

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

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND
INSOLVENCY ACT, R.S.C. 1985, c. B-3, as AMENDED AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, AS AMENDED

**AIDE MEMOIRE BRIEF OF THE TENANT, PEACE BRIDGE DUTY FREE
INC.**

(Case Conference returnable June 14, 2023)

Date: June 12 th , 2023	<p>BLANEY MCMURTRY LLP Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5</p> <p>David T. Ullmann (LSO #42357I) Tel: (416) 596-4289 Email: dullmann@blaney.com</p> <p>John Wolf (LSO #30165B) Email: jwolf@blaney.com</p> <p>Brendan Jones (LSO #56821F) Email: bjones@blaney.com</p> <p>Lawyers for the Respondent</p>
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TAB 1

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**AIDE MEMOIRE OF PEACE BRIDGE DUTY FREE INC.
(Case Conference Returnable June 14th, 2023)**

Introduction

1. The purpose of this Aide Memoire is to report to the court on the status of: disclosure of Peace Bridge Authority (“Authority” and/or “Landlord”) records; the Authority’s refusal to disclose any material particulars of the documents for which blanket privilege has been claimed; the Rule 39.03 examinations; and the cross-examinations all further to the disclosure endorsement and order of Justice Kimmel dated April 4th, 2023 (the “**Endorsement**”) – attached at **Tab A**
2. At the hearing on May 17th, counsel for the Peace Bridge Duty Free Inc. (“Peace Bridge” and or “Tenant”) advised the court that certain issues with disclosure and production from the Authority had arisen but that he was confident that the parties would be able to resolve them in a co-operative manner. Unfortunately, that confidence has proven to have been optimistic and the production issues have proven to be material.
3. Capitalized terms are as defined in the Lease or this Aide Memoire.

Status

4. The Court has scheduled the hearing of a further motion be heard on July 25th, 26th, and 27th, 2023 in respect of issues related to the application of subsection 18.07 of the Lease and the status of the tenancy's rental account, be it be in a debit, neutral or credit position (the "**18.07 Motion**").
5. Set-out below is a comparison timeline between the requirements of the Endorsement and the steps completed to date.

Endorsement	Steps Taken
Para 17 - Productions of Landlord and Tenant to be served by May 5 th , 2023	Landlord USB and Disclosure Brief #1 produced May 5 th , 2023 Tenant Document Brief produced on May 5 th , 2023
Para 16 - Rule 39.03 examination of Mr. Greg O'Hara, to be conducted by May 26 th , 2023	O'Hara – Withdrawn by Landlord with prejudice and without objection
Para 16 - Rule 39.03 examinations of Karen Costa and Tim Clutterbuck to be conducted by May 26 th , 2023	Parties agreed on May 19 th , 2023 to a slightly delayed schedule to commence Rule 39.03 examinations to accommodate witness and Authority's counsel scheduling limitations. (Tenant had proposed May 19 th or 26 th) Costa and Clutterbuck – examination commenced on May 30 th , 2023
Para 19 - Cross - Examinations of Mr. Ben Mills, Mr. Ron Rienas, and Mr. Jim Pearce	Scheduled for June 5 th , 6 th and 7 th . And adjourned by Tenant because the Authority had not complied with the spirit and content of Justice Kimmel's disclosure order and/or ordinary litigation practice, and because the Rule 39.03 examinations were incomplete
Undertakings to be answered in writing by June 30	Tbd

Factum of Tenant by July 7	Tbd
Factum of Landlord by July 14	Tbd
Reply Factum July 21	Tbd
Hearing of 18.07 motion	July 25 th , 26 th , 27 th
Receivership hearing	September 22 nd , 2022

6. The Authority asserts it made production of documentation as expressly noted in the Endorsement, as opposed to making complete production in a spirit of co-operation and utilizing the Endorsement as setting forth areas where production was needed. Peace Bridge asserts the Authority materially failed to comply with the ordinary production requirements in this matter (as described in more detail later).
7. The dispute over proper disclosure has led to the adjournment of the Rule 39.03 examinations, and to the deferral of cross-examinations. The parties seek advice and direction from this court. (At this point none of the examinations are complete, although two Rule 39.03 examinations were commenced on May 30th, but were adjourned pending answers to undertakings and proper production of relevant documents and disclosure of the reasons for privilege, and the documents for which privilege is claimed.)
8. The Tenant asserts that the Rule 39.03 examinations and the cross-examinations require fulsome disclosure of material relevant documents, and that claims for privilege need to be identified by document and reason, and that until such time as all examinations and cross-examinations are properly able to be conducted that any motion hearing date should be adjusted to reflect time required for proper production and the rescheduling of the completion of the Rule 39.03 examinations and thereafter the cross examinations.
9. At paragraphs 47-49 of this aide memoire Peace Bridge sets forth its proposal for adjusting timing by utilizing court dates already set aside by the Court and reserved for this matter.

Production Issues

10. The parties exchanged productions on or about May 5th, 2023. However, the manner in which the parties' productions were exchanged were dramatically different.
11. The Tenant submitted its productions in accordance with the usual practice in litigation, including scheduling its productions and identifying those productions that are privileged. The productions from the Tenant were similar to what would normally be expected or what would be produced in connection with an affidavit of documents. A copy of the index listing documents in chronological order from the Tenant's brief is attached as **Tab B**. The documents were produced in PDF format identified by date (YYYY-MM-DD).
12. The Landlord did not adopt this approach. Rather, it provided a "document dump" unindexed, largely uncategorized and unsorted. Some emails were separated by year in hard copy and approximately 300 additional unsorted emails were located on a USB stick. The Landlord did not identify any documents that it was claiming privilege over.
13. The Tenant has now learned that the Landlord withheld documents from Disclosure Brief #1 due to claims of privilege, but did not disclose the existence of such documents or identify that a privilege was being asserted. Material documents were not included such as meeting minutes where the Authority considered adjustments to rental payments under to subsection 18.07 of the Lease (November 20th, 2020 and December 17th, 2020), along with reports that were considered at meetings, and that formed the basis for direction given to Authority staff at those meetings.
14. On May 16th, 2023, in response to this, the Tenant wrote to the Landlord to seek clarification and further identification of missing documents, and to inquire into the circumstances and privilege of any of the documents and to require a response well in advance of the examinations. See correspondence at **Tab C**.
15. On or around this time, despite repeatedly asserting Rule 39.03 examinations of Greg O'Hara were necessary, the Landlord withdrew its demand to examine Greg O'Hara.

16. The two Rule 39.03 examinations to be conducted in connection with the Authority being Ms. Karen Costa (as directed by the Endorsement), and Mr. Tim Clutterbuck the former-chair of the Board at the material times, being the representative of the Board selected by the Tenant, were scheduled to both take place on May 30th, 2023.
17. The Tenant initially proposed the examinations take place in St. Catharines. The Landlord insisted on Fort Erie until it appeared the examinations would have to be rescheduled because no court report was available to attend in Fort Erie, at which time the Landlord allowed the Tenant to schedule the examinations in St. Catharines.
18. The Landlord ultimately produced a further disclosure brief on May 26th, 10 days after the May 16th letter and only one business day before the Rule 39.03 examinations to effectively compel the Tenant to proceed with the Rule 39.03 examinations with minimal time to analyze Disclosure Brief #2.
19. The index of Disclosure Brief #2 inexplicably identified only four emails of the approximately 300 emails from the USB stick that was delivered with Disclosure Brief #1.
20. For the first time, the Authority also disclosed that it was asserting total privilege over three reports and six sets of meeting minutes, instead of proceeding in the ordinary course to produce those documents redacting those portions where privilege was being claimed.
21. The Tenant attended the Rule 39.03 examinations as scheduled and attempted to complete the examinations and asked for an explanation about why only 4 of the unsorted USB emails produced with Disclosure Brief #1 were listed in Disclosure Brief #2.
22. It quickly became quite clear in the Rule 39.03 examinations that the deficiencies in the Authority's productions, including the failure to disclose meeting minutes and reports, impacted the ability to properly conduct and complete the examinations.
23. In particular, the examination of Mr. Clutterbuck, which only took two hours,

resulted in twenty-two (22) undertakings or refusals, almost all of which represented important productions that were not delivered, or issues with productions.

24. In the [Rule 39.03](#) examination of Ms. Karen Costa, Mr. Stanek commenced a cross-examination of his own witness in accordance with [Rule 39.03](#). That Rule 39.03 examination is also adjourned.

39.03 Examinations are to be complete before Cross Examinations

25. It is black-letter law that 39.03 examinations must be completed before cross examinations are conducted. The schedule in the Endorsement reflects that common-sense approach. It is also set out in the rules:

39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under [rule 39.03](#) may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, [r. 39.02 \(1\)](#).

(1.1) Subrule (1) does not apply to an application made under [subsection 140 \(3\)](#) of the [Courts of Justice Act](#). O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under [rule 39.03](#) without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under [rule 39.03](#). R.R.O. 1990, Reg. 194, [r. 39.02 \(2\)](#).

To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, [r. 39.02 \(3\)](#).

26. After taking one-day to analyze the implications of the disclosure issues and seek instructions from Peace Bridge, Blaney wrote to Gowlings on June 1st, 2023, and identified on a preliminary basis the deficiencies noted to that point in time and the fact that the examinations under [Rule 39.03](#) were still outstanding and incomplete. A copy is attached as **Tab D**.

27. The letter sets out in detail multiple areas of deficiency in the disclosure by the Authority.
28. The Landlord and Tenant exchanged further letters over the weekend on June 2nd, and June 4th. They are attached at **Tab E**.
29. Given the outstanding issues as identified in the letter of June 1st, the cross examinations of Mr. Ben Mills, Mr. Ron Rienas, and Mr. Jim Pearce were all adjourned, and the Landlord was advised that this matter would return before the Court at the scheduled case conference on June 14th at which point the direction of the Court would be sought.
30. On June 7th, when the transcripts were received from the Reporter, a list of undertakings and refusals was promptly sent to the Landlord. A copy of that letter is attached as **Tab F**.
31. On June 7th, 2023, the Landlord provided alleged responses to undertakings and refusals, but most responses were, “This request goes beyond the disclosure order by Her Honour”. Such refusals appear to be contrary to paragraph 21 of the Endorsement, and ignores customary litigation disclosure practice. Gowlings letter is attached at **Tab G** (undertakings charts reproduced without attachments).

Importance of Proper Disclosure

32. This is not merely a technical issue. It is the position of the Tenant that the Landlord is trying to specifically withhold documents and take advantage of the accelerated motion return schedule in this matter in order to avoid full compliance with usual discovery and production obligations for a complex and material piece of litigation, retreating to the position repeatedly that the court did not order the disclosure requested, rather than demonstrating that such disclosure is not relevant or germane to the dispute.
33. For example, it was disclosed in the examinations that the key board meetings were *recorded* in the ordinary course as they were conducted by Zoom, but the video

recordings were not disclosed or even mentioned until volunteered by Mr. Clutterbuck in response to a direct question on point in his examination. Recordings are still not produced. Instead of addressing the Zoom video recordings, the Authority advised that “audio recordings” made for the purpose of recording minutes were deleted, and avoided the issue of the Zoom videos.

34. Similarly, the Landlord has taken a very broad view of what is privileged, choosing to withhold entire meeting minutes and reports, rather than redacting allegedly privileged portions.
35. The Landlord asserted privileged over key board minutes, the disclosure of which was ordered in the Endorsement. The privilege was asserted in writing on the basis that Landlord counsel *attended* the board meeting. However, it has now been established by the record that Landlord counsel *did not attend* the board meetings in question and the minutes in fact do not appear to contain any solicitor-client privileged communication.

No Prejudice to Delay

36. On May 17th, 2023, this Court ordered the payment of the Minimum Rent contemplated by the Lease before the application of subsection 18.07 of the Lease, the so-called full rent. The first such payment was made on June 1st, 2023, to the Landlord and will continue to be made again monthly in accordance with the order. As such, the Landlord faces no prejudice from altering the motion return schedule, and in fact is potentially benefited by delay while this matter unfolds assuming the Tenant is successful.
37. Payments continue to be made to the Bank when due and the Bank continues to hold material cash collateral security.
38. The schedule in this matter was originally set when the Landlord was Normal Rent (20% of Gross sales plus additional rent and HST) being what the Tenant suggests is rent due by reason of the application of sub section 18.07 of the Lease which is less than what the Authority claimed to be full rent. This was key amongst factors that

the Court considered in bifurcating the Tenant's cross motion and setting a very accelerated hearing schedule in respect of the subsection 18.07 issue. Now that alleged full rent is being paid, any alleged prejudice to the Authority has dissipated.

39. Further, the Landlord's witnesses testified that the Landlord has not done any analysis of what rent or cost recovery it might receive from another tenant having regard to a full analysis of the net economic recovery after considering all direct and indirect costs of obtaining a replacement tenant.
40. Given the endorsement of May 17th, the current accelerated motion return schedule is unnecessary to the Authority, and prejudicial to Peace Bridge when compared against the need for the Court to have a full record before it. The Tenant notes that 8 affidavits have been filed, several hundreds of documents were produced in May for the first time, and there will be transcripts from at least five examinations.
41. We have advised the Monitor and the Bank of the production and privilege issues (see correspondence at **Tab H**).
42. In the ordinary course of litigation, productions, failed undertakings and refusals would be the subject of fully briefed motions before this court to force compliance. The court gave the parties the opportunity to deal with this matter quickly and with voluntary compliance on the assumption, presumably, that the parties would act reasonably and in good faith to facilitate a fair and orderly hearing.
43. Given the failure of the Authority to voluntarily meet its obligations under the Endorsement, or ordinary litigation practice in advance of the examinations, and its written positions thereafter this matter cannot be completed without further judicial intervention on procedural and evidentiary issues.
44. For example, if it is going to be the Landlord's position, as set out in their letter of June 7th, 2023, that they are simply going to refuse most or all of the undertakings, there will have to be a refusals motion in this manner, which can also be scheduled at the case conference. That motion would have to be completed before the examinations can be rescheduled.

45. The Landlord has advised Peace Bridge that the earliest examinations can now be completed would be June 30th, and that will happen only if documentary production is made on a co-operative basis and not used as a sword to advance litigation interests.
46. It is not reasonable (and more than likely not possible) that this matter can proceed to a hearing on its merits commencing July 25th, given the foregoing.
47. Given this court has already set aside September 22nd, 2023 as the prospective receivership motion return date (if required), that date could possibly be used as a hearing date. Mr. Wolf is out of the country overseas from the 5th of September and for the balance of the month and therefore dates in mid-October would be preferable to the Peace Bridge.
48. The July 25th - 27th hearing dates could become a new case conference date to update the court with the status of productions and Rule 39.03 examinations and cross-examinations etc., which would in turn minimize the risk of further motion delay
49. If necessary, a refusals motion could also be scheduled during that 3-day period so that it is already booked should either party consider such to be necessary.

ALL OF WHICH IS HEREBY SUBMITTED THIS 12th DAY OF JUNE 2023 BY:



David Ullmann

TAB 2

Document Relied Upon

TAB A



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL

DATE: 4 April 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: RBC v. Peace Bridge Duty Free Inc.

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

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Name of Person Appearing	Name of Party	Contact Info
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Mukul Manchanda	Monitor's representative	mmanchanda@spergel.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. This case conference was scheduled pursuant to the court's January 19, 2023 endorsement, which specified the following agenda of matters to be considered and addressed, post-mediation:
 - a. A report from the parties about any aspects of their disputes that have been resolved.
 - b. The costs of the Landlord's stay motion (decided by the court's January 16, 2023 endorsement) and whether those costs should be decided now or deferred to be decided in connection with the Tenant's cross-motion.
 - c. Directions regarding the stay and restrictions contained in, and "normal rent" payable under, the Appointment Order, including with respect to: i) the lifting of the stay of proceedings in paragraph 9 of the Appointment Order and/or relieving the Landlord of the restrictions under paragraph 11, ii) vacating or terminating the Appointment Order, and/or iii) the amount of "normal rent" that the Tenant should be paying to the Landlord pursuant to paragraph 11 of the Appointment Order if it is to remain in place pending the decision of the court on the Tenant's cross-motion.
 - d. Directions regarding any proposed 39.03 examinations that are objected to in connection with the Tenant's cross-motion.
 - e. Directions regarding the timetabling of the cross examinations the exchange of expert reports (if any), the need for any viva voce evidence, the exchange of written submissions and the eventual hearing of the Tenant's cross-motion.
 - f. Directions regarding the timetabling of the receivership application and any other matters arising in connection with the receivership application and/or the continuing role of the Monitor.
2. The Landlord and Tenant each filed Aide Memoires in advance of this case conference which assisted framing the issues for the court's consideration. Each of these agenda items were addressed in the Aide Memoires, as well as some additional items. The court heard from counsel present and the provides herein a summary of the points addressed and the orders and directions arising therefrom.

Report on Mediation

3. It was reported in the Aide Memoires that no settlement was reached at the mediation, with respect to any issues. The Tenant has said that it intends to make a further proposal to the Landlord. The mediator is available to continue the mediation if the parties consider that it would be productive. That shall not interfere with the timetable now set for the Tenant's Cross-Motion, unless both the Landlord and Tenant request a consent adjournment of same.

Costs of the Landlord's Stay Motion

4. The Tenant wants the court to decide the issue of the costs of the Landlord's Stay Motion decided by endorsement dated January 16, 2023 (*Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327).
5. The Landlord suggests that the court's decision regarding the entitlement/quantum/scale of costs of that motion should be deferred and decided in conjunction with the costs of the Tenant's Cross-Motion. The Landlord's request is reasonable, in the circumstances, for the reasons outlined in its Aide Memoire.
6. The issue of the costs of the Landlord's Stay Motion shall be decided at the same time as the costs of the Tenant's Cross-Motion (now scheduled), or at such further and other time as the court may direct.

Further Directions With Respect to Paragraphs 9 and 11 of the Appointment Order

7. The Landlord continues to argue that it should not be required to effectively finance the Tenant pending the determination of the Tenant's Cross-Motion, by virtue of the stay of proceedings and other restrictions imposed when the Receiver was appointed, which prevent the Landlord from exercising its remedies in respect of the Tenant's failure to pay Base Rent under the Lease, and other alleged breaches of the Lease by the Tenant. The Landlord's concerns are exacerbated the longer the process takes to a decision on the interpretation of section 18.07 of the Lease.
8. The court has to balance the Landlord's position against the Tenant's assertion that it cannot afford to pay the prescribed Base Rent and its contention that it is paying "normal" rent, which is all that it is required to pay by virtue of section 18.07 of the Lease and the events that transpired from and after March of 2020. This issue is raised squarely by the Tenant's Cross-Motion.
9. To alleviate the Landlord's concerns, the court has now scheduled the earliest available date to hear the declaratory relief sought by the Tenant's Cross-Motion (Lease interpretation issues, contained in paragraphs 1-6 and paragraph 11 of the Tenant's Cross-Motion), for three days July 25, 26 and 27, 2023.
10. The Landlord remains concerned about unrecoverable rent arrears that continue to accumulate and interest on past arrears (the interest alone it calculates to be approximately \$170,000 per month. This concern is of course dependent upon the Landlord's interpretation of the Lease prevailing. The Landlord is not satisfied that the Tenant is paying enough on an interim without prejudice basis, even with the Tenant's latest projections (which only approximates the level of Base Rent that the Landlord claims for a couple of months in the summer).
11. The court's January 16, 2023 Stay Motion Endorsement and January 19, 2023 case conference endorsement left open the question of what amount of rent the Tenant should be paying to the Landlord if the stay is to remain in place pending the decision of the court on the Tenant's Cross-motion. The court has previously indicated that it has jurisdiction to set the amount of rent to be paid by the Tenant during the stay period. While the Landlord does not accept that the Tenant's ability to pay should dictate the amount that the court determines is appropriate, as a practical matter, the court considers that to be a relevant data point and had anticipated that there might be evidence available at this case conference about the Tenant's ability to pay.
12. The Tenant has offered to pay for the cost of the Monitor to independently review and verify the Tenant's confidential cash flows (that have not been shared with the Landlord) and verify whether the Tenant is able to pay the Base Rent that the Landlord is requesting be paid, or any amount beyond 20% of its gross sales (which is what it has been paying and proposes to continue to pay until its Cross-Motion has been decided).
13. The Monitor has agreed to undertake this exercise and will provide its report to counsel for the Tenant and counsel RBC on or before May 5, 2023. The Tenant will review and advise within a week whether it accepts the Monitor's review and analysis. However, the Tenant has agreed that it will abide by any direction from the court regarding any increased amount of rent to be paid pending the court's determination of the Lease interpretation point on its Cross-Motion, based on the Monitor's report.
14. The parties shall attend a 30-minute case conference on May 17, 2023 at 9:15 a.m. at which time the court will consider and provide any further directions arising out of the Monitor's report (including any issues associated with the disclosure of that report to the Landlord, if the parties have not been able to come to terms upon which the report will be shared with the Landlord before then).

Rule 39.03 Examinations

15. After some back and forth, it has been agreed that Mr. O'Hara will be examined by the Landlord. The Tenant will examine Ms. Costa and one other person to be designated from the Landlord's Board of Directors. Preferably, someone who was on the board at the time of the Lease negotiations in 2016 and during the March 2020 to December 2021 time frame. But if no such individual exists, or if the Tenant

prefers to examine the current Chairman of the Landlord it may do so, in lieu of this other board representative.

16. These Rule 39.03 examinations (3 in total) shall be completed by May 26, 2023. These should be scheduled as soon as possible to avoid conflicts for witnesses and counsel.

Timetabling Directions: Tenant's Cross-Motion

17. The Tenant requested an order for discovery-like production to be made by both sides. Given that this is a contract interpretation case in which context/factual matrix has some limited relevance but must be considered on an objective standard, the court has provided the following directions regarding limited-scope production to be made by the Landlord and the Tenant by May 5, 2023 (in advance of any examinations):
- a. Documents exchanged between the parties and between their respective counsel, unless exchanged on a without prejudice/settlement basis (to be produced to each other to the extent not already appended as exhibits to affidavits already filed on the Cross-Motion):
 - i. In the time frame in which the Lease was being negotiated (circa 2016) that relate to s. 18.07 of the Lease or its subject matter; and
 - ii. In the time frame in which the boarder restrictions came into effect and thereafter (March 2020-December 2021) with respect to the effect and implementation of s. 18.07 of the Lease.
 - b. Non-privileged internal documents of the Tenant and the Landlord relating to approval and authorization:
 - i. Regarding s. 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016). On the Landlord's side, this will also include communications between the Landlord and its external fairness advisor in the Lease RFP process; and
 - ii. Regarding the requests made and responses given with respect to concessions to be provided/given under s. 18.07 of the Lease from and after the border restrictions came into effect (in the period from March 2020 to December 2021).
18. The court has not at this time made any ruling as to the admissibility or relevance of such documents, only that they shall be produced and available to be questioned upon. Redactions made be made on the face of any such produced documents for privilege.
19. The cross-examinations of all affiants shall be completed after the Rule 39.03 examinations (above) and on or before June 7, 2023. These should be scheduled as soon as possible to avoid conflicts for witnesses and counsel.
20. If the Tenant intends to deliver an expert report on issues relevant to the aspects of its Cross-Motion that are being adjudicated on July 25-27, 2023 (notice of Cross-Motion paragraphs 1-6 and 11, Lease interpretation issues) counsel shall agree by April 10, 2023 on a timetable for the exchange of expert reports that is completed by no later than May 30, 2023 so that the experts can be examined immediately after the completion of the other witness examinations.
21. The parties shall not refuse to answer questions on the cross-examinations or Rule 39.03 examinations on grounds of relevance. The objecting party may state the objection but the question shall be answered.
22. The parties shall attend a case conference on June 14, 2023 commencing at 9:00 a.m. (scheduled for no more than 45 minutes), which shall be primarily to address evidentiary considerations for the hearing of the Cross-Motion, including whether any party considers that it might be necessary for the court to hear *viva voce* evidence from any of the witnesses. The parties should come to this case conference prepared to discuss any other logistics for the hearing, including any sealing orders that might be requested.
23. Undertakings (and questions taken under advisement or refused that the objecting party is prepared to answer) shall be answered in writing by June 30, 2023.

24. The Tenant's factum (maximum 25 pages double spaced, including appendices) shall be delivered by July 7, 2023.
25. The Landlord's responding factum (maximum 30 pages double spaced, including appendices) shall be delivered by July 14, 2023.
26. The Tenant may deliver a reply factum (maximum 5 pages double spaced, including appendices) if there are matters of proper reply not anticipated and addressed in its initial factum, by July 21, 2023.
27. All materials is to be uploaded into the CaseLines bundle for this hearing by 4:30 p.m. on July 21, 2023. All materials must be hyperlinked (factums and indices to any records).

Timetabling Directions: Receivership Application

28. The Receivership application is now returnable on September 22, 2023. It may have to be adjourned if the court's decision on the Tenant's Cross-Motion has not yet been rendered. In the meantime, RBC's counsel does not intend to participate in the cross-examinations on the Tenant's Cross-Motion but RBC and the Tenant agree that the evidence from the Cross-Motion may be used on the Receivership application if and when it proceeds, to be supplemented by further evidence as either party may deem necessary, to be exchanged (and cross-examinations to be conducted) on a timetable to be agreed upon shortly after the Tenant's Cross-Motion has been heard so that the parties are ready to proceed with that application on September 22, 2023.
29. While the Landlord does not expect to directly participate in the Receivership application, it does have an interest in when it is heard, so counsel for the Landlord shall be kept apprised of any timetabling agreements regarding the Receivership application.

Conclusion

30. The parties shall abide by the above directions and orders and timetable. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.

A handwritten signature in dark ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.

TAB B

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

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND
INSOLVENCY ACT, R.S.C. 1985, c. B-3, as AMENDED AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, AS AMENDED

DOCUMENT BRIEF OF PEACE BRIDGE DUTY FREE INC.

Date: May 5, 2023	BLANEY MCMURTRY LLP Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5 David T. Ullmann (LSO #42357I) Tel: (416) 596-4289 Email: dullmann@blaney.com John Wolf (LSO #30165B) Email: jwolf@blaney.com Brendan Jones (LSO #56821F) Email: bjones@blaney.com Lawyers for the Respondent
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INDEX A – DISCLOSED DOCUMENTS

<u>No.</u>	<u>BegDoc Date</u> <u>(yyyy/mm/dd)</u>	<u>BegAttach Date</u> <u>(yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>
1.	2016-06-23		Email from O'Hara to Shareholders	Correspondence
2.	2016-07-13		Email from Costa to Pearce attaching draft Duty Free Shop Building Lease-Draft_7.12.16	Correspondence
3.	2016-07-13	2016-07-12	Building Lease between the Authority and PBDFI Draft 7.12.16	Lease
4.	2016-07-14		Email from Costa to Pearce attaching Draft Lease 7.14.16, Schedule D part 2, and Redacted Technical Proposal Report Schedule D	Correspondence
5.	2016-07-14	2016-05-09	Response to Request for Proposal Operation of Duty Free Shop at the Peace Bridge issued by the Authority	Report
6.	2016-07-14	2016-06-13	Building Lease between the Authority and PBDFI Draft 13.06.2016	Agreement
7.	2016-07-14	2016-05-09	Redacted Technical Report Schedule D part 1 of the Authority	Report
8.	2016-07-14		Email from Costa to Pearce attaching redlined lease v12A	Correspondence
9.	2016-07-14		Duty Free Shop Building Lease EDC LAW 1389402 v12A	Agreement
10.	2016-07-15		Email from Pearce to O'Hara re August board FW 2016-07-15 EF Reinas to OHara lease deadline	Correspondence
11.	2016-07-15		Email from Pearce to OHara re note to Rienas re board meeting	Correspondence
12.	2016-07-19		Email from Costa to Pearce attaching redlined v 18B of lease	Correspondence
13.	2016-07-20		Building Lease w Schedules	Agreement

<u>No.</u>	<u>BegDoc Date</u> <u>(yyyy/mm/dd)</u>	<u>BegAttach Date</u> <u>(yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>
14.	2016-07-20		Building Lease no Sched D	Agreement
15.	2016-07-20		Email from Costa to Pearce Encls Lease v19A, Redline Lease v19A, and Schedule B	Correspondence
16.	2016-07-20	2016-06-20	Building Lease Draft v19A	Agreement
17.	2016-07-20	2016-06-20	Redline Building Lease Draft v19A	Agreement
18.	2016-07-20	2016-06-20	Schedule B to Building Lease Draft v19A	Agreement
19.	2016-07-20		Email from Darling to Mills Encl Draft Certificate re Ownership	Correspondence
20.	2016-07-20	2016-07-00	Draft Officer's Certificate re Ownership	Corporate Certificate
21.	2016-07-22		Email from Darling to Mills confirming receipt of two signed leases	Correspondence
22.	2016-07-22		Email from O'Hara Encl amended Ownership Certificate	Correspondence
23.	2016-07-22	2016-07-22	Amended Officer's Certificate of Ownership 4636_001	Corporate Certificate
24.	2016-07-29		Email to All Staff re Winning Bid	Correspondence
25.	2020-04-01		Email between PBA and PBDF re request to delay rent payment	Correspondence
26.	2020-04-03		Email from O'Hara to Rienas rent response disappointing	Correspondence
27.	2020-04-03		Letter from PBDF to PBA request telephone meeting re COVID19	Correspondence
28.	2020-04-03		Email from PBDF to PBA, cannot generate revenue when closed	Correspondence

<u>No.</u>	<u>BegDoc Date</u> <u>(yyyy/mm/dd)</u>	<u>BegAttach Date</u> <u>(yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>
29.	2020-04-06		Letter Chairman of Authority to Peace Bridge Duty Free re covid impact	Correspondence
30.	2020-04-07		Email from O'Hara to Rienas re Letter from PBA Chairman and call	Correspondence
31.	2020-04-10		Email from Rienas to O'Hara re essential services	Correspondence
32.	2020-04-16 -		EF PBA to PBDF encl draft rent deferral agreement	Correspondence
33.	2020-04-17		Email from Rienas to O'Hara Washroom issue	Correspondence
34.	2020-04-17		Email from O'Hara to Rienas encl draft rent deferral proposal	Correspondence
35.	2020-04-20		Email from O'Hara to himself re note to Rienas comments on rent deferral agreement	Correspondence
36.	2020-04-20		Email from PBDF comments on rent deferral agreement	Correspondence
37.	2020-04-21		Email from Rienas to O'Hara rent proposal	Correspondence
38.	2020-04-21		Email from O'Hara to Rienas proposed agreement and assistance	Correspondence
39.	2020-04-22		Email from Rienas to O'Hara re rent proposal	Correspondence
40.	2020-04-24		Email from Rienas to O'Hara rent proposal circulated to board	Correspondence
41.	2020-05-06		Email from Rienas to O'Hara rent deferral agreement and pandemic	Correspondence
42.	2020-11-27		Letter from Buffalo to PBDF	Correspondence
43.	2020-12-02		Email from Rienas to Pearce rec'd 2019 financials, requesting additional financial docs	Correspondence

<u>No.</u>	<u>BegDoc Date</u> <u>(yyyy/mm/dd)</u>	<u>BegAttach Date</u> <u>(yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>
44.	2020-12-08 -		Email from Rienas to Pearce will not defer rent until March 31, request partial payment by Dec	Correspondence
45.	2020-12-21		Letter from PBA to PBDF, in default under lease, demand for payment	Correspondence
46.	2020-12-23		Letter from PBDF to Buffalo	Correspondence
47.	2020-12-29		Letter from Buffalo to PBDF	Correspondence
48.	2020-12-30		Letter from PBDF to PBA, kept building secure during lockdown, cannot pay demand amount	Correspondence
49.	2021-01-15		Letter from PBDF to Buffalo	Correspondence
50.	2021-01-19		Letter from PBA to PBDF, rejecting rent proposal	Correspondence
51.	2021-01-28		Email from Pearce to PBA, responses to questions about financial statement	Correspondence
52.	2021-01-29		Letter from PBA to PBDF advising no rent has been paid since March 2020	Correspondence
53.	2021-02-19		Letter from PBA to PBDF re outstanding rent	Correspondence
54.	2021-02-25		Letter from PBDF to Buffalo re lockdown support, CERS	Correspondence
55.	2021-02-26		Letter Buffalo to PBDF re CERS	Correspondence
56.	2021-03-25		Letter from PBDF to Buffalo cashflow, rent deferral arrangements	Correspondence
57.	2021-03-26		Letter from Buffalo to PBDF Encl Spreadsheets Amounts Paid	Correspondence
58.	2021-04-01		Letter from Buffalo to PBDF Encl MPAC Assessment	Correspondence

<u>No.</u>	<u>BegDoc Date</u> <u>(yyyy/mm/dd)</u>	<u>BegAttach Date</u> <u>(yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>
59.	2021-04-12		Letter from PBDF to Buffalo CERS, status requested financials	Correspondence
60.	2021-04-13		Letter from PBA to PBDF re Rent owing and requesting 2020 financial statements	Correspondence
61.	2021-06-01		Letter from Buffalo to PBDF Encl Analysis of Revenue Spreadsheet May 31, 2021	Correspondence
62.	2021-07-15		Letter from Buffalo to PBDF Encl Analysis of Revenue Spreadsheet July 14, 2021	Correspondence
63.	2021-07-29		Letter from PBDF to Buffalo requested amounts paid, CERS	Correspondence
64.	2021-08-21		Proposal from PBDF Buffalo re rent and performance	Report
65.	2021-09-08		Letter from Gowling to PBDF Encl Notice of Default & Appendix A Sept 7 Details of Arrears	Correspondence
66.	2021-09-17		Letter from Gowling to PBDF no moratorium, requesting payment	Correspondence
67.	2021-09-20		Letter from PBDF to Gowling WLG CERS, moratorium	Correspondence
68.	2021-09-22		LF Gowling to PBDF re CERS	Correspondence
69.	2021-10-15		Letter from PBDF Proposal re Rent, Back Rent, Food Services	Correspondence
70.	2021-10-26		Letter from Gowling to PBDF re Board's opinion to proposal	Correspondence
71.	2021-11-10		Letter from Gowling to PBDF re proposal	Correspondence
72.	2021-11-16		Letter from PBDF to PBA Counter Proposal	Correspondence
73.	2021-12-10		Email from Gowling to Blaney re proposal should be made to Board	Correspondence

<u>No.</u>	<u>BegDoc Date</u> <u>(yyyy/mm/dd)</u>	<u>BegAttach Date</u> <u>(yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>
74.	2021-12-10		Email from Blaney to Gowling proposal and COVID	Correspondence
75.	2021-12-10		Email from Gowling to Blaney scheduling meeting	Correspondence
76.	2021-12-11		Email from Gowling to Blaney re continued proposal discussions	Correspondence
77.	2021-12-13		Email from Blaney to Gowling Encl Letter from Wolf	Correspondence
78.	2021-12-13	2021-12-13	Letter from Blaney to Gowling summarizing phone call discussions Encl Motion Record and Factum	Correspondence
79.	2021-12-24		Email from Blaney to Gowling negotiation process mediation	Correspondence
80.	2021-12-30		Email from Gowling to Blaney re mediation	Correspondence

INDEX B – PRIVILEGED DOCUMENTS

<u>No.</u>	<u>Parent Doc Date</u> (yyyy/mm/dd)	<u>Attachment Doc Date</u> (yyyy/mm/dd)	<u>Description</u>	<u>Document Type</u>	<u>Privilege</u>
1.	2016-06-23		Email from O'Hara to Mills	Correspondence	Client-Solicitor Privilege
2.	2016-07-01		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
3.	2016-07-02		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
4.	2016-07-02	2016-07-01	Appendix A-Draft Lease	Lease	Client-Solicitor Privilege
5.	2016-07-04		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
6.	2016-07-04		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
7.	2016-07-04	2015-08-19	Letter from MBC to Duty Free	Correspondence	Client-Solicitor Privilege
8.	2016-07-05		Email from Mills to Pearce	Correspondence	Client-Solicitor Privilege
9.	2016-07-13		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
10.	2016-07-13	2016-07-13	July 7 Meeting Clauses	Typed Notes	Client-Solicitor Privilege
11.	2016-07-13	2016-07-13	July 7 Meeting Clauses	Typed Notes	Client-Solicitor Privilege
12.	2016-07-14		Email from Pearce	Correspondence	Client-Solicitor Privilege
13.	2016-07-15		Email from Pearce	Correspondence	Client-Solicitor Privilege

<u>No.</u>	<u>Parent Doc Date (yyyy/mm/dd)</u>	<u>Attachment Doc Date (yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>	<u>Privilege</u>
14.	2016-07-15		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
15.	2016-07-15		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
16.	2016-07-15		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
17.	2016-07-15		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
18.	2016-07-19		Email from Mills to Pearce	Correspondence	Client-Solicitor Privilege
19.	2016-07-19		Email from Pearce	Correspondence	Client-Solicitor Privilege
20.	2016-07-20		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
21.	2016-07-20		Email from Pearce	Correspondence	Client-Solicitor Privilege
22.	2016-07-20		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
23.	2016-07-20		Email from Mills to Pearce	Correspondence	Client-Solicitor Privilege
24.	2016-07-20		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
25.	2020-04-22		Email from O'Hara to Mills	Correspondence	Client-Solicitor Privilege
26.	2016-07-29		Email from Pearce to Mills	Correspondence	Client-Solicitor Privilege
27.	2020-12-03		Email from Mills to PBDF	Correspondence	Client-Solicitor Privilege
28.	2020-04-22		Email from O'Hara to Mills	Correspondence	Client-Solicitor Privilege

<u>No.</u>	<u>Parent Doc Date (yyyy/mm/dd)</u>	<u>Attachment Doc Date (yyyy/mm/dd)</u>	<u>Description</u>	<u>Document Type</u>	<u>Privilege</u>
29.	2020-12-03		Email from Mills to PBDF	Correspondence	Client-Solicitor Privilege

ROYAL BANK OF CANADA

Applicant

and

Court File No. CV-21-00673084-00CL

PEACE BRIDGE DUTY FREE INC.

Respondent

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

Proceeding commenced at Toronto

**BRIEF OF DOCUMENTS OF PEACE BRIDGE DUTY
FREE INC.**

BLANEY MCMURTRY LLP

Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, ON, M5C 3G5

David T. Ullmann (LSO #42357I)

Tel: (416) 596-4289

Email: dullmann@blaney.com

John Wolf (LSO #30165B)

Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)

Email: bjones@blaney.com

Lawyers for the Respondent

TAB C

Brendan Jones
D: 416-593-2997 F: 416-594-3593
BJones@blaney.com

May 16th, 2023

Via Email Patrick.Shea@gowlingwlg.com

Mr. Patrick Shea
Gowling WLG (Canada) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON, M5X 1G5

Dear Mr. Shea:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We are writing with respect to the examinations to be completed in the coming weeks and the recent disclosure in accordance with Justice Kimmel's April 4th, 2023 endorsement.

Rule 39.03 examinations and cross-examinations of affiants

We intend to examine Karen Costa and Tim Clutterbuck pursuant to Rule 39.03. We also intend to examine Ron Rienas on his various affidavits.

We are available on May 19th, 26th for the Rule 39.03 examinations. Alternatively, we can schedule the Rule 39.03 examinations to take place before the cross-examinations of the affiants to take place during the week of May 29th to June 2nd. We can accommodate examinations any day that week.

Document briefs

You requested our position regarding the use of the document briefs for the motion before Justice Kimmel on July 25th to 27th, 2023.

As a practical matter, the Authority has not produced a list of documents that it disclosed. It produced a hard copy disclosure brief, which only separates the documents by year, and a separate "email dump" on a USB key. These emails are not organized and are not identified in a list or index. The Authority also has not identified any of the documents it is claiming privilege over.

The Authority's disclosure in its current state is not useful to consider admitting as evidence at the hearing. Please confirm that an organized brief with a list of the documents will be provided.

With respect to the content of the disclosure, the only Board Reports and Board Minutes are from 2016. The Authority has not disclosed any reports or minutes after the border restrictions came into effect. Is it the Authority's position that no such records exist?

We also ask that you kindly clarify what use you propose be made of the document brief(s). Specifically:

1. Are the documents to be admitted as authentic true copies of the originals?
2. Are all correspondence and other documents to be admitted as having been prepared, sent and received on or about the dates set out in the documents, unless demonstrated otherwise?
3. Is the content of any particular document to be admitted for the truth of its contents?
4. Are there any documents to be treated as exceptions to the general agreement on the treatment of the documents in the document book?
5. Does the Authority object to any of the documents in either of the briefs being relied upon?
6. Can Justice Kimmel rely on any documents in the document brief that have not specifically been referred to or relied upon by the parties?

Request for response

We look forward to hearing from you regarding scheduling the examinations as set out above.

We also request a response with respect to the issues relating to the document briefs well in advance of the examinations.

We would be pleased to discuss these matters with you.

Yours very truly,

BLANEY MCMURTRY LLP



Brendan Jones

BJ/gf

cc: David T. Ullmann and John C. Wolf

TAB D

Brendan Jones
D: 416-593-2997 F: 416-594-3593
BJones@blaney.com

June 1st, 2023

Via Email

Patrick Shea and Christopher Stanek
Gowling WLG (Canada) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON, M5X 1G5

Dear Counsel:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We are writing further to the examinations of Mr. Clutterbuck and Ms. Costa on Tuesday May 30th, 2023 and the Authority's Disclosure Brief delivered in hard copy on Friday May 26th, 2023.

The Authority has not to date complied with Justice Kimmel's April 4th, 2023 Endorsement regarding production of its internal documents.

Specifically, paragraph 17.b. of Justice Kimmel's Endorsement requires:

b. Non-privileged internal documents of the Tenant and the Landlord relating to approval and authorization:

i. Regarding s. 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016). On the Landlord's side, this will also include communications between the Landlord and its external fairness advisor in the Lease RFP process; and

ii. Regarding the requests made and responses given with respect to concessions to be provided/given under s. 18.07 of the Lease from and after the border restrictions came into effect (in the period from March 2020 to December 2021).

Despite the evidence given by Mr. Clutterbuck that:

1. Any lease amendment or rent relief in the form of a deferral or abatement would require direction from the board of directors;
2. The board of directors would give direction to staff by way of resolution given at its meetings;

3. The board meetings are scheduled on a monthly basis;
4. The board of directors would rely on briefing notes, reports or summaries to give directions;
5. Resolutions would be recorded in the minutes of board meetings;
6. Agendas would be circulated before board meetings; and
7. Board meetings held virtually were recorded so far as he understood it.

The Authority produced one (redacted) report from the post-Covid period, which is dated April 24th, 2020 that relates to the first rent deferral agreement.

As an example of the Authority improperly withholding records, an email from Mr. Rienas to the board (Tab C25) indicated that the second rent deferral agreement would be discussed at the November 20th, 2020 meeting. Those minutes along with the report considered at the meeting have not been disclosed.

Similarly, the December 17th, 2020 meeting minutes and reports relied upon have not been produced despite a December 17th, 2020 email from Mr. Rienas (Exhibit 1 of Ms. Costa's examination) that indicates the deferred rent was discussed and direction was given to staff by way of resolution that was "subject to legal approval", which implies that the Authority's lawyers were not at the meeting.

The November 20th and December 17th, 2020 meetings are critical meetings because the Authority somehow went from receiving a recommendation to defer all rent payments until at least March 31st, 2021 to demanding immediate payment of \$1 million and refusing to defer any rent.

In any event, the Authority cannot withhold production of the entire meeting minutes or reports relied upon based on solicitor-client privilege without any explanation.

With respect to redactions made, for example in the reports at Tab F and elsewhere in the Disclosure Brief, it is apparent that information was redacted from documents that are otherwise relevant and go directly to issues raised in the notice of motion (including that the Authority gave preferential treatment to its other duty-free store tenant).

There were also a number of emails that were identified as being relevant and produced in the first disclosure brief, that were subsequently not included in the second disclosure brief (possibly because they are unhelpful to the Authority's position) without any explanation and without identifying what was removed.

Please provide a list of all documents (noting subject matter, date, to and from) for which privilege is claimed as well as the basis for privilege.

By failing to comply with Justice Kimmel's Endorsement, the Authority has prevented our client from being able to ask Ms. Costa and Mr. Clutterbuck about key records that have been withheld. You will recall that to streamline the litigation, Justice Kimmel's April 4th, 2023 Endorsement required production of documents *in advance* of the Rule 39.03 examinations.

Instead, the Authority caused a significant number of undertakings to produce documents that should have been available before the examinations; and which will likely result in a bifurcation of examinations.

As you are aware, under Rule 39.02(2), the Rule 39.03 examinations must be completed before the cross-examinations on affidavits.

The Authority must disclose all of its records prior to completion of the Rule 39.03 examinations. Once we receive full production of documents and information about claims of solicitor-client privilege, we will advise regarding scheduling the continuation of the examinations of Ms. Costa and Mr. Clutterbuck arising from the documents the Authority failed to produce.

We ask that you produce the Authority's documents as a supplementary brief of indexed documents with a schedule of privileged documents included as soon as possible.

Should you wish to discuss these matters, please contact us.

Yours very truly,

BLANEY MCMURTRY LLP

A handwritten signature in black ink, appearing to read "Brendan Jones", written in a cursive style.

Brendan Jones

BJ/gf

cc: David T. Ullmann and John C. Wolf

TAB E

02 June 2023

Sent by E-Mail (BJones@blaney.com)

E. Patrick Shea, LSM, CS Prof Corp
Direct 416-369-7399
patrick.shea@gowlingwlg.com

Brendan Jones
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario M5C 3G5

Dear Mr. Jones:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

Thank you for your letter of 1 June 2023.

We believe that we have complied with Her Honour's direction in terms of productions and we will address the undertakings given during the Rule 39.03 examinations of Mr. Clutterbuck and Ms. Costa.

Any issues, including whether witnesses are required to re-attend, can be addressed before Her Honour at the next attendance on 14 June 2023 and there is no basis for there to be any delay in completing the scheduled cross-examinations. Rule 39.02 contemplates that the Court may permit the continuation of your Rule 39.03 examinations of Mr. Clutterbuck and Ms. Costa notwithstanding that you have cross-examined Mr. Pearce. The cross-examination of Mr. Pearce may, in fact, assist you in determining whether there is actual substantive merit to the issues raised in your letter and a need to conduct further Rule 39.03 examinations of Mr. Clutterbuck and Ms. Costa.

Without engaging a debate or argument as to the merits of your assertions, we wish to clarify certain of the assertions made in your letter:

1. The Authority has produced two—not one—reports to the Board during the post-COVID period in which the arrangements with PBDF were referenced. The e-mail at J1 is the report that was produced for the purposes of the Board meeting on 20 November 2020.
2. With respect to the 17 December 2020 Board meeting, there was no report prepared for the purposes of that meeting.
3. The explanation for claiming privilege over Board-related materials is straight-forward—lawyers were in attendance at the meeting, legal advice was discussed at the meeting or the report prepared for the purposes of the meeting provides or summarizes legal advice. Provided you agree that by producing them no privilege is being waived, the Authority would be pleased to produce the Minutes from the 20 November 2020 and 17 December 2020 meetings today.

4. With respect to the Board's conditional approval of the Second Rent Deferral, you requested from Mr. Clutterbuck an undertaking to provide an explanation and one will be provided. We suspect that you will also cross-examine Mr. Rienas on that issue.
5. Can you please identify which e-mail(s)—the date, who the e-mail was from and to whom it was sent—that you assert were included in the first printed disclosure brief, but not in the second? You were provided with all of the documents in both briefs as well as a USB containing the documents that were not provided to us in “hard” copy. The only difference between the first and second in terms of what was included was to be the inclusion of a detailed index as requested by you and tabs. If there were documents that were left out of the second brief, it was unintentional—the fact that you purport to have identified that e-mails are missing from the second brief clearly means that there has been no prejudice.
6. We will not be providing you with a list of privileged documents. PBDF did not request, and Her Honour did not order, that Affidavits of Documents be produced and PBDF did not request, and Her Honour did not require, that either side deliver a list of privileged documents.

We would, of course, be pleased to discuss the foregoing in advance of your cross-examination of Mr. Pearce on 6 June 2023.

Sincerely,

GOWLING WLG (CANADA) LLP



E. Patrick Shea, MStJ, LSM, CS

EPS:jm

cc. Chris Stanek

57041683\1

Brendan Jones
D: 416-593-2997 F: 416-594-3593
BJones@blaney.com

June 4th, 2023

Via Email

Patrick Shea and Christopher Stanek
Gowling WLG (Canada) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON, M5X 1G5

Dear Counsel:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We are writing in response to Mr. Shea's letter dated June 2nd, 2023, which followed Blaney's letter following the commencement of Rule 39.03 examinations.

Continuation of Adjourned Rule 39.03 Examinations

The Rule 39.03 examinations are presently adjourned and incomplete as there are a large number of outstanding undertakings to produce undisclosed relevant documentation.

Without the receipt of proper responses to undertakings PBDF is unable to determine whether a continued examination of Mr. Clutterbuck and/or Ms. Costa is required; although it is PBDF's current belief that further examinations will be required.

We assume that in such an event Mr. Stanek will wish to continue his own Rule 39.03 examinations of the witnesses, meaning the Authorities examinations are also incomplete.

Cross Examinations Begin After Rule 39.03 Examinations Are Complete

Further, and perhaps more importantly, by reason of Rule 39.02(1) and (2) all Rule 39.03 examinations must be completed, including delivery of responses to undertakings, before cross-examinations on the affidavits can begin. The information and documents that are produced by way of undertakings in the Rule 39.03 examinations will thus be available for the cross-examinations. This cannot be resolved by the parties agreeing to continue the Rule 39.03 examinations after the cross-examinations are completed.

Had the Authority produced the records at first instance in accordance with Justice Kimmel's endorsement this situation would likely have been avoided.

It is inappropriate for PBDF to be deprived from having a complete record of documents and evidence of the Rule 39.03 witnesses available for the cross-examination of Mr. Rienas.

The examinations scheduled for June 5th to 7th, 2023 will need to be rescheduled until the Rule 39.03 production issues are rectified and those examinations are complete.

Other Relevant Factors Impacting Examinations and Cross Examinations

While we anticipate based upon past practice that the Authority's initial reaction may well be to object to a short postponement of the cross-examinations until the Rule 39.03 examinations are complete, please consider the following:

- The Authority's initial disclosure brief did not identify any individual documents. Instead it was a hard copy brief separated (mostly) by year and a USB key "email dump" of unindexed and unorganized emails. The absence of the courtesy of ordinary documentary organization, made examinations more difficult and time consuming.
- The Authority did not identify any documents that it was claiming privilege over in its initial disclosure brief. At the end of the day on Thursday May 24th, 2023, the Authority sent a three-volume disclosure brief in PDF by email. The index only identified four emails from the USB key. The index disclosed for the first time that the Authority was claiming wholesale privilege over certain meeting minutes and reports relied upon by the Authority in respect of its rent relief considerations under subsection 18.07 of the Lease.
- The following day, the Friday before the Tuesday Rule 39.03 examinations, the Authority delivered hard copies of the three volume disclosure brief. Again, the index only identified four emails from the USB key, the same as the PDF version.
- Contemporaneously the Authority sent an email attaching a word document index to only one of the PBDF's lawyers. The covering email did not advise the word document index was different than the PDF version or the hard copy version that were sent and it appeared to be the same index as provided in PDF and hard copy. *We have now learned that the word version contained ten additional pages of index listing the emails from the USB key, although we have not been able to confirm whether the word document list corresponds with the USB "email dump".*
- It was never disclosed to us, nor to date has it been explained why the USB emails were not included and produced in the second disclosure brief either in PDF form or hard copy or organized chronologically as the other emails were.
- Ordinary disclosure practice in litigation, would result in counsel believing the different manners of delivering documents (email/hardcopy/USB) included *the same documents*- and not a "find the difference if you can" approach to identify the USB documents that were omitted from the word and hard copy documents provided. This is especially so when the Authority elected to not engage in the courtesy of noting to PBDF that a difference existed.
- Whether intentional or not, the Authority's actions caused PBDF to be misled about the Authority's productions.
- In its second disclosure productions, the Authority improperly asserted complete privilege over the entirety of various reports and meeting minutes. In effect the Authority has withheld any disclosure about who authored the reports and minutes, who received them, the purpose of the creation of any such documents. The Authority has not identified who was at the meetings for which it has claimed privileged over the minutes in their totality. Obviously, parts of each such document are not privileged and they should have been delivered in advance of Rule 39.03 examinations with redactions as necessary.
- With respect to item #1 in your June 2nd, 2023 letter, the email at tab J1 indicates that Ms. Costa was going to be discussing Report 909/20 with the Board in the context of "potential collectability issues" relating to PBDF's lease. At that meeting, the Board elected not to execute the second rent relief agreement despite Mr. Rienas' recommendation to do so.
- With respect to item #6 in your June 2nd, 2023 letter, the assertion that the Authority has no obligation to disclose what documents it elected to assert a claim of privilege over that would have otherwise been producible pursuant to Justice Kimmel's April 4th, 2023 Endorsement is extremely

problematic. Without disclosure, there is no way to test whether the privilege is appropriate or to even know that a privilege has been asserted.

Whether or not the Authority agrees with the position set out above, we trust that you understand that the examinations scheduled for June 5th to 7th, 2023 must be adjourned until the Rule 39.03 examinations are completed. While this is not ideal, and Blaney would have preferred to proceed as scheduled, the delay is entirely outside of Blaney's control.

We also note the Authority effectively is in control of the amount of delay by the timing of production of undertakings, and ideally its reconsidering of the demand to itemize privileged documents. We also note there is no prejudice to the Authority from any short delay as it is currently receiving full rent.

PBDF is hopeful that the parties can move past the current status quo in a co-operative manner such that a full and complete record is available. In this regard the PBDF is at a loss as to understand why the Authority has refused to date to make appropriate disclosure as to its documentations for which a claim of privilege is asserted.

If the Authority disagrees about the scope of production requested, we suggest a case conference be convened with Justice Kimmel to address these matters.

Yours very truly,

BLANEY MCMURTRY LLP

A handwritten signature in black ink, appearing to read "Brendan Jones", written in a cursive style.

Brendan Jones

BJ/gf

cc: David T. Ullmann and John C. Wolf

TAB F

Brendan Jones
D: 416-593-2997 F: 416-594-3593
BJones@blaney.com

June 7th, 2023

Via Email

Patrick Shea and Christopher Stanek
Gowling WLG (Canada) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON, M5X 1G5

Dear Counsel:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

We enclose the Undertakings and Refusals Charts for Karen Costa and Tim Clutterbuck from their non-party examinations held on May 30th, 2023.

Please provide the answers to undertakings and advise if you will reconsider your position on the refusals.

Yours very truly,

BLANEY MCMURTRY LLP



Brendan Jones

BJ/gf
Encl.

cc: David T. Ullmann and John C. Wolf

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

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, AS AMENDED

REFUSALS AND UNDERTAKINGS CHART

REFUSALS					
Refusals to answer questions on the examination of Karen Costa, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the questions by issues.</i>)	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
1.	52	12	To provide a copy of the second RFP Proposal.		
2.	58	15	To advise whether or not clause 18.07 is in the Authority's other leases.		
3.	308	76	To provide the Authority's operating statement and balance sheets beginning in January 2020 until December 2021.		

UNDERTAKINGS					
Outstanding undertakings given on the examination of Karen Costa, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the undertakings by issues.</i>)	Question No.	Page No.	Specific undertaking	Date answered or precise reason for not doing so	Disposition by the Court
1.	130	36	To review and provide any notes of a meeting between Ms. Costa and Mr. Rienas on or about July 18 th or 19 th , 2019.		
2.	467	125	To advise what was redacted and the reason for the redaction in the January 19 th , 2021 email from Ms. Costa to Mr. Rienas.		

June 7th, 2023

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Lawyers for Buffalo and Fort Erie Public Bridge Authority

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

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, AS AMENDED

REFUSALS AND UNDERTAKINGS CHART

REFUSALS					
Refusals to answer questions on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the questions by issues.</i>)	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
1.	42-43	13	U/A: to advise whether the amount of unrestricted cash has gone up or down since 2021 and if so by how much.		
2.	47	16	U/A: to advise what documents were in the first document brief that are not in the second document brief and advise why		

REFUSALS					
Refusals to answer questions on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the questions by issues.</i>)	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
			they were removed.		
3.	67	22-24	U/A: To provide copies of any emails, text messages or other written communication between the board members and operational staff between January 2020 and December 2021 that relates to the Duty Free stores' tenancies, both on the Canadian side and on the American side.		
4.	78	27-29	U/A: to advise whether the board gave any guidance, other than the RFP, as to what an acceptable lease would be.		
5.	83	32	U/A: to provide any copies of draft resolutions that staff brought to the board in relation to the two leases between January 2020 and December 2021.		
6.	92	36-37	U/A: to provide all reports and briefing notes		

REFUSALS					
Refusals to answer questions on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the questions by issues.</i>)	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
			that led to offers from the Authority to Duty Free.		
7.	93	40	U/A: to provide the unredacted board minutes for the regular and executive board meetings from January 2020 to December 2021.		
8.	138	58	To provide notes taken by the executive assistant, or whoever was taking notes, for the board meetings during which the Peace Bridge Duty Free lease was discussed from January 2020 to December 2021.		
9.	160	64-65	U/A: to provide the unredacted version of the reports listed in the disclosure brief as privileged or advise what has been redacted and why, who authored the reports and who they were directed to.		
10.	160	66	To provide the unredacted version of the		

REFUSALS					
Refusals to answer questions on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the questions by issues.</i>)	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
			report at F2 and for the agenda dated June 23 rd , 2016 [will advise what was redacted and why].		
11.	171-174	70-71	U/A: to advise as to when discussion happened with a third party potential tenant, with who, particulars of the discussion, and if there was written communication then provide a copy of whatever written communication there was [will provide date, everything else under advisement].		
12.	213-215	87	To provide copies of video recordings of board meetings held over the internet between January 2020 and December 2021 [refusal, unless available to the public].		

UNDERTAKINGS					
Outstanding undertakings given on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the undertakings by issues.</i>)	Question No.	Page No.	Specific undertaking	Date answered or precise reason for not doing so	Disposition by the Court
1.	38	10	To direct as to where the bylaws of the Authority can be found and if not find same to produce them.		
2.	72	26	To provide the documents that have the Board's resolutions that relate to the two Duty Free store leases.		
3.	92	38	To provide all the missing minutes and if redactions are in place advise as to what has been redacted and the basis for the redactions.		
4.	109	45	To provide copies of the lease and agreements with the American Duty Free store [will advise what details can be released, if any]		
5.	130	54	To provide an unredacted copy of the American Duty Free store's rent deferral agreement, if unable to provide, to advise why it is redacted.		

UNDERTAKINGS					
Outstanding undertakings given on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the undertakings by issues.</i>)	Question No.	Page No.	Specific undertaking	Date answered or precise reason for not doing so	Disposition by the Court
6.	131	55	If available, to provide the agenda for each board meeting from January 2020 to December 2021.		
7.	152	62	To investigate and see if there are copies of any letters sent to politicians and the Canadian Government regarding Covid relief/support, advise if there are and if they can be produced.		
8.	205-208	84	To look at the November 20 th , 2020 board minutes to determine why the lease deferral agreement was revoked.		
9.	216	87	Advise if a lawyer representing the Authority was in attendance at the November 20 th and December 17 th , 2020 board meetings.		

UNDERTAKINGS					
Outstanding undertakings given on the examination of Tim Clutterbuck, dated May 30 th , 2023.					
Issue & relationship to pleadings or affidavit (<i>Group the undertakings by issues.</i>)	Question No.	Page No.	Specific undertaking	Date answered or precise reason for not doing so	Disposition by the Court
10.	263	101	To check the meeting minutes and advise what led to the decision to revoke the rent deferral.		

June 7th, 2023

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Lawyers for Buffalo and Fort Erie Public Bridge Authority

TAB G

07 June 2023

Sent by E-Mail (BJones@blaney.com)

E. Patrick Shea, LSM, CS Prof Corp
Direct 416-369-7399
patrick.shea@gowlingwlg.com

Brendan Jones
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario M5C 3G5

Dear Mr. Jones:

Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

Attached please find the responses to undertakings and refusals given by Tim Clutterbuck and Karen Costa at the Rule 39.03 examinations held on 30 May 2023.

Sincerely,

GOWLING WLG (CANADA) LLP



E. Patrick Shea, MStJ, LSM, CS
EPS:jm
Enclosure
cc. Christopher Stanek

57112356\1

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

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF
JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

EXAMINATION FOR DISCOVERY OF KAREN COSTA
(30 May 2023)

UNDERTAKINGS AND REFUSALS

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Lawyers for Buffalo and Fort Erie Public Bridge
Authority

UNDERTAKINGS AND REFUSALS

Undertakings Requested		Page	Answer
1.	To provide a copy of the second place RFP proposal; REFUSED	12	This request goes beyond the disclosure order by Her Honour.
2.	To advise whether any other leases, including the US Duty Free store, contain a Section 18.07 clause; REFUSED	15	This request goes beyond the disclosure order by Her Honour. However, none of the other leases signed by the Authority contains Art 18.07.
	To produce Report 909/20	14	This request goes beyond the disclosure order by Her Honour. However, Report 909/20 is attached.
3.	To review and provide any notes of a meeting between Ms. Costa and Mr. Rienas on or about July 18 th or 19 th , 2016	36	Ms Costa has been unable to locate any notes from meetings that took place with Mr. Rienas on or about 18 or 19 July 2016.
4.	To provide the operating statement and balance sheets beginning in January 2020 until December 2021; REFUSED	76	This request goes beyond the disclosure order by Her Honour. However, the Authorities annual audited financials are available on the Authority's website.
5.	To advise what was redacted, and the reason for the redaction, in the January 19 th , 2021 email from Ms. Costa to Mr. Rienas	125	The redacted portion is an e-mail from Mr. Rienas to the Authority's lawyers.

ROYAL BANK OF CANADA
Applicant

-and-

PEACE BRIDGE DUTY FREE INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

UNDERTAKINGS AND REFUSALS
OF KAREN COSTA

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

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C.
1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c.
C.43, AS AMENDED

TIM CLUTTERBUCK RESPONSE TO UNDERTAKING

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Lawyers for Buffalo and Fort Erie Public Bridge
Authority

UNDERTAKINGS AND REFUSALS

Undertakings Requested		Page	Answers
1.	To direct as to where the bylaws of the Authority can be found and if not found to produce them;	10	This request goes beyond the disclosure order by Her Honour. Her Honour directed disclosure of all non-privileged internal documents regarding: (a) Art 18.07 or its subject matter; and (b) requests made and responses given with respect to concessions to be provided or given under Art 18.07. However attached at Tab 1 is a copy of the Authority's By-laws.
2.	To advise whether the amount of unrestricted cash has gone up or down since 2021 and if so by how much;- UNDER ADVISEMENT	13	This goes beyond the disclosure order by Her Honour. However, the Authority's audited financial statements are available on the Authority's website.
3.	To advise what documents were in the first brief that are not in the second brief and advise why they were removed; - UNDER ADVISEMENT	16	Mr. Clutterbuck has no personal knowledge of the documents that were in the first brief and the second brief.
4.	To provide copies of any emails, text messages or other written communication between the board members and operational staff between January 2020 and December 2021 that relates to the Duty Free stores tenancies, both on the Canadian side and on the American side – UNDER ADVISEMENT	24	This request goes beyond the disclosure order by Her Honour.
5.	To provide the documents that have resolutions that relate to the two Duty Free store leases;	26	There is no "ledger" or stand alone list of resolutions. The Minutes regarding: (a) Art 18.07 or its subject matter; and (b) requests made and responses given with respect to concessions to be provided or given under Art 18.07 have been provided except the Minutes for 20 November and 17 December 2020, which are attached as Tabs 2 and 3 , which are being

Undertakings Requested		Page	Answers
			provided on the express understanding that no privilege is being waived as a result.
	To if there were brackets provided to staff with respect to what would be acceptable for the RFP process in 2016; REFUSED	27	Mr. Clutterbuck was not on the Board in 2016
6.	To advise whether the board gave any guidance, other than the RFP, as to what an acceptable lease would be; UNDER ADVISEMENT	29	No.
7.	To provide any copies of draft resolutions that staff brought to the board in relation to the two leases; UNDER ADVISEMENT	32	This request goes beyond the disclosure order by Her Honour. However, to the best of Mr. Clutterbuck's recollection there were no resolutions brought to the Board by Authority staff regarding: (a) Art 18.07 or its subject matter; and (b) requests made and responses given with respect to concessions to be provided or given under Art 18.07 that have not been produced, aside from the resolutions in the 20 November and 17 December 2020 Minutes, which are being produced subject to their being no waiver of privilege.
8.	To provide all reports and briefing notes that led to rent relief offers from the Authority to Duty Free; - UNDER ADVISEMENT	37	Assuming the undertaking does not relate to the First and Second Rent Deferrals, there are no Reports or formal briefing notes to the Board prior to January of 2022 that led to offers from the Authority. The only formal resolution by the Board approving a (counter-) proposal to PBDF during the relevant period was made on 25 October 2021 (attached as Tab 4). There was an e-mail sent to the Board on 15 October 2021 (attached as Tab 5) and another e-mail on 22 October 2021. Privilege is claimed over the 22 October 2021 e-mail because it includes legal

Undertakings Requested		Page	Answers
			<p>advice with respect to the (counter-) proposal. Ms Costa's Memo dated 13 May 2021 (attached as Tab 6) was also provided to the Board and may be said to have led to the Board's decision in terms of the (counter-) proposal that was made on 25 October 2021.</p> <p>Report 869/20 (attached as Tab 7) led to the First Rent Deferral. Report 869/20 is redacted to remove financial information re the US duty free. There were other Reports that could be said to have led to the First Rent Deferral and/or the Second Rent Deferral over which the Authority claims privilege on the basis that they include legal advice—933/21, 938/21 and 953/21. In addition, the following e-mails were sent to the Board in connection with the request by PBDF for rent relief and may be considered to have led to the First and/or Second Rent Deferral: (a) 3 April 2020 (attached as Tab 8); and (b) 19 November 2020 (attached as Tab 9).</p>
9.	To provide all the missing minutes and if redactions are in place advise as to what has been redacted and the basis for the redactions;	38	Without waiving any privilege that might exist, the Minutes from 20 November and 17 December 2020 are attached. The Authorities lawyers were present and provided advice to the Board at all other meetings at which (a) Art 18.07 or its subject matter; or (b) requests made and responses given with respect to concessions to be provided or given under Art 18.07 were addressed.
10.	To provide all the unredacted board minutes for the regular and executive board meetings from January 2020 to December 2021;- UNDER ADVISEMENT	40	This request goes beyond the disclosure order by Her Honour.

Undertakings Requested		Page	Answers
11.	To provide copies of the lease and agreements with the American Duty Free store; - WILL ADVISE WHAT DETAILS CAN BE RELEASED, IF ANY	45	This request goes beyond the disclosure order by Her Honour.
12.	To provide an unredacted copy of the American Duty Free store's rent agreement, if unable to provide, to advise why it is redacted	54	This request goes beyond the disclosure order by Her Honour.
13.	If available, to provide the agenda for each board meeting from January 2020 to December 2021	55	This request goes beyond the disclosure order by Her Honour.
14.	To provide notes taken by the executive assistant, or whoever was taking notes, for the board meetings during which the Peace Bridge Duty Free lease was discussed from January 2020 to December 2021; - REFUSAL	58	This request goes beyond the disclosure order by Her Honour. However, audio recordings are made for the purpose of preparing Minutes, but the recordings are destroyed once the Minutes are approved.
15.	To investigate and see if there's copies of any letters sent to politicians and the Canadian Government regarding COVID relief/support, advise if there are and if they can be produced;	62	This request goes beyond the disclosure order by Her Honour. However, the Authority wrote Federal Ministers on 30 June 2020, 26 July 2021 and 16 November 2021 concerning financial assistance for the Authority (see attached Tab 10).
16.	To provide the unredacted version of the reports listed in the disclosure brief as privileged or advise what has been redacted and why, who authored the reports and who they were directed to; - UNDER ADVISEMENT	65	The Reports that were not disclosed were prepared by Mr. Rienas with the assistance of other Authority Officers. They were directed to the Board and relay to the Directors legal advice provided by the Authority's lawyers, including advice on the dispute between the Authority based on breach of the Lease by PBDF.

Undertakings Requested		Page	Answers
17.	To provide the unredacted version of the report at F2 and for the agenda date June 23rd, 2016;- REFUSAL, WILL ADVISE WHAT WAS REDACTED AND WHY	66	The redacted portions of the report at F2 (573/16): (a) identify the other parties that participated in the RFP; (b) the "scoring" of the various proposals; (c) the net present value of each proposal; and (d) a comparison of the annual financial benefit of the PBDF proposal as compared to the prior lease. None of the redacted information relates to: (a) Art 18.07 or its subject matter; or (b) requests made and responses given with respect to concessions to be provided or given under Art 18.07.
18.	To advise as to when discussion happened with a third party potential tenant, with who, particulars of the discussion, and if there was written communication then provide a copy of whatever written communication there was;- WILL PROVIDE DATE, EVERYTHING ELSE UNDER ADVISEMENT	71	This request goes beyond the disclosure order by Her Honour. However, Mr. Clutterbuck is advised by Mr. Rienas that in or about August of 2021 a party was approached and asked whether it would be able to step in to operate the duty free if PBDF was ultimately evicted.
19.	To look at the November 20 th , 2020 board minutes to determine why the lease deferral agreement was revoked;	84	<p>There is nothing in the Minutes from 20 November 2020 or the e-mail provided to the Board in connection with that meeting that indicates the Second Lease Deferral was "revoked". The Second Rent Deferral had not previously been approved by the Board.</p> <p>On 18 November 2020, PBDF was advised that the Second Rent Deferral would be put to the Board for approval (see attached Tab 11). On 20 November 2020, PBDF was advised that the Second Rent Deferral had been conditionally approved (see attached Tab 12).</p>

Undertakings Requested		Page	Answers
20.	To provide copies of video board meetings held over the internet; - REFUSAL, UNLESS ALREADY AVAILABLE TO THE PUBLIC	87	This request goes beyond the disclosure order by Her Honour. However, audio recordings are made for the purpose of preparing Minutes, but the recordings are destroyed once the Minutes are approved.
21.	Advise if a lawyer representing the Authority was in attendance at the November 20 th and December 17 th , 2020 board meetings	87	The Minutes do not reflect that the Authority's lawyers were present on 20 November or 17 December 2020, although the resolutions passed at those Meetings as reflected in the Minutes were based on advice from the Authority's.
22.	The check meeting minutes and advise what led to the decision to revoke the rent deferral.	101	<p>There is nothing in the Minutes from 20 November 2020 or the e-mail provided to the Board in connection with that meeting that indicates the Second Lease Deferral was "revoked". The Second Rent Deferral had not previously been approved by the Board.</p> <p>On 18 November 2020, PBDF was advised that the Second Rent Deferral would be put to the Board for approval (see attached Tab 11). On 20 November 2020, PBDF was advised that the Second Rent Deferral had been conditionally approved (see attached Tab 12).</p> <p>To the best of Mr. Clutterbuck's recollection, on 20 November 2020, the Board directed that Mr. Rienas convey to PBDF that the any approval of the Second Rent Deferral was conditional on "getting greater assurances as to receiving unpaid rent". PBDF had committed in the First</p>

Undertakings Requested		Page	Answers
			<p>Rent Deferral to begin to repay deferred rent and had not done so.</p> <p>To the best of Mr. Clutterbuck's recollection, on 17 December 2020, the Board resolved that the Authority demand a \$1MM payment and directed that a rent repayment schedule and associated guarantees of full payment be developed with legal counsel based on the business decision that the Authority should not be financing PBDF.</p>

ROYAL BANK OF CANADA
Applicant

-and-

PEACE BRIDGE DUTY FREE INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

UNDERTAKINGS AND REFUSALS
OF TIM CLUTTERBUCK

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Lawyers for Buffalo and Fort Erie Public Bridge Authority

TAB H

Ariyana Botejue

From: David T. Ullmann
Sent: June 7, 2023 1:14 PM
To: Sanjeev Mitra; 'Leanne Williams'
Cc: John C. Wolf; Brendan Jones
Subject: Peace Bridge Examinations Adjourned and Schedule Issues for Consideration on June 14
Attachments: 2023-06-05 ltr to counsel.pdf; 2023-06-04 ltr to counsel.pdf; 2023-06-02 LF Stanek to B. Jones.pdf; 2023-06-01 - LT Stanek and Shea re discoveries.pdf; 2023-05-16 ltr to Shea.pdf

Mr. Mitra and Ms Williams,

We wanted to send you a note to bring you up to date about the status of the examinations and cross-examinations schedule between the PBDF and the Authority. In short all examinations have been adjourned because of some serious non disclosure issues by the Authority. The result of the adjournments may be that the schedule, including the scheduled hearing on July 25th, may be in jeopardy.

You may recall that I briefly mentioned to Her Honour at our last hearing on May 17th that there were some outstanding disclosure issues between lawyers with the productions that I was confident would be resolved and would not require Her attention. It seems I was mistaken.

The central issue causing a delay in the existing schedule arises directly from the fact that it has become plain that the Authority has withheld key documents and has not complied with the production requirements of Her Honour's Endorsement, or even in keeping with common litigation practice for productions, including a refusal to advise what documents privilege is claimed for, or on what basis.

It was made particularly clear from the statements made by witnesses at the Rule 39.03 examinations on May 30th that there are many relevant Board and Authority documents that exist and which ought to have been disclosed to PBDF and which have not been.

As a result, relevant on point documentary records were not available for the examinations of Ms. Costa and Mr. Clutterbuck; and would not have been available for Mr. Rienas' examinations had it proceeded as scheduled. It is our view that the Authority may be trying to use the urgent pace of this litigation as scheduled by Her Honour to deliberately avoid disclosing a full documentary record which, so far based on disclosures to date, seems to indicate that the Authority did not act in the best possible manner through the key periods in dispute, and either directly or indirectly support the positions of PBDF.

For your reference, attached are our letters to Mr. Shea and or Mr. Stanek, and their key responses, which chart the history of this issue, beginning with our letter of May 16th and ending with our letter of June 5.

Essentially PBDF's position is that the Authority's failure to produce relevant documents prevent the completion of r Rule 39.03 examinations, which, as you know, must be completed before the cross-examination of witnesses on their affidavits. Further the manner of the late production of the Authority's documents was unconventional and misleading as is set out in more detail in the attached letters.

The cross-examinations which were to take place this week on the affidavits of Mr. Mills, Mr. Rienas and Mr. Pearce have been cancelled pending rescheduling of the 39.03 examinations.

In our view, compliance with the documentary disclosure required in Her Honour's endorsements is a precondition to any cross-examinations taking place.

We intend to use the case conference on June 14th to seek the court's direction on these issues. While there is still some time between now and the proposed hearing date, we are not optimistic, based upon responses to date, that we will get what is required from the Authority in time to maintain the schedule.

As such, we are writing to you to ask that you begin to turn your minds to what your position would be if the schedule would have to change. While we can anticipate strong opposition from the Authority, they are the authors of this situation. In addition, given that they are receiving the so called "Full Rent" now, I do not know what prejudice they would suffer from a change to the schedule. In any event, as you consider this we would ask you to consider whether or not you would object to the time set aside for the receivership application being used instead for the hearing of the main motion, with the receivership to follow a month or two thereafter, if necessary.

Regards,

David

David T. Ullmann
Partner

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☎ 416-596-4289 | ☎ 416-594-2437

ROYAL BANK OF CANADA

and

Court File No. CV-21-00673084-00CL

PEACE BRIDGE DUTY FREE INC.

Applicant

Respondent

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

Proceeding commenced at Toronto

**AIDE MEMOIRE BRIEF OF THE TENANT, PEACE
BRIDGE DUTY FREE INC.
(Case Conference returnable June 14, 2023)**

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