



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00712124-00CL HEARING
DATE: July 31, 2024

NO. ON LIST: 7

TITLE OF PROCEEDING: BANK OF MONTREAL v. SERENDIPITY MEDIA LTD.

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Patrick Corney	Applicant	pcorney@millerthomson.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Valerie Cross	Bank of Hope	valerie.cross@dentons.com
Preet Saini	Royal Bank of Canada, Creditor	preet.saini@mcmillan.ca
Matthew Schneider	Old Kent Road, Creditor	mschneider@blg.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Clifton Prophet	Counsel to Receiver, Deloitte	clifton.prophet@gowlingwlg.com
David Cohen	Counsel to Receiver, Deloitte	david.cohen@gowlingwlg.com
Thomas Gertner	Counsel to Receiver, Deloitte	thomas.gertner@gowlingwlg.com
Jessica Chen	Counsel to Receiver, Deloitte	jessica.chen@gowlingwlg.com

Karen Fellowes	Grant Thornton, Court-Appointed Receiver	kfellowes@stikeman.com
Ari Taub	Self-Representative, Serendipity Media LTD.	ari@taublawn.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. On January 3, 2024 Deloitte was appointed by Order of the Ontario Superior Court of Justice (the "Ontario Receivership Order"), as Receiver, without security, of the undertaking and personal property of Serendipity Media Ltd. ("Serendipity") and all of the assets, undertakings and properties of the guarantor entities listed at Schedule "A" to the Ontario Receivership Order (collectively, the "BMO Guarantors" and, together with Serendipity, the "Existing Receivership Debtors") pursuant to section 243 of the *Bankruptcy and Insolvency Act* (the "BIA") and section 101 of the Courts of Justice Act.
2. The Receiver seeks orders:
 - a. Extending the receivership over certain film production companies and assets indirectly financed by the Applicant, through Serendipity (the "Third-Party Borrowers and Intermediaries");
 - b. Empowering (but not obligating) the Receiver to make assignments in bankruptcy in respect of Serendipity and the Debtors;
 - c. Approving the First Report of the Receiver dated July 16, 2024 (the "First Report") and the Confidential Supplement thereto, and the activities and conduct of the Receiver described therein;
 - d. Sealing the Confidential Supplement;
 - e. Authorizing the Receiver to enter into new distribution agreements in respect of certain film assets forming part of the receivership estate under what is described as the "Dever Proposal"; and
 - f. Approving the fees and disbursements of the Receiver and its counsel.
3. At the same time, Bank of Hope seeks an order to add certain companies indebted to it as respondents and debtors in these proceeding (the "BOH Debtors") and certain related collateral (the "BOH Collateral") to the receivership on the basis of, among other things, the close connections between the BOH Debtors and the existing Receivership Debtors.
4. The addition of the BOH Debtors and the BOH Collateral and the Third-Party Borrowers and Intermediaries is proposed to be effected through an amendment and restatement of the appointment order in this matter made by Cavanagh J. dated January 3, 2024.
5. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Receiver's factum filed on this motion.

Background to the Motions

6. Serendipity is a private Canadian film and television production and distribution company incorporated in Alberta with operations in Alberta, Manitoba, and Ontario, which primarily focus on documentary series.
7. Serendipity is the majority shareholder in a total of 71 productions, each held in a subsidiary company. Only 23 of the 71 subsidiary companies, defined as the BMO Guarantors above, are subject to the Ontario Receivership Order. The primary secured lender for the BMO Guarantors is the Bank of Montreal ("BMO") which was owed approximately \$20 million from the Existing Receivership Debtors ("BMO Indebtedness") as at January 3, 2024.
8. Other subsidiary or related companies of Serendipity, not subject to these receivership proceedings, have obtained financing from (i) Royal Bank of Canada ("RBC"), (ii) Bank of Hope ("BOH"), and (iii) a private group of lenders represented by Enlightened Private Capital Inc. ("Enlightened", collectively

with RBC and BOH, the "Additional Lenders"), totaling approximately \$40 million, which may have been guaranteed, in whole or in part by Serendipity.

9. Pursuant to paragraph 11 of the Ontario Receivership Order, the Additional Lenders maintain their ability to exercise any of their rights and remedies against the Existing Receivership Debtors, including commencing proceedings against Serendipity in respect of collateral subject to a security interest granted by Serendipity in favour of the Additional Lenders. RBC brought an application for the appointment of a receiver over certain RBC Borrowers that was granted by the Alberta Court of King's Bench on April 11, 2024.
10. In reviewing the Third-Party Loans, it has come to the Receiver's attention that, notwithstanding the terms of the underlying term sheets, Serendipity did not advance funds directly to the Third-Party Borrowers. Rather Serendipity funded certain other entities (the "Intermediaries"), who then advanced funds to the Third-Party Borrower, as a loan, "distribution advance", or share purchase. The BMO Security does not necessarily include the property, assets, and undertakings of the Intermediaries. Serendipity has a first ranking security interest against all of the personal property of each of the Third-Party Borrowers.
11. The Receiver's First Report and the Confidential Supplement indicate that the Existing Receivership Debtors' production structures and funding practices differ from industry norms. Tax credits form an important part of the funding structure and security for production companies like Serendipity. The BMO Guarantors and their respective film tax credit claims are being audited by CRA. There are also ongoing discussions with the Canadian Audio-Visual Certification Office (the agency responsible for administering federal film tax credit programs ("CAVCO"), Ontario Creates, and Manitoba Film and Music ("MFM") regarding the consideration of Existing Receivership Debtors' tax credit applications. Overall, the status of the film tax credits pledged as collateral to BMO and the other lenders to Serendipity and its affiliates is uncertain at present.
12. On April 29, 2024, the Receiver issued demands on the Third-Party Borrowers and Section 244 Notices under the BIA. On the same date, the Receiver also made demand on the Intermediaries. Upon receipt of these demands and Section 244 Notices, the Third-Party Borrowers and Intermediaries consented to enforcement.
13. The BOH Debtors are also experiencing a significant liquidity crisis and have defaulted on numerous obligations under their credit agreements. Government authorities have advised BOH and the Debtors that they have concerns with the tax credit applications submitted by, among others, the BOH Debtors, including the need for additional information and documentation to process such applications. Such discussions are still on-going, and the BOH and its advisors have been directly engaged in many of these discussions to date.
14. On July 11, 2024, BOH issued formal demand letters and notice of intention to enforce security. As at July 5, 2024, the total amount owing and due to BOH is \$7,864,815.74.27.
15. Trivium Media Ltd. is the sole or majority owner of shares in each of the BOH Debtors. Sarah Howell is the sole director sole of Trivium. Ms. Howell is also the sole director of Serendipity. There is a commonality of controlling minds between the BOH Debtors and Serendipity.
16. Each of the BOH Debtors guaranteed Trivium's obligations pursuant to a credit agreement on identical terms pursuant to unlimited guarantees, subject to different dates of execution, and granted an identical security interest to BOH pursuant to film production security and assignment agreements subject to differences in the jurisdiction of provincial tax credits.

Amended and Restated Receivership Order

Expansion of Receivership

17. The test for appointing the Receiver to include the Third-Party Borrowers, the Intermediaries and the BOH Debtors is the same as was considered and applied when the original appointment order was made

on January 3, 2024, which included the BOH Guarantors. The appointment of the Receiver over these additional debtors and their assets is just and convenient having regard to, among other things, the nature of the property and the rights and interest of all parties in relation thereto, which includes a secured creditor under its security. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 at paras 10-12.

18. The relevant factors rendering it just and convenient to appoint Deloitte as receiver over the Third-Party Borrowers and the Intermediaries and their property, assets and undertaking are set out in paragraph 36 of Deloitte's factum filed on this motion. Unlike the Third-Party Borrowers, the extension of the receivership to the Intermediaries is not strictly pursuant to the security. However, it is just and equitable to include the Intermediaries as a necessary parties in following the chain of funding so as to ensure that BMO's security is given its proper effect.
19. Special circumstances warranting the appointment of a receiver include cases where there are complex business structures or where there are large amounts of money at stake that might not be realized without the appointment of a receiver. See *Ontario College of Optometrists v. SHS Optical Ltd.*, 2010 ONSC 3786, at para 229.
20. With respect to the BOH Debtors and the BOH Collateral, the considerations applicable to the BMO Guarantors Third-Party Borrowers apply with equal force. The relevant factors rendering it just and convenient to appoint Deloitte as receiver over the BOH Debtors and their property, assets and undertaking are set out in paragraphs 39-43 of BOH's factum filed on this motion.
21. Having regard to the commonality of control, and in the interests of efficiency and cost-effectiveness, it is just and convenient to expand the Receiver's powers over the BOH Debtors in these on-going proceedings."
22. The requested expansion of the receivership was not opposed by any stakeholder. The Receiver consents to/seeks. It is just and convenient for the receivership order to be expanded in the manner proposed by both the Receiver and BOH in the proposed Amended and Restated Appointment Order.
23. The corresponding changes to the original order account for the expansion and funding of the receivership, including the increased borrowing and borrowing charges have been negotiated by the Receiver with the secured lenders and since they are supporting it, and no one else opposes, this expansion and its ancillary terms approved, subject to the carve outs that have been indicated in the order.

Authorization to Assign the Debtors into Bankruptcy

24. Serendipity is the entity that provided services to the BMO Guarantors and, as such, has considerable books, records, and information in its possession. The Ontario Receivership Order grants the Receiver access to any records, or information in Serendipity's possession, but only to the extent related to the BMO Guarantors (and now expanded to the Third-Party Borrowers, the Intermediaries and the BOH Debtors).
25. Based on the Receiver's preliminary review of the BMO Guarantors' books and records, there are transactions with Serendipity and other entities that the Receiver cannot fully investigate without full access to all of Serendipity's records.
26. The Receiver is of the view that a concurrent bankruptcy proceeding are required so that a BIA trustee can avail itself of the investigatory powers and remedies under the BIA. This is one among other reasons for this authority detailed in paragraph 46 of the Receiver's factum filed on this motion.
27. Similar reasons apply to the request for authorization to file for bankruptcy on behalf of the BOH Debtors.
28. Deloitte is knowledgeable with respect to the remaining assets, properties, undertakings, and specific issues facing the Debtors and is well positioned to effectively assume the role as the licensed insolvency trustee for the Debtors' estates. Deloitte is not aware of any conflict to act as licensed insolvency trustee for all of the now expanded list of debtors. Deloitte is willing to act in such capacity.

29. This court has the authority to empower a Receiver to file an assignment in bankruptcy on behalf of a debtor. See *RBC v. Gustin*, 2019 ONSC 5370 at para 15; *Bank of Montreal v. Owen Sand Golf and Country Club*, 2012 ONSC 557 at para 7. In *Royal Bank v. Sun Squeeze Juices Inc.*, 1994 CarswellOnt 266, [1994] OJ No 567 at para 11 (OSNC), aff'd *Royal Bank v. Sun Squeeze Juices Inc.* 1994 CanLII 8771 (ONCA) the fact specific nature of this inquiry was reinforced.
30. In this case, the bankruptcy assignment is for the purpose of permitting the Receiver to avail itself of the enhanced investigative powers available to a BIA trustee. It is not necessary for the Receiver to exhaust its remedies under other legislation before resorting to a bankruptcy assignment as such steps could prove to be needlessly inefficient and expensive. See *Gustin* at paras. 8 and 17.
31. A receivership and bankruptcy filing can proceed concurrently and the Receiver believes that it is necessary and appropriate in the circumstances of this case, as are particularized in paragraph 46 of the Receiver's factum. Nor is there anything specific about the existing Ontario or Alberta receivership orders that preclude the bankruptcy filings for which authorization is sought in this case.
32. Mr. Taub, appearing not as counsel but as a representative of Serendipity, raised concerns about the Receiver filing a bankruptcy petition, but no material was filed and no persuasive reasons were advanced for opposing this relief.
33. The Receiver's need for the enhanced investigatory powers available to a trustee in bankruptcy has been established through the concerns identified in the Receiver's First Report, having regard to, for example, the transactions with Serendipity and other entities and other apparent financial irregularities that have been identified involving significant payments and transfers made by the Existing Receivership Debtors to related parties prior to January 3, 2024, including the payments said to be for Serendipity Consulting Services to related parties.
34. The Receiver says that it has been frustrated in its efforts to obtain documents and records from Mr. Taub and others at Serendipity. While Mr. Taub denied this at the hearing, he did not file any response to the allegations in the Receiver's First Report which detail the concerns about the lack of co-operation and disclosure.
35. Another equally compelling and independent justification for authorizing the bankruptcy filing is that assigning the Debtors into bankruptcy could also have the effect of reversing the priority of pre-filing HST and GST liabilities which are significant for the Existing Receivership Debtors and may be an issue for the remaining Debtors (including the BOH Debtors) as well given the similar funding and operational structure used across the greater corporate enterprise.
36. Mr. Taub and his partner Ms. Howell appear to be the subject of the Receiver's investigation, so it is not surprising that they may prefer that the Receiver's investigative powers not be expanded through a bankruptcy, but that is not a legal justification for denying the requested order. Having considered the specific factors identified by the Receiver, I am satisfied that it is just and appropriate in the circumstances of this case to grant the Receiver the requested authority to make a bankruptcy filing.
37. The Debtors (now expanded) for which the bankruptcy filing is authorized are insolvent and the Receiver believes that any BIA requirements for making the bankruptcy filing(s) can be satisfied. On this basis, the Receiver is authorized to do so if it decides it is in the best interests of the stakeholders.

Ancillary Order

Sealing of Confidential Supplement

38. Discussions with CAVCO, CRA, Ontario Creates and MFM regarding the film tax credits remain ongoing and the information contained in the Confidential Supplement relates to these commercially sensitive discussions. Disclosure of the information could prejudice the discussions prematurely, to the detriment of stakeholders, including BMO. This is the type of important interest that is appropriate to protect by a sealing order and negative effects on third parties, if any, will be insignificant.

39. The proposed sealing order is limited to the Confidential Supplement so as to minimally intrude upon the public interest in the openness of our courts. Further, the order allows for the possibility of unsealing upon further order of the court and it will end upon the Final determination of all outstanding applications for tax credits of the Debtors.
40. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Preservation of this type of commercially sensitive information in the context of ongoing negotiations meets the requirements of the test for sealing court documents.
41. The only opposition to this sealing order was by Mr. Taub. Mr. Taub wants to see the Confidential Supplement. Included in it are some of the preliminary investigative findings of the Receiver that he would like to see. However, the important commercial interest in protecting the confidentiality of the information in this document while the negotiations are ongoing with the governmental and tax authorities outweighs Mr. Taub's curiosity and the public interest in the open court principle.
42. Mr. Taub also wants to see the Dever Proposal (discussed below) which is described in, and forms part of, the Confidential Supplement.
43. Mr. Taub's reason for wanting to see the Dever Agreement is to have insight into his mandate and the scope of his engagement and reporting obligations so that his progress can be monitored. Without expressing any view as to whether Mr. Taub will have any standing to address those issues, they are not of immediate concern. It was established during the hearing that Mr. Taub will eventually have access to this Agreement when it is made public.
44. The Receiver has indicated that it will disclose the parts of the Confidential Supplement that back up and details the terms of the Dever Proposal, after that proposal has been signed. At that time, it will be disclosed to all but there is no reason for it to be disclosed to Mr. Taub in advance.
45. The sealing of the Confidential Supplement is approved on the proposed terms. **The Receiver is directed to ensure that the Confidential Supplement is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that it can be physically sealed.**

Authorization of the Dever Proposal

46. The Receiver believes that acceptance of the Dever Proposal will minimize any confusion in the industry with respect to the sale of Serendipity productions by using the same distributor as the Additional Lenders and will result in maximizing recoveries for the estate.
47. The Receiver has discussed and shared the Dever Proposal with BMO, which holds security over the BMO Guarantors' production libraries, and BMO is in agreement with the Dever Proposal. The Receiver also notes that it is likely to enter into comparable arrangements with Mr. Dever in respect of film productions included in the BOH Collateral, should this court extend the receivership as requested by BOH.
48. As noted above, once it has been signed, it will be made public.
49. The mandate of the Receiver should already cover its authority to enter into the Dever Proposal. The court is in no position to evaluate the commercial terms or rational for it, and can do no more than rely upon and accept the Receiver's recommendations in this regard. That said, insofar as there is any question about the Receiver's authority to proceed with the Dever Proposal, having presented the justification and need for it in the First Report, I find it is appropriate for the court to expressly confirm that authority in the Ancillary Order and will do so.

Approval of First Report and Activities, Fees and Disbursements

50. The Receiver seeks court approval of the First Report and the actions, conduct and activities described therein. Such relief is commonly granted for well-established policy reasons including the stability of

ongoing insolvency proceedings. See for example, *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 22, 23. The approval contains the now standard qualification restricting reliance upon the approval to the Receiver.

51. The Receivership Order contemplated that the Receiver and its counsel would seek court approval of their fees. In determining whether to approve the accounts of a court-appointed receiver and its counsel, the court will consider the overall value contributed, taking into account (a) the nature, extent and value of the assets, (b) the complications encountered, (c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver's knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the receiver's efforts and (i) the cost of comparable services when performed in a prudent and economical manner. See BIA, s. 243(6); see *Bank of Nova Scotia v Diemer*, 2014 ONCA 851, paras. 33, 44, and 45.
52. Having regard to these criteria and having considered the supporting fee affidavits, I am satisfied that the fees and disbursements of the Receiver and its counsel are consistent with market rates for these services in comparable cases, and they are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and its counsel in connection with the receivership, that has been partly a function of the very complex structures and tax situations of the Existing Receivership Debtors.

Orders

53. The Amended and Restated Appointment Order and Ancillary Order both dated July 31, 2024 signed by me today shall have effect as of July 31, 2024 without the necessity of formal issuance and entry.

A handwritten signature in dark ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.

August 12, 2024