

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 101 OF THE
COURTS OF JUSTICE ACT, RSO 1990, c C43 and SECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c B-3, AS AMENDED

B E T W E E N :

FREEPORT FINANCIAL LLC

Applicant

- and -

PRACS INSTITUTE CANADA B.C. LTD.

Respondent

FACTUM OF THE APPLICANT
(returnable June 10, 2013)

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Court File No. CV-13-10046-00CL

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PART I - OVERVIEW

1. This motion is brought to lift the stay of proceedings against the Respondent and for an order granting leave to the Applicant to immediately bring a Bankruptcy Application against the Respondent.
2. In addition to the above relief, the Applicant seeks a bankruptcy order against the Respondent. This factum is filed in support of that request as well.
3. The Respondent was placed in receivership on March 22, 2013 and since that time the Receiver has realized on substantially all of the Respondent's assets. The Respondent is an insolvent shell, with no employees or operations. Substantially all that is left for the Receiver to do is to collect certain receivables, distribute the funds and address certain residual issues relating to the winding up of the Respondent. A

contemporaneous bankruptcy proceeding will provide for the most cost effective framework for winding up the estate.

PART II - THE FACTS

4. On March 22, 2013 Freeport Financial LLC (**“Freeport”**) applied for, and was granted, an order appointing PricewaterhouseCoopers Inc. (**“PwC”**) as receiver (the **“Receiver”**), without security, over all of the assets, undertakings and property (the **“Property”**) of PRACS Institute Canada B.C. LTD. (**“PRACS Canada”**) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the **“BIA”**) and section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended (the **“Receivership Order”**).

Affidavit of Donald T. Bobbs sworn May 28, 2013, Motion Record of the Applicant, Tab 2 (**“Bobbs Affidavit”**), pg. 9, para. 4.

5. PRACS Canada is a wholly owned subsidiary of PRACS Institute Holdings, LLC, a Delaware limited liability company (the **“Holding Company”**). The Holding Company is the holding company for the PRACS Institute group of companies (the **“PRACS Institute”**). The PRACS Institute provided early phase clinical research services for the development of drugs and medical services and operated its business through entities controlled, directly or indirectly, by the Holding Company.

Bobbs Affidavit, pgs. 9-10, para. 6

6. The PRACS Institute operated several research facilities and bioanalytical laboratories in North America. PRACS Canada operated certain of those facilities in the Greater Toronto Area.

Bobbs Affidavit, pg. 10, para. 7

7. At the time of the Receiver's appointment, PRACS Canada was indebted to certain lenders, of which Freeport is the agent (the "**Lenders**"), in the approximate amount of \$4,219,662. Additional interest, in the amount of approximately \$52,523.99, has accrued on this debt from the Receiver's appointment to May 22, 2013. Further, the Lenders have incurred legal fees in the approximate amount of \$110,000 in connection with these proceedings through to the end of April 30, 2013 and those fees are a further obligation of PRACS Canada secured by their security agreement with PRACS.

Bobbs Affidavit, pg. 10, para. 9

8. Prior to the Receiver's appointment, PRACS Canada terminated all 216 of its active employees. Any remaining employees were terminated pursuant to the Receivership Order. On the date of the Receiver's appointment, the directors of PRACS Canada resigned and the Holding Company, together with its United States subsidiaries, filed voluntary bankruptcy petitions under Chapter 7 of the United States Bankruptcy Code.

Bobbs Affidavit, pgs. 10-11, para. 10

9. The Receiver conducted a sales process to sell PRACS Canada's right, title and interest in and to the Property. That process resulted in a sale transaction for which the Receiver sought, and obtained, court approval on May 1, 2013 (the "**Sale Transaction**").

Bobbs Affidavit, pg. 11, para. 12

10. The Sale Transaction yielded proceeds of approximately \$3.6 million dollars.

Bobbs Affidavit, pg. 11, paras. 12 and 13

11. Approximately \$3.1 million was available for distribution to PRACS Canada's creditors as at May 24, 2013. The Receiver indicates that it expects to collect accounts receivable of approximately \$500,000 (the "**Receivables**"). There are no other significant assets upon which to realize.

Bobbs Affidavit, pg. 12, para. 15

12. PRACS Canada has not actively carried on business since the commencement of the receivership, substantially all of its assets have been sold and the primary remaining issues for the Receiver are the collection of the Receivables and the distribution of the pool of money in its hands. There are certain administrative issues in connection with the storage, shipment or disposal of third party property at PRACS Canada's former facility, in which the Receiver may have limited involvement.

Bobbs Affidavit, pg. 12, para. 16

13. The \$3.1 million currently available for distribution includes approximately \$146,000 in priority claims. Of that \$146,000, approximately \$27,300 is on account of vacation pay subject to a deemed trust under Ontario employment legislation, and approximately \$70,300 is on account of harmonized sales tax in respect of the pre-receivership period which is subject to a deemed trust under federal taxing legislation (together, the "**Deemed Trust Amounts**").

Bobbs Affidavit, pg. 12, para. 17

14. Assuming the entirety of the Receivables is recovered and distributed together with the \$3.1 million presently available for distribution, and given that the Deemed Trust Amounts of \$97,600 have priority over the Lenders outside of a bankruptcy, the

Lenders currently have an estimated unsecured deficiency claim against PRACS Canada for the further approximate amount of at least \$680,000.

Bobbs Affidavit, pgs. 12-13, para. 18

PART III - ISSUES AND THE LAW

15. There are two issues on this motion:

- (a) Should the stay of proceedings be lifted to allow the bringing of the Bankruptcy Application; and
- (b) If so, should the bankruptcy order be granted.

A. The Stay Should be Lifted

16. Using the BIA to alter priorities as between creditors is a legitimate reason to seek a bankruptcy and provides sufficient reason to lift a stay of proceedings against a debtor that is in receivership.

Re Ivaco Inc., 2006 CanLII 34551 at para. 76 (ON CA), Brief of Authorities of the Applicant (“**Applicant’s Brief**”), Tab 1

Bank of Nova Scotia v. Huronia Precision Plastics Inc., 2009 CanLII 2319 at paras. 19-20 (ON SC), Applicant’s Brief, Tab 2

17. The fact that all that remains of a debtor is a pool of money to distribute, also supports the lifting of a stay to bankrupt the debtor to effect the distribution of those funds under the BIA regime.

Re Ivaco Inc., 2006 CanLII 34551 at para. 76 (ON CA), Applicant’s Brief, Tab 1

18. Here, the Deemed Trust Amounts are presently a priority payable, not available to the Lenders in a distribution. In a bankruptcy, the Deemed Trust Amounts would be

available to the Lenders. This in itself is sufficient reason to permit the lifting of the stay to permit the Bankruptcy Application to proceed.

Bank of Nova Scotia v. Huronia Precision Plastics Inc., 2009 CanLII 2319 at para. 20 (ON SC),
Applicant's Brief, Tab 2

Bobbs Affidavit, pg. 12, paras. 17-18

19. Also, PRACS Canada has not actively carried on business since the commencement of the receivership, substantially all of its assets have been sold and the primary remaining issues are the collection of the Receivables and the distribution of the pool of money in the hands of the Receiver. This further supports the lifting of the stay to permit the Bankruptcy Application to proceed.

Re Ivaco Inc., 2006 CanLII 34551 at para. 76 (ON CA), Applicant's Brief, Tab 1

Bobbs Affidavit, pg. 12, para. 16

B. The Bankruptcy Order Should be Granted

20. Creditors may file an application for a bankruptcy order if it is alleged that the debt of the debtor to the applicant creditors is at least \$1,000 and the debtor committed an act of bankruptcy within the six months preceding the filing of the bankruptcy application.

Section 43(1), BIA

21. Section 43(7) permits the court to dismiss an application for a bankruptcy order if it concludes "that for other sufficient cause no order ought to be made." However, dismissing an application for bankruptcy on this ground is an exercise of discretion. Like any exercise of the court's discretion, it is to be founded on sound judicial reasoning arrived at from credible evidence adduced, and must be exercised judicially

according to common sense and justice and in a manner that does not occasion a miscarriage of justice.

Re Churchill Forest Industrial (Manitoba) Ltd. (1971), 16 C.B.R. (N.S.) 158 at para. 64 (Man. Q.B.), Applicant's Brief, Tab 3

22. Here, PRACS Canada owes more than \$1,000 to the Lenders and has committed an act of bankruptcy in the last six months, in that the company is in receivership and has ceased to meet its liabilities as they generally come due.

Bobbs Affidavit, pgs. 12-13, paras. 4 and 18

23. Moreover, no cause exists to justify this Court's exercise of discretion to dismiss the application for a bankruptcy order. In fact, the reverse is true.

24. A bankruptcy will provide a cost effective framework for the winding up of the estate. Certain priority claims will be eliminated along with the delay and expense associated with resolving them. Also, to the extent that claims are filed with the proposed trustee, the BIA provides for a framework to resolve those claims thus avoiding the cost of establishing a court-approved claims procedure. It is accepted by Canadian courts that a creditor may seek a bankruptcy order in these circumstances.

Re Ivaco Inc., 2005 CanLII 27605 at para. 13 (ON SC), appeal dismissed, *Re Ivaco Inc.*, 2006 CanLII 34551 at para. 76 (ON CA), Applicant's Brief, Tab 1

Bank of Nova Scotia v. Huronia Precision Plastics Inc., 2009 CanLII 2319 at para. 13 (ON SC), Applicant's Brief, Tab 2

25. The Lenders are unsecured creditors of PRACS Canada for the amount of its deficiency claim such that Freeport, as agent, is capable of bringing an application for a bankruptcy order. PRACS Canada has completed a sale of substantially all of its assets, is no longer operating as a going-concern business and, as such, the receivership proceedings are substantially complete.

Bobbs Affidavit, pgs. 12-13, para. 18

26. At this stage, no sufficient cause can be shown that a bankruptcy order ought not to be made. It is appropriate for the Court to allow the Lenders to institute bankruptcy proceedings and for the Court to forthwith issue a bankruptcy order in respect of PRACS Canada.

C. Notice of the Bankruptcy Application May Be Dispensed With

27. Freeport also seeks to dispense with notice of the Bankruptcy Application. Rule 70(1) of the *Bankruptcy and Insolvency General Rules* provides as follows:

70.(1) A notice indicating the time and place of the hearing of the bankruptcy application, together with a certified copy of the application and of the affidavit referred to in subsection 43(3) of the Act, must be served on the debtor, on the trustee named in the application and on the Division Office at least 10 days, or any shorter period that the court may order, before the hearing.

28. Here, the debtor, PRACS Canada, has been in receivership since March 22, 2013. Prior to the Receiver's appointment, PRACS Canada terminated all 216 of its active employees, and remaining employees were terminated pursuant to the Receivership Order. On the date of the Receiver's appointment, the directors of PRACS Canada resigned and the Holding Company, together with its United States subsidiaries, filed voluntary bankruptcy petitions under Chapter 7 of the United States Bankruptcy Code.

Bobbs Affidavit, pgs. 10-11, para. 10

29. The Receiver has consented to act as the trustee in bankruptcy of PRACS Canada, and in any event was served with the within motion materials together with the

materials to be filed in support of the Bankruptcy Application, as was the Division Office, on May 28, 2013. Moreover, the Canada Revenue Agency, the Ontario Ministry of Revenue and all other known affected parties were notified of this motion.¹

Consent of PricewaterhouseCoopers Inc. dated May 27, 2013, Motion Record, tab 7, page 125.

30. Also, the Receiver indicated in its report dated April 25, 2013 (the “**First Report**”) that Freeport had advised the Receiver that it intended to revisit the bankruptcy issue prior to the distribution of any proceeds of sale and that Freeport advised the Receiver that it reserved all rights and remedies available to it in this regard. The Service List was properly served with the First Report.

First Report of the Receiver dated April 25, 2013, Exhibit “D” to the Bobbs Affidavit, para. 40.

Order approving Sale Transaction dated May 1, 2013, Exhibit “E” to the Bobbs Affidavit, preamble.

31. Parties with an interest in this matter have been given a full opportunity to respond to the relief requested, pursuant to a court-ordered timetable. A further delay and second hearing of the Bankruptcy Application itself would waste judicial resources and would not advance procedural fairness. Under the circumstances, it is appropriate that this Court order that service of the materials described in Rule 70(1) of the *Bankruptcy and Insolvency Act General Rules* be dispensed with.

¹ Affidavits of Service evidencing same will be filed together with the motion materials.

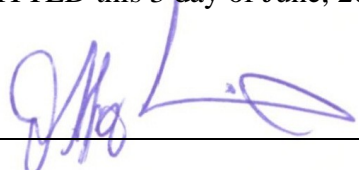
PART IV - ORDER REQUESTED

32. For the foregoing reasons, Freeport requests an order:

(a) lifting the stay of proceedings against PRACS Canada for the sole purposes of filing an application for a bankruptcy order and dispensing with further notice of same; and

(b) abridging the time for service and validating the service of this Notice of Motion and the Motion Record so that this Motion is properly returnable June 10, 2013 and dispensing with further service thereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3 day of June, 2013.


_____ for

Brett Harrison
Jeffrey Levine

McMillan LLP

Lawyer for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Re Ivaco Inc.*, 2005 CanLII 27605 (ON SC); *Re Ivaco Inc.*, 2006 CanLII 34551 (ON CA)
2. *Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 CanLII 2319 (ON SC)
3. *Re Churchill Forest Industrial (Manitoba) Ltd.* (1971), 16 C.B.R. (N.S.) 158 (Man. Q.B.)

**SCHEDULE “B”
RELEVANT STATUTES**

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

Bankruptcy application

- **43.** (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
 - (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
 - (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.
- **If applicant creditor is a secured creditor**
 - (2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.
- **Affidavit**
 - (3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.
- **Place of filing**
 - (5) The application shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.
- **Proof of facts, etc.**
 - (6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.
- **Dismissal of application**
 - (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.
- **Appointment of trustee**
 - (9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.
- **Stay of proceedings if facts denied**
 - (10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.
- **Stay of proceedings for other reasons**

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

Bankruptcy and Insolvency General Rules, CRC, c 368

70. (1) A notice indicating the time and place of the hearing of the bankruptcy application, together with a certified copy of the application and of the affidavit referred to in subsection 43(3) of the Act, must be served on the debtor, on the trustee named in the application and on the Division Office at least 10 days, or any shorter period that the court may order, before the hearing.

(2) After service of an application in accordance with this section, a copy of that application must immediately be filed at the office of the registrar.

(3) Subject to [section 71](#), service on the debtor under subsection (1) must be effected by personal service.

(4) For the purposes of paragraph 256(3)(c) of the Act, the interval is 10 days.

Appendix A

SERVICE LIST

Freeport Financial LLC v.
PRACS Institute Canada B.C. LTD.

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Respondent

Court File No: CV-13-10046-00CL

ONTARIO
**SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

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(RETURNABLE June 10, 2013)**

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