

**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

AIDE MEMOIRE

1. Based on the failure of PBDF to pay rent as required by the Lease since 14 Dec 2021, the Authority wishes to terminate the Lease. The Authority is stayed by the Appointment Order from exercising its remedies against PBDF.
2. PBDF is again seeking to delay the hearing of the Authority's Motion until sometime in mid-2023, while continuing to pay to the Authority only the rent that it wishes to pay, as opposed to the rent required by the Lease. This is prejudicial to the Authority. If the Authority is correct and PBDF is required to pay rent in accordance with
3. The basic timeline since immediately before the attendance on 6 Oct 2022 is:
 - 19 Aug 2022**—Authority draft Notice of Motion delivered. No substantive response.
 - 7 Sept 2022**—Authority sworn Affidavit and Exhibits served. No substantive response.
 - 12 Sept 2022**—Parties agree to 0930 on 6 Oct 2022 to schedule return of Authority's Motion.
 - 27 Sept 2022**—Authority follows up with PBDF re Responding Materials. No substantive response.
 - 6 Oct 2022**—0930 Scheduling Appointment. Motion scheduled for 9 Dec 2022. Court directs:

*The tenant proposed a timetable for the exchange of materials for this motion and cross-motion. That timetable was not agreed to by the landlord and has not been provided to the court. Now that the motion date has been set, **the parties are directed to work out a timetable that ensures that all pre-hearing steps have been completed, including focused cross-examinations, if necessary, and the exchange of facts, such that all materials are available and uploaded onto CaseLines at least four business days prior to the hearing date.***

6 Oct 2022—Authority asks PBDF when it will deliver Responding Materials. No response from PBDF.

6 Oct 2022—RBC indicates that it will wait to review PBDF Responding Materials before considering how it will address its issues. No response from PBDF.

7 Oct 2022—Authority serves compiled Motion Record. Draft Notice was previously delivered on 19 Aug 2022. Sworn Affidavit was previously served on 7 Sept 2022.

21 Oct 2022—Authority advises PBDF and Monitor that it is waiting for PBDF to advise when it will deliver Responding Materials. No response from PBDF.

26 Oct 2022—Monitor inquires as to whether a schedule has been agreed. Authority responds that it is still waiting for PBDF. No response from PBDF.

4 Nov 2022—PBDF finally e-mails:

*As you will recall, we had proposed a schedule which would have included that we were to deliver materials this week, **but nothing was agreed or ordered.** At this point, although we are working on them, those materials are not complete. We intend to deliver them next week.*

Week of 7 Nov 2022—RBC reaches out to PBDF. No response from PBDF. Authority was not party to this communication and does not know the purpose or contents.

12 Nov 2022—RBC indicates that it will have to schedule 0930.

13 Nov 2022—PBDF served Cross-Motion and Affidavit.

14 Nov 2022—RBC scheduled 0930 for ½ day on 29 Nov 2022.

24 Nov 2022—RBC served Aide Memoire in support of 0930 on 29 Nov 2022.

25 Nov 2022—PBDF served Aide Memoire/Factum in connection with 0930 on 29 Nov 2022 requesting (lengthy) adjournment and indicating that because of the issues it wishes to put before the matter will need to be scheduled for multiple full days.

26 Nov 2022—Authority served Reply Affidavit.

28 Nov 2022—Authority served (or will serve) Factum.

4. RBC has been kept “current” and obtained additional “cash” security from PBDF since 14 Dec 2021. Presumably all of PBDF’s other suppliers and creditors have been paid since 14 Dec 2021.

5. PBDF has been “short paid” over \$1.2MM in rent since 14 Dec 2021. This is in addition to the millions in unpaid rent that was owing by PBDF as at 14 Dec 2021. PBDF continues to only pay to the Authority 20% of its sales and the amount owing to the Authority increases every month.
6. PBDF has indicated that it has no intention of paying rent in accordance with the Lease or repaying the deferred rent in accordance with the First (or even the Second) Rent Deferral.
7. If the Authority’s Motion is delayed, PBDF will suffer material prejudice. There is no dispute that PBDF’s assets are not of sufficient value to pay even RBC. Any (further) debt accruing due to the Authority will not be recoverable.
8. There is no prejudice to PBDF. This Motion is about only whether the Authority can exercise its remedies under the Lease notwithstanding the Appointment Order and the narrow issue of whether the Authority is obliged of accept partial payment after 14 Dec 2021 in full satisfaction of the rent payable by PBDF under the Lease—the parties agree that: (a) the Lease by its terms contemplates minimum rent of \$333,333 on the first of each month; and (b) PBDF has not paid \$333,333 on the first of the month since 14 Dec 2021.
9. If the Authority is right, PBDF can apply for relief from forfeiture under the *Commercial Tenancies Act*.
10. The only prejudice to RBC is that if the Authority is permitted to exercise its remedies a receiver appointed by RBC will not be able to occupy and operate the duty free unless it reaches an agreement with PBDF to pay occupation rent, assuming that a receiver even can operate the duty free. There is no dispute that the Lease has no realizable value for RBC. The cost to “cure” the Lease far exceeds what anyone will pay for an assignment.
11. On 6 Oct 2022, Her Honour wrote:

The tenant has advised that there is a dispute about the proper interpretation of the lease and the calculation of rent payable, which in turn will form part of its response to the landlord’s motion. Further, to ensure that the determination of rent due and payable under the lease is properly before the court, the tenant anticipates a cross-motion for declaratory relief regarding the rent owing under the lease.
12. PBDF’s Cross-Motion seeks substantive relief against the Authority in an Application in which the Authority is not an Applicant or Respondent and in which no relief is being sought against the Authority.
13. There is no merit to RBC’s argument that the interest of other creditors of PBDF aside from the Authority and RBC are involved. The Authority has never objected to RBC appointing a receiver over the assets of PBDF. The situation is not different than if PBDF had, with the concurrence of RBC, filed a notice of intention to make a proposal and then stopped by rent to the Authority.

Cosgrove-Moore Bindery Services Ltd (Re), 2000 CanLII 22377 (ON SC)

[10] I have come to the conclusion that the purpose of s. 65.1 is to provide a commercial enterprise with the opportunity to continue operations while working toward a reorganization but at the same time to give creditors obligated to continue to supply goods, services or the use of leased property some protection that payments ordinarily due during the proposal period will not be wiped out or reduced to *pro rata* unsecured claims in the event of an ultimate bankruptcy.

[11] It seems to me to be inconsistent with such purpose to require the supplier of such goods and services or use of leased property to commence possibly lengthy and expensive litigation to collect the amounts for which the court has determined that immediate payment should be made.

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