

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43 and SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

BETWEEN:

FREEPORT FINANCIAL LLC

Applicant

- and -

PRACS INSTITUTE CANADA B.C. LTD.

Respondent

**FACTUM OF PRICEWATERHOUSE COOPERS INC.
IN ITS CAPACITY AS RECEIVER OF PRACS INSTITUTE CANADA B.C. LTD.**

June 21, 2013

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PART I - OVERVIEW

1. This Factum is filed in support of a motion (the “**Motion**”) brought by PricewaterhouseCoopers Inc. (“**PwC**”) in its capacity as Court-appointed receiver (in such capacity, the “**Receiver**”) of PRACS Institute Canada B.C. LTD. (“**PRACS Canada**” or the “**Debtor**”) for, *inter alia*, an order authorizing and directing the Receiver to make a distribution (the “**Interim Distribution**”) to its secured creditor, Freeport Financial LLC (“**Freeport**”), subject to a reserve (the “**Reserve**”) retained by the Receiver to pay certain claims that have priority over Freeport’s secured claim.

2. Following the Interim Distribution, the Receiver will have completed substantially all of its mandate to sell PRACS Canada’s assets and apply the proceeds towards the satisfaction of PRACS Canada’s creditors. Only incidental tasks remain unfinished. Accordingly, to avoid the additional costs of a separate discharge motion and the need to re-attend at Court, the Receiver also seeks an Order discharging it, upon the filing of a certificate (the “**Discharge Certificate**”) confirming that the Receiver has made all payments contemplated herein and has performed all remaining activities described in the Third Report of the Receiver, dated June 19, 2013 (the “**Third Report**”). As part of its discharge, PwC also seeks to be released from any and all liability that PwC now has or may hereafter have by reason of its acts or omissions while acting in its capacity as Receiver (the “**Release**”).

3. The Receiver also seeks additional ancillary relief in the Motion, including (a) approval of the Second Report of the Receiver, dated June 6, 2013 (the “**Second Report**”), the Third Report and the activities of the Receiver described therein; and

(b) approval of the fees and disbursements of the Receiver and the Receiver's legal counsel, Blake, Cassels & Graydon LLP ("**Blakes**").

PART II -FACTS

Background

4. On March 22, 2013, upon an application by Freeport, Mr. Justice Wilton-Siegel issued an Order (the "**Receivership Order**") appointing PwC as Receiver, without security, over all of the assets, undertakings and property (the "**Property**") of PRACS Canada, pursuant to section 243(1) 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.C. 1990, c. C-43, as amended.

Third Report, at para. 1, Motion Record Tab 2, Page 12.

5. On April 19, 2013, the Receiver entered into an asset purchase agreement (the "**APA**") with CML HealthCare Bioanalytics Inc. f/k/a 1893929 Ontario Inc. ("**CML**") and 2368350 Ontario Inc. ("**Inflamax**" and, together with CML, the "**Purchasers**") for the purchase of substantially all of the Debtor's right, title and interest in and to the Property for approximately \$3.575 million (the "**Sale Transaction**")

Third Report, at para 3, Motion Record Tab 2, Pages 12-13.

6. The APA was approved by this Court on May 1, 2013 (the "**Approval and Vesting Order**") and the Sale Transaction closed on May 3, 2013.

Third Report, at para. 10, Motion Record Tab 2, Page 17.

7. As of May 22, 2013, PRACS Canada owed Freeport approximately \$4,272,186 in principal and accrued interest, plus professional fees and expenses, which continue to accrue (the “**Total Indebtedness**”).

Affidavit of Donald T. Bobbs, sworn May 28, 2013, at para. 9; Third Report, at para. 41, Motion Record Tab 2, Page 25.

8. Freeport was granted leave from the Court to issue an application for a bankruptcy order against PRACS Canada and, pursuant to an Order issued by Mr. Justice Morawetz on June 10, 2013 (the “**Bankruptcy Order**”), PRACS Canada was adjudged bankrupt.

Third Report, at para. 22, Motion Record Tab 2, Page 20.

9. Pursuant to the Bankruptcy Order, PwC was appointed as trustee in bankruptcy (the “**Trustee**”).

Third Report, at para. 22, Motion Record Tab 2, Page 20.

10. As a result of the Bankruptcy Order, certain deemed trust claims – including the deemed trust for Harmonized Sales Tax (“**HST**”) in the amount of approximately \$70,300 and the deemed trust for vacation pay under the *Employment Standards Act* (Ontario), 2000 S.O. 2000, c. 41 in the amount of approximately \$27,300 – are subject to the distribution scheme set out in the BIA and constitute unsecured claims in a bankruptcy, ranking behind Freeport’s secured claim.

Second Report, at paras. 9-10, Motion Record Tab 2C, Pages 80-81.

11. Other priority claims – including the Receiver’s Charge (as defined in the Receivership Order), the deemed trust claim of Canada Revenue Agency (“**CRA**”) for withheld but unremitted source deductions (the “**Deemed Trust Claim**”), and the secured claims in respect of wages, salaries and commissions pursuant to section 81.4 of the BIA (the “**s. 81.4 Claims**”) – continue to have priority over Freeport’s secured claim.

Freeport’s Security

12. PRACS Canada and its direct and indirect subsidiaries entered into a credit agreement dated as of June 20, 2012, as amended from time to time (the “**Credit Agreement**”), with various financial institutions (the “**Lenders**”) including Freeport as agent and lead arranger.

Third Report, at para. 36, Motion Record Tab 2, Page 24.

13. The Total Indebtedness is secured by first registered liens and security interests (the “**Freeport Security**”) granted pursuant to a general security agreement (“**GSA**”), dated as of June 20, 2012, granted by PRACS Canada in favour of Freeport.

Third Report, at para. 37, Motion Record Tab 2, Page 24.

14. The Lenders are the Debtor’s only secured creditors.

15. Blakes has rendered an opinion that, subject to the standard assumptions and qualifications set out therein, the security granted by the Debtor in favour of Freeport under the GSA, as registered pursuant to the *Personal Property Security Act* (Ontario)

and the *Personal Property Security Act* (British Columbia), creates a valid and perfected security interest in the Debtor's business and Property.

Third Report, at para.39, Motion Record Tab 2, Pages 24-25.

The Proposed Interim Distribution

16. The Receiver's statement of cash receipts and disbursements for the period from March 22, 2013 through June 18, 2013 indicates that the Receiver currently has \$3,235,089.79 in cash on hand.

Third Report, at para. 23, Motion Record Tab 2, Page 21.

17. Accordingly, the Receiver seeks authorization to make an Interim Distribution of \$2,735,089.79 to Freeport. The Interim Distribution is substantially less than the Total Indebtedness, which will enable the Receiver to pay out part of the Total Indebtedness while still maintaining a sufficient amount in the Reserve to pay priority claims and other amounts owed by the Receiver in priority to Freeport's secured claim.

The Reserve

18. The Freeport Security is subject to certain prior charges and security interests or claims against the Property (either by operation of law or by way of agreement with Freeport) and the Receiver seeks authority to pay the following amounts owing from the Reserve, without further Order of this Court:

- (a) The Receiver's accrued and unpaid obligations as of the date of the Third Report, in the amount of \$41,121 (collectively, the "**Accrued**

Obligations”), which include unpaid fees and disbursements (secured by the Receiver’s Charge) and outstanding or unpaid expenses related to the Receiver’s occupation of PRACS Canada’s former leased premises prior to the closing of the Sale Transaction;

Receivership Order, at para. 18, Motion Record Tab 2A, Page 37.

- (b) The Receiver’s estimated amount of the Receiver’s fees and disbursements (including the fees and disbursements of its legal counsel) required to complete the administration of the receivership proceedings, in the total amount of approximately \$50,000 (collectively, the “**Remaining Fees and Disbursements**”), which are also secured by the Receiver’s Charge;
- (c) CRA’s Deemed Trust Claim for withheld but unremitted source deductions owing by PRACS Canada (the “**Deemed Trust Claim**”) in the estimated amount of \$18,879 but subject to CRA’s completion of a certain trust examination (the “**Trust Exam**”);
- (d) The s.81.4 Claims in respect of outstanding wages and vacation pay for former PRACS Canada employees in the amount of \$29,741; and
- (e) The fees and disbursements (the “**Trustee Fees**”) of the Trustee relating to the discharge of its statutory duties, up to the amount of Freeport’s agreed funding in respect of the Trustee Fees in the amount of \$40,000

(collectively, the Accrued Obligations, the Remaining Fees and Disbursements, the Deemed Trust Claim, the s. 81.4 Claims and the Trustee Fees are the “**Reserve Obligations**”).

Third Report, at para. 7, Motion Record Tab 2, Pages 13-15.

19. Accordingly, the Receiver estimates current Reserve Obligations to be approximately \$179,741 and seeks to retain a Reserve of \$500,000 to satisfy the Reserve Obligations, any potential contingencies associated therewith and any additional priority claims that may arise.

Third Report, at para. 44, Motion Record Tab 2, Page 26.

20. When the Receiver, in its reasonable discretion, determines that all Reserve Obligations are paid, the Receiver seeks authority to pay residual amounts, if any, remaining in the Reserve to Freeport, up to the amount of the Total Indebtedness, without further Order of this Court.

21. The Receiver is still in the process of collecting certain receivables owed to PRACS Canada. If and when such receivables are collected, they will be included in the Reserve to pay, first, the Reserve Obligations and, second, amounts owing to Freeport. Even if all outstanding receivables are collected in full, however, the Receiver does not anticipate that there will be sufficient funds in the receivership estate to pay the Total Indebtedness in full or to pay the Debtor's unsecured creditors.

Third Report, at para. 47, Motion Record Tab 2, Page 26.

22. To the extent that any amounts do remain in the receivership estate after payment of the Total Indebtedness, the Receiver seeks authority to pay over any remaining amounts to the Trustee for distribution in the bankruptcy proceeding pursuant to the priority scheme of the BIA, without further Order of this Court.

Receiver's Activities

23. The Receiver's activities up to April 25, 2013 were approved in the Approval and Vesting Order.

24. As outlined in the Second Report and the Third Report, the Receiver's activities since that date have included, *inter alia*: communicating with the Purchasers, Freeport and other interested stakeholders; closing the Sale Transaction pursuant to the APA; completing and filing a Receiver's Certificate; performing all necessary post-closing activities, including monitoring the Purchasers' compliance with the Third-Party Property Protocol (as defined in the APA); notifying certain former PRACS Canada employees whose provincial deemed trust claims for outstanding vacation pay would be affected or reversed by the Bankruptcy Order; arranging for the completion and mailing of T4s for 2013 to PRACS Canada's 216 former employees; soliciting offers to purchase certain miscellaneous assets not subject to the Sale Transaction; and seeking to collect all accounts receivable owing to the Debtor, all of which is consistent with the Receiver's powers and obligations under the Receivership Order.

Third Report, at para. 19, Motion Record Tab 2, Pages 18-20.

25. The Receiver respectfully requests that such activities be approved by this Court.

Fees and Disbursements

26. The Receiver and Blakes have accrued fees and expenses in their capacity as Receiver or counsel to the Receiver, respectively.

27. As outlined in the Affidavit of Tracey Weaver (the “**Weaver Affidavit**”), sworn June 19, 2013, the fees and disbursements of the Receiver for services rendered for the period ending May 31, 2013 total \$506,300.49 plus HST, which amount includes legal fees already paid to Blakes in the amount of \$63,547.54.

Third Report, at para. 32, Motion Record Tab 2, Page 23

28. As outlined in the Affidavit of Matthew Kanter (the “**Kanter Affidavit**”), sworn June 18, 2013, the fees and disbursements of Blakes, as counsel to the Receiver, for services rendered for the period ending June 14, 2013 total \$260,442.65 plus HST, which amount does not include the \$63,547.54 already paid by the Receiver and thus included as part of the Receiver’s fees and disbursements.

Third Report, at para. 33, Motion Record Tab 2, Page 23.

PART III -- ISSUES

29. The issues on this Motion are as follows:

- (a) Should this Court authorize the Receiver to make the Interim Distribution to Freeport, in the amount of \$2,735,089.79?
- (b) Should this Court authorize the Receiver to pay the Reserve Obligations from the Reserve without further Court Order?

- (c) Should this Court approve the fees and disbursements of the Receiver and counsel to the Receiver?
- (d) Should this Court approve the activities of the Receiver?
- (e) Should this Court discharge and release the Receiver?

PART IV -- ARGUMENT

A. THE INTERIM DISTRIBUTION ORDER SHOULD BE GRANTED

30. The Receiver respectfully submits that the Interim Distribution to Freeport in the amount of \$2,735,089.79 should be approved because PRACS Canada owes Freeport approximately \$4,272,186 in principal and accrued interest, plus professional fees and expenses that continue to accrue, all of which is secured pursuant to the GSA.

31. In addition, the Receiver has proposed to hold back a sufficient amount in the Reserve to satisfy all of the estimated Reserve Obligations, as well as any potential contingencies or unexpected but valid post-receivership expenditures. The Receiver believes that a \$500,000 Reserve is sufficient.

32. Orders granting interim distributions with a reserve for undetermined priority claims are routinely granted by Canadian courts in insolvency proceedings and receiverships.

Re AbitibiBowater Inc., 2009 QCCS 6461, 2009 CarswellQue 14224 (QC. Sup. Ct.) (“**Abitibi**”) at paras. 70-75.

Re Northstar Aerospace Inc., 2012 ONSC 4423, 2012 CarswellOnt 9607 (Ont Sup Ct. J. [Commercial List]).

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd., (2007), 37 C.B.R. (5th) 107 (Ont. Sup. Ct. J.) at para. 9.

33. While *Abitibi* dealt with an interim distribution pursuant to a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, Justice Gascon considered a number of factors in considering whether to approve an interim distribution that are equally applicable to a receivership proceeding, including whether:

- (a) the payee's security is valid and enforceable;
- (b) the amounts owed to the payee exceed the distribution; and
- (c) the distribution would result in significant interest savings.

Abitibi at para. 75.

34. In the case at bar, the Receiver's independent legal counsel has determined that Freeport's security is valid, enforceable and exists over substantially all of the Debtor's Property. In addition, the Total Indebtedness far exceeds the contemplated Interim Distribution such that no creditor subordinate to Freeport will suffer any prejudice.

35. While the Interim Distribution will not result in significant interest savings, it is still appropriate given the equities involved. The Lenders hold valid and enforceable security and only the lenders – and no other creditors – are prejudiced by the delay in distributing the proceeds from the receivership, given that the Reserve is sufficient to satisfy current and future claims and contingencies that could rank in priority to Freeport's secured claim. There is no valid reason to further delay the Interim Distribution.

B. THE RECEIVER SHOULD BE AUTHORIZED TO PAY THE RESERVE OBLIGATIONS FROM THE RESERVE WITHOUT FURTHER COURT ORDER

36. The Reserve Obligations constitute claims that must be paid in priority to the Total Indebtedness either by statute or by Freeport's agreement to fund PRACS Canada's bankruptcy proceeding. Accordingly, the Receiver respectfully submits that the Receiver should be able to pay the Reserve Obligations from the Reserve as they are determined, without further Order of the Court.

37. Moreover, to the extent that the Reserve Obligations are paid in full, any amounts left in the Reserve would accrue to Freeport, as the Debtor's sole secured creditor. Thus, the Receiver should be authorized to pay any residual amounts in the Reserve to Freeport, up to the amount of the Total Indebtedness, without requiring further Court approval and the attendant costs that another distribution motion would entail.

38. To the extent that the Total Indebtedness is satisfied in full, which the Receiver considers very unlikely, residual amounts will remain in the receivership estate. In such a scenario, distributions would have to be made to PRACS Canada's unsecured creditors in accordance with the distribution provision of the BIA. Accordingly, the Receiver proposes to pay amounts remaining in the receivership estate, after payment of the Total Indebtedness in full, to the Trustee, who will be best situated to make distributions to the Debtor's unsecured creditors in the bankruptcy proceeding.

C. THE FEES AND DISBURSEMENTS SHOULD BE APPROVED

39. The Receiver respectfully submits that its fees and disbursements, together with the fees and disbursements of its legal counsel, should be approved.

40. It is the Receiver's view that its and Blakes' fees and disbursements were incurred at the Receiver's and Blakes' standard rates and charges, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and on behalf of the Receiver by Blakes in connection with the receivership.

Third Report, at para. 36, Motion Record Tab 2, Page 24.

D. THE RECEIVER'S ACTIVITIES SHOULD BE APPROVED

41. The activities of the Receiver from and after the date of the Approval and Vesting Order, as set out in detail in the Second Report and the Third Report, were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order and the Approval and Vesting Order, and were in each case in the best interests of the Debtor's stakeholders generally. The Receiver therefore respectfully submits that such activities should be approved by this Court.

E. THE RECEIVER SHOULD BE DISCHARGED AND RELEASED

42. The Receiver has substantially completed its limited mandate as contemplated by the Receivership Order, the Approval and Vesting Order, the APA and under the BIA. Accordingly, the Receiver respectfully submits that it should be discharged and released, following the filing of the Discharge Certificate with the Court, attached as **Schedule "A"** to the Distribution Order, certifying that all payments contemplated by the Third Report, including the payment of the Reserve Obligations, have been made, and the activities necessary to conclude the receivership proceedings have been completed.

43. The Receiver is seeking a discharge at the hearing of this Motion in order to avoid the cost to the receivership estate of another motion, which would include another report to the Court, another motion record, and the re-attendance by the Receiver and its counsel. The Receiver believes, under the circumstances of this receivership, that it is both efficient and appropriate for this Court to grant the Receiver a discharge upon the filing of the Discharge Certificate.

44. PwC also seeks a release from any and all liability that PwC now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of PwC while acting in its capacity as Receiver, save and except for any gross negligence or wilful misconduct on the part of PwC.

45. The Release is a standard term in the Commercial List model discharge order. Indeed, as Justice Pattillo asserted in *Kraus*, “in the absence of any evidence of improper or negligent conduct, the release should issue.” As in *Kraus*, there is no such evidence in the case at bar. Thus, the Release should be granted.

Pinnacle Capital Resources Ltd. v. Kraus Inc., 2012 CarswellOnt 14138 (Ont. Sup Ct. J. [Commercial List]) at para. 47.

46. Freeport, the only party with an economic interest in the Debtor’s Property, is supportive of this discharge mechanism and the Release.

PART V -- RELIEF REQUESTED

47. For the foregoing reasons, the Receiver respectfully requests that this Court grant the following relief:

- (a) approving the Second Report and the activities of the Receiver described therein;
- (b) approving the Third Report and the activities of the Receiver described therein;
- (c) approving the accounts of PwC as set forth in the Weaver Affidavit for the period up to and including May 31, 2013;
- (d) approving the accounts of Blakes as set forth in the Kanter Affidavit for the period up to and including June 14, 2013;
- (e) authorizing and directing the Receiver to distribute the Interim Distribution of \$2,735,089.79 to Freeport from the Receiver's available cash on hand;
- (f) authorizing and directing the Receiver to pay the Reserve Obligations and any contingencies that may arise from the Reserve, without further Order of this Court;
- (g) upon satisfaction of the Reserve Obligations in full, authorizing and directing the Receiver to pay any remaining amounts in the Reserve to Freeport, up to the amount of the Total Indebtedness, without further Order of this Court;
- (h) authorizing and directing the Receiver to pay amounts remaining in the receivership estate after payment of the Total Indebtedness, if any, to the

Trustee, for distribution in accordance with the distribution scheme in the BIA, without further Order of this Court;

- (i) discharging the Receiver, subject to the Receiver completing its administration of the receivership proceedings and filing a Discharge Certificate with the Court confirming that the Receiver has completed all steps necessary to conclude the receivership proceedings; and
- (j) upon the filing by the Receiver of the Discharge Certificate, releasing and discharging PwC from any and all liability that PwC now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of PwC while acting in its capacity as Receiver, save and except for any gross negligence or wilful misconduct on the part of PwC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Linc Rogers / Matthew Kanter

Lawyers for PricewaterhouseCoopers Inc.,
in its capacity as Court-Appointed Receiver

SCHEDULE “A”

LIST OF AUTHORITIES

Re AbitibiBowater Inc., 2009 QCCS 6461, 2009 CarswellQue 14224 (QC. Sup. Ct.).

Re Northstar Aerospace Inc., 2012 ONSC 4423, 2012 CarswellOnt 9607 (Ont. Sup Ct. J. [Commercial List]).

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd., (2007), 37 C.B.R. (5th) 107 (Ont. Sup. Ct. J.)

Pinnacle Capital Resources Ltd. v. Kraus Inc., 2012 CarswellOnt 14138 (Ont. Sup Ct. J. [Commercial List]).

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act (Ontario): Section 101

INTERLOCUTORY ORDERS

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Bankruptcy and Insolvency Act: Sections 81.4 and 243

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

Liability of receiver

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Claims of officers and directors

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

“compensation”

« *rémunération* »

“compensation” includes vacation pay but does not include termination or severance pay.

“person who is subject to a receivership”

« *personne faisant l'objet d'une mise sous séquestre* »

“person who is subject to a receivership” means a person any of whose property is in the possession or under the control of a receiver.

“receiver”

« *séquestre* »

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

- (2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who
- (a) is appointed under subsection (1); or
 - (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

FREEPORT FINANCIAL LLC.

Applicant

-and-

PRACS INSTITUTE CANADA B.C. LTD.

Respondent

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

Proceeding commenced at Toronto

FACTUM OF THE RECEIVER

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