

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BETWEEN:

**GROSVENOR PARK MEDIA FUND L.P.**

Plaintiff

- and -

**ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD.,  
ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE  
JUNGLE PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS  
INC., ARCADIA PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS  
INC., UNDERZOO PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS  
LTD., SIR SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS  
MURRAY, KALLAN KAGAN and PETER KOZIK**

Defendants

**RESPONDING MOTION RECORD OF BK2BRAC HOLDINGS INC.  
(Returnable May 29, 2020)**

**MARKS & CLERK LAW LLP**

Barristers and Solicitors  
100 Simcoe Street, Suite 200  
Toronto, ON M5H 3G2

**Andrew R.O. Jones (LSO# 26234D)**

**Nathan Fan (LSO# 62173A)**

Tel: 416-595-1155

Fax: 416-595-1163

Lawyers for BK2BRAC Holdings Inc.

TO: **GOLDMAN SLOAN NASH & HABER LLP**

480 University Avenue, Suite 1600  
Toronto, ON M5G 1V2

**Mario Forte (LSO #:27293F)**

Tel: 416-597-6477

Fax: 416-597-3370

Email: forte@gsnh.com

Lawyers for Deloitte Restructuring Inc. in its capacity as the Court appointed  
Receiver of Arc Productions Ltd. et al.

AND TO: **THE SERVICE LIST**

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TAB 1

Commercial List File No. CV-16-11472-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BETWEEN:

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LTD., SIR SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS  
MURRAY, KALLAN KAGAN and PETER KOZIK**

Defendants

**AFFIDAVIT OF BRIANNE PAPACONSTANTINO**  
[Sworn May 21<sup>st</sup>, 2020]

I, **BRIANNE PAPACONSTANTINO**, of the City of Toronto, Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

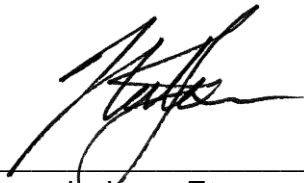
1. I am a legal assistant in the law firm Marks & Clerk Law LLP, solicitors for BK2BRAC Holdings Inc. ("**BK2BRAC**"). I was also a legal assistant with the predecessor firm Sim Ashton & McKay LLP, which merged with the law firm Marks & Clerk Law LLP in 2018. I have directly assisted with this matter and as such have knowledge of the matters herein deposed, except where stated to be based on upon information and belief, and where so stated, I believe the same to be true.
2. BK2BRAC is a third party claimant in this proceeding. BK2BRAC is a party to a Production Service Agreement dated March 29, 2013 ("**PSA**") with the Defendant, Arc Productions Ltd. ("**Arc**").

3. On June 28, 2013, BK2BRAC perfected the security interest granted to BK2BRAC by Arc under the PSA by way of a PPSA registration in favour of BK2BRAC (Registration No. 20130628 1419 1590 3302) against Arc's Inventory, Equipment, Accounts and Other. Copies of the PPSA Verification Statement dated June 28, 2013 and the relevant excerpt from an August 4, 2016 PPSA search against Arc in favour of BK2BRAC are attached hereto and marked as Exhibits "**A-1**" and "**A-2**".
4. On December 2, 2015, BK2BRAC entered into a Subordination Agreement with Grosvenor Park Media Fund L.P., whereby BK2BRAC's security interest against Arc was subordinated to Grosvenor Park Media Fund L.P. A copy of the Subordination Agreement dated December 2, 2015 is attached hereto and marked as **Exhibit "B"**.
5. On August 10, 2016, a Receivership Order was issued by the Honourable Justice Penny which appointed Deloitte Restructuring Inc. (the "**Receiver**") as the receiver of the assets, properties and undertakings of Arc and the other corporate Defendants (collectively, "**Arc Defendants**"). A copy of the Receivership Order dated August 10, 2016, which was obtained from the Receiver's website at <<https://www.insolvencies.deloitte.ca/en-ca/Pages/ArcProductionsLtd.aspx?searchpage=Search-Insolvencies.aspx>> is attached hereto and marked as **Exhibit "C"**.
6. On April 18, 2017, a Distribution Order was issued by the Honourable Justice Newbould relating to the general distribution of funds on an ongoing basis and funds relating to the proceeds of the collection of Arc's tax credits. A copy of the Distribution Order dated April 18, 2017, which was obtained from the Receiver's website at <<https://www.insolvencies.deloitte.ca/en-ca/Pages/ArcProductionsLtd.aspx?searchpage=Search-Insolvencies.aspx>> is attached hereto and marked as **Exhibit "D"**.
7. On September 2, 2016, BK2BRAC wrote to the Receiver advising of with respect to a claim to Canadian tax credits belonging to BK2BRAC which were to be collected by Arc and to a claim of repayment of fees paid by BK2BRAC to Arc. A

copy of the correspondence sent to the Receiver dated September 2, 2016 is attached hereto and marked as **Exhibit “E”**.

8. On March 21, 2019, our office received an e-mail from the Receiver’s legal counsel attaching a redacted version of the “Arc OCASE 2013 Certificate” and the “Arc OCASE 2014 Certificate” pertaining to tax credits in respect of BK2BRAC productions. Copies of the Arc OCASE 2014 and 2013 Certificates are attached hereto and marked as **Exhibits “F-1” and “F-2”**.
9. In support of the within motion, the Receiver filed redacted copies of the PSA between BK2BRAC and Arc as Appendix “A” to the Fifteenth Report of the Receiver. I am advised by Andrew Jones, a solicitor of Marks & Clerk Law LLP, and verily believe, that the redacted content of the PSA pertains to information that is commercially sensitive to BK2BRAC, that such content is irrelevant and serves no legitimate purpose in resolving the issues on this motion, and that public disclosure of such commercially sensitive information would cause considerable and real harm to BK2BRAC.
10. I make this Affidavit in support of the BK2BRAC’s Responding Motion Record and for no other improper purpose.

**SWORN BEFORE ME** at the City of Toronto, Province of Ontario, this 21<sup>st</sup> day of May, 2020.



\_\_\_\_\_  
A Commissioner Etc.

Nathan Fan

Brianne Papaconstantinou

\_\_\_\_\_  
**BRIANNE PAPACONSTANTINO**

**THIS IS EXHIBIT "A-1" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**



---

**A COMMISSIONER ETC.**

Nathan Fan

OnCorp Trans No: **145145**      Date Created: **Jun 28, 2013**      This Confirmation Printed on: **Jun 28, 2013 02:21 pm**  
 Your Ref Info: **BK2BRAC HOLDINGS INC.**      Your Docket Info: **46-835**

PPSA File Ref No: **688192776**      Regn No: **20130628 1419 1590 3302**      Expiry Date: **06/28/2018**

Caution Filing:      MV Schedule:      PPSA/RSLA: **P**      Regn Period: **5**

| <i>DEBTOR NAME &amp; ADDRESS</i>                                       | <i>DATE OF BIRTH</i> | <i>CORPORATION NO</i> |
|--|----------------------|-----------------------|
| ARC PRODUCTIONS LTD.<br>230 RICHMOND STREET EAST<br>TORONTO ON M5A 1P4 |                      | 001847816             |

| <i>SECURED PARTY</i>   |
|--|
| BK2BRAC HOLDINGS INC.<br>500 SOUTH BUENA VISTA STREET<br>BURBANK CA 91521-4859 |

| <i>COLLATERAL INFORMATION</i>               | <i>MATURITY DATE</i> | <i>AMOUNT SECURED</i> |
|---|----------------------|-----------------------|
| Inventory    Equipment    Accounts    Other |                      |                       |
|   |                      |                       |

| <i>REGISTERING AGENT</i>  |
|---|
| SIM IP PRACTICE<br>330 UNIVERSITY AVENUE, 6TH FLOOR    TORONTO ON M5G 1R7 |

This document is a record of the Reference File Number and Registration Number assigned to this filing by the PPSR system, MINISTRY OF CONSUMER AND BUSINESS SERVICES. No liability is undertaken by OnCorp Direct Inc. regarding its completeness, correctness, or the interpretation or use which may be made of it. Registration details must be verified by the user upon receipt of the 3C Verification statement from MCBS.



**THIS IS EXHIBIT "A-2" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**

A handwritten signature in black ink, appearing to read 'Nathan Fan', is written over a horizontal line.

**A COMMISSIONER ETC.**

Nathan Fan

RUN NUMBER : 217  
RUN DATE : 2016/08/04  
ID : 20160804104417.23

PROVINCE OF ONTARIO  
MINISTRY OF GOVERNMENT SERVICES  
PERSONAL PROPERTY SECURITY REGISTRATION SYSTEM  
ENQUIRY SEARCH RESPONSE

REPORT : FSSR060  
PAGE : 77

TYPE OF SEARCH : BUSINESS DEBTOR  
SEARCH CONDUCTED ON : ARC PRODUCTIONS LTD.  
FILE CURRENCY : 03AUG 2016

FORM 1C FINANCING STATEMENT / CLAIM FOR LIEN

|    |                           |                                   |                       |                              |          |                           |                        |                     |                        |         |
|----|---------------------------|-----------------------------------|-----------------------|------------------------------|----------|---------------------------|------------------------|---------------------|------------------------|---------|
| 00 | FILE NUMBER<br>688192776  | CAUTION<br>FILING                 | PAGE<br>NO. OF PAGES  | TOTAL<br>PAGES               | 1        | MOTOR VEHICLE<br>SCHEDULE | REGISTRATION<br>NUMBER | REGISTERED<br>UNDER | REGISTRATION<br>PERIOD | 5       |
| 01 | DATE OF BIRTH             | FIRST GIVEN NAME                  | INITIAL               | SURNAME                      | 20130628 | 1419                      | 1590                   | 3302                | P                      | PPSA    |
| 02 | DEBTOR                    |                                   |                       |                              |          |                           |                        |                     |                        |         |
| 03 | NAME                      | BUSINESS NAME                     | ARC PRODUCTIONS LTD.  |                              |          |                           |                        |                     |                        |         |
| 04 | DATE OF BIRTH             | ADDRESS                           | 230                   | RICHMOND STREET EAST         | TORONTO  |                           |                        |                     |                        |         |
| 05 | DEBTOR                    | DATE OF BIRTH                     | FIRST GIVEN NAME      | INITIAL                      | SURNAME  |                           |                        |                     |                        |         |
| 06 | NAME                      | BUSINESS NAME                     | BK2BRAC HOLDINGS INC. |                              |          |                           |                        |                     |                        |         |
| 07 | SECURED PARTY /           | ADDRESS                           |                       |                              |          |                           |                        |                     |                        |         |
| 08 | LIEN CLAIMANT             | ADDRESS                           | 500                   | SOUTH BUENA VISTA STREET     | BURBANK  |                           |                        |                     |                        |         |
| 09 | COLLATERAL CLASSIFICATION | ONTARIO CORPORATION NO. 001847816 |                       |                              |          |                           |                        |                     |                        |         |
| 10 | CONSUMER                  | GOODS                             | INVENTORY EQUIPMENT   | ACCOUNTS OTHER               | INCLUDED | MOTOR VEHICLE             | AMOUNT                 | DATE OF             | MATURITY               | OR      |
|    |                           | X                                 | X                     | X                            | X        |                           |                        |                     |                        |         |
|    | YEAR MAKE                 | MODEL                             |                       |                              |          |                           |                        |                     |                        |         |
|    |                           | V.I.N.                            |                       |                              |          |                           |                        |                     |                        |         |
| 11 | MOTOR                     |                                   |                       |                              |          |                           |                        |                     |                        |         |
| 12 | VEHICLE                   |                                   |                       |                              |          |                           |                        |                     |                        |         |
| 13 | GENERAL                   |                                   |                       |                              |          |                           |                        |                     |                        |         |
| 14 | COLLATERAL                |                                   |                       |                              |          |                           |                        |                     |                        |         |
| 15 | DESCRIPTION               |                                   |                       |                              |          |                           |                        |                     |                        |         |
| 16 | REGISTERING               | SIM IP PRACTICE                   |                       |                              |          |                           |                        |                     |                        |         |
| 17 | AGENT                     | ADDRESS                           | 330                   | UNIVERSITY AVENUE, 6TH FLOOR | TORONTO  |                           |                        |                     |                        |         |
|    |                           |                                   |                       |                              |          |                           |                        |                     | ON                     | M5G 1R7 |

\*\*\* FOR FURTHER INFORMATION, CONTACT THE SECURED PARTY. \*\*\*

CONTINUED... 78

**THIS IS EXHIBIT "B" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**

A handwritten signature in black ink, appearing to read 'Nathan Fan', is written over a horizontal line.

**A COMMISSIONER ETC.**

Nathan Fan

## SUBORDINATION, ASSIGNMENT, POSTPONEMENT AND STANDSTILL AGREEMENT

TO: Grosvenor Park Media Fund LP ("Lender")

Re: Lender Loan to Arc Productions Ltd. (the "Borrower")

**WHEREAS** the undersigned has been or may be granted security interests, claims, charges, liens or other encumbrances by the Borrower and has registered or may register such security interests, claims, charges, liens or other encumbrances against the Borrower, including, without limitation, under the *Personal Property Security Act* (Ontario) or other applicable personal property security legislation (the "Security");

**AND WHEREAS** Lender requires a security position in priority to the undersigned against all of the Borrower's present and after-acquired property, assets and undertakings as a condition to extending credit to the Borrower;

**AND WHEREAS** Lender has been or may be granted security interests, claims, charges, liens and other encumbrances by the Borrower and has registered or may register such security interest, claims, charges, liens and other encumbrances against the Borrower, including, without limitation, under the *Personal Property Security Act* (Ontario) or other applicable personal property security legislation (the "Lender Security");

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the undersigned, the undersigned hereby consents to the Lender Security granted by the Borrower to and in favour of Lender and acknowledges, covenants and agrees to and in favour of Lender: (a) that notwithstanding any priority provided by and principle of law, equity or statute or the relative order of execution, delivery, creation, grant, registration, advance, attachment, possession, perfection or non-perfection, default, demand, notice, crystallization, enforceability or enforcement of the Lender Security or the Security, or any other matter or thing whatsoever, the Security of the undersigned in and to any and all of the present and after-acquired property, assets and undertakings of the Borrower, and any and all proceeds therefrom, and any and all insurance claims and proceeds in connection therewith, which the undersigned may now have or hereinafter obtain and be perfected by any existing registrations under the *Personal Property Security Act* (Ontario) or another personal property security legislation, or any subsequent registrations, shall be fully and unconditionally subordinated to the Lender Security in favour of Lender; and (b) to do all things and execute all documents which may be reasonably requested by Lender to give effect to this Subordination, Assignment, Priority and Standstill Agreement; and (c) that all present and future indebtedness and liability of the Borrower to the undersigned is hereby assigned by the undersigned to Lender and postponed to all obligations of the Borrower to Lender and any and all moneys received by the undersigned in respect thereof will be received in trust for and forthwith paid over to Lender.

This Subordination, Assignment, Postponement and Standstill Agreement shall enure to the benefit of Lender and be binding upon the undersigned and the Borrower and their respective successors and assigns, provided that the undersigned will not assign or transfer any or all of the security held or to be held by it or any of its rights thereunder relating to the undertaking and assets of the Borrower unless and until the proposed assignee or transferee shall have delivered to Lender a written agreement to be bound by the provisions hereof to the same extent as the assignor.

It is specifically acknowledged and agreed that this agreement may be executed in several counterparts, each of which shall be deemed to be an original and that such separate counterparts shall together constitute one and the same agreement.

Upon indefeasible payment, in full, and performance of all obligations to Lender by the Borrower, all covenants and agreements of the undersigned and the Borrower hereunder shall be at an end and the Lender shall, upon the written request of the Borrower and at the expense of the Borrower, execute such instruments and other documents and give such notifications or assurances as may be necessary to fully release, cancel and discharge this Subordination, Assignment, Postponement and Standstill Agreement in the circumstances.

This Agreement shall be governed and construed in accordance with the laws of the Province of Ontario.

DATED this 2nd day of December, 2015.

*by* **BK2BRAC HOLDINGS INC.**

Per: 

Name: **John I. McGuire**  
Title: **SVP, Business Affairs and Legal Counsel**

I have authority to bind the Corporation.

**THE UNDERSIGNED HEREBY ACKNOWLEDGES** receipt of a copy of the foregoing Subordination, Assignment, Postponement and Standstill Agreement, accepts all of the terms and conditions contained therein and further agrees with Lender to give effect to all of the provisions thereof. The undersigned further acknowledges that nothing contained in this agreement shall confer any rights or benefits on the Borrower.

DATED this \_\_\_ day of December, 2015.

**ARC PRODUCTIONS LTD**

Per: 

Name: **PETER KOZIN**  
Title: **EVP & CFO**

I have authority to bind the Corporation.

**THIS IS EXHIBIT "C" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINOU  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**



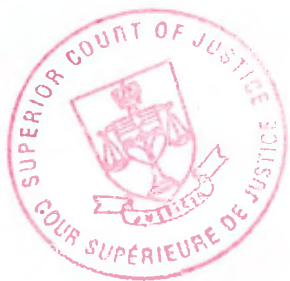
**A COMMISSIONER ETC.**

Nathan Fan

Court File No. CV-16-11472-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

THE HONOURABLE MR. ) WEDNESDAY, THE 10TH  
JUSTICE PENNY ) DAY OF AUGUST, 2016



**GROSVENOR PARK MEDIA FUND L.P.**

Plaintiff

- and -

**ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD.,  
ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE  
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LTD., SIR SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS  
MURRAY, KALLAN KAGAN and PETER KOZIK**

Defendants

**RECEIVERSHIP ORDER**  
(August 10, 2016)

**THIS MOTION** made by the Plaintiff for an Order pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing Deloitte Restructuring Inc. as Receiver (in such capacities, the "Receiver") without security, of, among other things, all of the assets, undertakings and properties of the corporate defendants (the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, and certain shares of the individual defendants (the "Directors") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavits of Donald Starr sworn July 29, 2016, Jason Wadden sworn July 29, 2016, and Jesse Mighton sworn August 2, 2016, and the exhibits thereto, and the First Report of the Interim Receiver, and on hearing the submissions of counsel for the Plaintiff and the Interim Receiver, on reading the consent of Deloitte Restructuring Inc. to act as the Receiver,

### **SERVICE**

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

### **APPOINTMENT**

2. THIS COURT ORDERS that, Deloitte Restructuring Inc. is hereby appointed Receiver pursuant to section 243 of the BIA and section 101 of the CJA, without security, of:

- (a) all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof; and
- (b) the shares of Arc Investments Ltd. held by each of the Directors

(collectively, the "Property").

### **RECEIVER'S POWERS**

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;



- 3 -

- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter

- 4 -

instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding \$250,000 provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the Receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

- 5 -

- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;
- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

#### **TRANSITION TO RECEIVER**

4. THIS COURT ORDERS that the Interim Receiver is hereby authorized and directed, without further approval or direction from this Court, to take all steps that the Receiver considers necessarily or desirable to effect a transition of the Property and its affairs from the Interim Receiver to the Receiver, including, but not limited to, transferring all monies, funds, accounts, contracts, held by or in the name of the Interim Receiver to the Receiver as the Receiver may direct.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

5. THIS COURT ORDERS that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons

acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and

providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

8. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days' notice to such landlord and any such secured creditors.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

9. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

#### **NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY**

10. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

11. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the

environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

**NO INTERFERENCE WITH THE RECEIVER**

12. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

**CONTINUATION OF SERVICES**

13. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

**RECEIVER TO HOLD FUNDS**

14. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for

herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

### **EMPLOYEES**

15. THIS COURT ORDERS that the Receiver shall not be obligated to hire any of the former employees of the Debtor. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

### **PIPEDA**

16. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

17. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the

protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

18. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

#### **RECEIVER'S ACCOUNTS**

19. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.



20. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

21. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

### **FUNDING OF THE RECEIVERSHIP**

22. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

23. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

25. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

#### **SERVICE AND NOTICE**

26. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: [www.insolvencies.deloitte.ca/en.ca/arcproductions](http://www.insolvencies.deloitte.ca/en.ca/arcproductions).

27. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

#### **GENERAL**

28. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a receiver or a trustee in bankruptcy of the Debtors.

30. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estate and the Property with such priority and at such time as this Court may determine.

33. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

AUG 10 2016

PER / PAR: 

**SCHEDULE "A"**

**RECEIVER CERTIFICATE**

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

1. THIS IS TO CERTIFY that DELOITTE INC., the Receiver (the "Receiver") of the assets, undertakings and properties ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD., ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE JUNGLE PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS INC., ARCADIA PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS INC., UNDERZOO PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS LTD., SIR SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD. (collectively, the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the 29th day of July, 2016 (the "Order") made in an action having Court file number \_\_-CL-\_\_\_\_\_, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$\_\_\_\_\_, being part of the total principal sum of \$\_\_\_\_\_ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the \_\_\_\_\_ day of each month] after the date hereof at a notional rate per annum equal to the rate of \_\_\_\_\_ per cent above the prime commercial lending rate of Bank of \_\_\_\_\_ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

DELOITTE INC., solely in its capacity  
as Receiver of the Property, and not in its  
personal capacity

Per: \_\_\_\_\_  
Name:  
Title:

GROSVENOR PARK MEDIA FUND L.P.

Plaintiff

and

ARC PRODUCTIONS LTD., et al.

Defendants

Court File No. 16-CV-11472-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**RECEIVERSHIP ORDER  
(Motion Returnable August 10, 2016)**

**GOODMANS LLP**  
Barristers & Solicitors  
333 Bay Street, Suite 3400  
Toronto, Ontario M5H 2S7

L. Joseph Latham LSUC#: 32326A  
Jason Wadden LSUC#: 467575M

Tel: 416.979.2211  
Fax: 416.979.1234  
Lawyers for the Plaintiff

**THIS IS EXHIBIT "D" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**

A handwritten signature in black ink, appearing to read 'Nathan Fan', is written over a horizontal line.

**A COMMISSIONER ETC.**

Nathan Fan

Court File No. 16-CV-11472-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
 (COMMERCIAL LIST)

THE HONOURABLE )

TUESDAY, THE

JUSTICE NEWBOULD )

18<sup>TH</sup> DAY OF APRIL, 2017



BETWEEN:

**GROSVENOR PARK MEDIA FUND L.P.**

**Plaintiff**

- and -

**ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD., ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE JUNGLE PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS INC., ARCADIA PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS INC., UNDERZOO PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS LTD., SIR SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS MURRAY, KALLAN KAGAN and PETER KOZIK**

**Defendants**

**DISTRIBUTION ORDER**

THIS MOTION, made by Deloitte Restructuring Inc. in its capacity as the Court-appointed Receiver (in such capacity, the “**Receiver**”), without security, of all the assets, undertakings and properties (collectively, the “**Property**”) of Arc Productions Ltd. and its subsidiaries and affiliates, which consist of the other corporate defendants described in the title of proceedings (collectively, “**Arc**”) for an Order approving the activities of the Receiver since December 5, 2016 as set out in the Fifth Report of the Receiver dated March 27, 2017 (the “**Fifth Report**”), approving the fees of the Receiver for the period from November 1, 2016 to February 28, 2017 and the fees of the Receiver’s legal counsel for the same period, and authorizing the Receiver to make distributions to Grosvenor Park Media Fund, from time to time, subject to the



terms and conditions set out in the herein Order, was heard this day at at 330 University Avenue, Toronto, Ontario.

ON READING the Fifth Report and the affidavits of the Receiver and its counsel as to fees, and on hearing the submissions of counsel for the Receiver and of the Plaintiff, no one else appearing although properly served as appears from the affidavit of Mario Forte, sworn March 23, 2017, filed:

### **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

### **APPROVAL OF FEES AND ACTIVITIES**

2. **THIS COURT ORDERS** that the activities of the Receiver and its counsel since December 5, 2016, as set out in the Fifth Report, are hereby approved.

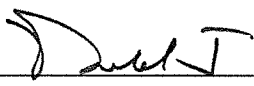
3. **THIS COURT ORDERS** that the fees of the Receiver and its counsel for the period from November 1, 2016 to February 28, 2017, as set out in the Fifth Report, are hereby approved.

### **DISTRIBUTIONS**


4. **THIS COURT ORDERS** that, subject to paragraph 5 of this Order, the Receiver be and is hereby authorized to distribute to Grosvenor Park Media Fund L.P. ("GP") from time to time all funds coming into its hands, subject to such reserves as the Receiver may deem prudent in the circumstances, up to the amount of \$43,953,400, without further Order of this Court.

5. **THIS COURT ORDERS** that, notwithstanding paragraph 4 hereof, any distributions by the Receiver hereunder of proceeds of the realization or collection of tax credits of Arc, where the Receiver has notice of the interests of parties other than GP claiming ownership, security

interests, or both in such tax credits or their proceeds, shall only be made upon further Order of the Court on notice to GP and to such other parties.

  
\_\_\_\_\_

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ON / BOOK NO:  
LE / DANS LE REGISTRE NO:  
APR 18 2017

PER / PAR: 

**GROSVENOR PARK MEDIA FUNDS L.P.**  
**Plaintiff**

v

**ARC PRODUCTIONS LTD. et al.**  
**Defendants**  
Commercial List File No. CV-16-11472-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
Proceedings commenced at  
Toronto

**DISTRIBUTION ORDER**

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
TORONTO, ON M5G 1V2

**Mario Forte** (LSUC #: 27293F)  
**Lori Goldberg** (LSUC #58581V)  
Tel: 416-597-6477  
Fax: 416-597-3370  
Email: [forte@gsnh.com](mailto:forte@gsnh.com)

Lawyers for Deloitte Restructuring Inc.

**THIS IS EXHIBIT "E" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**

A handwritten signature in black ink, appearing to read 'Nathan Fan', is written over a horizontal line.

**A COMMISSIONER ETC.**

Nathan Fan

sim.<sup>®</sup>

IP Practice

September 2, 2016

**CONFIDENTIAL****Via E-mail****Our Ref: 46-867**

Deloitte Restructuring Inc.  
 Bay Adelaide Centre, East Tower  
 22 Adelaide Street West, Suite 200  
 Toronto, Ontario M5H 0A9 Canada

Attention: Warren Leung

Dear Mr. Leung:

**Re: Arc Productions Ltd. Insolvency - Claim for Canadian Tax Credits and Claim for Fee Overpayment Pursuant to Production Services Agreement dated March 29, 2013 between Arc Productions Ltd. and B2KBRAC Holdings Ltd.**

We act for B2KBRAC Holdings Inc. ("**B2KBRAC**"), an affiliate of The Walt Disney Company. B2KBRAC entered into a Production Services Agreement with Arc Productions Ltd. ("**Arc**") effective March 29, 2013 (the "**PSA**") in relation to the production of *Planes* and other animated features. We assume you have access to a copy of the PSA.

Pursuant to paragraph (k) at Schedule H to the PSA, and Section 30(e) of the PSA, the information in this letter and the attachments is designated **Confidential Information** of B2KBRAC as that term is defined in the PSA. **Please be advised that, in the event that the Receiver wishes to include in any report to the Court information from this letter or the PSA, B2KBRAC requires sufficient advance notice so that a motion can be heard requesting a protective order pursuant to which any such B2KBRAC Confidential Information can be filed under seal.** We would appreciate knowing in response to this letter whether the Receiver would provide such notice and support or at least not oppose a B2KBRAC motion for a protective order.

**Overview of Claims by B2KBRAC**

As further set out below, this is notice to Deloitte Restructuring Inc. as Receiver for Arc that B2KBRAC:

1. confirms its entitlement to the full amount of the Canadian federal and provincial tax credits assigned by Arc to B2KBRAC pursuant to section 16 of the PSA (the "**Canadian Credits**"); which we note were excluded from the assets being sold pursuant to the August 19, 2016 Asset Purchase Agreement, and which B2KBRAC estimates will be approximately

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Andrew Jones  
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 E jones@simip.com



- 2 -

CAD\$900,000 and which Arc has previously advised were expected to be paid in September 2016; and

2. claims repayment of Fees paid by B2KBRAC under the PSA to Arc, which the parties confirmed in the attached email exchange between Peter Kozik and Disney between June 17 and 21, 2016, amounted to CAD\$400,000; an amount which was subsequently reduced by agreement conditional upon payment by Arc of scheduled payments totalling CAD\$165,139.30 (the "**Fee Overpayment**").

The obligation of Arc for the Fee Overpayment is secured by the security interest granted to B2KBRAC under section 18 of the PSA (the "**Security Interest**"), which was perfected by a June 28, 2013 registration in favour of B2KBRAC, registration number 20130628 1419 1590 3302 against Inventory, Equipment, Accounts and Other; and subordinated to the security held by Grosvenor Park Media Fund LP ("**Grosvenor Park**") by agreement between B2KBRAC and Grosvenor Park dated December 2, 2015 (the "**Subordination Agreement**"). The relevant page extracted from an August 4, 2016 PPSA search against Arc shows the B2KBRAC registration together with a copy of the Subordination Agreement are attached.

The Subordination Agreement is not applicable to the Canadian Credits. The Subordination Agreement subordinates B2KBRAC's security "*in and to any and all of the present and after-acquired property, assets and undertakings of the Borrower, and any and all proceeds therefrom...*" When Arc assigned the Ontario and Federal tax credits associated with the production of the relevant films to B2KBRAC under section 16 of the PSA, they ceased to be property, assets and undertakings of the Borrower and became the property of B2KBRAC, and are outside of the property subject to the Subordination Agreement.

### **The Canadian Credits**

Further details concerning the assignment of the Canadian Credits are set out below.

Pursuant to section 16(e) of the PSA, Arc assigned to B2KBRAC all "Canadian Credits", namely all federal and Ontario tax credits, including Ontario Computer Animation and Special Effects Tax Credits, associated with the Disney productions under the PSA. Arc also appointed B2K through a power of attorney for the purpose completing application for those credits.

- (e) Assignment of Canadian Credits. **Arc hereby assigns and transfers absolutely to Producer all of its present and future rights, interests, and benefits in and to any and all Canadian Credits arising from the Picture and Ancillary Content and Producer hereby accepts such assignment.** Arc hereby irrevocably nominates, constitutes and appoints Producer its lawful attorney-in-fact (which appointment is a power coupled with an interest), to act and perform the following in connection with the Picture and Ancillary Content: (i) if a firm of chartered accountants is not appointed by the first fiscal year end of Arc following the date of this Agreement, Producer may appoint a firm of chartered accountants, at the expense of Arc, to audit expenses incurred by Arc with respect to production costs of the Picture or Ancillary Content; and (ii) to

- 3 -

promptly sign, execute, deliver and file with the Canada Revenue Agency, the Canadian Audio-Visual Certification Office, the Ontario Media Development Corporation, and/or any other governmental organization administering any provincial Canadian Credits, as the case may be, all documents necessary to obtain payment of any amounts payable to Arc with respect to the Canadian Credits for the Picture or Ancillary Content. Arc shall consult with Producer with respect to the hiring of an accounting firm pursuant to the provisions set forth in (i) above, and Producer and Arc hereby agree to engage in good faith negotiations, at the time of such hire, respecting any and all accounting fees relating thereto.

**“Canadian Credits”** are defined at at section 16(a):

- (a) For purposes hereof, **“Canadian Credits”** means as at any date all Film or Video Production Services Tax Credits established pursuant to the provisions of Section 125.5 of the Income Tax Act (Canada), and all equivalent, matching or additional provincial tax credits established pursuant to the provisions of any applicable Income Tax Legislation (as defined below) (including the Ontario Production Services Tax Credit and the Ontario Computer Animation and Special Effects Tax Credit), which Arc is or will be entitled to claim or may reasonably be expected to claim, or has claimed (but for clarification, excluding any credits for which Producer applies or claims directly) in any taxation year of Arc as a result of incurring certain of the production expenses for the Picture or Ancillary Content in Canada, calculated by reference to certain production expenses incurred by Arc for the Picture or Ancillary Content in Canada or deemed to have been paid by Arc. **“Canadian Credits Refund”** means amounts in respect of the Canadian Credits, including any interest thereon, that are refunded and actually received by Arc or that are credited or applied against any income tax otherwise payable by Arc.

As stated above, according to previous advice from Arc, the amount of approximately CAD\$900,000 is expected to be paid in September. Any such payments made or to be made are held in trust for and remitted to B2KBRAC.

### **Fee Overpayment Claim**

Peter Kozik confirmed with Disney by email on June 21, 2016 that an overpayment of \$400,000 had been made by Disney to Arc. Arc agreed to forego a payment of CDN\$69,721.40 being the final installment/payment for the Tumbleweed Test Services, which was applied against the \$400,000 overpayment thereby reducing the amount owing to Disney to CDN\$330,278.60.

Arc and Disney then agreed that 50% of this remaining balance (i.e., a total of CDN\$165,139.30) (the **“Reduced Overpayment Repayment”**) will be paid by Arc to Disney, provided that the payment is made in the following three installments:

1. First installment of CDN\$55,046.43 payable on or before October 1, 2016;
2. Second installment of CDN\$55,046.43 payable on or before January 1, 2017; and

- 4 -

3. Third installment of CDN\$55,046.43 payable on or before April 1, 2017

(collectively, the “**Installment Payments**”).

This Installment Payments obligation is secured by the Security Interest, albeit subordinate to the Grosvenor Park Media Fund LP security.

We note that the PSA is not included in the Assigned Contracts sold to Jam Filled Entertainment and is therefore not subject to paragraph 5 of the Vesting Order.

### **The Security Interest**

At section 18(a) of the PSA, Arc granted a security interest in its present and future undertaking and property, both real and personal, to B2KBRAC to secure the performance of all present and future obligations of Arc to B2KBRAC pursuant to the PSA, which would include the obligations in relation to the Canadian Credits at section 16 of the PSA and the obligation to repay the overpayment of Fees.

- (a) As general and continuing security for the performance of all present and future obligations of Arc to Producer pursuant to this Agreement (collectively, the “**Obligations**”), Arc hereby grants to Producer a security interest in the present and future undertaking and property, both real and personal, of Arc (collectively, the “**Collateral**”), and as further general and continuing security for the performance of the Obligations, Arc hereby assigns the Collateral to Producer and mortgages and charges the Collateral as and by way of a fixed and specific mortgage and charge to Producer. Without limiting the generality of the foregoing, the Collateral shall include all right, title and interest that Arc now has or may hereafter have, be possessed of, or be entitled to or hereafter be acquired by Arc in all property of the following kinds as such terms are defined in the *Personal Property Security Act* (Ontario) (the “**PPSA**”): *accounts, chattel paper, equipment, documents of title, inventory, securities, instruments, intangibles, money*, and all substitutions and replaces and increases additions and accessions to any of the foregoing, and all *proceeds* therefrom but not including any *consumer goods*. Producer agrees that “Collateral” shall not include:
- (i) money paid during the Term to Arc by third parties dealing with Arc at arm’s length against compensation to Arc under a written agreement for Arc services, which has not been earned by performance; or
  - (ii) securities in any entity jointly owned by Arc and a third party at arm’s length that is established and carries on business solely for the purpose of producing the motion pictures and television productions described in 18(a)(iii); or
  - (iii) original motion picture(s) and television production(s) owned in whole or in part by Arc, including copyright in such motion picture(s) and television production(s), regardless of the stage of development or production.



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- (b) Arc represents warrants and covenants that while the Obligations remain outstanding no interest in the Architect Technology will be transferred by Arc; the Arc Technology shall remain Collateral.
- (c) Arc confirms that value has been given by the Producer to Arc, that Arc has rights in the Collateral (other than after-acquired property) and that Arc and the Producer have not agreed to postpone the time for attachment of the security interests created by this Agreement to any of the Collateral. Arc acknowledges receipt of an executed copy of this Agreement an.
- (d) Producer acknowledges that the priority of the security interest created by this Agreement shall be determined in accordance with the date of perfection pursuant to the Personal Property Security Act (Ontario) or comparable legislation in other jurisdictions where Producer determines registration(s) is appropriate and desirable to perfect the security interest.
- (e) Upon the occurrence of any Event of Default set out in Paragraphs 21(a)(i)-21(a)(x), inclusive and at any time thereafter, any or all of the Obligations shall at the option of the Producer becomes subject to immediate performance without further demand or notice, both of which are expressly waived; any or all security granted hereby shall, at the option of the Producer, become immediately enforceable; and the Producer shall have, in addition to any right or remedy provided by law, the rights and remedies set out below, all of which rights and remedies shall be enforceable successively, concurrently and/or cumulatively:...

### **Canadian Credits and B2KBRAC Agreement Excluded from Asset Purchase Agreement**

We note in the Asset Purchase Agreement between Deloitte Restructuring Inc. and Jam Filled Entertainment (Toronto) Inc. dated August 16, 2016 (the “**Asset Purchase Agreement**”) that the Canadian Credits were excluded from the assets purchased and sold expressly by virtue of sections 1.1 and 2.3 as well as by section 2.6 of the Asset Purchase Agreement.

We also note, notwithstanding the redactions from Schedule 2.1(e) of the Asset Purchase Agreement, that the March 29, 2013 Production Services Agreement between B2KBRAC and Arc does not appear to be included in the Assigned Contracts. We assume that this is due to the requirement for the consent of B2KBRAC to any assignment of the Arc rights and obligations under the PSA set out in paragraph 43 of the PSA, which has neither been given nor promised.

Accordingly, B2KBRAC’s security interest securing Arc’s obligations in relation to the repayment of the Fee Overpayment is unaffected by paragraph 5 of the August 19, 2016 Vesting Order of The Honourable Justice Newbould vacating claims and encumbrances against the Purchased Assets.

### **Summary of Claims**

Please accept this letter as notice to Deloitte Restructuring Inc. that B2KBRAC Holdings Inc. claims entitlement to be paid:

- 6 -

1. the full amount of the Canadian Credits in the approximate amount of CAD\$900,000, which is the property of B2KBRAC by virtue of the assignment; and
2. the amount of the Fee Overpayment to Arc in accordance with the PSA and the email exchange of June 17 - 21, 2016.

We would appreciate your advice as to the Receiver's position in respect of our client's entitlement and claims, and as to a motion, if necessary, for a protective order in respect of B2KBRAC's Confidential Information at your earliest convenience.

We look forward to hearing from you.

Yours truly,

**Sim Lowman Ashton & McKay LLP**



Andrew Jones

Encl.:

- Extract from August 4, 2016 search of Arc Productions Ltd.
- June 17 – 21, 2016 emails between Arc and Disney regarding the Fee Overpayment

- 7 -

**June 28, 2013 registration under the *PPSA* in favour of  
B2KBRAC, registration number 20130628 1419 1590 3302  
against Inventory, Equipment, Accounts and Other**

00 FILE NUMBER 688192776  
 CAUTION PAGE TOTAL MOTOR VEHICLE REGISTRATION REGISTERED REGISTRATION  
 FILING NO. OF PAGES SCHEDULE NUMBER UNDER PERIOD  
 001 1 20130628 1419 1590 3302 P PPSA 5

01 DEBTOR DATE OF BIRTH FIRST GIVEN NAME INITIAL SURNAME  
 02 DEBTOR BUSINESS NAME ARC PRODUCTIONS LTD.  
 03 NAME BUSINESS NAME TORONTO ON M5A 1P4  
 04 ADDRESS 230 RICHMOND STREET EAST INITIAL SURNAME  
 DATE OF BIRTH FIRST GIVEN NAME SURNAME  
 05 DEBTOR BUSINESS NAME ONTARIO CORPORATION NO. 001847816  
 06 NAME BUSINESS NAME ONTARIO CORPORATION NO.

07 SECURED PARTY / ADDRESS BK2BRAC HOLDINGS INC.  
 08 LIEN CLAIMANT  
 09 COLLATERAL CLASSIFICATION ADDRESS 500 SOUTH BUENA VISTA STREET BURBANK CA 91521-4859  
 COLLATERAL CLASSIFICATION CONSUMER  
 GOODS INVENTORY EQUIPMENT ACCOUNTS OTHER INCLUDED MOTOR VEHICLE AMOUNT DATE OF NO FIXED  
 YEAR MAKE X X X X MODEL V.I.N. MATURITY OR MATURITY DATE

10 MOTOR  
 11 VEHICLE  
 12 GENERAL  
 13 COLLATERAL  
 14 DESCRIPTION  
 15 REGISTERING  
 16 AGENT  
 17 ADDRESS 330 UNIVERSITY AVENUE, 6TH FLOOR TORONTO ON M5G 1R7  
 \*\*\* FOR FURTHER INFORMATION, CONTACT THE SECURED PARTY. \*\*\*  
 CONTINUED... 78

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**June 17 – 21, 2016 emails between Arc and Disney regarding  
the Fee Overpayment**

---

**From:** Peter Kozik <Peter.Kozik@arcproductions.com>  
**Sent:** June-21-16 1:08 PM  
**To:** Shokrai, Mona  
**Cc:** McGuire, John; Michelle Abbott  
**Subject:** RE: Deposit Settlement - Please Confirm

I confirm that we are in agreement.

Best;  
Peter

---

**From:** Shokrai, Mona [<mailto:Mona.Shokrai@disney.com>]  
**Sent:** June-17-16 8:39 PM  
**To:** Peter Kozik  
**Cc:** McGuire, John  
**Subject:** Deposit Settlement - Please Confirm  
**Importance:** High

Hi Peter,

Good news. The payment schedule we had discussed with respect to the issue of the CDN\$400,000 overpayment was approved internally, as follows:

- The CDN\$69,721.40 (the final installment/payment for the Tumbleweed Test Services) shall not be paid by Disney and this sum will be applied against the CDN\$400,000 overpayment.
- The remaining balance of the overpayment is now CDN\$330,278.60. 50% of this remaining balance (i.e., a total of CDN\$165,139.30) shall be paid by Arc to Disney in three installments:
  - First installment of CDN\$55,046.43 payable on or before October 1, 2016;
  - Second installment of CDN\$55,046.43 payable on or before January 1, 2017; and
  - Third installment of CDN\$55,046.43 payable on or before April 1, 2017.

Please confirm your agreement to the foregoing by responding to this email. Thank you.

Best,  
Mona

---

**Mona R. Shokrai**  
*Director, Business Affairs & Legal Counsel*  
Disneytoon Studios  
833 Sonora Avenue, Glendale, CA 91201  
Phone: 818.544.9310 | Fax: 818.460.9809  
Tie-Line: 8223.9310

This e-mail message is confidential, intended only for the named recipient(s) above, and may contain information that is privileged attorney work product or exempt from disclosure under applicable law. If you receive this e-mail message in error, or are not the named recipient(s), please immediately notify the sender at (818) 544-9310 and delete this e-mail from your computer. Thank you.

**THIS IS EXHIBIT "F-1" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**

A handwritten signature in black ink, appearing to read 'Nathan Fan', is written over a horizontal line.

**A COMMISSIONER ETC.**

Nathan Fan

# Ontario Media Development Corporation



## ONTARIO COMPUTER ANIMATION AND SPECIAL EFFECTS (OCASE) TAX CREDIT

**CERTIFICATE No.**

18D01226

**Corporation:**

Arc Productions Ltd.

**Business Number:**

89587 7488

**Taxation Year Ending:**

December 31, 2014

**No. of Productions for this Certificate:**

8

**OMDC FILE No.:**

07157-16-TXD

**Estimated OCASE Tax Credit Per Production:**

|                                    |               |    |
|------------------------------------|---------------|----|
|                                    |               |    |
| Tink'n About Animals               | \$ 106,817.20 | 4  |
| The Pirate Fairy, I (1-2)          | \$ 19,989.80  | 5  |
| Vitaminamulch: Air Spectacular     | \$ 125,747.60 | 6  |
| Meet the Piston Peak Team, I (1-4) | \$ 144,967.00 | 7  |
|                                    |               |    |
|                                    | \$ -          | 9  |
|                                    | \$ -          | 10 |
|                                    | \$ -          | 11 |
|                                    | \$ -          | 12 |

**OCASE Tax Credit**

**Estimated Amount of the Qualifying Corporation's Tax Credit for the Taxation Year:**

**Certification**

The Ontario Media Development Corporation certifies that this certificate has been issued with respect to the eligible production(s) listed on this certificate and that the estimated amount of the Qualifying Corporation's Ontario Computer Animation and Special Effects Tax Credit for the taxation year for the purposes of section 90 of the Taxation Act [redacted] Such amounts may be subject to audit by the Canada Revenue Agency.

This certificate does not ensure that a tax credit will be received. In order to receive the tax credit in respect of the eligible production(s) the corporation must attach this certificate and the claim form/schedule to the T2 Corporation Income Tax Return. The Canada Revenue Agency will process your claim after the tax return has been received. To ensure that your claim is processed as quickly as possible please make sure that all information submitted to the Canada Revenue Agency is correct and complete.

A certificate is required for each taxation year in which a claim is made for the production(s) listed on this certificate.

The Ontario Media Development Corporation

By: Jennifer Blitz  
Director, Tax Credits & Financing Programs

Date: February 23, 2018



**THIS IS EXHIBIT "F-2" TO THE AFFIDAVIT OF  
BRIANNE PAPACONSTANTINO  
SWORN BEFORE ME THIS 21<sup>st</sup> DAY OF MAY, 2020.**

A handwritten signature in black ink, appearing to read 'Nathan Fan', is written over a horizontal line.

**A COMMISSIONER ETC.**

Nathan Fan

# Ontario Media Development Corporation



## ONTARIO COMPUTER ANIMATION AND SPECIAL EFFECTS (OCASE) TAX CREDIT

**CERTIFICATE No.**

18D01200

**Corporation:**

Arc Productions Ltd.

**Business Number:**

89587 7488

**Taxation Year Ending:**

December 31, 2013

**No. of Productions for this Certificate:**

1

**OMDC FILE No.:**

07157-14-TXD

**Estimated OCASE Tax Credit Per Production:**

|                                    |              |    |
|------------------------------------|--------------|----|
|                                    |              |    |
| Vitaminamulch: Air Spectacular     | \$ 59,607.60 | 8  |
| The Pirate Fairy, I (1-2)          | \$ 95,643.80 | 9  |
| Meet the Piston Peak Team, I (1-4) | \$ 2,626.88  | 10 |
|                                    |              |    |
|                                    | \$ -         | 12 |

**OCASE Tax Credit**

**Estimated Amount of the Qualifying Corporation's Tax Credit for the Taxation Year:**

**Certification**

The Ontario Media Development Corporation certifies that this certificate has been issued with respect to the eligible production(s) listed on this certificate and that the estimated amount of the Qualifying Corporation's Ontario Computer Animation and Special Effects Tax Credit for the taxation year for the purposes of section 90 of the Taxation Act [redacted] Such amounts may be subject to audit by the Canada Revenue Agency.

This certificate does not ensure that a tax credit will be received. In order to receive the tax credit in respect of the eligible production(s) the corporation must attach this certificate and the claim form/schedule to the T2 Corporation Income Tax Return. The Canada Revenue Agency will process your claim after the tax return has been received. To ensure that your claim is processed as quickly as possible please make sure that all information submitted to the Canada Revenue Agency is correct and complete.

A certificate is required for each taxation year in which a claim is made for the production(s) listed on this certificate.

The Ontario Media Development Corporation

By: Jennifer Blitz  
Director, Tax Credits & Financing Programs

Date: January 4, 2018

TAB 2

Commercial List File No. CV-16-11472-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BETWEEN:

**GROSVENOR PARK MEDIA FUND L.P.**

Plaintiff

- and -

**ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD.,  
ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE JUNGLE  
PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS INC., ARCADIA  
PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS INC., UNDERZOO  
PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS LTD., SIR SIMON  
PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS MURRAY, KALLAN  
KAGAN and PETER KOZIK**

Defendants

**STATEMENT OF FACT AND LAW  
OF THE THIRD PARTY CLAIMANT, BK2BRAC HOLDINGS INC.  
(Receiver's Motion Returnable on May 29, 2020)**

**I. OVERVIEW**

1. BK2BRAC Holdings Inc. ("**BK2BRAC**") is a third party claimant in this proceeding. BK2BRAC is a party to a March 29, 2013 Production Service Agreement (the "**BK2BRAC PSA**") with Arc Productions Ltd. ("**Arc**"). Under the BK2BRAC PSA, Arc contracted to submit and collect tax recovery claims on behalf of BK2BRAC with respect to certain productions. The rights to the tax credits were assigned and transferred absolutely to BK2BRAC as at March 29, 2013.

2. Funds resulting from certain Canadian tax credit recoveries submitted on behalf of BK2BRAC pursuant to the Production Service Agreement have been received by Deloitte Restructuring Inc. (the “**Receiver**”) from the Canada Revenue Agency (“**CRA**”).
3. The Receiver in its capacity as receiver of the assets, properties and undertakings of Arc and the other corporate Defendants (collectively, “**Arc Defendants**”), brings this motion to seek advice and directions from the Court concerning the making of distributions relating to, among other funds, tax credits received by Arc on behalf of BK2BRAC.
4. As the tax credits under the BK2BRAC PSA were assigned and transferred absolutely to BK2BRAC on March 29, 2013 before the Arc insolvency, BK2BRAC has a proprietary interest in the tax credits at issue and those Canadian tax credits are not impressed with the security interest of other secured creditors.
5. Aside from the tax credits, BK2BRAC overpaid certain fees to Arc under the BK2BRAC PSA in the amount of approximately CDN\$400,000. Arc’s obligation to return the overpayment of fees was secured by a security interest perfected on June 28, 2013 by registration under the Ontario PPSA. That obligation subsequently was subordinated to the interest of Grosvenor Park by a December 2, 2015 subordination agreement between BK2BRAC and Grosvenor Park Media Fund L.P. (“**Grosvenor Park**”).

## **II. FACTS**

### The Production Service Agreement and Canadian Tax Credits

6. On March 29, 2013, Arc and BK2BRAC entered into the BK2BRAC PSA, wherein Arc agreed to facilitate the application and collection of tax credit recovery claims on behalf of BK2BRAC with respect to certain productions in Canada pursuant to the BK2BRAC

PSA. The right to those Canadian tax credits was assigned and transferred absolutely to BK2BRAC on March 29, 2013 in the BK2BRAC PSA before the Arc receivership and bankruptcy.

**BK2BRAC Production Service Agreement dated March 29, 2013 [“BK2BRAC PSA”], Appendix “A” to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020),**

7. In paragraph 16(e) of the BK2BRAC PSA, Arc assigned absolutely all rights, interests and benefits in the Canadian Tax Credits to BK2BRAC:

*(e) Assignment of Canadian Credits. Arc **hereby assigns and transfers absolutely to Producer all of its present and future rights, interests, and benefits in and to any and all Canadian Credits arising from the Picture and Ancillary Content and Producer hereby accepts such assignment.** Arc hereby irrevocably nominates, constitutes and appoints Producer its lawful attorney-in-fact (which appointment is a power coupled with an interest), to act and perform the following in connection with the Picture and Ancillary Content: (i) if a firm of chartered accountants is not appointed by the first fiscal year end of Arc following the date of this Agreement, Producer may appoint a firm of chartered accountants, at the expense of Arc, to audit expenses incurred by Arc with respect to production costs of the Picture or Ancillary Content; and (ii) to promptly sign, execute, deliver and file with the Canada Revenue Agency, the Canadian Audio-Visual Certification Office, the Ontario Media Development Corporation, and/or any other governmental organization administering any provincial Canadian Credits, as the case may be, all documents necessary to obtain payment of any amounts payable to Arc with respect to the Canadian Credits for the Picture or Ancillary Content. Arc shall consult with Producer with respect to the hiring of an accounting firm pursuant to the provisions set forth in (i) above, and Producer and Arc hereby agree to engage in good faith negotiations, at the time of such hire, respecting any and all accounting fees relating thereto.*

[bold emphasis added]

**BK2BRAC PSA, at para. 16(e), Appendix “A” to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

8. “Canadian Credits” was defined in paragraph 16(a) of the BK2BRAC PSA as follows:

*(a) For purposes hereof, **“Canadian Credits”** means as at any date all Film or Video Production Services Tax Credits established pursuant to the provisions of Section 125.5 of the Income Tax Act (Canada), and all equivalent, matching or additional provincial tax credits established pursuant to the provisions of any*

*applicable Income Tax Legislation (as defined below) (including the Ontario Production Services Tax Credit and the Ontario Computer Animation and Special Effects Tax Credit), which Arc is or will be entitled to claim or may reasonably be expected to claim, or has claimed (but for clarification, excluding any credits for which Producer applies or claims directly) in any taxation year of Arc as a result of incurring certain of the production expenses for the Picture or Ancillary Content in Canada, calculated by reference to certain production expenses incurred by Arc for the Picture or Ancillary Content in Canada or deemed to have been paid by Arc. **“Canadian Credits Refund”** means amounts in respect of the Canadian Credits, including any interest thereon, that are refunded and actually received by Arc or that are credited or applied against any income tax otherwise payable by Arc.*

**BK2BRAC PSA, at para. 16(a), Appendix “A” to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

9. In particular, the tax credit claims covered by the BK2BRAC PSA included all applicable Film or Video Production Services Tax Credits established pursuant to Section 125.5 of the *Income Tax Act* (Canada) and the equivalent, matching or additional provincial tax credits (the **“Canadian Tax Credits”**), including *inter alia* the Ontario Computer Animation and Special Effects (**“OCASE”**) tax credit, for various productions pursuant to the BK2BRAC PSA.

**BK2BRAC PSA, at para. 16(a), Appendix “A” to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

10. Under the BK2BRAC PSA, Arc agreed to apply for and obtain all Canadian Tax Credits on BK2BRAC’s behalf and to pay all such Canadian Tax Credits it receives to BK2BRAC. Arc also agreed to apply for, in cooperation with BK2BRAC, the accreditation of its productions under Canadian Tax Credits, including the OCASE tax credits.

**BK2BRAC PSA, at paras. 16(b), (c) and (d), Appendix “A” to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

11. As of March 29, 2013, the date of the BK2BRAC PSA, BK2BRAC was the absolute owner of all rights, interests and benefits in the Canadian Tax Credits, including any OCASE tax credits.

### OCASE Tax Credits

12. On or about January 4, 2018, Arc obtained a certificate issued by the Ontario Media Development Corporation (“**OMDC**”) certifying that certain productions under the BK2BRAC PSA, and the estimated amount of expenditures for such productions for the taxation year ending December 31, 2014, were eligible productions for the OCASE tax credit, subject to an audit by the Canadian Revenue Agency (the “**2014 OCASE Tax Credits**”). The qualifying 2014 OCASE Tax Credits for the eligible productions were estimated as follows:

| <b>Year</b>                 | <b>Production</b>                  | <b>Estimated OCASE Tax Credit</b> |
|-----------------------------|------------------------------------|-----------------------------------|
| 2014                        | Meet the Piston Peak Team, I (1-4) | 144,967.00                        |
| 2014                        | The Pirate Fairy, I (1-2)          | 19,989.80                         |
| 2014                        | Tink’n About Animals               | 106,817.20                        |
| 2014                        | Vitaminamulch: Air Spectacular     | 125,747.60                        |
| Total 2014 OCASE Tax Credit |                                    | \$397,521.60                      |

**OMDC 2014 OCASE Tax Credit Certificate, Exhibit “F-1”, Papaconstantinou Affidavit sworn May 21, 2020 (“Papaconstantinou Affidavit”), Responding Motion Record of BK2BRAC Holdings Inc. (“BK2BRAC RMR”), Tab 1F-1**

13. In the Fifteenth Report of the Receiver dated April 9, 2020, the Receiver reported that as at February 29, 2020, the amounts received from the CRA for the 2014 OCASE Tax Credits were as follows:

| <b>Year</b>                           | <b>Production</b>                  | <b>Received OCASE Tax Credit</b> |
|---------------------------------------|------------------------------------|----------------------------------|
| 2014                                  | Meet the Piston Peak Team, I (1-4) | 144,967                          |
| 2014                                  | The Pirate Fairy, I (1-2)          | 19,9990                          |
| 2014                                  | Tink’n About Animals               | 106,817                          |
| 2014                                  | Vitaminamulch: Air Spectacular     | 125,748                          |
| Accrued Interest                      |                                    | 27,423                           |
| Fees and disbursements                |                                    | (29,855)                         |
| Actual 2014 OCASE Tax Credit Received |                                    | \$395,090                        |



**Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020), at para. 12 and Appendix “C”**

14. On or about January 4, 2018, Arc obtained a certificate issued by the OMDC certifying that certain productions under the BK2BRAC PSA, and the estimated amount of expenditures for such productions for the taxation year ending December 31, 2013, were eligible productions for the OCASE tax credit, subject to an audit by the Canadian Revenue Agency (the “**2013 OCASE Tax Credits**”). The qualifying 2013 OCASE Tax Credits for the eligible productions were estimated as follows:

| <b>Year</b>                 | <b>Production</b>                  | <b>Estimated OCASE Tax Credit</b> |
|-----------------------------|------------------------------------|-----------------------------------|
| 2013                        | Meet the Piston Peak Team, I (1-4) | 59,607.60                         |
| 2013                        | The Pirate Fairy, I (1-2)          | 95,643.80                         |
| 2014                        | Vitaminamulch: Air Spectacular     | 2,626.88                          |
| Total 2014 OCASE Tax Credit |                                    | \$157,878.28                      |

**OMDC 2013 OCASE Tax Credit Certificate, Exhibit “F-2”, Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1F-2**

15. In the Fifteenth Report of the Receiver dated April 9, 2020, the Receiver reported that as at February 29, 2020, the 2013 OCASE Tax Credits were still outstanding and had not yet been issued by the CRA.

**Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020), at Appendix “C”**

Security Interest and Subordination Agreement applicable to the Fee Overpayments

16. Under paragraph 18(a) of the BK2BRAC PSA, Arc agreed to provide a general and continuing security for the performance of all present and future obligations owed to BK2BRAC under the BK2BRAC PSA, including a security interest in Arc's property.

**BK2BRAC PSA, at para. 18(a) and Appendix "A" to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

**BK2BRAC Notice to Receiver dated September 6, 2016, Exhibit "E", Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1E**

17. BK2BRAC overpaid fees to Arc in the amount of CDN\$400,000 (the "**Fee Overpayment**"). BK2BRAC's entitlement to the Fee Overpayment was secured by a security interest granted by Arc to BK2BRAC perfected by a PPSA registration in favour of BK2BRAC on June 28, 2013 ("**BK2BRAC's Security Interest**").

**PPSA Registration in favour of BK2BRAC dated June 29, 2013, Exhibits "A-1" and "A-2", Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1A-1 and 1A-2**

**BK2BRAC Notice to Receiver dated September 6, 2016, Exhibit "E", Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1E**

**BK2BRAC PPSA Registration, at para. 11 and Appendix "B" to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

18. The rights and entitlement to the Canadian Tax Credits did not form part of the Fee Overpayment covered by BK2BRAC's Security Interest. The Canadian Tax Credits were assigned and transferred absolutely to BK2BRAC on March 29, 2013. .

**BK2BRAC PPSA Registration, at para. 11 and Appendix "B" to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

**BK2BRAC Notice to Receiver dated September 6, 2016, Exhibit "E", Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1E**

19. BK2BRAC's Security Interest in the Fee Overpayment was subsequently subordinated to the Plaintiff, Grosvenor Park by agreement between BK2BRAC and Grosvenor Park dated December 10, 2015.

**BK2BRAC Subordination Agreement, at para. 11 and Appendix “B” to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)**

**Subordination Agreement, Exhibit “B”, Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1B**

Receivership and Distribution Order

20. On August 8, 2016, Grosvenor Park brought a motion seeking the appointment of the Receiver over Arc. The motion was granted and a Receivership Order was issued by the Honourable Justice Penny on August 10, 2016, which, *inter alia*, appointed the Receiver of “*all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof*”.

**Receivership Order of Justice Penny dated August 10, 2016, at para. 2, Exhibit “C”, Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1C**

21. On April 18, 2017, the Honourable Justice Newbould granted a Distribution Order which, *inter alia*:
- (a) authorized the Receiver to generally distribute funds on an ongoing basis to Grosvenor Park up to the amount of \$43,953,400; and
  - (b) carved out proceeds of the collection of Arc’s tax credits from the general authorization to distribute funds to Grosvenor Park, and for the distribution of such proceeds to be made only upon further Order of the Court.

**Distribution Order of Justice Newbould dated April 18, 2017, at para. 5, Exhibit “D”, Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1D**

### III. ISSUES

22. The issues before this Court are as follows:

- (a) whether the Court should grant an Order directing the Receiver to distribute the proceeds from the 2013 OCASE Tax Credits and the 2014 OCASE Tax Credits in full to BK2BRAC, as and when such proceeds are received.

### IV. LAW AND ARGUMENT

#### Canadian Tax Credits Not Subject to Arc Receivership

23. As set out in paragraph 6 to 11 above, paragraph 16 of the BK2BRAC PSA states that all rights, interests, and benefits of the Canadian Tax Credits were “*hereby assigned and transferred absolutely*” to BK2BRAC by and as of the date of the BK2BRAC PSA. Arc’s continued involvement under the BK2BRAC PSA with respect to the Canadian Tax Credits was merely to facilitate the tax credit claims for all applicable Canadian Tax Credits *on behalf of BK2BRAC* and to remit such tax credits received by Arc to BK2BRAC. Arc did not retain any entitlement in the Canadian Tax Credits or any related proceeds after March 29, 2013.
24. The assignment of the Canadian Tax Credits to BK2BRAC was effective on March 29, 2013 well prior to August 10, 2016, the date on which the Receiver was appointed and Arc was ordered into receivership..
25. Ontario Courts have held that a Receiver has no authority to take possession of interests that are proprietary to another party whose property is not subject to the receivership.

**1565397 Ontario Inc. (Re), [2009] O.J. No. 2596, 54 C.B.R. (5th) 262, (Ont. SCJ) at para. 68 to 73, BK2BRAC RMR, Tab 3A**

26. The Receivership Order applies only to property of the Arc Defendants and does not extend to the property of BK2BRAC. The fact that the funds resulting from certain Canadian Tax Credits were not received from the CRA until after Arc entered into receivership does not render the Canadian Tax Credits as general funds to be distributed to Arc's secured creditors.
27. The Ontario Computer Animation and Special Effects (OCASE) tax credits are expressly covered under paragraph 16(a) of the BK2BRAC PSA under the scope of "Canadian Credits" that were assigned to BK2BRAC. Accordingly, the 2014 OCASE Tax Credits in the amount of \$395,090 received by the Receiver from CRA belong to BK2BRAC and are outside the Arc receivership. \$395,090 representing the funds granted for the 2014 OCASE Tax Credits should be distributed in full to BK2BRAC.
28. Similarly, the 2013 OCASE Tax Credits, which are estimated to be \$157,878.28 but have yet to be received by the Receiver from the CRA, also belong to BK2BRAC and should be ordered distributed in full to BK2BRAC once the funds are received by the Receiver.

#### BK2BRAC Entitlement to Canadian Tax Credits Not Subordinate to Grosvenor Park

29. As set out in paragraphs 16 to 19 above, BK2BRAC's Security Interest related to a fee overpayment made by BK2BRAC to Arc. Given that all rights, interests and benefits in the Canadian Tax Credits were assigned absolutely to BK2BRAC on the date of the agreement, the rights to the Canadian Tax Credits are independent of and did not form part of BK2BRAC's Security Interest with Arc.
30. That the fee overpayment was separate from the Canadian Tax Credits already assigned and transferred absolutely to BK2BRAC on March 29, 2013 was confirmed in

correspondence from this firm to the Receiver on September 2, 2016, in which was stated:

*The obligation of Arc for the Fee Overpayment is secured by the security interest granted to B2KBRAC under section 18 of the PSA (the "Security Interest"), which was perfected by a June 28, 2013 registration in favour of B2KBRAC, registration number 20130628 1419 1590 3302 against Inventory, Equipment, Accounts and Other; and subordinated to the security held by Grosvenor Park Media Fund LP ("Grosvenor Park") by agreement between B2KBRAC and Grosvenor Park dated December 2, 2015 (the "Subordination Agreement"). The relevant page extracted from an August 4, 2016 PPSA search against Arc shows the B2KBRAC registration together with a copy of the Subordination Agreement are attached.*

*The Subordination Agreement is not applicable to the Canadian Credits. The Subordination Agreement subordinates B2KBRAC's security "in and to any and all of the present and after-acquired property, assets and undertakings of the Borrower, and any and all proceeds therefrom..." When Arc assigned the Ontario and Federal tax credits associated with the production of the relevant films to B2KBRAC under section 16 of the PSA, they ceased to be property, assets and undertakings of the Borrower and became the property of B2KBRAC, and are outside of the property subject to the Subordination Agreement.*

**BK2BRAC Notice to Receiver dated September 6, 2016, Exhibit "E" at p. 2, Papaconstantinou Affidavit, BK2BRAC RMR, Tab 1E**

31. As the Subordination Agreement only subordinated BK2BRAC's Security Interest in the Fee Overpayment to Grosvenor Park, the subordination did not affect BK2BRAC's rights to the Canadian Tax Credits.
32. Moreover, the Subordination Agreement, which was entered into on December 2, 2015, subordinated BK2BRAC's Security Interest "in and to any and all of the *present and after-acquired* property, assets and undertakings" of Arc to the security held by Grosvenor Park. As the rights to the Canadian Tax Credits were assigned absolutely to BK2BRAC on March 29, 2013, the date of the BK2BRAC PSA, the Canadian Tax

Credits remained the property of BK2BRAC and did not form part of the present or after-acquired property of Arc as of the date of the Subordination Agreement.

33. Accordingly, BK2BRAC's rights, interests and benefits to the Canadian Tax Credits are separate from BK2BRAC's Security Interest and are not affected by the subordination to Grosvenor Park. As such, Grosvenor Park does not have any priority claim to the Canadian Tax Credits.

#### Redactions of Production Service Agreement

34. The Courts have held that redactions to a document would be acceptable where the redacted content is not relevant to the issues to be resolved and that the disclosure would cause significant harm to the producing party. For example, G.R. Strathy J. in *McGee v. London Life Insurance Co.* summarized the principle as follows:

*9 The whole of a relevant document must be produced except to the extent it contains information **that would cause significant harm to the producing party** or would infringe public interests deserving of protection. [emphasis added] I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in *North American Trust Co. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (S.C.) at para. 13:*

*Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what **is clearly not relevant is by its nature such that there is good reason why it should not be disclosed**, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. **In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.***

[emphasis in original]

***McGee v. London Life Insurance Co.*, [2010] O.J. No. 898, 2010 ONSC 1408 (Ont. SCJ) at para. 9, BK2BRAC RMR, Tab 3B**

35. Redactions of documents may be allow where the redactions are necessary in protecting an important interest, where disclosure of such irrelevant information would cause real damage or embarrassment. Commercially sensitive financial information has been found to be important interests worthy of protection.

***McGee v. London Life Insurance Co.*, [2010] O.J. No. 898, 2010 ONSC 1408 (Ont. SCJ) at para. 13, BK2BRAC RMR, Tab 3B**

36. In support of the within motion, the Receiver filed redacted copies of the BK2BRAC PSA between BK2BRAC and Arc as Appendix "A" to the Fifteenth Report of the Receiver. The redacted content of the BK2BRAC PSA pertains to information that is commercially sensitive to BK2BRAC. The redacted content is also irrelevant and serves no legitimate purpose in resolving the issues on this motion; however, disclosure of the commercially sensitive information would cause considerable and real harm to BK2BRAC.

**Papaconstantinou Affidavit at para. 9, BK2BRAC RMR, Tab 1**

37. Accordingly, the redactions in the BK2BRAC PSA document are proper and in line with the principles of documentary disclosure established by the Courts.

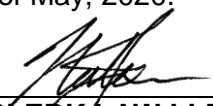


**IV. ORDER SOUGHT**

38. BK2BRAC respectfully requests an Order:

- (a) directing the Receiver to distribute to BK2BRAC the amount of \$395,090 representing the funds granted for the 2014 OCASE Tax Credits;
- (b) directing the Receiver to distribute to BK2BRAC the amount to be received as the funds granted for the 2013 OCASE Tax Credits, at the time such funds are received by the Receiver; and
- (c) such further and other relief as counsel may advise and this Honourable Court deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of May, 2020.




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Lawyers for Deloitte Restructuring Inc. in its capacity as the Court appointed Receiver of Arc Productions Ltd. et al.

AND TO: **THE SERVICE LIST**

TAB 3

TAB 3A

# 1565397 Ontario Inc. (Re), [2009] O.J. No. 2596

Ontario Judgments

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: March 25 and April 9, 2009.

Judgment: June 23, 2009.

Court File No. 07-CL-7309

**[2009] O.J. No. 2596** | 54 C.B.R. (5th) 262 | 2009 CarswellOnt 3614 | 81 R.P.R. (4th) 214 | 178 A.C.W.S. (3d) 124

RE: IN THE MATTER OF the Receivership of 1565397 Ontario Inc., a company duly incorporated in Ontario with a head office in the Town of Maple, in the Province of Ontario

(88 paras.)

## Case Summary

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**Corporations, partnerships and associations Law — Corporations — Receivers and receiver managers — Duties — Powers of the court — Application by court-appointed receiver for declaration it was entitled to disclaim undertaking and sell property free of interests of respondents pursuant to undertaking dismissed — Undertaking created interests of respondents in two lots that were properly characterized as interests in land — Receiver could not disclaim undertaking and court had no authority to authorize receiver to terminate or vest out respondents' proprietary interests in land — Equitable considerations argued against permitting receiver to sell property free of respondents' interest.**

**Creditors and debtors law — Receivers — Court appointed receivers — Powers — Realization of property — Sales by receiver — Application by court-appointed receiver for declaration it was entitled to disclaim undertaking and sell property free of interests of respondents pursuant to undertaking dismissed — Undertaking created interests of respondents in two lots that were properly characterized as interests in land — Receiver could not disclaim undertaking and court had no authority to authorize receiver to terminate or vest out respondents' proprietary interests in land — Equitable considerations argued against permitting receiver to sell property free of respondents' interest.**

Application by court-appointed receiver for a declaration that it was entitled to disclaim an undertaking given on the closing of the purchase of a property by the debtor and sell property free of interests of respondents pursuant to the undertaking. By an agreement of purchase and sale, the respondent Marcular Investments Inc. ("Marcular") agreed to sell a parcel of land to 2010149 Ontario Inc. ("2010149"). A schedule to the agreement provided that a plan of subdivision would be registered prior to the closing, and if it was not, then the purchaser would hold two lots on the draft plan of subdivision in trust for the vendor and would transfer one lot to the vendor

and the second to the respondent Mr. Learmonth on demand upon registration of the plan of subdivision. At closing the deed for the property was delivered to the debtor, 1565397 Ontario Inc., upon the direction of 2010149 and because no plan of subdivision was registered at closing, the debtor delivered to the respondent at closing an undertaking to hold the two lots in trust and transfer them to the respondents upon registration of the plan of subdivision. The undertakings were not registered on title to the property until 2008. The debtor received \$3.4 million secured by a mortgage against the property from CareVest Capital Inc. ("CareVest"), who had knowledge of the undertaking prior to advancing the funds. In December 2007, the receiver was appointed by the court for the purpose of selling the property and its powers included to apply for registration of the draft plan of subdivision, to cease to perform any contracts of the debtor and to apply for any vesting order necessary to convey the property to a purchaser free and clear of any liens or encumbrances affecting the property. The receiver had satisfied all conditions, but one, to register the plan of subdivision and intended on registering the plan of subdivision.

HELD: Application dismissed.

The undertaking did not create a trust of the respondents' interests in the property prior to the registration of the draft plan of subdivision as the lots in question did not exist at the time the undertaking was executed and it was questionable whether the property interests of the respondents were sufficiently certain as to subject matter to constitute a trust as of the date of execution of the undertaking. However, the undertaking created interests of the respondents in the two lots that were properly characterized as interests in land. The undertaking was an unconditional obligation to vest the two lots in trust upon the occurrence of a specified event and the fact that the lots had not yet been created did not prevent an inchoate interest in property from arising prior to their creation. The undertaking did not constitute an option to purchase land that violated the Planning Act as the respondents' interest in land could not properly be characterized as an option to purchase or other such interest such that s. 50(3) of the Planning Act applied. Furthermore, even if s. 50(3) of the Planning Act did apply, the circumstances were sufficient to satisfy the saving clause in s. 50(21). The receiver could not disclaim the undertaking and the court had no authority to authorize the receiver to terminate or vest out the respondents' proprietary interests in the land. Furthermore, the equitable considerations argued against permitting the receiver to sell the property free of the respondents' interest as they had a valuable interest in the property, had fully performed their obligations, there was no issue of unjust enrichment as there was no issue of notice of the undertaking and the receiver intended to register the draft plan of subdivision.

## **Statutes, Regulations and Rules Cited:**

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Planning Act, R.S.O. 1990, c. P.13, s. 50, s. 50(3)(b), s. 50(21)

## **Counsel**

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*Harvey G. Chaiton*, for A. Farber & Partners Inc., court-appointed Interim Receiver and Receiver and Manager of 1565397 Ontario Inc.

*Brandon Jaffe*, for John Robert Learmonth.

*Michael W. Carlson*, for Marlucor Investments Inc.

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**ENDORSEMENT****H.J. WILTON-SIEGEL J.**

1 The court-appointed receiver A. Farber & Partners Inc. (the "applicant" or the "receiver") of 1565397 Ontario Inc. ("156" or the "debtor") seeks the approval of the Court by way of advice and directions to disclaim an undertaking dated April 23, 2003 (the "Undertaking") given on the closing of the purchase of a property by the debtor. For the following reasons, the relief is denied.

**Background*****Circumstances of Delivery of the Undertaking***

2 By an agreement of purchase and sale dated May 26, 2002 (the "Sale Agreement"), the respondent Marculor Investments Inc. ("Marculor") agreed to sell a 107 acre parcel of land located in West Gwillimbury (the "Property") to 2010149 Ontario Inc. ("201").

3 Schedule "A" to the Sale Agreement contained the following provisions:

2.(a) The aggregate purchase price for the Property, in the sum of One Million, Twenty-Five Thousand (\$1,025,000.00) Dollars, as set out in this Agreement shall be paid or satisfied as follows: [...]

(b) The parties acknowledge and agree that the purchase price has been determined on the basis of the Property comprising 26 lots according to Draft Plan of Subdivision 43T-93015 (which lays out a total of 28 lots, it being agreed that Lots 14 and 16 on the said plan are not included in this transaction). ...

7. The Vendor covenants and agrees to deliver to the Purchaser on or before closing, the following:

(a) A transfer of the 26 lots comprising the Property in registerable form whereby title thereto in fee simple, subject to the exceptions herein provided, is conveyed to the Purchaser. In the event that the plan of subdivision of the Property is not registered by the closing date, the Purchaser shall hold Lots 14 and 16 on the Draft Plan of Subdivision in trust following closing and shall transfer Lot 14 to the Vendor and/or the Vendor's assigns, and shall transfer Lot 16 to Mr. Learmonth as prescribed in the Draft Plan of Subdivision 43T-93015, on demand without cost upon registration of the plan of subdivision.

4 At closing, the deed for the Property was delivered to 156 upon the direction of 201. Although it would appear that 201 and 156 were under common ownership, the parties have been unable to locate any formal assignment of the Sale Agreement to 156. Because Marculor did not register a plan of subdivision prior to the closing of the transaction, 156 delivered the Undertaking to the respondents at closing. I have proceeded on the basis that the rights of the respondents are derived from the Undertaking alone and that the respondents are not also alleging that the covenant in section 7(a) of the Sale Agreement is enforceable.

**5** The Undertaking reads as follows:

IN CONSIDERATION of and notwithstanding the closing of the above transaction, the undersigned hereby undertakes as follows:

1. [...]
2. To hold Lots 14 and 16 on the Draft Plan of Subdivision in trust following the closing of this transaction and upon registration of the Plan of Subdivision undertakes to transfer Lot 14 to the Vendor and/or the Vendor's assigns and transfer Lot 16 to Mr. Learmonth as prescribed on the Draft Plan of Subdivision 43T-9315, on demand without cost in accordance with the Agreement of Purchase and Sale dated May 26, 2002, save and except for any Land Transfer Tax or any of the direct costs of the transferees.

**6** Accordingly, pursuant to the Sale Agreement and the Undertaking, the respondent Marcular attempted to reserve Lot 14 for itself and Lot 16 for the respondent John Learmonth ("Learmonth"). Lot 14 is approximately 65 acres in area; Lot 16 is approximately 1.5 acres in area and includes Learmonth's residence.

***Subsequent History of the Property***

**7** Pursuant to a commitment letter dated May 12, 2006, CareVest Capital Inc. ("CareVest") loaned approximately \$3.4 million to 156 secured by a mortgage against the Property. CareVest had knowledge of the Undertaking prior to advancing any of these funds to 156. This is reflected in, among other things, letters dated July 29, 2008 to each of the respondents from CareVest's legal counsel in which the "prior interest" of the respondents in Lots 14 and 16 was recognized notwithstanding the fact that notices of the interests of the respondents pursuant to the Undertaking were not registered on title to the Property until 2008. For the reasons set out below, I think this statement should be understood to mean that the security constituted by the CareVest mortgage does not extend to the respondents' interests in the Property.

**8** On December 7, 2007, the applicant was appointed by the Court as the receiver of 156 for the purpose of selling the Property by order of this Court (the "Receivership Order"). 156 had not registered a plan of subdivision by that date. The Receivership Order included powers in favour of the receiver to apply for registration of the draft plan of subdivision, to cease to perform any contracts of 156, and to apply for any vesting order necessary to convey the Property to a purchaser free and clear of any liens or encumbrances affecting the Property.

**9** The applicant has satisfied all conditions to registration of the plan of subdivision, apart from entering into an agreement with a telecommunications supplier. The form of this latter agreement has been settled. However, the applicant does not intend to sign the agreement until after the Court has addressed the issue on this application. The applicant does not otherwise foresee any other obstacle to registration of the plan of subdivision and intends to do so after this application is concluded.

***Prior History of the Property***

**10** In 1989, Learmonth sold the Property to a predecessor in title to Marcular, Charlesmark Investment Corporation "(Charlesmark)", pursuant to an agreement dated April 14, 1989 (the

"Charlesmark Sale Agreement"). None of the parties can locate a copy of the Charlesmark Agreement. However, Learmonth's solicitor registered notice of the Charlesmark Sale Agreement in the land registry office on April 27, 1989. This registration was removed from title, without notice to Learmonth, when the Property was put into the land titles system in 1999.

**11** Charlesmark and Learmonth also entered into an agreement dated April 14, 1989, which contained the following provision (the "Charlesmark Undertaking"):

Charlesmark Investment Corporation shall hereby undertake that upon the final approval of registration of the Plan of Subdivision for the proposed residential development of the Lands to convey to John Robert Learmonth, or his successors of [sic] assigns one (1) lot on the said plan of subdivision containing the existing one and one-half storey aluminium clad farm house and being approximately 1.5 acres in size at no cost to him.

I have proceeded on the basis that the Charlesmark Undertaking has been superceded by the Undertaking and therefore its continuing significance is limited to evidence of Marculor's knowledge of the interest of Learmonth in the Property.

**12** Learmonth and Charlesmark also entered into a lease dated April 14, 1989 by which Learmonth leased the home and 1.5 acre parcel described in the Charlesmark Undertaking on a month-to-month tenancy at a rent of one dollar per month (the "Charlesmark Lease"). The Charlesmark Lease was stated to terminate upon the conveyance of the lot contemplated by the deed pursuant to which Learmonth transferred the Property to Charlesmark.

**13** On October 1, 1993, Charlesmark transferred the Property to Marluor. Marluor does not deny knowledge of the Charlesmark Sale Agreement or the Charlesmark Lease.

### **Issues**

**14** The following issues are addressed on this motion:

1. does the Undertaking create a trust in favour of Marculor and Learmonth (collectively, the "respondents")?
2. does the Undertaking grant Marculor and Learmonth an interest in land?
3. does the applicant have the power to disclaim the Undertaking and/or sell the Property free of any interest of the respondents?
4. if the applicant has such power, do the equities favour granting approval to the applicant to disclaim the Undertaking and/or sell the Property free of any interest of the respondents?

### **Analysis and Conclusions**

#### ***Does the Undertaking Create a Trust?***

**15** The respondents argue that the Sale Agreement, as supplemented by the Undertaking, created a trust of Lots 14 and 16 in favour of the respondents as of the date of closing of the sale of the Property. On this basis, they argue that the interests of the respondents in the Property did not vest in the applicant pursuant to the Receivership Order. I am not satisfied,



however, that the Undertaking constituted, or evidenced, the creation of a trust in favour of the respondents as of its date of execution, whether in Lots 14 and 16 or otherwise.

**16** Although courts will enforce a contract for the conveyance of future property by an order for specific performance, a trust of future property cannot be constituted. Lots 14 and 16 do not exist and will only come into existence, if ever, on the registration of the draft plan of subdivision. Accordingly, the Undertaking cannot constitute a trust of Lots 14 and 16 prior to registration of the draft plan of subdivision notwithstanding the language of the Undertaking which purports to establish a trust of Lots 14 and 16 at the time of its delivery. Instead, I think the proper interpretation of the Undertaking is that 156, as the settlor, has executed a binding declaration of trust in respect of a trust that is only effective as of the date it is "fed" by the coming into existence of Lots 14 and 16.

**17** It is also questionable whether the inchoate property interests of the respondents described below are sufficiently certain as to subject matter to constitute a trust as of the date of execution of the Undertaking. In any event, however, the Undertaking does not evidence an intention to hold in trust an interest in the Property that is other than the fee in Lots 14 and 16.

**18** For the same reason, it is not possible to construe the subject matter of the trust at the present time to be the covenant contained in the Undertaking insofar as it constitutes a declaration of an intention to create a trust. That obligation is expressed in the Undertaking by reference to holding in trust Lots 14 and 16, which do not yet exist, rather than to holding such interests in the Property as arise prior to registration of the draft plan of subdivision and thereafter holding in trust Lots 14 and 16. Therefore, the covenant in the Undertaking does not establish a trust at the present time.

**19** Accordingly, I conclude that the Undertaking does not create a trust of the respondents' interests in the Property prior to registration of the draft plan of subdivision.

### ***Does the Undertaking Create Interests in Land?***

**20** The following features of the Undertaking are relevant for this issue:

1. The Undertaking consists of a unilateral covenant on the part of 156 to hold Lots 14 and 16 in trust "following the closing of [the] transaction" together with a subsidiary covenant to convey the lots to the respondents upon their creation, which covenant would, in any event, be implied as a right of the beneficiaries of the trust;
2. While the Undertaking does not expressly say so, it is also clear that lots 14 and 16 are to be conveyed to the respondents free of any mortgage or lien incurred by 156;
3. The respondents are intended at all times to have interests only in respect of the portions of the Property that are to become Lots 14 and 16, rather than an undivided interest in the entire Property;
4. Insofar as the Undertaking can be construed as evidencing a contractual agreement between the parties respecting the transfer of Lots 14 and 16 to the respondents, the respondents have performed their obligations under such agreement by completing the sale of the Property; and

5. The Undertaking does not provide the respondents with any means of causing registration of the draft plan of subdivision. The conduct of the necessary work for such registration, and the timing of such registration, is left entirely in the discretion of 156.

### *Analysis and Conclusions*

**21** I conclude that the Undertaking creates interests of the respondents in Lots 14 and 16 that are properly characterized as interests in land on the following reasoning.

**22** *Black's Law Dictionary*, 8th ed. (St. Paul, Minn: West Publishing Co., 2004) defines an inchoate interest as "a proprietary interest that has not yet vested." This appears to capture the nature of the rights granted the respondents under the Undertaking. The Undertaking is an unconditional obligation to vest Lots 14 and 16 in trust upon the occurrence of a specified event. The fact that the lots have not yet been created does not prevent an interest in the Property arising prior to their creation as an "inchoate interest" in land. This conclusion is reinforced by the following considerations.

**23** When considered collectively, the elements of the Undertaking described above indicate an intention to grant rights in the Property effective as of the date of delivery of the Undertaking rather than at a future date. The Undertaking purports, to the extent possible as of its date of delivery, to grant the respondents interests in two particular lots to be excluded from the Property in the future on registration of the draft plan of subdivision. There is no issue regarding the enforceability of the Undertaking as at the date of its delivery. The subject-matter of the Undertaking are rights specifically described by reference to that draft plan of subdivision. The Undertaking has effect unconditionally. Furthermore, the respondents have satisfied their obligations in respect of their interests in Lots 14 and 16 by completing the sale of the Property to 156. There are no further actions on their part required to obtain Lots 14 and 16 when they are created. Similarly, 156 has done all that is necessary to grant an interest in the Property upon the registration of the plan of subdivision by agreeing that it will hold Lots 14 and 16 in trust upon their creation without further action or condition.

**24** The respondent's inchoate interests in the Property have a similarity to an interest in land created pursuant to a restrictive covenant. However, they differ from a restrictive covenant in that the interests exist in an inchoate form until such time as registration occurs at which time they mature to encompass the right to deal with Lots 14 and 16 as the beneficial owners thereof. However, the fact that the respondents do not have the full rights of beneficial owners as of the date of delivery of the Undertaking does not mean that the respondents did not acquire any interests in the Property when the Undertaking was delivered.

**25** I think this conclusion is consistent with the authorities cited to the Court on this motion to the extent they address the issue. The applicant relies principally on four decisions: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818, aff'd *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005 BCCA 154; *Pope & Talbot Ltd. (Re)*, 2008 BCSC 1000, *CareVest Capital Inc. v. CB Development Ltd.*, 2007 BCSC 1146 and *bclMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897. It argues that the respondents do not have any interest in land because the Undertaking is an executory contract and/or is a contract for the sale of the land for which a court will not grant specific performance. They rely upon the fact that the respondents cannot compel the applicant to register the plan of subdivision because the undertaking does not contain a covenant to

register the draft plan of subdivision and that, in any event, a court will not compel a receiver to undertake further work, or to obtain financing, to complete a contract for the sale of land.

**26** These are factually complicated decisions from which, in the case of the *bcIMC* and *CareVest* decisions, it is also difficult to extract the legal basis for the conclusions reached although in each case the practical result is compelling. However, I do not think these decisions are of any assistance in determining whether the respondents have an interest in the Property for four reasons: (1) the decisions do not actually address the issue in the terms suggested by the applicant; (2) there is no reason to conclude that specific performance - the unavailability of which was a significant factor in the decisions - is unavailable to the respondents in this case; (3) the issue of priority relative to secured lenders that is at the heart of the *CareVest* and *bcIMC* decisions does not arise in the present circumstances; and (4) the Undertaking differs from the applicable contracts in *CareVest* and *bcIMC* insofar as the latter are treated as executory. I will address each in turn.

**27** First, as I read these decisions, they do not actually stand for the proposition proposed by the applicant - that a party cannot obtain an interest in a lot in an unregistered plan of subdivision until it is created by registration of the plan because a court will not grant specific performance to require completion of the remaining work required to bring the lot into existence.

**28** In each of *New Skeena* and *Pope & Talbot*, Brenner C.J.S.C. held that the interests involved did not constitute an interest in land for reasons that are of no relevance to the issue in this proceeding. These decisions therefore do not address the issue in this proceeding.

**29** In *CareVest*, Pitfield J. refused to exclude the possibility that the purchasers might have an "unregistered equitable charge against the project" ranking ahead of the second mortgage. His refusal to award specific performance was, therefore, not determinative of the issue of whether the purchasers had an interest in land.

**30** In *bcIMC*, the court gave effect to the express contractual provisions in the purchase agreements that negated any interest in land arising thereunder. Such provisions are common in condominium purchase transactions and reflect at least a reasonable concern that a purchaser would have an interest in land absent such an agreement. In addition, apart from one sentence suggesting that the purchasers had no equitable interest in the projects because they were not yet registered, the court in *bcIMC* avoided the issue by holding, as the principal alternative conclusion, that if the purchasers had an equitable interest in the projects, the receiver had, or should be given, the power to disclaim the purchase contracts. This alternative conclusion was, in turn, based, not on the absence of any equitable interest in the projects, but rather on the absence of any equity in any interests in the property that the purchasers might have pursuant to the contracts. In the case of each of the disclaimed contracts, the purchasers were subordinated to the petitioner mortgagee and had no right of partial discharge of the petitioner's mortgage. In these circumstances, there was a basis for a "vesting out" order and no basis for an order for specific performance for the reasons expressed in *CareVest*. A vesting order in these circumstances is not inconsistent with the conclusion in this Endorsement for the reasons set out below.

**31** In summary, therefore, insofar as *CareVest* and *bcIMC* address the issue of the existence of an interest in land, they do not decide the issue by reference to the availability of specific performance. Both these decisions treat the lack of availability of specific performance as a

basis for authorizing a receiver to sell the relevant property free of equitable interests asserted by the purchasers rather than as determinative of the validity of the purchasers' claims. They do not proceed from a determination that specific performance is not available to a determination that the purchaser has no equitable interest. Instead, they proceed on the basis that the lack of availability of specific performance is a basis for ordering a sale of the relevant property free of a purchasers' claims even if the purchaser may be found to have an equitable interest.

**32** Second, while it is axiomatic that a party can only have an equitable interest in land if a court is prepared to order equitable relief, I am not persuaded that the applicant is correct in its assertion that this principle can be applied to the present circumstances in the manner suggested by it.

**33** I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. However, these circumstances are not present in this proceeding.

**34** The respondents are not bringing a motion for specific performance of the Undertaking as in *CareVest* and *bcIMC*. There is no need to do so. Instead, the receiver has, on its own volition, completed all the necessary work to register the draft plan of subdivision and intends to do so. It has undertaken this course of action based on its own assessment of the best means of maximizing the value of the Property, whether or not Lots 14 and 16 are included. In these circumstances, the issue of the availability of specific performance does not arise. The actions of the receiver in registering the draft plan of subdivision will trigger the Undertaking vesting Lots 14 and 16 in trust.

**35** As a related matter, the applicant's decision to register the draft plan is a relevant consideration in assessing the equities relative to the receiver's exercise of any right it might have to "vest out" the respondents' rights. This is addressed below.

**36** The applicant says that the Court should disregard the fact that it has chosen to undertake this work and consider the issue of the respondents' interests in the Property as of the date of the appointment of the applicant as the receiver of 156. I think this merely begs the question. The issue of whether the respondents had an interest in the Property would only have been presented at that time if the receiver had proposed selling the Property. This would have required the respondents to bring a motion for specific performance. If, however, it had proposed at that time to register the draft plan of subdivision, I do not see how the circumstances would have been any different from those presented today. In short, as long as 156 or the applicant was, or is, proposing to register the draft plan of subdivision, the respondents do not need the Court's assistance by way of an order for specific performance to enforce their interests in the Property. Moreover, specific performance will be available upon registration of the draft plan of subdivision, whenever that occurs, to enforce the trust contemplated by the Undertaking. In these circumstances, I think it is unnecessary for the Court to consider the availability of specific performance in the determination of whether the respondents have interests in the Property.

**37** Third, the interests in the Property asserted by the respondents are fundamentally different from the interests in land addressed in *CareVest* and *bcIMC* upon which the applicant relies, except in one respect addressed below that contradicts the applicant's position.

**38** In each case, the court was prepared to consider the possibility that the purchasers had an equitable interest in the properties. However, it was also clear that, in each case, further construction activity was required in order to realize any value in the property which, in turn, required considerable additional financing secured against the entire project including the purchasers' units. The purchasers, therefore, had no equity in their proposed condominium units unless they ranked in priority to the existing mortgage financing on the projects. The court was prepared to consider that possibility in *CareVest*, resulting in an order for sale with a subsequent hearing on the priority issue. It did not consider that to be a possibility in *bc/MC*, resulting in an order for sale based on the absence of any equity of the purchasers in the property.

**39** In the present circumstances, however, the Undertaking provides that the interests of the respondents are carved out of the interest of 156 and are entirely separate. The Sale Agreement expressly provides that the transaction did not include Lots 14 and 16 and that Lots 14 and 16 are not part of the Property to be retained by 156. Accordingly, as mentioned, the Undertaking must be taken to provide that 156 was obligated to discharge any mortgage financing on the Property upon vesting of Lots 14 and 16 in trust. There is no suggestion in the record that either of the mortgagees (including *CareVest*) understood the Undertaking to operate differently vis-à-vis 156. There is, therefore, no priority issue to be determined regarding the respondents' interests in the Property. Nor is there any dispute that there is substantial equity in the respondents' interests in the Property.

**40** Fourth, while it is not express, I agree with the applicant that an important consideration in *bc/MC* and *CareVest* is the fact that the contracts are executory in the sense that each party had obligations that remained to be performed. I would add that it was also the case that, even if the purchasers had performed their obligations under their respective contracts to pay the remaining purchase price, their performance would have been insufficient to fund the construction necessary to bring the condominium units into existence.

**41** By contrast, in the present proceeding, the contract was not executory in that sense. Neither Marculor nor Learmonth was required to perform any further obligations to obtain their interests in Lots 14 and 16. This element is a relevant equitable consideration that is addressed below. However, I also think it distinguishes the cases relied upon by the applicant from the present circumstances and reinforces the conclusion that the respondents acquired interests in the Property pursuant to the Undertaking.

**42** In summary, therefore, the principles in these decisions do not prevent the Undertaking from creating interests in land in favour of the respondents and, in certain respects, support that conclusion.

*Is the Interest in Land Void Under the Planning Act?*

**43** The applicant argues that, if the Undertaking creates interests in land, such interests are void under clause 50(3)(b) of the *Planning Act*, R.S.O. 1990, c. P.13 (the "Act") and are not saved by subsection 50(21) of that Act. These provisions read as follows:

- (3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the

effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

...

- (b) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision; ...
- (21) An agreement, conveyance, mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

**44** Conversely, the respondents submit that the Undertaking does not violate the Act for two reasons: (1) the interests in land conferred thereby are not prohibited by paragraph 50(3)(b); and (2) in any event, any defect under section 50(3) is remedied by section 50(21). I will address each in turn.

#### Application of Paragraph 50(3)(b)

**45** The applicant says that the Undertaking constitutes an option to purchase land that violates the *Planning Act*. Given the nature of the respondents' interest in Lots 14 and 16, I do not think it is accurate to characterize their interest as an option to purchase. However, whatever the characterization, the case law makes it clear that the prohibition in clause 50(3)(b) does not affect the retention of an interest in land unless that interest confers a right of disposal of the land that is not dependent on the action or inaction of a third party: see *Re Redmond et al. and Rothschild*, [1971] 1 O.R. 436 (C.A.) at 441; *Pattison et al. v. Sceviour et al.* (1983), 43 O.R. (2d) 229 (H.C.J.); and *Ratnanather v. Kosalka et al.* (1995), 24 O.R. (3d) 326 (Gen. Div.).

**46** The applicant relies on the decision in *Morgan Trust Co. of Canada v. Falloncrest Financial Corp.* (2006), 218 O.A.C. 71 (C.A.) in which the Court of Appeal held that an option to purchase land violated section 50(3) of the Act. However, in that case, the option could be exercised on the earlier to occur of three events, one of which was the mere expiration of 20 years from the date of the option agreement. Such an option is in clear violation of the Act because the optionee retained an interest in land that could be conveyed, at the latest, at the end of the 20-year period.

**47** In the present circumstances, while the respondents do retain inchoate interests in the Property that are assignable, such interests do not constitute a "fee" in Lots 14 or 16. Until registration of the draft plan of subdivision, the "inchoate" interests of the respondents constitute a lesser interest in land for purposes of section 50(3). Nor do such interests constitute an interest in land abutting the Property. Such a relationship can only arise at the time of creation of Lots 14 and 16. Similarly, the respondents do not have the power to mortgage or dispose of Lots

14 and 16 prior to registration of the draft plan of subdivision. The Undertaking does not permit the respondents to convey Lots 14 and 16 at any time prior to registration. Until that time, the respondents can convey no more than the inchoate interests in such lots described above. Nor, as mentioned, is there a positive obligation on 156 to register the plan of subdivision or any right in favour of the respondents to cause such registration. Therefore, until registration occurs as a result of a decision by 156, which might never happen, the respondents also cannot be said to have retained a "power or right to grant, assign or exercise a power of appointment" in respect of Lots 14 and 16.

**48** The circumstances in the present proceeding are indistinguishable from those in *Marcrob Estates Ltd. v. Servedio* [1976] O.J. No. 1281, (1976) 1 R.P.R. 344 at 345 (H. Ct.), aff'd [1977] O.J. No. 800 at 352 (C.A.), in which Cromarty J. concluded that the predecessor of subsection 50(3)(b) was not invoked on the following basis:

There is no evidence that Marcrob was the owner of any lands abutting those conveyed to Rosa and Vincenzo Crocitto. If it is the defendants' argument that by putting an option to purchase into the agreement of sale, he was attempting to retain the fee in the "back lands" it appears to me that it conveyed all of its lands subject only to the right to purchase a portion of them if and when the Planning Act was complied with in accordance with the terms of the agreement.

**49** A similar decision was reached in *Ratnanather v. Kosalka*, (1995), 24 O.R. (3d) 326 (Gen. Div.), which applied *Marcrob* and which addressed the application of the predecessor to subsection 50(3)(b) to a transfer of an entire parcel of land under a plan of subdivision for the value of part of the parcel coupled with an option to buy back the unpaid part of the parcel within a fixed period of time. In that case, Langdon J. concluded:

To retain an "interest" in part of the land is not necessarily to retain the fee or the power of disposition. ... *Miller v. Ameri-cana Motel Ltd.*, [1983] 1 S.C.R. 229, 143 D.L.R. (3d) 1, held that the granting of an option vests in the option-holder an equitable interest in the optioned lands. This means that the disposing power is no longer held by the grantor of the option. But does this mean that the opposite is true, i.e., that the power to dispose has been transferred to the option-holder to such an extent that he has the "fee"? The option-holder's interest is assignable. However, before he exercises the option and acquires full legal title he cannot dispose of or mortgage the optioned part. The option-holder has an equitable interest but cannot be said to have the power to dispose of the land. He can block disposal by the title-holder for the life of the option (or 21 years) but, absent approval under the Planning Act, cannot himself dispose of the property. With Planning Act approval, his power to dispose offends no policy.

The definition of "fee" for the purposes of the Planning Act has evolved with a view to a functional, rather than a technical approach, to the Act and to the regulation of specific land transfers: see Sidney Troister, *The Law of Subdivision Control in Ontario*, 2nd ed. (1994). A functional approach examines whether the purposes of the Act have been frustrated by the transaction.

While this transaction was structured to avoid the Planning Act restrictions on the retention of abutting land, it did so by compliance, i.e., by a transfer of the whole. The risk of getting back less than the whole was borne by the contracting party. The Act does not forbid risk-taking. The purpose of the Act is to prevent the subdivision of land without planning approval. No parcel of land was subdivided. The sellers retained an interest in

part of the parcel but not one equal to a power to dispose. The option and its exercise would never create more than one parcel if approval were not forthcoming. I conclude that the seller did not retain the fee in abutting lands within the meaning of the Planning Act. This conclusion accords with the result of the decision of the Court of Appeal in *Marcrob*.

**50** I am of the opinion that these principles are equally applicable in the present circumstances.

#### Application of Section 50(21)

**51** Given the foregoing conclusion, it is unnecessary to consider the further issue of whether, if the Undertaking were characterized as an interest in land to which section 50(3) applied (whether as an option to purchase or otherwise), 50(21) operates to remedy any defect under section 50(3) given the particular terms of the Undertaking. I am of the opinion, however, that it does so in the unique circumstances of this proceeding on the following reasoning.

**52** At all times, the parties expressly envisaged compliance with the Act in the form of registration of the draft plan of subdivision as a condition of 156's obligation to hold Lots 14 and 16 in trust of the respondents. The Undertaking therefore provides that Lots 14 and 16 will only vest in trust in favour of the respondents in circumstances in which the Act will necessarily have been complied with. Such an interest in land satisfies the objective of the Act of preventing subdivision of land without planning approval. Moreover, the terms of the Undertaking comply substantively with the provisions of section 50(21) if the provision is interpreted to require a conditionality to the arrangements that has the result that the Undertaking is only effective to vest Lots 14 and 16 in trust upon actions of 156 that include compliance with the Act. I am of the opinion that these circumstances are sufficient to satisfy the saving clause in section 50(21).

**53** Such an interpretation is consistent with other decisions on this issue. In particular, in *Ratnanather*, Langdon J. addressed a provision that apparently stated simply that the option to purchase was "subject to severance".

I find no merit whatever in the Kosalkas' argument that the wording of this second option was somehow insufficient to fulfil the requirements of s. 50(21) of the Planning Act in that it did not constitute "an express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with". The purpose of s-s. (21) is to validate and facilitate agreements which otherwise would be made ineffective by the language of the infamous s. 50(3)(b). No precise formula of words is needed to invoke s-s. (21). The expression "severance" meaning a subdivision of a parcel of land authorized under the Planning Act is so common and pervasive in the real estate industry in Ontario as to need no further explanation. The requirements of s-s. (21) would be fulfilled if nothing more had appeared in the agreement than "subject to (a) severance".

**54** The applicant relies on the statement of LaForme J.A. in *Morgan Trust* at para. 20, which could be read to provide that, absent inclusion of explicit reference to compliance with s. 50 in the relevant agreement, no reservation of a right of disposition will be saved by section 50(21). However, as mentioned, the option to purchase in *Morgan Trust* could not be saved under section 50(21) as it did not, by its terms, restrict the exercise of the option to purchase to circumstances in which the Act would necessarily have been complied with. As such, it does not address the specific issue raised in this case. Nor did the relevant agreements in any of the



other decisions relied upon by LaForme J.A. in reaching his conclusion: see *Dical Investments Ltd. v. Morrison* (1990), 75 O.R. (2d) 417 at 425 (C.A.); *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427; and *Murray Elias Ltd. v. Walsam Investments Ltd.* [1964] 2 O.R. 381 (H.C.J.), aff'd [1965] 2 O.R. 672 (C.A.).

**55** The principle articulated in each of *Nepean*, *Dical Investments* and *Morgan Trust* is that an implied covenant to make an agreement for the sale of land effective on compliance with the *Planning Act* does not satisfy the requirement in section 50(21) for an express condition. Accepting that this principle remains the law in Ontario, I do not think that it can properly be applied in the present circumstances for the reason that there is no such agreement, as such, to be complied with. Instead, there is a commitment to vest Lots 14 and 16 only upon the occurrence of an event - registration of the draft plan of subdivision - which constitutes compliance with the *Planning Act*. In the present circumstances, inclusion in the Undertaking of a term of the nature contemplated in *Nepean*, *Dical Investments* and *Morgan Trust* that the vesting in trust of Lots 14 and 16 is only to be effective upon compliance with the *Planning Act* would be unnecessary and any such term would clearly be redundant - the trust can only exist if there has been such compliance.

**56** Accordingly, if it were held that the respondents' interests in the Property were caught by section 50(3), I conclude that they remained enforceable interests in the Property by virtue of section 50(21).

#### *Conclusion*

**57** Based on the foregoing, I conclude that the respondents have enforceable interests in the Property pursuant to the Undertaking.

#### ***Authority of the Receiver to Disclaim and/or Obtain a Vesting Order in Respect of the Respondents' Interest in the Property***

**58** The applicant argues that, even if the respondents have a property interest in the Property pursuant to the Undertaking, the receiver may disclaim the Undertaking and sell the Property free and clear of the respondents' interests. I propose to discuss three elements of this position.

#### *Can the Receiver Disclaim the Undertaking?*

**59** The applicant says that it can disclaim the Undertaking even if it creates an interest in land. I understand disclaimer in this sense to be limited to repudiation of the Undertaking leaving the respondents with a right to claim damages for breach of contract against 156 for failure to perform the Undertaking.

**60** I do not think the applicant's position is correct. I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment of an interest in the Property would be the transfer of such interest to 156. Such action amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors of 156.

**61** In addition, as a related matter, insofar as the Undertaking can be construed as an agreement for the sale of land as the applicant suggests, it has been fully performed by the

respondents. Any breach, or more properly anticipatory breach by the applicant, at this time, cannot convert an interest in land into an unsecured claim.

**62** Moreover, the case law cited to the Court by the applicant does not support such a right. As mentioned above, the decisions in *New Skeena* and *Pope & Talbot* are not relevant as, in each case, the court held that the relevant parties did not hold an interest in land. In *CareVest*, Pitfield J. proceeded on the basis that it was possible that the strata contract purchasers had an equitable interest in the property and expressly dismissed the receiver's application for the power to disclaim the relevant contracts. In *bcIMC*, the court proceeded on the alternative grounds that (1) the purchasers had no interest in land; and (2) that, if the purchasers had an interest in land, it could be "vested out" based on the absence of any equity in such interest, rather than that the contract could be disclaimed.

### *Can the Receiver "Vest Out" the Undertaking?*

**63** The applicant also argues that the receiver is entitled to "vest out" the interests of the respondents in the Property, by which it means selling the Property free of the interests of the respondents in the Property pursuant to the Undertaking. The applicant makes two alternative submissions regarding a receiver's power to "vest out" a proprietary interest.

**64** The more aggressive position of the receiver is that the Court can authorize the receiver to sell free of the respondents' interests in the Property leaving the respondents with an unsecured claim for damages against the Receiver. This is no different from the concept of disclaimer addressed above. For the reasons stated above, I do not accept that the Court or the receiver has such power in respect of an interest in land except perhaps in circumstances in which it is clear that there is no equity in the interest being "vested out".

**65** The less aggressive position is that the Court has the authority to authorize the receiver to sell the Property free of the respondents' interests with a subsequent hearing to be held to determine the value of the respondents' interests. It finds support for such right in the *CareVest* and *bcIMC* decisions. The remainder of this section addresses the authority of the Court to authorize the receiver to "vest out" the respondents' interests in the Property in this sense.

**66** I would note first that there is a significant difference between the present circumstances and the circumstances in the decisions upon which the applicant relies. The applicant is seeking authority to sell the interests in the Property of both the debtor, in this case 156, and the respondents. It contemplates a subsequent hearing to determine the allocation of the purchase price between the two interests, it being acknowledged that the interests of the respondents have real value. In *CareVest* and *bcIMC*, the receiver sought authority to sell a property free and clear of an equitable right in such property asserted by a third party. The purpose of the subsequent hearing ordered in *CareVest*, and considered in *bcIMC*, was to determine whether such equitable right existed rather than to determine the value of such right, which was either quantified or quantifiable on the sale of the property.

**67** Whether or not the Court has the authority alleged by the applicant generally, I do not think the Court has the authority to order a sale of the respondents' interests in the Property on the basis proposed by the applicant for the following four reasons.

**68** First, it follows from the conclusion that the Undertaking created property interests in the

Property in favour of the respondents, that 156 granted, and therefore no longer retained, such interests. Such interests in the Property reside in the respondents whose property is not subject to the receivership. In this respect, the present circumstances are similar to those in *Re Terastar Realty Corp.* (2005), 16 C.B.R. (5th) 111 (Ont. Sup. Ct.) and analagous to those in *2022177 Ontario Inc. v. Toronto Hanna Properties Limited* (2005), 203 O.A.C. 220 (C.A.) (in which, however, density rights were found not to be proprietary rights). As the receiver of 156, the applicant has taken possession of the property of the debtor only. It cannot have taken possession of, or otherwise have any interest in, the respondents' interests in the Property, regardless of the terms of the Receivership Order because the Order extends only to the assets of 156. As such, the applicant has no authority under the Receivership Order to sell the interests of the respondents. Nor does the Court have the authority to grant such an order in the absence of the appointment of a receiver over the respondents' property and assets.

**69** Second, this is not a circumstance in which the receiver is seeking approval to sell a mortgagor's equity of redemption on the basis that either there is no equity in the property or that the mortgagor has no ability to service the mortgage. There is no suggestion that the respondents have any obligation to CareVest in respect of the CareVest mortgage. In addition, as mentioned, because the respondents' interests in the Property are separate from the interest of 156 and given the terms of the Undertaking, there is no question that there is value in the interests of the respondents.

**70** Third, as mentioned, the present circumstances differ from those in *bcIMC* and *CareVest* in that the issue is not a priorities dispute between creditors in respect of a quantified, or quantifiable, claim. In these decisions, the court treated the purchasers' interests in the relevant projects as derived from the equity of the project owners and therefore as subordinated to the interests of the mortgagees (subject to the priority issue raised in *CareVest* which is irrelevant for the present proceeding). In addition, the court treated the claims of the purchasers as an equitable charge that could be discharged on sale of the relevant property pursuant to an express or implied power of sale.

**71** It is not possible to treat the respondents' interests in the Property in this manner for four reasons. First, for the reasons stated above, the interests of the respondents exist as of the present time otherwise than by way of an equitable charge against the property of 156 derived from the equity of redemption of 156. Second, it is questionable whether the CareVest mortgage extends to such interests given the intention that Lots 14 and 16 are intended to be conveyed to the respondents upon their creation free of any mortgages or liens incurred by 156. Third, even if it does, CareVest has acknowledged that the respondents' interests in the Property rank in priority to its mortgage. Lastly, the value of the respondents' claims are neither quantified nor quantifiable upon a sale of the Property.

**72** Finally, as a related matter, the absence of any principle or basis for allocating the proceeds of sale of the Property between the interest of 156 and the interests of the respondents reflects the conceptual defect in the applicant's position. Even prior to registration of the draft plan of subdivision, the interests of the respondents in Lots 14 and 16 are entirely separate and distinct from the interest of 156 in the Property.

**73** In reaching the conclusion that the receiver does not have the power to "vest out" the respondents' interests in the Property, I have also concluded, for the reasons set out below, that

the four decisions cited above do not support the applicant's position that the Court has the authority to order such a sale.

**74** As mentioned, the decisions of Brenner C.J.S.C. in *New Skeena* and *Pope & Talbot* proceed on the basis that there was no *in rem* or proprietary interest in land involved so the issue did not arise. In fact, the approach of Brenner C.J.S.C. in these decisions implies that he would have reached a contrary result in each case if he had found that the applicants held an *in rem* or proprietary right, which reinforces the conclusion that a court does not have the authority to authorize a "vesting out" of an interest in land. I do not read the appellate decision in *New Skeena* as proceeding on a different basis because the British Columbia Court of Appeal upheld this determination of Brenner C.J.S.C. before concluding that the vesting order language in the receivership order was sufficient authority in favour of the receiver to allow it to disclaim the relevant contracts. I would add that I do not think that vesting language in a receivership order can, by itself, be determinative. It depends for its effectiveness upon the authority of the court to approve "vesting out" transactions in any particular circumstance.

**75** In *bcIMC*, the principal basis of the decision is that the strata contract purchasers did not have an interest in land by virtue of express contractual provisions. The alternative conclusion that the receiver should be given the power to sell the projects free of the purchasers' equitable interests under their purchase contracts was based on the absence of any equity in such equitable interests because partial discharges of the relevant lots were not available. While the court also referred to other specific equitable considerations in considering each of the contracts individually, this is the common thread that runs through the decision in respect of each of the purchase contracts. While the Court has the authority to order such a "vesting out" of property interests having no residual equity in order to permit a sale of property subject to security (or, as in *CareVest*, a refinancing of such a property), as mentioned above, these circumstances are not present in this proceeding.

**76** Insofar as *CareVest* may suggest that the purchasers had an interest in land that could be "vested out", it is clear that the Court did not address the contractual provisions in the strata purchase contracts and did not make an express finding that the purchasers had an interest in land. There are also two features of the property interest asserted by the purchasers in the *CareVest* decision that are not present in this proceeding that have been mentioned above. First, the court treated the purchasers' potential interest as an equitable charge to secure the excess of the sale price over the contract price. Second, as a related matter, the court proceeded on the basis that a sale of the Property was warranted because there was no remaining equity in the project. In the present circumstances, the interests of the respondents in the Property are separate and distinct from the interest of 156, rather than derived from 156's equity in the Property in the manner of the strata purchase contracts in *CareVest* and *bcIMC*, and have real value.

**77** For these reasons, I also do not find any of the decisions cited by the applicant to be of any assistance on the authority of the receiver to sell the Property free and clear of the interests of the respondents.

*Do the Equities Favour a Disclaiming of the Undertaking and/or Vesting Out of the Property Free of Claims Under the Undertaking?*

**78** If I have erred in concluding that the Court does not have the power to authorize the receiver

to disclaim the Undertaking and "vest out" the respondents' interests in the Property granted pursuant to the Undertaking, the receiver is nevertheless subject to the requirement that it must exercise proper discretion in making a decision to do so. As an officer of the Court, it must have regard to equitable considerations.

**79** In my view, the equitable considerations in this case argue against permitting a receiver to sell the Property free of the respondents' interests in the Property pursuant to the Undertaking. Accordingly, to the extent that the issue in these proceedings turns on whether the Court should exercise its discretion, I would decline to make such an order having regard to the five equitable considerations set out below.

**80** First, the respondents have valuable interests in property, rather than a mere contractual interest that can be terminated in respect of future obligations. As mentioned, the effect of the requested relief would be to transfer the value of the respondents' interests in the Property to 156 for no compensation.

**81** Second, as a related matter and as mentioned above, the respondents have fully performed the obligations that were the pre-condition to the creation of their rights, and given consideration for the Undertaking, by closing the transaction contemplated by the Sale Agreement. This is not an instance of termination of an executory contract in the sense of a contract in which both parties have obligations under the contract that remain to be performed.

**82** Third, unlike the circumstances in *Morgan Trust*, there is no issue of notice of the Undertaking and, therefore, no issue of unjust enrichment. Each of 156 and CareVest has been aware of the Undertaking from the time of their initial involvement with the Property. In particular, CareVest had knowledge of the Undertaking when it made its loans to 156. It therefore knew that compliance with the Undertaking was a cost of any realization proceedings if it concluded that registration of the draft plan of subdivision prior to the sale of the Property would increase its recovery.

**83** Fourth, the fact that there is no goodwill of 156 to preserve is not, by itself, an equitable consideration in favour of "vesting out" the Undertaking given the nature of the respondents' interests in the Property. Similarly, the fact that the receiver will receive no proceeds of sale from Lots 14 and 16 is not a valid consideration given the intention of the parties as set out in the Undertaking and the absence of any further covenant to be performed by the respondents to obtain the benefit of the Undertaking.

**84** Fifth, as mentioned, the applicant intends to register the draft plan of subdivision. There is no question that the intention of the parties was that Lots 14 and 16 were not to be included in the Property ultimately retained by 156 after such registration. Similarly, there is no question that the intention of the parties was that 156 was to convey Lots 14 and 16 to the respondents free of any mortgage or lien securing any obligations of 156, including any financing required to fund the costs of registration of the draft plan of subdivision. There is no basis in the record for a conclusion that either of such features of the Undertaking were to terminate in the event of the insolvency of 156.

**85** More generally, the applicant is, in effect, seeking to have it both ways. It has chosen to complete the action triggering the Undertaking but claims an entitlement to disclaim its obligation to do so. In the present circumstances, in which the receiver intends to register the plan of

subdivision, the remedy of specific performance would, therefore, absent special circumstances, be available to the respondents if the receiver does not also honour the Undertaking. The receiver can only seek the power to disclaim the Undertaking in such circumstances if it can demonstrate that the respondents' interests in the Property have no value. It cannot do so.

### **Conclusion**

**86** Based on the foregoing, the applicant's requested declaration that it is entitled to disclaim the Undertaking and sell the Property free of the interests of the respondents therein pursuant to the Undertaking is denied.

**87** The parties are at liberty to schedule a hearing on the remainder of the application at a 9:30 a.m. conference to be scheduled by counsel.

### **Costs**

**88** The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

H.J. WILTON-SIEGEL J.

TAB 3B

# McGee v. London Life Insurance Co., [2010] O.J. No. 898

Ontario Judgments

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: January 29, 2010.

Judgment: March 8, 2010.

Court File No. 07-CV-327818CP

**[2010] O.J. No. 898** | 2010 ONSC 1408 | 86 C.C.L.I. (4th) 86 | 81 C.C.P.B. 226 | 2010 CarswellOnt 1278 | 86 C.P.C. (6th) 381 | 185 A.C.W.S. (3d) 1069

RE: Barbara McGee and Pauline McCallum, Applicants/Moving Parties, and London Life Insurance Company Limited, Respondent/Responding Party

(23 paras.)

## Case Summary

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**Civil litigation — Parties — Class or representative actions — Discovery — Production and inspection of documents — Relevancy — Motion by plaintiff for production of unredacted copies of documents that defendant had produced in redacted form because it considered those portions irrelevant allowed — Impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions were not relevant — Defendant had identified no aspect of any of the documents at issue that gave rise to an interest requiring protection.**

Motion by the plaintiff for production of unredacted copies of documents that were requested on the examination of the defendant and which it had produced in redacted form. The plaintiff had commenced a class action regarding the entitlement of the defendant's former employees, whose employment was terminated in 1996 as a result of a re-organization, to the surplus in a staff pension plan after a partial wind-up of the plan. The plaintiff argued that the documents at issue related to the central issues in the proceeding and that the defendant was not entitled to redact those portions that it considered irrelevant. The documents at issue were minutes of various committees of the defendant, minutes of Board of Director meetings and various documents related to the plan.

HELD: Motion allowed.

It was impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions were not relevant. The whole of a relevant document must be produced except to the extent it contained information that would cause significant harm to the producing party or would infringe public interests deserving of protection. The party seeking to redact material bore the onus of establishing that redaction was necessary to protect an important interest. The defendant had identified no aspect of any of the documents at issue that gave rise to an interest requiring protection, other than the general interest that every company would have in the confidentiality of minutes of board and committee meetings and other corporate records.



## Statutes, Regulations and Rules Cited:

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Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 30.04(6)

## Counsel

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*Howard Goldblatt and Christine Davies*, for the Moving Parties.

*Jeff Galway and Ashley Richards*, for the Respondent.

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## ENDORSEMENT

### **G.R. STRATHY J.**

1 This is a pension surplus dispute that was certified by Lax J. as a class action: *McGee v. London Life Insurance Co.* (2008), 63 C.P.C. (6th) 107, [2008] O.J. No. 1760. The primary issue in the action is whether class members, former employees of the respondent ("London Life"), whose employment was terminated in 1996 as a result of a reorganization, are entitled to the surplus attributable to the partial wind-up of the staff pension plan (the "Plan"). The common issues certified by Lax J. include whether the surplus assets of the Plan were impressed with a trust in favour of Plan members, the quantum of the partial wind up surplus and whether London Life committed breaches of trust. Justice Lax subsequently ordered that the action be converted into an application. Affidavits have been filed, cross-examinations have taken place and documents have been produced.

2 The issue on the motion before me is whether London Life can be compelled to produce unredacted copies of documents that were requested on the examination of its affiant and which it has produced in redacted form, disclosing only those portions that it considers relevant. The applicants maintain that the documents at issue relate to the central issues in the application, particularly the creation, design, funding and maintenance of the Plan, the registration of the Plan with federal tax authorities and London Life's understanding of its legal obligations under the Plan. They say that London Life must produce all relevant documents and that it is not entitled to redact those portions that it considers irrelevant.

3 The documents at issue on this motion fall into the following general categories:

- (a) minutes of various London Life committees involving pensions, including the Management Committee, the Pension Committee, and the Management Development and Compensation Committee;

- (b) minutes of Board of Directors Meetings and Annual General Meetings of Shareholders;
- (c) various documents related to the Plan; and
- (d) material submitted to the Board of Directors of London Life.

**4** Where copies of these documents have been delivered to the applicants, portions have been redacted on the basis that they are irrelevant to the issues before the court on the application. In some cases, entire documents have been redacted, or not produced, on the basis of relevance. In a few cases, redactions have been made for privilege. The applicants do not take issue with redactions for privilege.

**5** For the purpose of hearing the motion, counsel for London Life provided me with unredacted copies of the documents at issue. Copies were not provided to counsel for the applicants but an "aide memoire," containing one sentence summaries of the nature of the redactions, was provided to counsel for the applicants. While a procedure of this kind is contemplated for the inspection of privileged documents under Rule 30.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, no such provision is made for the examination of redacted documents. Counsel for the applicant was understandably concerned, as was I, that this procedure put him at a material disadvantage in the argument of the motion.

**6** In most cases, London Life admits that the document at issue is relevant, in the sense that it contains information relevant to the issues, but it says that the irrelevant portions should be redacted and should not even be disclosed to counsel for the applicants.

**7** In determining whether a trust was created, the court will be required to consider all the surrounding circumstances concerning the establishment, amendment, funding, structure and operation of the Plan: *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, [1994] S.C.J. No. 48; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* (2005), 22 E.T.R. (3d) 238, [2005] O.J. No. 5775 (S.C.J.). I agree with the observation of Panet J. in the latter case, at para. 53, that a "narrow, highly technical approach to the issue of relevance" would not be appropriate in a case of this kind. There should be a generous approach to production in this case.

**8** It is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant. I respectfully agree with the observations of Corbett J. in *Albrecht v. Northwest Protections Services Ltd.*, [2005] O.J. No. 2149, 139 A.C.W.S. (3d) 644 (S.C.J.) at para. 11 and *Guelph (City) v. Super Blue Box Recycling Corp.* (2004), 2 C.P.C. (6th) 276, [2004] O.J. No. 4468. In the former case Corbett J. observed that there may be some cases where it would be appropriate to redact for relevance, referring to his decision in the latter case, but he declined to make any general observations in the absence of argument on the point. In the latter case he observed that redaction is common in the case of privileged documents and also referred to *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, [2000] O.J. No. 5210, 103 A.C.W.S. (3d) 32 (S.C.J.) where Case Management Master MacLeod had approved redaction of certain information on the basis of relevance where the parties were business competitors. The Master stated, at para. 4, that: "[t]he right to redact information from documents which are otherwise relevant should *only* be given in circumstances such as these where the parties are business competitors and the information which is not relevant may be sensitive in nature." [emphasis added]

**9** The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in *North American Trust Co. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (S.C.) at para. 13:

Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant *is by its nature such that there is good reason why it should not be disclosed*, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. *In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.* [emphasis added]

**10** Lowry J. referred to a number of authorities, some of which were referred to by London Life in the motion before me, and observed, at para. 11:

In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues and, because of its nature, there has been good reason why that part should not be disclosed. *With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings, or the personal sensitivity of a person's medical records, diary notations, or familial communications, and much the same can be said where expurgated disclosure of a document has been upheld in the cases cited from other jurisdictions. Statements to the effect that only the relevant parts of a document need be produced, such as in Jervis Court Development [Jervis Court Development Ltd. v. Ricci, [1992] B.C.J. No. 2932] at para. 24 and [K.L.V. v. D.G.R.], [1993] B.C.J. No. 1662] at para. 10, must be read in the context of what was decided.* [emphasis added]

**11** In that case, the defendants sought production of an asset purchase agreement that was part of a transaction whereby the plaintiff North American Trust Company had acquired the assets of the other plaintiff, Westlaco Investment Company. One of the assets was the debenture that was the basis of the plaintiff's claim against the defendants. The defendants asked for production not only of the assignment agreement pertaining to the debenture, but also the entire asset purchase agreement. The plaintiff was only prepared to produce a redacted version of the asset purchase agreement. Lowry J. held, at para. 15, that in order to maintain that position, the plaintiffs would have to establish that the redacted portions "are both clearly irrelevant and that there is good reason why they should not be disclosed."

**12** I will return shortly to the comments of Lowry J. in the quotation above, regarding corporate minutes.

**13** Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an

important interest. Some of the cases referred to by the parties include:

- (a) patents or trade secrets: *Kimberly-Clark Corp v. Procter & Gamble Inc.* (1990), 31 C.P.R. (3d) 207, [1990] F.C.J. No. 451 (F.C.T.D.); *United States Surgical Corp. v. Downs Surgical Canada Ltd.*, [1982] 1 F.C. 733, [1981] F.C.J. No. 164 (F.C.T.D.);
- (b) personal income tax information: *Janhevich v. Thomas* (1977), 15 O.R. (2d) 765, [1977] O.J. No. 2227 (H.C.); *Collins v. Beach* (1988), 24 C.P.C. (2d) 228, [1988] O.J. No. 43 (H.C.);
- (c) commercially sensitive financial information: *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47, [1989] O.J. No. 1456 (H.C.); *John Labatt Ltd. v. Molson Breweries* (1993), [1994] 1 F.C. 801, [1993] F.C.J. No. 1343 (F.C.T.D.); *North American Trust Co. v. Mercer International Inc.*, above, at paras. 11, 13-16 (S.C.); *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, above;

**14** The additional cases referred to by Lowry J. give rise to another possible category:

- (d) records of a purely private and personal nature and not relevant to the issues, such as notes between parties: *Jervis Court Development Ltd. v. Ricci*, [1992] B.C.J. No. 2932 (S.C.) and personal diaries: *Lazin v. Ciba-Geigy Canada Ltd.*, [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.); *K.V.L. v. D.G.R.*, [1993] B.C.J. No. 1662, 39 A.C.W.S. (3d) 424 (S.C.) or irrelevant and sensitive medical information.

**15** Lowry J. also referred to *Goddard v. Shoal Harbour Marine Services Limited* (1958), 24 W.W.R. 166, [1958] B.C.J. No. 23 (S.C.). In that case, the plaintiff had been granted an equitable mortgage on all the shares of the corporate defendant in order to secure a loan to two of the directors. He claimed that the directors had fraudulently diluted his security by allotting further shares to others. He was able to become registered as the owner of the hypothecated shares and sought to have the share register rectified by having the allegedly fraudulent allotment struck out. Brown J. held that the plaintiff was entitled to production of the minutes of meetings of directors and shareholders of the corporation and copies of books and accounts of the company, but only insofar as the documents had to do "directly or indirectly" with the allotment of the disputed shares. He ordered that anything in the minute books that had nothing to do with the action "may be sealed in accordance with the English practice" (at para. 16). As far as I am aware, this decision has never been considered in Ontario.

**16** I do not regard *Goddard v. Shoal Harbour Marine Services Limited* as authority for a general proposition that corporate minutes enjoy any special status in terms of production and discovery. Nor do I consider the observations that I have highlighted in the reasons of Lowry J. at para. 11 of *North American Trust Co. v. Mercer International Inc.* to stand for such a broad proposition. In *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Assn*, 2009 BCSC 1498, [2009] B.C.J. No. 2166, leave to appeal refused, 2009 BCCA 452, [2009] B.C.J. No. 2077, Bruce J., held that minutes of board meetings and executive meetings, for which privilege had not been established, were required to be produced in an unredacted form. In *St. Elizabeth Society v. Hamilton-Wentworth (Regional Municipality)* (2004), 50 C.P.C. (5th) 199, [2004] O.J. No. 1428 (S.C.J.), Harris J. of this court found that directors' minutes did not attract privilege, noting, at para. 12, that "confidentiality alone, 'no matter how earnestly desired and clearly

expressed,' does not confer privilege on a communication: *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1, 193 D.L.R. (4th) 680 at 698 (C.A.)."

**17** The issue was also considered by Lowry J. in *Vernon & District Credit Union v. Cue Datawest Ltd.*, [1999] B.C.J. No. 364 (S.C.). In that case, the plaintiff had sued for a declaration that a commitment letter that it had signed in favour of the defendant did not result in a binding contract. The defendant sought production of various reports generated by the plaintiff, which had been produced by the plaintiff in redacted form. These included operations reports, a report of the general manager, a report of the board of directors and minutes of a meeting of the board of directors. The plaintiff took the position, as does London Life in the case before me, that it was only required to produce those portions of the reports that were relevant to the issues and that the balance, which it considered of no relevance, could be redacted. The plaintiff in that case went farther than London Life because it took the position that the court could not be asked to inspect the documents to determine whether the claim for relevance was sound.

**18** Lowry J. firmly rejected this contention, at para. 7:

In my view, there is simply no merit in what the plaintiff says. The position it takes is not based on any claim of privilege or commercial confidentiality. Were that the case, the court might well be required to examine the documents and rule on whether the claim to privilege was sound or whether some terms of confidentiality in an order for production would be appropriate. But otherwise, a litigant is generally not entitled to refuse to produce portions of relevant documents. The whole of a document is relevant and producible if any of its contents are relevant. The documents produced in almost every commercial law suit contain much that can be said to be irrelevant to the issues. The discovery of documents would take on a whole new meaning if litigants could go through their listed documents (minutes, reports, and correspondence) and redact those portions that they did not consider bore on the pleaded issues.

**19** He held that each of the documents was producible, in its entirety, subject to a claim for privilege in the case of one document.

**20** It seems to me that corporate minutes, like a personal diary, may contain some information that is irrelevant but innocuous and some information that is irrelevant and very sensitive - sensitive in the sense that the party resisting production would suffer damage or real embarrassment if the irrelevant information were to be disclosed. Very often these issues are resolved between counsel. Where they are not, the court has a duty to ensure that relevant information is produced and also to ensure that the process is not being used for oppressive or collateral purposes.

**21** In this case, London Life has identified no aspect of any of the documents at issue that gives rise to an interest requiring protection, other than the general interest that every company would have in the confidentiality of minutes of board and committee meetings and other corporate records. Nothing has been identified that could be in any way harmful to the commercial interests of London Life or that would cause embarrassment or prejudice to any third party.

**22** For these reasons, I order that London Life produce for inspection copies of all relevant documents in their unredacted form. Counsel should be able to agree on a procedure for inspection, but if they are unable to do so an appointment may be scheduled through Judges'

Administration. I would also expect that counsel will be able to agree on a record that does not contain irrelevant material, for filing with the court. If, following production of the documents, the parties are unable to agree on the record, and London Life wishes to bring a motion to exclude materials from the record, a motion may be brought.

**23** Counsel may make brief written submissions as to costs, addressed to me care of Judges' Administration.

G.R. STRATHY J.

**GROSVENOR PARK MEDIA FUND L.P.**

- and

**ARC PRODUCTIONS LTD. et al**

Plaintiff

Defendant

**COURT FILE No.: CV-16-11472-00CL**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**PROCEEDINGS COMMENCED AT TORONTO**

**RESPONDING MOTION RECORD OF  
BK2BRAC HOLDING INC.**

**MARKS & CLERK LAW LLP**  
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