

**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

**AIDE MEMOIRE OF THE AUTHORITY
(Attendance on 9 December 2022)**

I. Background

1. The attendance on 9 December 2022 is pursuant to the Endorsements made on 6 October 2022, 30 November 2022 and 4 December 2022, all of which are attached.
2. This is an Application by RBC seeking to appoint a receiver over the assets and property of PBDF. The Application is based on a default under the agreement(s) between RBC and PBDF that results from the failure of PBDF to reach a commercial resolution with the Authority to address certain defaults that the Authority asserts exist under the Lease, including the failure of PBDF to pay rent. PBDF asserts that its failure to pay rent results from the impact that COVID had on its business and asserts that there was (and is) no default Lease and that no receiver ought to be appointed because doing so will destroy its business.
3. On 14 December 2022, the Court appointed a "Monitor" to preserve the interest of creditors while PBDF and the Authority determined whether a commercial resolution to their dispute over the rent owing by PBDF was possible. The Authority's sole involvement in this Application is as a supplier impacted by the Appointment Order.
4. As at 14 December 2021, PBDF was, over the objection of the Authority, not paying the minimum rent required by the Lease and was paying only percentage rent. PBDF continued to pay only percentage

rent after 14 December 2021. The Authority continued to object to this practice, but rather than engage in litigation allowed PBDF the opportunity to develop a commercial proposal.

5. In August of 2022, the Authority advised that it would be seeking leave to enforce its remedies as a result of the continued failure of PBDF to pay minimum rent as required by the Lease. PBDF did not rectify the situation and asserted that it is entitled by the Appointment Order to not pay rent as required by the Lease—in other words that the Court has directed that the Authority accept less than the rent required by the Lease and to provide “credit” to PBDF.

6. The Authority brought a Motion seeking various relief based on the assertion that the failure of PBDF to pay minimum rent since 14 December 2021. It has served all of its materials, including a Factum and (very short) Supplemental Factum.

7. On 6 October 2022, Justice Kimmel scheduled the Authority's Motion to be heard on 9 December 2022. Her Honour's Endorsement of 6 October 2022 contemplated that PBDF could bring a Cross-Motion to obtain a declaration with respect to the proper interpretation of the Lease and, in particular, the calculation of the rent payable under the Lease.

8. PBDF has purported to bring a Cross-Motion seeking substantive relief against the Authority, including a rent abatement or a reduction in the rent and damages. PBDF asserts that it will take an extended period to brief and argue the Cross-Motion and that the Authority's Motion should, as a result, be adjourned so it can be heard in mid-2023 at the same time as the Cross-Motion.

9. On 30 November 2022, Justice Kimmel directed that the parties attend on 9 December 2022 to address a narrow issue:

... decide whether to hear the Landlord's Motion to Terminate the Lease (and corresponding more limited aspects of the tenant's cross-motion) before the broader issues raised by the tenant's cross-motion have been fully briefed and argued.

II. Argument

10. The Authority asserts on its Motion that PBDF is required by the Appointment Order to pay rent in accordance with the Lease and that the failure of PBDF to do so since 14 December 2021 results in the Authority being able to exercise its remedies under the Lease. Essentially, the Authority's position is that the Court does not have jurisdiction, particularly in an Application brought by RBC, to vary the Lease or to require that the Authority extend further credit to PBDF by requiring that it accept from PBDF less than the rent required by the Lease.

11. PBDF asserts that it either: (a) as a right to pay only percentage rent; or (b) the Authority is obliged to agree to PBDF paying only percentage rent and, as a result of the Appointment Order, the Authority cannot exercise its remedies because PBDF has paid the rent that it asserts it is required to pay, although there has been no judicial determination as to whether PBDF's assertions are correct.

12. There is no serious factual dispute that:

- (a) the Authority refused to “guarantee” any minimum level of cross-border traffic and, subject only to Art 18.07, PBDF and its shareholders assumed the risk that volumes would vary;
 - (b) the minimum monthly rent payable under the Lease is \$333,333;
 - (c) PBDF has not been paying \$333,333 and has, instead, been paying 20% of its gross sales **[See attached Rent Ledger]**;
 - (d) the Authority has objected to PBDF paying only 20% of gross sales;
 - (e) this Application was brought by RBC to enforce its security over PBDF’s assets and property, including the Lease;
 - (f) the Authority did not consent to RBC taking security over the Lease and RBC did not request that the Authority provide a landlord waiver or enter into an inter-creditor agreement to address what would happen if PBDF defaulted under the Lease;
 - (g) the Appointment Order was made based on the assertion by PBDF that a commercial resolution could be reached with the Authority;
 - (h) there is no commercial resolution and PBDF has not presented a substantive proposal to the Authority since the Appointment Order was made;
 - (i) PBDF has not commenced any reorganization proceedings;
 - (j) the Authority has not yet evicted PBDF as a result of the potential application of the Provincial moratorium on the eviction of commercial tenants and the Appointment Order;
 - (k) except for the Cross-Motion, PBDF has taken no steps to have its assertions that it is entitled to an abatement or an amendment to the Lease determined by the Court;
 - (l) unless it is entitled to a rent abatement, PBDF owes the Authority well in excess of \$8.2MM in unpaid rent and that amount increases each month that PBDF pays only percentage rent; and
 - (m) the secured debt owing to RBC exceeds the realizable value of PBDF’s assets.
13. The core issue on 5 January 2023 will be the proper interpretation of the Lease to determine:
- (a) what rent was and is payable by PBDF during the stay period—does Art 18.07 of the Lease entitled PBDF to unilaterally amend the Lease to pay only percentage rent;
 - (b) whether that rent has been paid; and, if not,
 - (c) whether the Authority is entitled to terminate the Lease.
14. The Court will also have to consideration of the following issues:

- (a) does the Court have jurisdiction to vary the Lease to permit PBDF to pay only 20% of its gross sales as opposed to the \$333,333 required by the Lease; and, if so,
- (b) can the Appointment Order be interpreted as varying the Lease to permit PBDF to pay only percentage rent.

15. PBDF is asserting a right to execution before judgment—without first obtaining an Order that it is entitled to an abatement that it can set off against rent or an determination that the Lease is varied to permit the payment of only percentage rent, PBDF is unilaterally paying only percentage rent and relying on the Appointment Order to prevent the Authority from exercising its remedies under the Lease.

16. The determination by the Court of the broader issues raised on the Cross Motion will require a multi-day hearing that likely can't take place until late-2023. While it may be procedurally possible to have PBDF's relief against the Authority determined in this Application, there will, based on the assertions being made, and the relief sought, by PBDF, need to be "pleadings", discovery, examinations and, perhaps, *viva voce* evidence. The issues raised by PBDF—a claim for over \$8.2MM in damages based on allegations of bad faith—cannot be resolved on a Motion based on hear-say and opinion evidence¹ contained in Affidavits.

17. In determining whether to hear the Authority's Motion on 5 January 2023, the Court should consider: (a) the likelihood that the Court will Order that (i) the Authority accept only percentage rent or direct that the Lease be varied to provide for only percentage rent; or (ii) PBDF is entitled to an abatement that it can apply against future rent; and (b) the relative prejudice to the Authority and PBDF.

A. Merits of the Authority's Arguments

18. PBDF's position that it is entitled to pay only percentage rent is fully set out in its Factum dated 7 December 2022.

19. There is substantial case law that suggests that PBDF has little chance of ever obtaining an Order that it is entitled to a variation of the Lease or a rent abatement based on COVID. At best, PBDF is going to be able to obtain an Order permitting it to pay 100% of the amount it owes to the Authority over a reasonable period of time. **[See, for example, *Hudson's Bay Company ULC v. Oxford Properties*, 2021 ONSC 4515 (CanLII) aff'd, 2022 ONCA 585 (CanLII) and *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922 (CanLII)]**

20. There is no merit to the argument by PBDF that this case does not involve relief from forfeiture because the Authority has not terminated. The Authority has not terminated the Lease because of the Appointment Order. Unless PBDF is waiving its right to seek relief from forfeiture, once the Lease is terminated, PBDF will seek relief from forfeiture.

21. However, taking PBDF at its word that it will only raise the interpretation of the Lease in response to the Authority's Motion, the Record before the Court is more than sufficient for the Court to interpret the provisions of the Lease raised by PBDF in its Factum. PBDF has had ample time to put forward all of its

¹ PBDF appears to have waived privilege by referring to *ex post facto* legal advice received with respect to the meaning of Art 18.07 of the Lease.

evidence relevant to the interpretation of the Lease and has filed 2 Affidavits. The Commercial List routinely interprets leases based on Affidavit evidence. **[See *Priszm Income Fund (Re)*, 2012 ONSC 6144 (CanLII)]**

22. In *Salah v. Timothy's Coffees of the World Inc.* **[2010 ONCA 673 (CanLII)]** the Court was clear:

When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties.

23. The Lease is clear that: (a) PBDF cannot set-off any claim it might have against the Authority against rent payable under the Lease **[Art 4.05]**; and (b) that PBDF is not entitled to reduce the rent it pays based on any force majeure. **[Art 18.08]**

24. The only thing that PBDF has the right to under the lease is consultation to discuss the impact of PBDF of the legislative response to COVID. **[Art 18.07]** That happened, but any assertion by PBDF that it didn't is the basis for a claim for damages, and PBDF is to an amendment to the Lease. PBDF is not entitled under the Lease to a rent abatement or to any financial concessions from the Authority based on COVID and is certainly not able to unilaterally reduce the rent that it pays. The duty of good faith and fair dealing does not require that the Authority subordinate its own economic interest to assist PBDF and its shareholders. **[See *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021 SCC 7 (CanLII)]**

25. There is no merit to PBDF's argument that the Lease contemplates only percentage rent. The Lease is clear that the minimum rent is \$333,333 per month.

26. There is no merit to PBDF's argument that the Authority is a Government Authority such that it is responsible for: (a) the measures taken by the Governments of Canada and Ontario to deal with COVID; and (b) the fact that Government measures to assist companies like PBDF have not, according to Mr. Pearce, been adequate.

27. The Authority did not "wait in the weeds". It consistently told PBDF that it was not accepting only percentage rent.

28. There is no dispute that the Authority did not immediately come to Court and ask for an Order terminating the stay or requiring that PBDF pay the minimum rent required by the Lease. Based on the intention of the Appointment Order and relying on Art 2.17 of the Lease, the Authority gave PBDF a reasonable time to present a proposal backed by a business plan. Had the Authority acted immediately, it would have been accused of not providing PBDF and its shareholders a fair opportunity to develop a proposal to address the financial impact of COVID.

29. In the 12 months since the Appointment Order was made—5 months since the Authority indicated that it would bring its Motion—PBDF has not presented a proposal as to how it will address the rent it owes. The only proposal identified by PBDF is a proposal from August of 2021 that was rejected by the Authority in

which PBDF proposed a 100% rent abatement and that the Lease be amended provide for only percentage rent for the rest of PBDF's tenancy.²

30. There is no legal support for the proposition that, in the absence of statutory authority, the Court has the jurisdiction to amend or vary a contract. The Court can interpret agreements and enforce agreements, but not vary them. What PBDF is seeking is a material variation of the Lease. **[See, for example, *Hudson's Bay Company ULC v. Oxford Properties*, 2021 ONSC 4515 (CanLII) aff'd, 2022 ONCA 585 (CanLII)]**

31. It simply cannot be the case that the Court intended on 14 December 2021 to force the Authority to extend further credit to PBDF. There is no legal support for the proposition that the Court has the jurisdiction to force a landlord to continue to provide leased property to an insolvent tenant who is not paying rent and thereby cause the landlord to increase its exposure to financial loss.

32. The "rent clause" in CCAA Initial Order referred to by PBDF permits rent to be paid twice per month. PBDF did not ask to pay rent twice per month.

33. There is no factual support for the assertion that the Monitor approved PBDF paying only percentage rent. The Monitor is clear that it is not taking a position on that issue. Moreover, the Monitor can't agree to vary the Lease on behalf of the Authority.

34. This is not a CCAA and there are no "building block" leading to a restructuring. The Appointment Order was made to provide PBDF with the opportunity to reach a commercial agreement with the Authority. That has not happened.

35. The assertion that PBDF did not know the case it had to meet until 7 October 2022 is not supported by the facts. The only thing that was different between the Notice of Motion that was served on 7 October 2022 and the draft that was delivered on 19 August 2022 was the date of the Motion. The Authority served its sworn Affidavit in support of the Motion on 7 September 2022.

B. Relative Prejudice

36. There is no prejudice to PBDF in having the issue of the rent payable under the Lease determined on 5 January 2023.

37. If the Authority is successful, PBDF will have until 19 January 2023—the date scheduled for the return of this Application by RBC seeking to appoint a receiver—to "cure" the default and preserve the Lease or initiate proceedings under the *Commercial Tenancies Act* seeking relief from forfeiture and a stay RBC's Application. There is no indication that RBC will force the hearing of this Application on its merits so long as the Authority does not exercise its remedies under the Lease.

38. PBDF is not in any way prejudiced by having the issue as to whether the Authority is obliged to accept only percentage rent determined in advance of its claims against the Authority. The Lease requires that PBDF pay rent without set-off or deduction. **[Art 4.05]** PBDF currently owes the Authority over \$8.2MM

² There were other proposals exchanged prior to 14 December 2021, but PBDF has chosen to not include them in the Record.

in rent. In the unlikely event that PBDF obtain Judgment against the Authority for more than \$8.2MM, that Judgment is recoverable from the Authority in the ordinary course.

39. There has been no evidence delivered by PBDF to establish that it does not have the financial means available to pay the minimum rent required by the Lease.

40. There is, on the other hand, serious prejudice to the Authority if the matter is delayed. Every day that goes by, the amount owing by PBDF to the Authority increases. It is highly unlikely that the Authority will not be able to recover any amount owing to it by PBDF.

41. The fact that the Authority is receiving more rent now than it has in the past does not change the fact that PBDF is not paying the minimum rent required by the Lease and, unless it is wildly successful on its Cross-Motion, the Authority will never recover the delta between what PBDF has been (and intends to continue) paying and what it owes under the Lease.

42. The implication that the Authority has to establish that PBDF is not entitled to damages before it can establish prejudice has no merit. PBDF is *prima facie* required to pay rent and has the burden of proving that: (a) it is entitled to damages; and, more importantly, (b) it is entitled to set-off those damages against rent notwithstanding the express terms of the Lease.

III. Authority's Position/Conclusion

43. The Authority's position is:

- (a) its Motion and the issue as to whether it is obliged by the Appointment Order to accept percentage only rent—whether it is obliged to extent further credit to PBDF—be determined on 5 January 2023;
- (b) assuming its Motion is successful, PBDF be given until 19 January 2023 to make arrangement to “cure” the post-14 December 2021 payment default; and, assuming PBDF “cures” the default, a process be put in place to have the broader issues raised by PBDF on its Cross-Motion determined.

44. If the determination as to whether the Authority is required to accept only percentage rent from PBDF is to be deferred later into 2023, there should be protections put in place to ensure that the Authority is not exposed to further losses should PBDF not be successful in obtaining a Judgment in excess of \$8.2MM and a Court-ordered variation of the Lease. PBDF should be ordered to pay: (a) the difference between \$333,333 and what PBDF paid from 14 December 2021 to date; and (b) the difference between \$333,333 and 20% of gross sales going forward, to the Monitor in trust.

Excerpts from Appointment Order

9. **THIS COURT ORDERS** that all rights and remedies against the Debtor, the Monitor or affecting the Property are hereby stayed and suspended except with the written consent of the Monitor or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services, **provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Debtor, or as may be ordered by this Court.**

Excerpts from Lease

2.17 Amendment and Waiver

No supplement, modification, amendment, waiver, discharge or termination of this Lease is binding unless it is executed in writing by the party to be bound. No waiver of, failure to exercise, or delay in exercising, any provision of this Lease constitutes a waiver of any other provision (whether or not similar) nor does any waiver constitute a continuing waiver unless otherwise expressly provided.

4.05 Rent and Payments Generally

All Rent and other payments by the Tenant to the Landlord of whatsoever nature required or contemplated by this Lease, which are payable by the Tenant to the Landlord, shall:

- (a) be paid when due hereunder, without prior demand therefor and without any abatement, set-off, compensation or deduction whatsoever (except as otherwise specifically provided for in this Lease);
- (b) be applied towards amounts then outstanding hereunder in such manner as the Landlord determines in its sole discretion;
- (c) bear interest at a rate equal to twenty-four percent (24%) per annum, calculated and payable monthly from the date such Rent or other payments became due to and including the date of payment;

...

18.07 Regulatory Changes

In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect on the business operations of the Tenant at the Leased Premises, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

18.08 Unavoidable Delay

Notwithstanding anything to the contrary contained in this Lease, if any party hereto is bona fide delayed or hindered in or prevented from performance of any term, covenant or act required hereunder by reason of Unavoidable Delay, then performance of such term, covenant or act is excused for the period of the delay and the party so delayed, hindered or prevented shall be entitled to perform such term, covenant or act within an appropriate time period after the expiration of the period of such delay. However, the provisions of this Section [18.08] do not operate to excuse the Tenant from the prompt payment of Rent and any other payments required by this Lease.

17.01 Event of Default

An "Event of Default" shall be considered to have occurred when any one or more of the following happens:

- (a) the Tenant fails to pay any Rent when it is due and such failure continues for five (5) days after notice from the Landlord to the Tenant of such failure;
- (b) the Tenant fails to observe or perform any other of the terms, covenants, conditions or agreements contained in this Lease and such failure continues for ten (10) days after notice from the Landlord to the Tenant specifying the failure (except as set out in paragraphs (c)-(n), both inclusive, below where the Landlord shall have no obligation to provide such notice to the Tenant);
- (c) the Term or any of the goods, chattels or fixtures of the Tenant on the Leased Premises are seized or taken in execution or attached by any creditor;
- ...
- (g) the Tenant abandons or attempts to abandon the Leased Premises or the Leased Premises remain vacant for ten (10) consecutive days or more without the prior written consent of the Landlord;

This is Exhibit "B" referred to in the Reply Affidavit of Jim Pearce
sworn remotely this 2nd day of December 2022.



Commissioner for Taking Affidavits (or as may be)

Tyler Matthews (*Articling Student*)

Tyler Andrew George Matthews,
a Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires May 4, 2024.

<u>2022</u>	<u>Gross Sales</u>	<u>Base Rent</u>	<u>Rent Paid</u>	<u>Date Paid</u>
Jan.	\$266,000	\$333,333.33	\$53,200	2/16/2022
Feb.	\$317,000	\$333,333.33	\$63,400	3/10/2022
Mar.	\$575,000	\$333,333.33	\$115,000	4/11/2022
April	\$802,000	\$333,333.33	\$160,400	5/19/2022
May	\$840,000	\$333,333.33	\$168,000	6/21/2022
June	\$942,000	\$333,333.33	\$188,400	7/8/2022
July	\$1,332,000	\$333,333.33	\$266,400	8/11/2022
Aug.	\$1,295,000	\$333,333.33	\$259,000	9/8/2022
Sept.	\$1,185,000	\$333,333.33	\$237,000	10/4/2022
Oct.	\$1,215,000	\$333,333.33	\$243,000	11/1/2022
Nov.	\$980,000	\$333,333.33	\$196,000	12/1/2022

**** 4/20/2022 - Rec'd \$18,545.66 (CERS - Jan. 16 thru Feb. 12, 2022)***



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL DATE: 6 October 2022

NO. ON LIST: _____

TITLE OF PROCEEDING: **ROYAL BANK OF CANADA v. PEACE BRIDGE DUTY FREE
INC.**

BEFORE JUSTICE: **MADAM JUSTICE KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
SANJEEV MITRA	ROYAL BANK OF CANADA	smitra@airdberlis.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
PATRICK SHEA	PEACE BRIDGE AUTHORITY	Patrick.shea@gowlingwlg.com
DAVID ULLMAN	PEACE BRIDGE DUTY FREE INC.	dullmann@blaney.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
LEANNE WILLIAMS	MONITOR	williams@tgf.ca

ENDORSEMENT OF JUSTICE KIMMEL:

1. A monitor has been appointed in respect of Peace Bridge Duty Free Inc. (the “tenant”) and a stay of proceedings was included in the appointment order.
2. The landlord, Peace Bridge Authority, wishes to schedule a motion in which it will seek leave to lift the stay of proceedings and various relief said to arise out of alleged historic and continuing breaches of the lease by the tenant. Its motion materials have been served.
3. 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.
4. A half day hearing has been scheduled in this matter on December 9, 2022 commencing at 10:00 a.m. The start time should be confirmed with the commercial list office prior to the hearing date.
5. 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. The tenant proposed a mediation as part of its timetable. The landlord has not agreed to a mediation and is concerned that it will delay the hearing of the motion(s). The court is not going to order the parties to attend a mediation between now and December 9, 2022 in a circumstance where one of the parties is not a willing participant, but encourages the parties to consider whether a mediation might prove fruitful after they have completed some of the pre-hearing steps, if time permits.
7. The Royal Bank of Canada will be seeking to move forward with its application for the appointment of a receiver for the tenant if the lease is invalidated. Counsel asked that this motion for the appointment of a receiver be scheduled to return on December 9, 2022 as well. If this is on consent or not opposed that may be something that can be put before the court on this return date. However, it is not realistic to expect that there will be sufficient time on December 9, 2022 for the court to also hear a contested receivership motion. If there are concerns arising from the request for the lifting of the stay of proceedings that tie into the receivership motion, the parties are encouraged to work out an agreement to preserve their respective positions so that the request for the stay to be lifted does not prejudice RBC in connection with any subsequent motion for the appointment of a receiver.
8. If the concerns of the Royal Bank cannot be worked out and a date is needed for a contested motion to appoint a receiver and interim relief to cover the period between December 9, 2022 and that subsequent motion date, the parties may request a further 9:30 scheduling appointment to address these further considerations, which should come before me if my schedule permits.

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

KIMMEL J.



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL DATE: 30 November 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: Royal Bank of Canada v. Peace Bridge Duty Free Inc.

BEFORE MADAM JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
John Wolf and David Ullmann	Peace Bridge Duty Free	jwolf@blaney.com dullmann@blaney.com

For Other, Self-Represented:

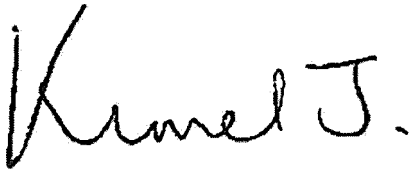
Name of Person Appearing	Name of Party	Contact Info
Leanne Williams and Mukul Manchanda	For the Monitor	lwilliams@tgf.ca mmanchanda@spergel.ca
Patrick Shea	Bridge Authority	Patrick.shea@gowlingwlg.com

ENDORSEMENT OF JUSTICE KIMMEL:

1. At a case conference on October 6, 2022 I scheduled a half day hearing on December 9, 2022 to hear a motion by the landlord (Peace Bridge Authority) to lift the stay of proceedings imposed under the court's December 14, 2021 appointment order and for a declaration that the tenant (respondent, Peace Bridge Duty Free Inc.) has failed to pay rent due and owing under its lease since the appointment order was made, is in breach of the lease and that entitles the landlord to terminate the lease (the "Landlord's Motion to Terminate the Lease"). The tenant did not deliver its responding materials and cross-motion until November 13, 2022.
2. The tenant's cross-motion deals with matters anticipated at the last appearance (in response to the dispute about the proper interpretation of the lease and the calculation of rent payable, and for declaratory relief regarding the rent owing under the lease and that the landlord should not be permitted to terminate the lease) but also seeks other remedies, including damages, that the landlord says are not properly before the court. The landlord delivered reply materials in respect of the lease interpretation issue (what rent was and is payable during the stay period) on Sunday November 27, 2022.
3. The parties appeared yesterday on a scheduling appointment to discuss what issues, if any, could be adjudicated on December 9, 2022. The tenant maintains that all should be heard together and none will be ready to be adjudicated on December 9, 2022. The landlord disagrees and wants the Landlord's Motion to Terminate the Lease to proceed, with the other issues in the tenant's cross-motion to be adjudicated at another time.
4. The court did not have an opportunity to review all of the voluminous materials (and Aide Memoires) filed for the November 29, 2022 appearance and the matter was adjourned to today. After hearing submissions from counsel for approximately an hour today, it became clear that there are concerns about the time needed to adjudicate all of the issues raised by the landlord and the tenant, whether they can be bifurcated and the appropriate sequencing of these issues. Depending on how those issues play out, the applicant's receivership application may also need to be heard.
5. So as to ensure that the court has the complete submissions on what appear to be nuanced and somewhat complex considerations about the inter-relationship between the narrow issue that the landlord would like to determine on the Landlord's Motion to Terminate the Lease (what rent was payable by the tenant from and after the appointment order during the stay period, and whether it has been paid, or conversely if the tenant is in breach of its obligations under the lease to pay rent and does that entitle the landlord to terminate the lease) and the broader issues raised by the tenant's cross-motion, that may include arguments of set-off and relief from forfeiture amount other considerations, the following directions are provided for the next steps:
 - a. The landlord says it has no further material that it wishes to file on the Landlord's Motion to Terminate the Lease. Its evidence and factum have been delivered in connection with that motion and the aspects of the tenant's cross-motion that are directly responsive to that motion. The landlord has not responded to the aspects of the tenant's cross-motion that seek damages or other affirmative relief from the landlord.
 - b. The tenant may file "reply" material to the material delivered by the landlord earlier this week on or before the end of the day on Friday December 2, 2022.
 - c. The tenant shall deliver its factum on the Landlord's Motion to Terminate the Lease (and corresponding issues on the tenant's cross-motion) on or before Wednesday December 7, 2022.
 - d. This will complete the evidence on the Landlord's Motion to Terminate the Lease and those aspects of the tenant's cross-motion addressing the question of the proper interpretation of the lease to determine what rent was and is payable by the tenant during the stay period, whether that

rent has been paid and, if not, whether the landlord is entitled to terminate the lease. No parties anticipate a need for cross-examinations on this evidence.

- e. All parties shall file a brief Aide Memoire on the question of whether the Landlord's Motion to Terminate the Lease (and corresponding more limited aspects of the tenant's cross-motion) should be heard first and before the broader issues raised by the tenant's cross-motion are fully briefed and argued.
 - f. On December 9, 2022, the court will hear submissions and thereafter decide whether to hear the Landlord's Motion to Terminate the Lease (and corresponding more limited aspects of the tenant's cross-motion) before the broader issues raised by the tenant's cross-motion have been fully briefed and argued. The parties will need to make their submissions in an orderly manner to ensure that they are completed within a maximum of 2.5 hours.
 - g. If the court decides to hear the Landlord's Motion to Terminate the Lease (and corresponding more limited aspects of the tenant's cross-motion) that will be heard on January 5, 2023 (booked for a half day). All material will have already been filed for that motion except the monitor's report, which will be delivered by January 3, 2023.
 - h. If the court does hear the Landlord's Motion to Terminate the Lease (and corresponding more limited aspects of the tenant's cross-motion) on January 5, 2023 and decides that in favour of the landlord, the stay will be continued on consent of all parties until RBC's application for the appointment of a receiver can be heard on January 19, 2023 (booked for a half day).
 - i. In anticipation of this possibility, RBC will deliver its updated application record for appointment of receiver on Dec 16, 2022.
 - j. The tenant and any other party who wishes to respond to that application shall do so on or before January 9, 2023. RBC shall deliver its reply record, if any, and factum by January 13, 2023.
 - k. The tenant and any other party taking a position on the receivership application shall deliver their responding factums on or before January 17, 2023.
 - l. It is not anticipated by any party at this time that there will be a need for cross-examinations on the application to appoint a receiver but if that anticipation changes, any party who may wish to cross-examine shall propose a revised timetable to allow for that by no later than December 28, 2022 and seek a further scheduling appointment if need be after fully canvassing revisions to the schedule that will still allow the receivership application to proceed on January 19, 2023.
6. The directions contained in this endorsement shall have the immediate effect of a court order without the necessity of a formal order being taken out.

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

KIMMEL J.

Shea, Patrick

From: Kimmel, Madam Justice Jessica (SCJ) <Jessica.Kimmel@scj-csj.ca>
Sent: December-04-22 9:29 PM
To: 'Ariyana Botejue'
Cc: David T. Ullmann; John C. Wolf; Brendan Jones; JUS-G-MAG-CSD-Toronto-SCJ Commercial List; JUS-G-MAG-CSD-Toronto-SCJ Commercial List; Stanek, Chris; Shea, Patrick; 'smitra@airdberlis.com'; 'jnemers@airdberlis.com'; 'lwilliams@tgf.ca'
Subject: RE: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL) – Motion returnable December 9, 2022

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Dear Counsel,

The requirement in the timetable that the tenant deliver its factum on the Landlord's Motion to Terminate the Lease (and corresponding issues on the tenant's cross-motion) on or before Wednesday December 7, 2022, before the next appearance on December 9, 2022, was designed to crystalize the narrower issues in dispute so that submissions could be made in the Aide Memoires to be filed on December 8, 2022 and oral submissions on December 9, 2022 about whether those issues can/should be adjudicated in advance of the broader issues raised by the tenant's cross motion.

The court understands that the landlord's factum addressing these issues has been filed already. There needs to be a mechanism for the Tenant's position on the narrow points to be before the court on December 9, 2022 and a factum is thought to be the best vehicle for that, as the intention of the Aide Memoires was that they be focussed on sequencing and procedure not on illuminating the factual predicates and legal positions of the parties. Whether on January 5, 2023 or later, these issues will be adjudicated so it was thought that the factum would assist for immediate purposes and will be used eventually.

After the fleshing out of issues in connection with the December 9 hearing, if the court decides that the January 5, 2023 hearing will proceed and provides further directions, and if any party anticipates they might wish to revise their factum in advance of the January 5, 2023 hearing if it is proceeding, the court will be open to permitting them to deliver revised factums as long as they can be completed before the holidays so that the matter is ready to proceed on January 5, 2023, if so ordered. This can be addressed on December 9, 2022.

For these reasons, the court would prefer to maintain the timetable ordered.

Thank you.

Justice Jessica Kimmel
(she/her/elle)
Ontario Superior Court of Justice
361 University Avenue
Toronto, Ontario
M5G 1T3
416.327.2888

From: Ariyana Botejue <ABotejue@blaney.com>

Sent: December 2, 2022 6:17 PM

To: Kimmel, Madam Justice Jessica (SCJ) <Jessica.Kimmel@scj-csj.ca>

Cc: David T. Ullmann <DUllmann@blaney.com>; John C. Wolf <jwolf@blaney.com>; Brendan Jones <BJones@blaney.com>; JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>; JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>; 'Christopher.Stanek@gowlingwlg.com' <Christopher.Stanek@gowlingwlg.com>; 'patrick.shea@gowlingwlg.com' <patrick.shea@gowlingwlg.com>; 'smitra@airdberlis.com' <smitra@airdberlis.com>; 'jnemers@airdberlis.com' <jnemers@airdberlis.com>; 'lwilliams@tgf.ca' <lwilliams@tgf.ca>

Subject: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL) – Motion returnable December 9, 2022

Your Honour,

Attached, please find correspondence from Mr. Ullmann.

Thank you,

**Blaney
McMurtry** 2 Queen Street East | Suite 1501
Toronto, Ontario M5C 3G5

Ariyana Botejue
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ROYAL BANK OF CANADA
Applicant

-and- **PEACE BRIDGE DUTY FREE INC.**
Respondent

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
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AIDE MEMOIRE

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