

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

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

FACTUM OF THE PLAINTIFF
(Motion Returnable July 23, 2020)

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I. OVERVIEW

1. Grosvenor Park Media Fund L.P. (“**GPM**”) files this factum in response to the Receiver’s motion for advice and directions regarding the distribution of amounts the Receiver has received or anticipates to receive on account of certain federal and provincial animation production tax credits (the “**Tax Credits**”). The Receiver applied for the Tax Credits on account of the debtor, Arc Productions Ltd. (“**Arc**”), in connection with projects undertaken for three of Arc’s Customers (the “**Customers**”) – Disney, Spin Master and Blazing (defined below).

2. The Customers contend that they are entitled to the Tax Credits that relate to their individual projects, arguing that their respective agreements contemplated that Arc would pay them an amount equal to the Tax Credits once received by Arc. However, each of the covenants in these agreements in reality is a form of secured transaction subject to the personal property security regime established by the *Personal Property Security Act* (“**PPSA**”). As a result, each of the Customers were required to comply with the provisions of the PPSA if they wished to establish a first ranking priority interest in the tax credits receivable. However, under the PPSA regime, it is GPM who has priority to the Tax Credits. To attempt to avoid that result, each of the Customers make archaic arguments that their particular form of security interest, whether styled an “assignment” or “trust”, was such that the PPSA was never engaged or was circumvented.

3. Foundationally, the PPSA regulates and governs creditors’ competing security interests in collateral, including accounts receivable. It applies to all arrangements that purport to provide security for the payment or performance of a future obligation without regard to the form of the security – whether styled an assignment, trust, lease, consignment, or otherwise. The PPSA

establishes a uniform regime for parties to create security – indeed, its purpose was to replace the archaic mechanisms used to attempt to create a “better” security over other creditors.

4. Of the three Customers, only Disney registered its security interest under the PPSA. However, while that registration would have given Disney priority over GPM, Disney entered into a Subordination Agreement (defined below) expressly subordinating its security interest to that of GPM. With respect to Spin Master and Blazing, both failed to register their disguised secured transactions as required by the PPSA. Accordingly, their unperfected security interests rank behind GPM’s first ranking security interest that was properly perfected under the PPSA.

5. The public policy behind the PPSA regime is to provide greater certainty in commercial transactions and in the distribution of a debtor’s assets in the event of an insolvency. While Arc’s receivership and bankruptcy intervened and interrupted the parties’ relationships with Arc and each of the parties have lost money as a result of Arc’s insolvency, they were sophisticated parties. Yet, only GPM and Disney played by the rules established by the PPSA, and Disney agreed to subordinate its security interests to GPM. The respective priority rights of GPM and each of Disney, Spin Master and Blazing to the Tax Credits must be determined under the PPSA. There is no place in Ontario for parties to try to resort to archaic mechanisms and arguments to subvert the priority regime set out in the PPSA. For the reasons set out below, it is GPM, with the first ranking security interest, who is entitled to all of the Tax Credits.

6. The Customers also attempt to dress up this claim as being one of equities or the like and suggest that a secured creditor like GPM would be getting a “windfall” as a result of its first ranking priority under the PPSA regime. There is no merit to such argument – GPM is an innocent party in this ordeal, is still owed over \$20 million of the funds which it advanced, and it

took proper steps to secure itself against all of the debtor's assets. Each of the Customers also advanced funds in respect of the potential tax credits receivable and could have organized their affairs to properly secure and perfect their interests; they chose not to or, in the case of Disney, agreed to subordinate their interest. Fairness, in these situations, is created by adherence to the regimes established by the PPSA and the *Bankruptcy and Insolvency Act*.

II. FACTS

A. Grosvenor Park

7. GPM was a media and entertainment specialty finance company offering expert advisory and single-source financing solutions, serving clients in film, television, and digital media.

Affidavit of Donald Starr, sworn July 29, 2016 ("Starr Affidavit") at para. 2;
GPM Motion Record, Tab 2, p. 13

B. Arc Productions

8. Arc was an animation studio that specialized in high-end animation and digital production services for motion pictures and television.

C. The Credit Agreement Between Arc and GPM

9. On December 10, 2015, GPM entered into a Credit Agreement with Arc and its subsidiaries (as amended on May 3, 2016 by the Amendment to the Credit Agreement) (the "**Credit Agreement**"). Under that agreement, GPM agreed to provide credit facilities in the aggregate amount of US\$46,326,500, which amounts were broken into certain tranches. The purpose of the Credit Agreement was to give Arc the liquidity to: (i) pay out its existing secured lenders; (ii) stabilize its operations; and (iii) allow Arc to carry on its core operations, namely providing animation and digital production services for the film and television industry.

Starr Affidavit, at para. 11-12; GPM Motion Record, Tab 2, p. 19

10. Arc's obligations under the Credit Agreement were secured by, among other things, a General Security Agreement (the "GSA"), Securities Pledge Agreement and various guarantees and assignments of tax credits. Pursuant to the GSA, GPM has first ranking security on all of Arc's accounts receivables, including the Tax Credits.

Starr Affidavit, at para 13-14; GPM Motion Record, Tab 2, p. 18

11. Within two months of entering into the Credit Agreement, Arc was already in default. Over the next seven months, GPM repeatedly gave Arc time and indulgences to permit it to fix its affairs – specifically, the parties entered into two forbearance agreements in February and May of 2016, which, among other things, required Arc to take steps to improve its management.

Starr Affidavit, at para. 4, 15ff; GPM Motion Record, Tab 2, p. 18

12. By May 2016, Arc's situation was dire, and it needed even more funding. Notwithstanding this rapidly deteriorating position, GPM agreed to further advance up to US\$4 million under certain terms and conditions.

Starr Affidavit, at para. 18ff; GPM Motion Record, Tab 2, p. 20

13. By July 2016, Arc's situation was even worse, it was again in breach under the Credit Agreement, and it again came back to GPM for further funding. Despite the fact that GPM had no obligation to advance further funds, GPM, induced by the provision of the Acknowledgement provided by Blazing (as described below), advanced further funds to Arc on July 13, 2016, to ensure that Arc's employees would receive their payroll on July 14, 2016. GPM has not yet recovered that money.

Starr Affidavit, at para. 25ff; GPM Motion Record, Tab 2, p. 24

D. The Tax Credits

14. The federal and Ontario governments provide certain tax credits to businesses involved in certain media production work. Arc's work qualified it to apply for such tax credits.

15. Since the media tax credits are offered by the federal and Ontario governments, they may only be applied for by eligible Canadian companies and are receivable by filing a Canadian tax return. These tax credits may be applied for by either: (i) the Canadian production company that undertakes the work; or (ii) a Canadian company that pays a production company for such work.

Harris Affidavit, at para. 4; Spin Master Record Book, Tab 5

16. Typically, an animation company like Arc and its customers will enter into one of three types of contractual arrangements in order to address the anticipated tax credits: (i) the production company/customer advances funds to the animation company (e.g., Arc) that includes an advance in respect of the amount of the anticipated tax credits on the basis that the animation company will repay that advance to the production company once it receives the tax credit(s); (ii) the production company pays a discounted contract price and the animation company (e.g., Arc) funds its own eligible payroll costs and retains the tax credit(s) for itself; or (iii) the production company is or creates a Canadian entity to fund the eligible payroll costs which could give rise to tax credits, and it applies for the tax credit(s) itself.

Harris Affidavit, at para. 4; Spin Master Record Book, Tab 5

17. It was open to each of Disney, Spin Master and Blazing to structure their relationship differently, yet they arranged their relationship with Arc as per the first model – they each *advanced* Arc funds to *finance* payroll costs of the production on the premise that, once Arc's Tax Credits were received, Arc would *repay the advance*. The fundamental nature of the

relationship is one of debtor (Arc) and creditor (the Customers). Whatever the Customers advanced to Arc, they expected to be repaid. While it was open for each of Disney, Spin Master and Blazing to have structured their relationship differently, they chose not to do so and took the benefits, and must suffer the burdens, of the their chosen structure.

E. The Customers

(i) Disney

18. Pursuant to a Production Service Agreement between Arc and BK2BRAC Holdings Inc. (“**Disney**”) dated March 29, 2013 (the “**Disney Agreement**”), Disney was a customer of Arc at the time GPM and Arc entered into the Credit Agreement.

Affidavit of Brianne Papaconstantinou, sworn May 21, 2020
 (“**Papaconstantinou Affidavit**”), para. 2; Disney Motion Record, Tab 1, p. 4

Disney Agreement, section 16(e); Receivers Fifteenth Report, Appendix A

19. Under the Disney Agreement, Arc agreed to apply for federal and provincial tax credits related to work which Arc undertook in connection with the Disney Agreement. Arc also agreed that it would pay Disney an amount equal to the Tax Credits received:

“...to obtain payment of any amounts payable to Arc with respect to the Canadian Credits for the Picture or Ancillary Content...” [emphasis added]

Disney Agreement, section 16(e); Receivers Fifteenth Report, Appendix A

20. As with the other Customers’ contracts, at the time the Disney Agreement was entered into, there was no certainty as to the amount of tax credits that Arc would receive in the future – since the amount of tax credits received were based on the eligible expenditures incurred for work actually carried out, the amount of tax credits would only be ascertainable once: (i) the work was undertaken; (ii) the state of Arc’s tax position was known (as CRA might offset the tax

credits against other amounts owing); and (iii) the tax credits were applied for and approved. That the parties appreciated that the actual amount of the tax credits was not ascertainable at the outset of their contracts is made clear from: (a) the provisions in the agreement in which the parties say they will work together to “maximize” the credits that might be claimed; (b) Arc expressly made no representations as to the amount that might be received; and (c) there could be (and were) various factors, such as Arc’s demise that caused it to stop work on projects, that would impact the amount of tax credits that could be applied for in the future.

Disney Agreement, section 16(b)-(d); Receiver’s Fifteenth Report, Appendix A

21. In order to secure Arc’s future obligation to repay Disney the amounts of tax credits it received, the Disney Agreement styled Arc’s obligation to pay as an assignment of Arc’s interest in the future Tax Credits in section 16 of the Disney Agreement:

16(e) Assignment of Canadian Credits. Arc hereby assigns and transfers absolutely to [Disney] 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...

Papaconstantinou Affidavit, paras. 3 and 7; Disney Motion Record, Tab 1, p. 2

Disney Agreement, section 16(e); Receiver’s Fifteenth Report, Appendix A

22. Despite the use of the word “assignment”, it is clear from the whole of section 16 that, as actually happened, the intention was for Arc to apply for tax credits and then to repay the advance to Disney when Tax Credits were received. If this was an absolute assignment, there would not have been any thing left for Arc to do as the tax credits would have been “assigned” to Disney. Accordingly, it is clear that the “assignment” in the Disney Agreement did nothing more than create a security interest in Arc’s future tax credits in order to *secure* Arc’s obligation to pay Disney an amount of money equal to the Tax Credits actually received.

... the same instrument cannot be both a “security interest” and an “absolute assignment”: *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963 at para. XXII

23. In fact, the Disney Agreement contained a specific grant of security to Disney, in section 18, whereby Arc granted Disney a security interest in all of its assets to secure “all present and future obligations of Arc to [Disney] pursuant to the Agreement”. Although Disney now asserts that such security was only intended to secure a repayment of an “overpayment”, there is nothing in the agreement that provides that the security was only for an overpayment and no overpayment was contemplated in the Disney Agreement. Moreover, section 18 excludes certain items from the definition of “collateral”, and those exclusions do not include receivables on account of tax credits. Clearly, under the terms of the Disney Agreement, the security secures the tax credit assignment and other obligations. Indeed, in their September 2, 2016 letter to the Receiver at the outset of the receivership, Disney took the position that the security interest covered the tax credits referred to in section 16, in addition to the overpayment.

24. Disney – unlike Blazing or Spin Master – registered its security interest under the PPSA as required to perfect its security and assert priority to the future Tax Credits received by Arc.

Papaconstantinou Affidavit, para. 3; Disney Motion Record, Tab 1, p. 2

25. However, in connection with GPM entering into the Credit Agreement, Disney executed a Subordination Agreement with Arc and GPM dated December 10, 2015 (the “**Subordination Agreement**”), expressly subordinating its security and rights to GPM. Had Disney, as it now suggests, wished to “retain” priority to the tax credits, it had the ability to limit its subordination or to carve out the tax credits from that subordination – but it did neither. Accordingly, GPM has priority over Disney in and to all of the Tax Credits relating to any Disney project.

Papaconstantinou Affidavit, para. 4; Disney Motion Record, Tab 1, p. 2

(ii) *Blazing*

26. Arc and Blazing Productions Ltd. (“**Blazing**”) entered into a Production Service Agreement dated September 21, 2015 (the “**Original Blazing Agreement**”). Pursuant to the Original Blazing Agreement, Blazing advanced funds to Arc and Arc was to apply for the Tax Credits and repay the advances when the Tax Credits were received.

Original Blazing Agreement; Receiver’s Fifteenth Report, Tab A

27. Some time before April of 2016, as Arc’s financial concerns worsened, Blazing began to demand that an amended and restated production services agreement be executed, among Arc, Samurai Productions Ltd. (a wholly-owned subsidiary of Arc, the “**Arc Subsidiary**”), Blazing and a newly incorporated Canadian subsidiary of Blazing, in the hopes that if Arc became insolvent, Blazing could try to recover tax credits. Ultimately, those parties did execute an Amended and Restated Production Services Agreement (together, the “**A&R Blazing Agreement**”). While the A&R Blazing Agreement was dated April 16, 2016, it was not signed until on or about July 13, 2016 as noted below.¹ Pursuant to the A&R Blazing Agreement, Blazing advanced funds to the Arc Subsidiary, which then transferred the funds to Arc, and the Arc Subsidiary then applied for the Tax Credits.

Blazing Agreement; Receiver’s Fifteenth Report, Appendix A

Affidavit of Brittany Oates, sworn June 19, 2020 (the “**Oates Affidavit**”); para. 2 and 7; Blazing Motion Record, Tab 1, p. 6, 7

¹ The Receiver was unaware of the executed A&R Blazing Agreement and so operated under the Original Blazing Agreement. It applied for tax credits on behalf of Arc, not Arc Subsidiary or the Blazing Sub. It was only when the tax credits were being processed that a review of certain files was undertaken and the amendments and the various security documents were found.

28. Pursuant to the May 2016 amendment to the Credit Agreement, Arc Subsidiary provided a guarantee to GPM dated May 3, 2016, fully guaranteeing Arc's obligations to GPM under the Credit Agreement (the "**Guarantee**"), and it granted a General Security Agreement to secure its obligations under the Guarantee. The Guarantee expressly notes that the provision of the Guarantee was to induce GPM to enter into the amended Credit Agreement. Arc also received specific assignments of the federal and Ontario tax credits related to the Blazing agreement as part of the amendments. GPM registered its security interest against Arc Subsidiary and thus has a perfected security interest in Arc Subsidiary.

GSA and Guarantee, Receiver's Compendium

29. When Arc was desperate for funding on July 13, 2016 to meet payroll, GPM only funded such amounts, expressly against the expected Blazing related Tax Credits, after Blazing executed the Notice of Assignment & Direction to Pay in which it acknowledged in writing that the amount of \$1,050,000 owing from Arc to Blazing – being comprised solely of the Tax Credits as no other such amounts were owing to Blazing – were to be paid to GPM (the "**Acknowledgement**"). Blazing at the same time had required that the A&R Blazing Agreement be executed. Both of the A&R Blazing Agreement and Acknowledgement were signed by Blazing, Arc and their relevant subsidiaries on July 13, 2016 and GPM advanced the funds. (The amount of the Tax Credits available, in reality, is \$1,046,000.)

Notice of Assignment & Direction to Pay, Exhibit "B" to the Oates Affidavit;
Blazing Motion Record, Tab 1-B, p. 37

30. Despite the various amendments to the agreements, at all times, the structure of the relationship and actions between Arc and Blazing was that Blazing provided an *advance of funds*

to Arc and Arc would *repay that advance* once it received the Tax Credits that related to the work Arc undertook for that project. This relationship is expressly set out section 17(a):

Subject to the terms and conditions of this Agreement, [Blazing] agrees to make one or more advances (the “OCASE Advances”) to Samurai to be used by Samurai for the sole and exclusive purpose of paying for the Production Services in accordance with this Agreement. The parties hereto agree that Samurai shall repay to Producer by cheque or wire transfer (and for certainty, not by way of set-off), that portion of the Production Financing equal to the OCASE Tax Credit within ten (10) days of the receipt by Samurai of the OCASE Tax Credit. [emphasis added]

A&R Blazing Agreement, Exhibit C to the Oates Affidavit; Blazing Motion Record, Tab 1-C, p. 51

31. In any event, section 17 of the Original Blazing Agreement and A&R Blazing Agreement state that Arc acknowledged that Blazing would be entitled to all Tax Credits that became available and agreed that it shall hold the amounts in “trust” and solely on behalf of Blazing:

For the avoidance of doubt, Arc and [Arc Subsidiary] acknowledge and agree that [Blazing] alone shall be entitled to all Tax Credits available in respect of the Services and/or the Film. In that regard and with respect to the OCASE Tax Credit, Arc and Samurai agree that Samurai shall claim and collect said OCASE Tax Credit and shall hold same in trust and on behalf solely of Producer, as a fiduciary of Producer.

A&R Blazing Agreement, Exhibit C to the Oates Affidavit; Blazing Motion Record, Tab 1-C, p. 51

32. As discussed below, this “trust” arrangement is not a trust, but rather is a disguised secured transaction, which is subject to the PPSA:

- (a) clearly, Blazing *advanced* sums to Arc on the strength of a promise by Arc to *repay the advance* after the tax credits had been received;
- (b) the statement by which Arc acknowledged Blazing was entitled to the amounts of the tax credits is nothing more than a promise by Arc to pay the amounts to Blazing in the future;

- (c) there is no trust actually created at the time the agreement is entered into because there is no certainty of subject-matter since, as noted above, the exact amounts that might actually be paid by the governments as tax credits were not known;
- (d) the wording of the “trust” provision provides that it only applies with respect to the OCASE tax credit and not all tax credits that might be applied for;
- (e) there is no real trust relationship as between Arc and Blazing as the agreements do not give Arc the powers of a trustee but rather simply imposes on it an obligation to pay; and
- (f) even if it was a true trust arrangement, then Arc would still have legal title to such funds and could grant a security interest in same.

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 SCR 24 at para. 19

33. However, Blazing – unlike Disney – did not register under the PPSA as it was required to do in order to have a perfected security interest potentially prior in time to GPM, giving it priority to such amounts. Accordingly, as discussed below, Blazing only has an unperfected and thus unsecured claim that is subordinate to the interests of secured creditors like GPM.

34. Furthermore, Blazing signed the Acknowledgement in favour of GPM, specifically knowing that it related to the Tax Credits and GPM was advancing the new funds based on that Acknowledgement, thereby undercutting any argument it legitimately has to the Tax Credits.

(iii) *Spin Master*

35. Pursuant to the Production Service Agreement between Arc and Spin Master Riveting Productions Inc. (“**Spin Master**”) dated August 11, 2014 (the “**Spin Master Agreement**”), Spin Master was a Customer of Arc at the time GPM and Arc entered into the Credit Agreement.

36. The language in the Spin Master Agreement is also indicative of a disguised secured transaction. Subsections 6(a) and (b) of the Spin Master Agreement discuss how Arc will apply for the Tax Credits and then remit them to Spin Master when received. As noted in the Harrs Affidavit at paragraph 4, Spin Master elected to “prepay” the amount of the anticipated tax credits rather than pay Arc “financing costs” to have Arc in effect finance those amounts over the life of the project. Although Mr. Harrs uses the word “prepay”, Spin Master is in fact *advancing* funds to Arc and asking Arc to promise to *repay those advances* when the Tax Credits are received. This is an arrangement of debtor-creditor, not trustee-beneficiary.

Harrs Affidavit, para. 4; Spin Master Motion Record, Tab 5, p. 41

Spin Master Agreement, Exhibit “A” to Harrs Affidavit; Spin Master Motion Record, Tab 5-A, p. 61

37. Under the Spin Master Agreement, Arc was to apply for the Tax Credits and would pay Spin Master when the tax were credits received. In an effort to secure Arc’s obligation to pay Spin Master those amounts, the Spin Master Agreement, like the Blazing Agreement, created a secured transaction which was disguised as a “trust”:

For avoidance of doubt, Contractor acknowledges and agrees that Producer alone shall be entitled to all Tax Credits available in respect of the Services, Elements and/or Episodes, including the OCASE Tax Credit, which Contractor shall claim and collect in trust on behalf of Producer.

Spin Master Agreement, section 6(a) Exhibit “A” to Harrs Affidavit; Spin Master Motion Record, Tab 5-A, p. 61

38. This provision mirrors the language used in the Blazing Agreement discussed above. The comments regarding the indicia that this language does not, and cannot, create a true, express trust apply equally to the Spin Master language. Moreover, the Hays Affidavit at paragraph 4 acknowledges that any “trust” would only arise once the funds were received – however, those funds were already impressed with GPM’s prior ranking secured interest at the time of receipt and Arc was therefore incapable of creating a “trust” with such amounts.

III. LAW AND ARGUMENT

A. The PPSA Governs This Dispute

39. As noted above, in each of the Disney Agreement, Blazing Agreement and Spin Master Agreement, the Customer *advanced* funds to Arc for production services and received some form of promise to *repay the advance* when the related tax credits were received by Arc. Each agreement either expressly created a security interest, an unsecured obligation or, at best, represented a transaction which was in form and substance a secured transaction disguised as some other type of transaction to try to “secure” the payment of promised funds in future. Each of Disney, Spin Master and Blazing could have arranged their affairs from the outset to create their own special purpose Canadian production companies to apply for those tax credits directly themselves, or in the case of Spin Master could have applied for the tax credits itself as it is a Canadian company; however they chose not to. Rather, they each elected to arrange their affairs so that they provided an advance or loan of funds in respect of the anticipated tax credits and took back a promise to pay an amount equal to the Tax Credits received, and either created or tried to create some form of security to secure that promise.

40. The PPSA is broad in its scope and application, and applies to all arrangements that purport to secure the payment or performance of a future obligation. The PPSA defines a “security interest” as follows:

“security interest” means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

- (a) the interest of a transferee of an account or chattel paper, and
- (b) the interest of a lessor of goods under a lease for a term of more than one year; [emphasis added]

41. Indeed, the foundational premise of the PPSA is that it applies to all forms of security in personal property (including accounts receivables) regardless of the manner or form in which the security is said to take. The PPSA was designed to replace archaic forms of security in personal property with a single statutory regime that would level the playing field and provide commercial certainty for all parties.

McLaren, Richard H., *Secured Transactions in Personal Property in Canada* (3rd ed) (“McLaren on Secured Transactions”) at §1.03 – Personal Property Security – Legislation in Canada – [1] Ontario

42. Specifically, section 2 of the PPSA effectively abolishes all other forms of security as it provides that the PPSA applies to all transactions that create a security interest without regard to form or title, and expressly applies where the security is structured as an assignment or a transfer of an account, even when such assignment is not premised on the payment of an obligation:

2 Subject to subsection 4 (1), this Act applies to,

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

- (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and
- (ii) an assignment, lease or consignment that secures payment or performance of an obligation;

(b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and

(c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation. [emphasis added]

43. The effect of section 2 of the PPSA is that the particular form of the transaction is ignored by the Court, and instead the Court is to consider all such interests simply as a “security interest”, and determine priority according to the priority rules in the PPSA based on whether a security interest has “attached” and has been “perfected”.

McLaren on Secured Transactions at §3.01: Scope, Included Transactions – [1]
Security Interests Within The Scope – [A] Creation Of A Security Interest – [ii]
No Regard for Form or Title

44. The PPSA’s key priority rule is that the first creditor to “perfect” their security by registering the security interest in the public registration system obtains priority over other creditors who perfect their interest later in time or who have not perfected. This allows creditors and potential creditors to know – at the outset – how their security will rank as against the debtor’s collateral, and permits them to engage prior registered creditors, just as GPM did with Disney in connection with the Subordination Agreement. This system is based on the simple proposition that in order to have enforceable security as against the public, you must have registered your security interest in the public registration system.

McLaren on Secured Transactions at §7.01: Priority, The Default or Residual
Rule: S. 30 – [2] The First to Register Rule and [9] Application of the Rule to
Deemed Trusts

45. The PPSA provides that, if a creditor does not register to perfect its security interest in the PPSA registry system, it only has an unperfected security interest and cannot have priority over other secured creditors who perfect their security interests:

20 (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act,...

46. The approach of focusing on substance over form in assessing transactions serves a critical public policy: it eliminates the ability of parties to circumvent the PPSA regime by purporting to craft bespoke arrangements for the purpose of avoiding the intent and purpose of the PPSA regime. Importantly, it also prevents situations where creditors such as GPM who rely on the PPSA registry to structure their affairs (as the Legislature contemplated) from being surprised by private, unregistered arrangements that purport to operate outside the statutory regime. Furthermore, it creates certainty in commercial matters by avoiding inquiries into – and basing priorities on – what parties purportedly knew and did not know about other creditors’ arrangements. Under the PPSA regime, there is simply no place for such inquiries. As a result, the PPSA achieves predictability and certainty – cornerstones of commercial fairness.

Royal Bank v. Sparrow Electric Corp., [\[1997\] 1 S.C.R. 411](#) at paras. 21-22

B. Disney’s “Assignment” Does Not Defeat GPM’s Perfected Security Interest Under the PPSA

47. Disney in effect argues that the PPSA does not apply to it because “its agreement” effected an “assignment” of the relevant Tax Credits. However, as noted above, sections 1(1)(“security interest”) and 2(1) of the PPSA each provide that the PPSA applies in respect of an “assignment” or a “transfer of an account” whether by way of security or otherwise. Moreover, the Disney Agreement also speaks expressly of granting Disney a “security interest”. Accordingly, the PPSA applies to Disney’s alleged assignment, particularly given that the assignment in this case was to secure Arc’s obligation to pay the amount of the future Tax Credits to Disney, as admitted by Disney in 2016 at the outset of the receivership.

48. Furthermore, any argument that the “assignment” is an “absolute” assignment must fail.

49. First, the “assignment” was in reality a disguised security interest but Disney did it right – it specifically took a security interest in all the assets and registered its interest in the PPSA registry and became a perfected secured creditor. However, it agreed to sign the Subordination Agreement. The reality is Disney did everything it needed to in order to have priority and then gave it away by not limiting the subordination. Its attempt now to claim that the assignment was absolute and the security interest did not apply to the Tax Credits is contrary to statements made to the Receiver in September 2016 and is nothing more than historical revisionism.

50. Second, the PPSA expressly provides that a secured party may by contract subordinate its security interest to another party and such subordination is effective according to such agreement:

Subordination

38 A secured party may, in the security agreement or otherwise, subordinate the secured party’s security interest to any other security interest and such subordination is effective according to its terms.

51. The Subordination Agreement was a full and unrestricted subordination of Disney’s priority to GPM. There was no carve out for the Tax Credits – if that was the intention, Disney could have bargained it. It is not open to Disney to now argue that it did not mean for the Subordination Agreement to apply to the Tax Credits. Accordingly, GPM has priority to the Tax Credits related to the Disney Agreement.

C. Spin Masters' and Blazing's Alleged "Trusts" Do Not Defeat GPM's Perfected Security Interest Under the PPSA

52. Spin Master and Blazing make a number of arguments as to why they should be entitled to priority. These arguments are based on ignoring the PPSA regime, and conflating various other concepts. Their arguments are dealt with in turn.

(i) The "Trust" Argument Fails

53. Spin Master and Blazing argue that the Tax Credits are subject to a trust in their favour as a result of the wording of their agreements. However, any argument based on an allegation that the Tax Credits are trust property must fail for several reasons.

54. First, the alleged imposition of a trust for the purposes of securing the payment of a future obligation is captured by the PPSA. The use of a "trust" to address the repayment of an advance is nothing more than a disguised security interest. As noted above, at their root, these arrangements dealt with an *advance* of funds that were to be *repaid* once Arc received the Tax Credits. As a result, the relative priorities between a perfected security interest and the unperfected "trust" security interest are determined by section 20 of the PPSA which provides that the perfected security interest prevails.

McLaren Book – §7.01: Priority, The Default or Residual Rule: S. 30 – [5]
Perfected Interests Versus Unprotected Interests

55. Second, the *Bankruptcy and Insolvency Act* and decisions of the Supreme Court of Canada make it clear that, in a bankruptcy, notional or "deemed" trusts do not take priority over perfected security interests unless: (i) there is an express federal statute that provides for such a result; or (ii) there is, in fact, a fully constituted and actual trust in existence.

(a) Section 67(2) of the *Bankruptcy and Insolvency Act* provides that property that is to be subject to a statutory deemed trust “shall not be regarded as held in trust... unless it would be so regarded in the absence of that statutory provision”. While there are narrow, specific exemptions in section 67(3), none of them apply to a contractually created deemed trust such as those alleged to be created in the Original or A&R Blazing Agreements and the Spin Master Agreement.

(b) Similarly, the Supreme Court of Canada has repeatedly held that a statutory deemed trust (other than as may be exempted in federal statutes) does not take priority over a perfected security interest in the absence of the creation of an actual express trust – that is, until the funds in question are actually put into a separate trust account, there is no trust and priorities to the amounts in question are to be determined by provincial priority law. The Supreme Court of Canada reiterated this position in its recent decision in *Canada v. Callidus Capital Corporation*, in which it adopted the dissenting opinion at the Federal Court of Appeal, where the dissenting judge held that Parliament put holders of deemed trusts on the same footing as unsecured creditors:

Subsection 67(2) makes it clear that Parliament intended to do away with the deemed trusts in bankruptcy. The effect of these trust is to withdraw the property subject to the deemed trust from the estate of the bankrupt so that the federal government's claim takes priority over the claims of unsecured creditors. By eliminating these trusts in bankruptcy, Parliament put the Crown on the same footing as unsecured creditors. [emphasis added]

Canada v. Callidus Capital Corporation, [2017 FCA 162](#) at para. 73, app'd 2018 SCC 47

*Henfrey Samson Quartet*²

² *Deputy Minister of Rev. (Que.) v. Rainville*, [\[1980\] 1 SCR 35](#), *Deloitte Haskins & Sells v. Workers' Comp. Board* [\[1985\] 1 SCR 785](#), *Federal Business Development Bank v. Québec (CSST)* [\[1988\] 1 SCR 1061](#), and *British Columbia v. Henfrey Samson Belair Ltd.* [\[1989\] 2 SCR 24](#)

56. Third, there can be no true trust under the Spin Master and Blazing Agreements because there is no “certainty of subject” at the time the contracts were entered into. Since no tax credits could be applied for until the eligible expenditures were incurred, it would therefore not be known exactly what amounts would be received by Arc until: (i) work was carried out (which scope of work might be different than anticipated to due to insolvency, termination of the contract or other events); (ii) Arc’s tax situation was determined since the CRA might offset the tax credits against Arc’s taxes payable; and (iii) CRA reviewed and approved the tax credit claims (that is, they are subject to third party approval). This uncertainty is reflected in each of the agreements wherein the parties speak of their “intention” to undertake work in a manner that will qualify for tax credits and to work together to maximize the available tax credits (for example, see section 6 of the Spin Master Agreement, and section 6(a) of the Blazing Agreement). These provisions show that there was no certainty of subject, which is required to create a true trust.

57. Moreover, there was no transfer of funds away from Arc (as alleged settlor) to constitute a trust, and certainly not before GPM’s security interest attached to the receivable.

58. Lastly, Blazing’s argument that, based on hindsight, it would have applied for the Tax Credits directly if had it recalled its A&R Blazing Agreement is not only irrelevant, but it also demonstrates that there is no true trust:

- (a) First, it is irrelevant because Blazing cannot rewrite history. The fact that it now wishes it had proceeded differently cannot change the past and change what in

fact transpired. It had the ability and opportunity to engage with the Receiver earlier and did not do so;³ and

- (b) Second, Blazing’s argument in fact demonstrates that there was no “true” trust since, if the Blazing Agreement created a true “trust”, Blazing could not have applied for the Tax Credits (as it now says it would) because the legal rights in the Tax Credits would have been held by Arc as “trustee” under the Blazing Agreement. That Blazing says it could have applied for the Tax Credits is, in effect, an admission that there was no true trust.

(ii) *There Is No Assignment*

59. For the reasons described in paragraphs 22 and 48 to 52 above, there is no “absolute assignment” as Spin Master and Blazing claim in the alternative. (Furthermore, there is nothing in their agreements to even suggest that there is such an assignment.)

(iii) *There Is No Unjust Enrichment or Equitable Wrong*

60. The fact that GPM has priority over the Tax Credits does not mean that GPM has been unjustly enriched. First, there is clearly a juridical reason why GPM would received the Tax Credits – it is a secured lender with first ranking security. The payment of a debt has been clearly recognized as a juridical reason for an enrichment. Furthermore, with respect to Blazing, the fact that GPM extended further funding based on the Acknowledgement is another juridical reason for GPM to be repaid.

Royal Bank v. Harowitz, [\[1997\] O.J. No. 2599](#) (C.A.) at para. 2, affirming [\[1994\] O.J. No. 619](#) (Gen. Div.).

³ It should be noted that Blazing does not contest the authenticity of the A&R Blazing Agreement given that it purports to rely on it in these proceedings.

61. Second, there is no “deprivation”. Nothing was taken from them. While they were owed money by Arc for amounts which they *advanced* to Arc, so was GPM – this case is simply a case of determining priority as between creditors as happens in many insolvency cases.

62. Furthermore, there is no “equitable wrong” that justifies the imposition of a constructive trust to get around the PPSA regime. Spin Master and Blazing cannot point to a separate, free-standing equitable wrong that occurred. The flaw in their alternative “breach of trust” argument is that it is based on the existence of a trust. However, their alternative breach of trust argument only arises after the Court finds that there is no true trust that defeats the PPSA priority regime. They cannot therefore use a “breach of trust” argument to get a constructive trust to avoid and defeat the PPSA regime.

Constructive trusts and express trusts are described as “chalk and cheese”:
Waters, Gillen and Smith, Waters' Law of Trusts in Canada (3rd ed) (Toronto:
Thomson, 2005) at p. 473

63. Moreover, Spin Master and Blazing conflate the concept of a proprietary interest with an equitable wrong. They claim that they had some unparticularized “proprietary” interest and that therefore they should be entitled to a constructive trust. The only “proprietary” interest (other than a beneficial interest in their alleged trust) they could have had is a security interest, which triggers the PPSA regime. Either way, the mere, unsubstantiated claim of a “proprietary interest” does not give rise to an equitable wrong or grounds to impose a constructive trust.

64. Lastly, the Court must be cautious not to grant a constructive trust where doing so would upset the priorities as among creditors.

Barnabe v. Touhey (1995), [26 OR \(3d\) 477](#) (C.A.)

(iv) *There Is No Grounds For A Quitclose Trust*

65. Furthermore, there is no “Quitclose Trust” or any basis to impose one. Spin Master and Blazing confuse the facts necessary to prove a Quitclose Trust. A Quitclose Trust is used where: (i) some property is given to a debtor for a specific purpose; (ii) the debtor because of insolvency cannot use that property; and (iii) allowing the debtor to keep the property in the face of the failed purpose would amount to a windfall to the other creditors. That is not what happened:

- (a) Spin Master and Blazing both advanced funds to Arc in the hope that they would be repaid from the Tax Credits once they were received by Arc (or other funds of the same amount);
- (b) The funds advanced to Arc were intended to be used by Arc in the running of its business, and in fact were used in the running of its business;
- (c) Neither Spin Master nor Blazing gave Arc the Tax Credits – those amounts came from the government; and
- (d) There is not one iota of evidence that the government only gave Arc the Tax Credits for the sole and single purpose that they would be conveyed to Spin Master and Blazing as they allege.

66. As discussed above, the purpose of Arc paying an amount to Spin Master or Blazing based on the Tax Credits was to repay the advances made by them to Arc. Because the funds were used to repay an advance, the funds cannot be subject to a Quitclose Trust.

(v) *Blazing Expressly Acknowledged GPMs' Interest*

67. Lastly, as noted above, Blazing expressly acknowledged that the amounts of the tax credits were being assigned to GPM, at a time when they knew GPM was only advancing further funds on the basis of the signed Acknowledgement that confirmed that GPM would have priority to the credits (which itself would constitute an assignment of rights from Blazing to GPM), which interests GPM properly perfected under the PPSA. That acknowledgment, which referenced the amount of future anticipated tax credits, was provided for the specific purpose of inducing GPM to provide additional funds to Arc in a situation where Arc was distressed and Blazing itself was hoping Arc would be able to continue in operations so it was incited to cooperate. While the Acknowledgement was not even necessary to give GPM priority over the Tax Credits, it demonstrates that Blazing's argument to priority at this stage is revisionist history.

IV. RELIEF SOUGHT

68. For these reasons, GPM respectfully requests that this Honourable Court authorize and direct the Receiver to pay the Tax Credits to GPM with costs payable by the Customers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



GOODMANS LLP

Lawyers for Grosvenor Park Media Fund L.P.

**SCHEDULE “A”
LIST OF AUTHORITIES**

Cases	
1.	<i>Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.</i> , [1996] 1 SCR 963
2.	<i>British Columbia v. Henfrey Samson Belair Ltd.</i> , [1989] 2 SCR 24
3.	<i>Royal Bank v. Sparrow Electric Corp.</i> , [1997] 1 S.C.R. 411
4.	<i>Canada v. Callidus Capital Corporation</i> , 2017 FCA 162
5.	<i>Deputy Minister of Rev. (Que.) v. Rainville</i> , [1980] 1 SCR 35
6.	<i>Deloitte Haskins & Sells v. Workers' Comp. Board</i> , [1985] 1 SCR 785
7.	<i>Federal Business Development Bank v. Québec (CSST)</i> , [1988] 1 SCR 1061
8.	<i>Royal Bank v. Harowitz</i> , [1997] O.J. No. 2599 (C.A.), affirming [1994] O.J. No. 619 (Gen. Div.).
9.	<i>Barnabe v. Touhey</i> (1995), 26 OR (3d) 477 (C.A.)
10.	<i>Ontario (Training, Colleges and Universities) v. Two Feathers Forest Products LP</i> , 2013 ONCA 598
Secondary sources	
11.	McLaren, Richard H., <i>Secured Transactions in Personal Property in Canada</i> (3rd ed)
12.	Waters, Gillen and Smith, <i>Waters' Law of Trusts in Canada</i> (3rd ed) (Toronto: Thomson, 2005)

**SCHEDULE “B”
RELEVANT STATUTES**

Personal Property Security Act, RSO 1990, c P.10

Section 1(1) – “security interest”

“security interest” means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

- (a) the interest of a transferee of an account or chattel paper, and
- (b) the interest of a lessor of goods under a lease for a term of more than one year;

Section 2 – “Application of Act, general”

Subject to subsection 4 (1), this Act applies to,

- (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
 - (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and
 - (ii) an assignment, lease or consignment that secures payment or performance of an obligation;
- (b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and
- (c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

Section 20(1) – “Unperfected security interests”

Except as provided in subsection (3), until perfected, a security interest,

- (a) in collateral is subordinate to the interest of,
 - (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act,...

Section 38 – “Subordination”

A secured party may, in the security agreement or otherwise, subordinate the secured party’s security interest to any other security interest and such subordination is effective according to its terms.

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Section 67(2) – “deemed trusts”

Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.