paid. There was some debate about whether or not that fee represented a savings from current outlays; it appears to me that some savings will in fact be realized but, regardless, in my view the appointment of the CRO is

nonetheless appropriate and beneficial for the reasons set out above. I find that the request for sealing and confidentiality of the Confidential Exhibit to the Goldstein Affidavit is appropriate, and meets the criteria of the Sherman Estate case.

[115] Accordingly, I grant the CRO Appointment order.

Return to Court as Required

[116] I expect that there may yet be issues to be addressed as these orders and related steps are implemented. In the circumstances, the parties may come back to this court (either to Penny J. or to me) to address any such remaining issues and steps.



W.D. BLACK J.

DATE: October 7, 2024