IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Access Road Capital, LLC v. Bron Media Corp.,* 2023 BCSC 497

Date: 20230313
Docket: S221214
Registry: Vancouver

Between:

Access Road Capital, LLC

Plaintiff

And

Bron Media Corp.

Defendant

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	P. Bychawski A. Burns
Counsel for the Defendant:	K. Fellowes, K.C., appearing March 10, 2023 J.R. Buysen, appearing March 13, 2023 K.A. Campbell, appearing both days
Counsel for the Secured Creditors, Comerica Bank and Creative Wealth Media Lending LP 2016:	C.E. Hunter, K.C. H. Cook
Place and Date of Hearing:	Vancouver, B.C. March 10, 2023
Place and Date of Judgment:	Vancouver, B.C. March 13, 2023

[1] The Plaintiff, Access Road Capital, LLC (“Access”), seeks the court appointment of a receiver over the Defendant, Bron Media Corp.’s (“Bron Media”) assets, undertakings, and property. Access relies on s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], arguing that the appointment is just or convenient. Bron Media opposes the application.

[2] Access loaned US$20 million in May 2020. The borrowers went into default in May 2021. Approximately US$11.5 million is still owing. Access obtained a consent judgment against Bron Media in this Court on October 6, 2022, for US$10.9 million plus accruing interest. Bron Media has paid only US$151,000 under the judgment.

[3] Above I referred to "borrowers," in the plural, because the Access money was loaned to two companies. Neither of those companies was the Defendant. The Defendant is only a guarantor, one of two guarantors, for the loan. One of the borrowers, Bron Ventures 1 (Canada) Corp., appears to be one of Bron Media’s subsidiaries according to a chart showing the "Bron Group of Companies" as of March 25, 2022. The other borrower, which is shown on the same chart, is Bron Ventures 1 LLC. Both borrowers were characterized as Bron Media subsidiaries in the course of argument, and I treat them as such.

[4] There is no debt instrument, including the loan agreement itself, giving Access a contractual right to have a receiver appointed.

[5] In addition to the two points above (the receivership is requested over the assets of the parent company of the borrowers, not the borrowers themselves, and the Plaintiff and Defendant in their loan documents did not provide for a potential receivership appointment), there is another factor Access needs to contend with on the application. Two lenders, ranking above Access in any liquidation, are secured lenders, and they oppose the application. A company named Creative Wealth Media Lending LP 2016 ("Creative") is owed US$30 million on its loan to Bron Media or Bron Media’s subsidiaries. Another company, named Comerica Bank ("Comerica"), is owed US$9.4 million on its loan to Bron Media or its subsidiaries.

[6] From my review of the lending documents, I find that Creative and Comerica negotiated contractual rights to have receivers appointed but both companies consider a receivership at this time to be premature. (The factual basis for the opposition of the two secured creditors is found in the Adam Korn affidavit for Comerica filed March 3, 2023, at paragraphs 12-16, and in the Richard McConnell affidavit for Creative, affirmed on March 8, 2023, at paragraphs 14-15.)

[7] Bron Media is a significant player, with a credible record, in the movie-making business. A point in the affidavits referred to above, and developed at some length by Bron Media itself on this application, is that Bron Media and its many subsidiaries are on the brink of returning to, or improving, profitability, partly through anticipated financing, such that it would be damaging at this point to take the current management out of management control, as is inevitable when an institutional receiver is installed.

[8] Incidentally, and before turning to the submissions of Bron Media, counsel for Access was critical of the Creative and Comerica witnesses for not fully disclosing their links to the Bron Media group, and counsel for Creative and Comerica was critical of Access for attempting to charge ahead with this application without notice to her two clients. There is probably some merit in both criticisms, but I do not intend to digress by elaborating upon them here. It is sufficient to note that Creative and Comerica were able to get themselves properly heard on the application, and that fuller disclosure of the links amongst the companies and individuals responding to the application came out in the course of the hearing.

[9] Returning to Bron Media, its counsel made two main points in the course of the oral submissions before me. Its main argument was that a receivership at this time would be premature. The other was that Access should first exhaust other remedies instead of seeking the appointment of a receiver.

[10] Bron Media referred the Court to three affidavits of its CEO, Aaron Gilbert. The first two discuss, among other points, the company's admirable history of achievement in the movie industry. The third, sworn last Thursday, focusses on the

company's main theme in the application, namely, that financial rescue without a receiver is just around the corner. It refers to two term sheets and a letter of intent as evidence of imminent funding, but stated that those three documents could not be disclosed for reasons of commercial confidentiality. Upon my request, the three documents became Exhibit A, placed in a sealed envelope, which I was able to examine (the exhibit is resealed now and will not be opened without a further order of the Court).

[11] The three documents do not contain the lenders' commitments the Plaintiff says they would need to contain in order to be relevant on the application. Access would say, I expect, that the documents have been rustled up mainly to form evidence for this hearing, as opposed to being *bona fide* commercial documents evidencing the likelihood of imminent lending.

[12] I would suggest the truth between those two positions would be partway in between. The documents are not legally enforceable in any way, but that is hardly surprising in dealings among sophisticated parties at this early stage of potential financing. Solicitors for potential lenders invariably ensure that term sheets and letters of intent in this context contain so many phrases of non-commitment that they seem more like wish lists than term sheets or letters of intent. Nonetheless, at the same time, these are, I believe, *bona fide* commercial documents, and I find they do constitute some evidence of *bona fide* efforts to secure funding soon.

[13] Counsel for Bron Media, in the course of her oral submissions, said that her client has a strong track record and good prospects, with the result that there will be financing by May 1, and that Mr. Gilbert, the CEO, is confident that Access will be paid out by then. That submission, in a sense, merges with that of Comerica and Creative that now is not the right moment for a receiver.

[14] Turning to Bron Media's second point, that Access has alternative remedies, counsel stressed that Access had set up an examination in aid of execution but did not pursue it. There was stick-handling between the parties over document production preceding the intended examination, and it appears that Access did not

set a new date for examining after at least some documents had been exchanged. In my view, however, the examination in aid that was anticipated cannot be considered as a reasonable substitute for a receiver. It offers so much less power for securing eventual access to funds that it cannot be given significant weight in the analysis.

[15] Access has already experienced a long history of defalcations by Bron Media in the nearly two years the loan has been in default, including defaults of the consent settlement order referred to above in para. 2, such that it is not unreasonable for it to be seeking a receiver at this stage as a significant step within its procedural arsenal.

[16] The law relevant to the court appointment of a receiver under the just or convenient analysis in s. 39 of the *LEA* is not in dispute.

[17] Bron Media cited *Quest Capital Corp. v. Longpre*, 2012 BCCA 49, at para. 16; and *Clarke v. Braich*, 2021 BCSC 121, at paras. 52-54. Paragraph 16 from *Quest Capital*, quoted below, adopts part of an article by Professor Edinger in the *Canadian Bar Review* and related comments in a decision of Master Joyce, as quoted by Chief Justice Brenner in another case:

> [16] E. R. Edinger describes the rules governing the appointment of equitable receivers in "*The Appointment of Equitable Receivers: Application of Rules or Exercise of Pure Discretion?*" (1988) 67 Can. B. R. 306 at p. 308 as follows:
>
> > ... [F]irst, the asset must be of a kind that is exigible by a common law or legal process; second, there must be some impediment to employment of a legal process; third, there must be some benefit to be obtained by the appointing of an equitable receiver and the appointment must be just and convenient; but fourth, special circumstances established by the judgment creditor may permit the court to disregard the second rule.
>
> To like effect are the comments of Master Joyce in *Pacific West v. Fehr Dri-Wall Ltd.*, 2001 BCSC 354, 4 C.P.C. (5th) 127, as quoted by Chief Justice Brenner in *Down (re) (Trustee of)*, 2002 BCSC 1023, 21 C.P.C. (5th) 230 at para. 9.

[18] Access relied generally on *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32, including, at para. 49 in *Ward Western*, a recitation from *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 130-132, of 16 non-exhaustive

factors to consider in determining justice or convenience. Paragraph 49 from *Ward Western* reads as follows:

> [49] Another reason that the issues the appellants seek to advance are largely irrelevant to this appeal is that they are immaterial to the judge's determination that it was "just and convenient" to appoint a receiver. Before the judge, the respondents argued, relying on *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 at para. 50, and Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 130–32, that the following non-exhaustive list of factors governs the question of whether it is "just and convenient," in all of the circumstances, to appoint a receiver:
>
> > a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
> >
> > b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> >
> > c) the nature of the property;
> >
> > d) the apprehended or actual waste of the debtor's assets;
> >
> > e) the preservation and protection of the property pending judicial resolution;
> >
> > f) the balance of convenience to the parties;
> >
> > g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
> >
> > h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
> >
> > i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
> >
> > j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
> >
> > k) the effect of the order upon the parties;
> >
> > l) the conduct of the parties;
> >
> > m) the length of time that a receiver may be in place;
> >
> > n) the cost to the parties;
> >
> > o) the likelihood of maximizing return to the parties; and

p) the goal of facilitating the duties of the receiver.

The judge listed these various factors at para. 57 of his reasons.

I have studied those factors from the *Bennett* text, and have taken them into account in my overall assessment on the present application.

[19] Returning to the facts, I quote and adopt the following written submissions of Access, as found in its notice of application filed February 9, 2023, at pages 5-7, paragraphs 7-16:

> ***First***, the Consent Judgment acknowledges a debt of approximately US $10.9 million as of May 19, 2022, an amount that has since the date of the Consent Judgment grown to approximately US $11.5 million as of February 1, 2023.
>
> ***Second***, Bron Media is in breach of the Consent Judgment entered pursuant to the Settlement Agreement. Bron Media's obligations with respect to Monthly Gross Revenue Payments under the Consent Judgment as of the filing of this Application total approximately US $1.3 million (before costs and expenses including legal fees).
>
> ***Third***, Bron Media is presently either unable or unwilling to meet its financial obligations to Access Road as they become due under the Consent Judgment.
>
> If Bron Media is ***unable*** to meet its obligations as they become due, then it is insolvent, and the Receivership Order is a just and convenient means of preserving and protecting the Bron Media's property in the interest of all stakeholders including Access Road.
>
> If the Bron Media is ***unwilling*** to meet its financial obligations to Access Road as they become due, then it is willfully breaching this Court's Consent Judgment, and the Receivership Order is a just and convenient remedy for Bron Media's conduct.
>
> ***Fourth***, Bron Media has enjoyed the benefit of substantial accommodations from Access Road including:
>
> a) a deferral of enforcement proceedings for a period of approximately two years;
>
> b) the granting of three forbearance periods prior to the Settlement Agreement;
>
> c) the granting of a fourth forbearance period upon the reaching of the Settlement Agreement;
>
> d) the implementation of a repayment plan as part of the Consent Judgment;
>
> e) two months' notice of Access Road's intention to apply for the Receivership Order; and

f) a five-month period between Bron Media's initial breach of the Consent Judgment and the hearing of this Application.

Notwithstanding such accommodations, Bron Media remains in breach of its obligations to Access Road under the Consent Judgment.

Fifth, Bron Media has acknowledged its own and the Bron Borrowers' obligations, as applicable, to cause the Bron Borrowers to liquidate their investment in each Portfolio Company and all other assets under their direct or indirect control in each of the Loan and Security Agreement, the Guarantee, the First Forbearance Agreement, the Second Forbearance Agreement, and the Third Forbearance Agreement. Bron Media has failed to comply with this obligation for more than two years.

Sixth, in each of the First Forbearance Agreement, the Second Forbearance Agreement, and the Third Forbearance Agreement, Bron Media acknowledged that Access Road was entitled to immediately exercise all of its rights and remedies under the Loan Documents (including the Loan and Security Agreement and Guarantee) including by, without limitation, foreclosing on Bron Media's interest as a shareholder of Bron Ventures 1 (Canada) Corp. (one of the two Bron Borrowers), and/or exercising the rights of Bron Media as the shareholder of Bron Ventures 1 (Canada) Corp., and that neither Bron Ventures 1 (Canada) Corp. nor Bron Media have any defences to the exercise of such rights and remedies.

Seventh, while Access Road is not a secured creditor of Bron Media per say, Access Road does hold a security interest in the assets of Bron Media's British Columbia-based subsidiaries including Bron Ventures 1 (Canada) Corp., Bron Studios Inc., and Bron Animation Inc. (among other security that includes charges on the assets of each of the Bron Borrowers in Canada and the United States, as applicable). The appointment of the Receiver over Bron Media will avoid the costs and delays associated with a multiplicity of enforcement proceedings by providing for a centralized enforcement process to be carried out by this Court's officer under this Court's supervision.

[20] What then is the best result?

[21] Access seeks the appointment of a receiver forthwith. The thrust of Bron Media's submission, supported by Comerica and Creative, is that financial support is imminent such that a receiver coming in now will cause undue disruption and instability.

[22] I have decided, in the result, that any appointment of a receiver will be postponed on the following basis. The postponement will enable Bron Media to honour the assurance it gave to the Court that adequate financing to pay out Access in full will be in place by May 1, 2023. If Access is paid out in full by May 1, 2023, there will be no receiver appointed from this application. If Access is not paid out by

then, I find that it will be both just and convenient to appoint a receiver on May 8, 2013. I order accordingly. The appointment would be in accordance with the form of order as amended and seen at Tab 15 of the application record filed March 8, 2023, and I am prepared to hear this morning any other submissions as to the form of that order.

"Macintosh J."