

**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 OF PEACE BRIDGE DUTY FREE INC.  
(Case Conference Returnable April 4<sup>th</sup>, 2023)**

**Introduction**

1. Capitalized terms are as defined in the Lease or this Aide Memoire.
2. This Aide Memoire is made in connection with the Endorsement of Justice Kimmel dated January 19<sup>th</sup>, 2023 (the “**Endorsement**” – attached as **Tab A**) with respect to the next steps in the adjudication of the respondent Tenant’s cross- motion (“**Cross Motion**”). The Tenant’s Cross- Motion deals with the interpretation of section 18.07 of the Lease for the Peace Bridge Duty Free Inc.’s shop, and to address damages and other relief as detailed in the Cross Motion. An excerpt of the Cross Motion, setting out the relief sought, is attached at **Tab B**.<sup>1</sup>

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<sup>1</sup> Relief sought in paragraphs 1 and 9 of the NOM were addressed in the Endorsement

### **Summary of steps taken since the January 19<sup>th</sup> 2023 Case Conference**

3. Since the January 19<sup>th</sup>, 2023, case conference the parties have delivered a:
  - a. Further affidavit of Jim Pearce dated February 13<sup>th</sup>, 2023;
  - b. Further affidavit of Ron Rienas dated March 1, 2023;
  - c. Tenant's settlement proposal dated March 13<sup>th</sup>, 2023,
  - d. Landlord's settlement proposal dated March 21<sup>st</sup>, 2023;
  - e. Tenant's mediation brief dated March 22<sup>nd</sup>, 2023; and
  - f. Landlord's mediation brief dated March 22<sup>nd</sup>, 2023.

The parties attended a mediation before Stephen Morrison on March 27<sup>th</sup> and 28<sup>th</sup>, 2023.

4. This Aide Memoire addresses the directions or questions set out in paragraph 7 of the Endorsement, in the order set out therein.

### **Outcome of Mediation**

5. Both tenancy parties, and the Monitor, attended the mediation on March 27<sup>th</sup> and 28<sup>th</sup>, 2023 (except the Monitor was excused for the second day by the mediator). Although scheduled for two full days, the mediation ended at 1:00 p.m. on March 28<sup>th</sup>, without any resolution. The Tenant has asked the mediator if he would be prepared to continue the mediation at a later date given that the full two days were not used. He has advised he is prepared to do so.
6. The Tenant currently intends to deliver a further without prejudice offer to settle all issues to the Landlord for consideration in advance of the opportunity to schedule the continuation of the mediation. The mediator advised that he had availability in the month of April to do so.
7. The Tenant does not intend to delay the scheduling of the Cross- Motion (notwithstanding the possible return of the mediation and the delivery of any further settlement proposal(s).

8. Pursuant to the Endorsement, the parties exchanged without prejudice settlement offers prior to the Mediation. The Tenant is prepared to share those offers, and a summary of the mediation with the court if the court is inclined to judicially mediate this dispute.

**Costs of the Landlord's Stay Motion**

9. The Tenant continues with the position that costs should be paid in connection with the hearing of the Landlord's stay motion ("**Stay Motion**") as set-out in its cost submissions attached hereto as **Tab C**. The deferral of costs to the cause or the deferral of those costs to allow them to be applied against possible rent owing to the Landlord once the matter is resolved, cancels any impact of the costs and allows the Landlord to litigate without risk.

### **Continuation of the Stay and payment of “Normal Rent”**

10. For the reasons set-out in the Endorsement and in PBDF’s previous submissions, the judicial stay should continue in effect pending the outcome of the Cross-Motion.
11. With respect to the amount of basic rent payable hereafter through the determination of the Cross-Motion , it is the position of the Tenant that no amount in addition to the continuation of payment of Normal Rent as paid since September 2021 to date (twenty percent of Gross Sales) should be paid.
12. Below is a Normal Rent projection for the remaining lease year to and including October 31<sup>st</sup>, 2023. The Tenant is heading into the highest annual Gross Sales period of the year and it projects that Normal Rent payable to the Landlord will continue to increase monthly. The projected Normal Rent to be paid for the balance of this fiscal year, based on anticipated Gross Sales, is as follows.

Month	Normal Rent
Apr-23	\$180,000
May-23	\$200,000
Jun-23	\$240,000
Jul-23	\$325,000
Aug-23	\$325,000
Sep-23	\$250,000
Oct-23	\$250,000

13. The total estimated Normal Rent to be paid over the period set out above is \$1,800,000.
14. Since it began reporting to the Monitor in February 2022, the Tenant has provided to the Monitor estimated Gross Sales monthly and has experienced an aggregate positive variance to estimate of approximately 11% over that period ( although on a monthly basis the variations to estimate experienced both positive and negative swings). Sales during this period have exceeded estimates by \$1,262,000 in the aggregate. As such, actual performance during the

balance of the fiscal year may be better than currently forecast and the projections above may prove to be conservative.

15. Gross Sales are projected at approximately 70% of pre-pandemic historical levels. Although the pandemic has subsided, non-commercial motor vehicle traffic patterns have not returned to normal. Traffic is approximately 86% of pre-pandemic levels, but non-commercial car traffic, which is a material market component for the store, is still only approximately 72% of pre-pandemic rates. Commercial Truckers rarely frequent the Tenant's store and its return to higher levels is irrelevant to PBDF's sales. Tour bus traffic has also not to date resumed in any meaningful way. On average each tour bus stopping at PBDF generates approximately \$2,000 in Gross Sales, and in the event of the return of tour bus traffic performance will be enhanced.
16. Attached as *confidential and to be sealed* at **Tab "D"** is the most recent cashflow, the financials year-to-date provided to the Monitor, and the financials which were attached to the without prejudice settlement offer submitted March 13, 2023. The financials which were attached as Exhibit "I" to the Affidavit of Jim Pearce sworn February 13<sup>th</sup>, 2023 is also provided at **Tab E**.
17. As noted in the financial reporting, while there is cash in the Tenant's bank account with RBC, that cash is impaired as set out in the notes to the financial statements. The financial statements demonstrate that the Tenant operated at a net loss last year; and has only a minimal net income, year to date.
18. The cash in the Tenant's account is also subject to the RBC security and will presumably be seized by RBC in the event of a receivership.

19. The court has not sought from, nor has the court appointed Monitor been asked to produce, an analysis of what the impact on the business of the Tenant would be in the event any amount of rent, other than Normal Rent, was to be ordered to be paid going forward.
20. In the event the Court is of the view that some other amount other than Normal Rent may be appropriate, the Tenant submits that the Monitor should be directed to make a recommendation to the Court in this regard and that the Monitor be directed to consult with the Landlord and Tenant in making such a recommendation.
21. On March 31, 2023, the Tenant provided the Landlord with a without prejudice proposal with respect to the payment of Normal Rent going forward through to the determination of the Cross-Motion, which proposal has not been responded to.

### **Rule 39.03 Examinations**

22. The Landlord has previously indicated that it sought to examine PBDF's President and Board Member Greg O'Hara in accordance with Rule 39.03 (who is not an affiant). The Tenant is prepared to allow that examination in conjunction with the Landlord's agreement to permit similar examinations of a representative of the Landlord's Board of Directors to be selected by the Tenant; and one other employee of PBA (in addition to Mr. Rienas) to be selected by the Tenant. In the absent of agreement on Rule 39.03 examinations, timetabling will be required for a motion.

### **Timetabling of the Cross-Motion**

23. The Tenant has written to the Landlord with respect to scheduling on Friday March 31<sup>st</sup> but does not yet have a reply to its proposal in this regard.

## *Productions*

24. While both parties to the Lease have produced affidavit evidence, neither side has made documentary disclosure of all relevant documents as would be normal productions for a dispute of this nature. The issues to be litigated in the Cross Motion addresses the formation of the lease contract and in particular the interpretation of subsection 18.07, the facts evidencing over the periods at issue the performance and or non-performance of the duties under subsection 18.07 from and after March 2020, and other information relevant to damages suffered, a greater degree of production will be required.
25. At this point, by reason of proceeding by Motion and the Cross-Motion, the parties have only produced evidence which assists their case, as exhibits to their affidavits.
26. PBDF has none of the Landlord's internal notes, records, reports, proposals, projections, e-mail correspondence, Board agenda or Board minutes, presentations, or negotiation notes or other information relevant to the issues, all of which would otherwise normally be produced by affidavit of documents in connection with such a dispute.
27. Absent Court order to address this productions issue, the completion of cross-examinations will inevitably have to be adjourned or delayed while numerous undertakings to produce relevant documentation are fulfilled, following which a continuation of cross-examinations will likely be required.
28. PBDF favours the court ordering the parties to proactively produce relevant documentation in advance of the cross-examinations and other examinations to hopefully curtail delay from answering undertakings.

*Expert Report(s)*

29. The Tenant intends to commission an expert report(s) related to the following factual issues which impact this dispute:
- i. what is a range of market rent for this business post pandemic having regard to all relevant factual data?
  - ii. Is the Tenant operating its business at a best standards level having regard to relevant facts?
  - iii. What financial loss will the Tenant sustain in the event that the Lease is terminated?
  - Iv. detailing information in respect of rent at other duty free border stores
30. This independent and objective evidence will assist the court in assessing the reasonableness of the positions taken by the parties during the pandemic and with respect to their obligations to act in good faith and apply section 18.07 of the Lease.
31. In addition, the Tenant intends to produce an expert report to quantify damages suffered by the Tenant, both to date and projected for the balance of the lease term arising from termination or constructive termination by the Landlord of the Lease.
32. It is likely preferable for any expert report(s) to be delivered prior to examinations. This will only be possible if comprehensive pre-examination documentary disclosure is made and the reasonably inquiries of the expert are responded to in a timely and complete fashion.
33. The Tenant has engaged Matson, Driscoll & Damico Ltd. Forensic Accountants to review these issues and prepare the report required.

**Cross-Examinations**

34. Cross-examinations and examinations should be scheduled in conjunction with this court's decisions in respect of the issues of:



- i. the timing and manner of productions of relevant documents;
  - ii the timing of delivery of expert report(s);
  - iii whether Rule 39.03 examinations can proceed on consent or whether a-motion is required
35. PBDF expects that various examinations will require that multiple days be set aside for examinations.

#### **Further Case Conference/ Pre-trial Conference**

36. A further case conference should be held after the completion of examinations to schedule the hearing of the motion, and to consider the manner of introduction of evidence at that hearing. In addition, the length of time required for the hearing will be better understood once the record is further developed.
37. It is expected that the eventual motion will be a multi-day proceeding.

#### **Receivership (the “Receivership”) of Royal Bank of Canada (the “Bank”)**

38. Given the position of the Landlord that it would consent to a stay following the determination of the Cross Motion (should it succeed), in order to allow for the possibility of the return of the Receivership Application of the Bank, the Tenant is content that no materials need to be filed by the Bank at this time until such time as the dispute with the Landlord is resolved.
39. Similarly, the Tenant is content that the Bank not be party to the examinations, nor would the Bank be examined itself at this point as the issues which would be relevant to the Receivership are distinct from the issues relevant to the Landlord dispute.
40. The Bank may attend the examinations in the Landlord dispute if it wishes to do so. Regardless of whether the Bank attends the examinations or not, the Bank should not be precluded from

examining on those affidavits in the future, if necessary to the Receivership and relevant. The Tenant also would reserve its right to examine the Bank should it be necessary to do so in contesting the receivership.

41. The lending facilities between the Bank and the Tenant are term facilities. There is no operating loan. As such, the debt to the bank declines with time. It should be noted that, depending on the passage of time required for the litigation, the amount owing to the Bank may end up being equal to or less than the combined value of the Tenant's assets and the cash collateral already posted with the Bank (to the extent that is not already the case, which it may be). This would presumably be a factor considered in any contested receivership proceeding and or might render such a proceeding moot in the future.

**ALL OF WHICH IS HEREBY SUBMITTED THIS 3<sup>rd</sup> DAY OF APRIL 2023 BY:**

A handwritten signature in dark ink, appearing to read 'D. Ullmann', is written above a horizontal line.

David T. Ullmann

**ROYAL BANK OF CANADA**

and

Applicant

Respondent

E-mail addressees of recipients:

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

Proceeding commenced at Toronto

**AIDE MEMOIRE OF PEACE BRIDGE DUTY  
FREE INC.**

(Case Conference Returnable April 4<sup>th</sup>, 2023)

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Lawyers for the Respondent

# TAB A



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

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

HEARING

DATE: January 19, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: RBC 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
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**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
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 (Spergel)	lwilliams@tgf.ca
Patrick Shea	Counsel to the Authority	Patrick.shea@gowlingwlg.com

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**ENDORSEMENT OF JUSTICE KIMMEL:**

1. This case conference was scheduled to address matters arising out of my previous endorsements, including my most recent endorsement of January 16, 2023.
2. Further to the court's direction, Peace Bridge Duty Free Inc. ("PBDF" or the "Tenant") and the Buffalo & Fort Erie Public Bridge Authority (the "Authority" or the "Landlord") are in the process of booking a mediation which is expected to be completed by March 28, 2023. That mediation shall be briefed in accordance with the directions contained in my January 16, 2023 endorsement.
3. As directed by my last endorsement, the Landlord and Tenant have also reached an agreement about the procedure for addressing the issues raised in the Tenant's cross-motion (notice of motion dated November 13, 2022). In its cross-motion, the Tenant seeks the determination of various issues and damages, dependent upon the interpretation of Article 18.07 of the subject Lease which, in turn, the court has indicated will require a more fulsome evidentiary record that considers the factual matrix from which the Lease arose, as well as conduct of the parties since March 2020 given the allegations of a failure to negotiate or consult in "good faith".
4. The relief sought by the Tenant against the Landlord on its cross-motion falls procedurally outside of the within receivership application, to which the Landlord is not a party. In the interests of efficiency, recognizing that the separate proceeding would be brought before this court in any event, the parties have reached the following agreement regarding the court's jurisdiction and binding nature of the adjudication of the issues raised and to be decided on the Tenant's cross-motion (provided by the parties on January 25, 2023):

For the purpose of the Tenant's Cross Motion the Landlord is a Respondent to that motion and the court shall have jurisdiction to grant the relief sought against the Landlord by the Tenant therein, including, without limitation, with respect to damages, if any, to which the Tenant might be entitled. The Landlord and the Tenant agree that the question of the interpretation of rent payable under the Lease and the amount, if any, of any damages to which the Landlord is entitled to offset rent owing under the Lease as determined at the Cross Motion (or in any appeal arising therefrom) shall be binding on the parties for all purposes.

5. As the court previously directed, the Landlord and Tenant have agreed that the Tenant shall deliver any further evidence upon which it intends to rely on its cross-motion within three weeks of the case conference held on January 19, 2023 and the Landlord shall deliver its responding evidence and record on the cross-motion within two weeks thereafter. This evidence may also be used at the mediation.
6. The parties shall all re-attend at a case conference before me that has been scheduled for two hours commencing at 10:00 a.m. on April 4, 2023. Aide Memoires shall be filed in advance of no more than ten pages double spaced by each participating party. The Aide Memoires and any other materials intended to be referred to at this case conference shall be uploaded by each party into the appropriate bundle for this case conference by no later than noon on April 3, 2023.
7. Matters that ,au be addressed at the post-mediation case conference include:
  - 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 my 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. In addition to the timing of the decision regarding the costs of the stay motion, the court may hear brief submissions, if time permits, on any other aspects of the question of costs not already addressed in the costs outlines filed for the landlord's stay motion. The court was asked not to decide the matter of costs of these two motions until at least this further case conference, at or after which directions, or a decision, regarding these costs may be provided by the court.

- c. As was indicated in paragraph 60 of my last endorsement, if the mediation has not successfully resolved some or all of the issues in dispute between the Landlord and the Tenant, the parties may provide further submissions (to be included in Aide Memoires and evidence to be filed in advance), and the court may provide further 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, based on the enhanced financial disclosure that the Tenant will have by that time provided in its further evidence on its cross-motion and/or in materials provided in the context of the mediation and extracted for the court's consideration (to be filed in accordance with the existing sealing order).
  - d. Submissions may be made, and directions provided, regarding any proposed 39.03 examinations that are objected to in connection with the Tenant's cross-motion.
  - e. Submissions may be made, and directions provided, 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. Submissions may be made, and directions provided, 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.
8. 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 black ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.

January 25, 2023

**TAB B**



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

**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

**NOTICE OF CROSS-MOTION**

**THE MOVING PARTY, PEACE BRIDGE DUTY FREE INC. (“Duty Free”)**, will make a cross-motion before a Judge of the Ontario Superior Court of Justice (Commercial List) to be heard with or immediately before or after a motion brought by the Buffalo and Fort Erie Public Bridge Authority’s (“**Authority**”) seeking to lift the existing judicial stay and for leave to terminate Duty Free’s commercial lease, or as soon after that time as the motion can be heard.

**PROPOSED METHOD OF HEARING:** The motion is to be heard by video conference.

**THE MOTION IS FOR:**

1. An order staying the Authority’s motion seeking to terminate the Lease (defined below) in respect of any alleged default under the Lease until a determination is made with respect how the Lease is impacted by the Border Restrictions, and what amount of Base Rent, if any, Base Rent is payable under the Lease.

2. A declaration that the U.S.-Canada border restriction legislation and related regulations and requirements as a result of the Covid-19 pandemic (“**Border Restrictions**”), individually and collectively, amount to an “unanticipated introduction of or a change in any Applicable Laws” that caused a material Adverse Effect on Duty Free’s business operations at the Leased Premises, thereby engaging subsection 18.07 of the Lease.

3. A declaration the Authority had and has an ongoing obligation to consult with Duty Free about the impact of the U.S.-Canada Border Restrictions (as they evolved individually and collectively) would and continue to have on the Lease, and to reasonably reconsider the impacted terms of the Lease, including Article IV of the Lease dealing with Base Rent.

4. A declaration the Authority breached subsection 18.07 of the Lease by failing to enter into reasonable, or any, discussions with Duty Free about the impact of the Border Restrictions as they evolved, individually and collectively, on Base Rent payable under the Lease to the date of this motion.

5. A declaration in respect of whether any Base Rent is due and payable under the Lease, and if so, a determination of the amount owing, specifically with respect to the following periods impacted by introduction and changes in Applicable Laws due to the Covid-19 pandemic:

- (a) The Canada Emergency Commercial Rent Assistance (“**CECRA**”) program period from April to September 2020;
- (b) From October 2020 to November 8<sup>th</sup>, 2021, the day before the U.S.-Canada border reopened for non-essential travel (with restrictions);

- (c) November 9<sup>th</sup>, 2021 to September 30<sup>th</sup>, 2022, when the Canadian government discontinued vaccine requirement for entry and use of the ArriveCAN app;
  - (d) October 1<sup>st</sup>, 2022 to the date to be determined when the U.S. border reopens for unvaccinated travellers.
6. In the event that arrears of Base Rent are determined to exist, an order that those arrears are to be amortized over the balance of the term of the Lease.
7. An order for damages resulting from the Authority's breach of the Lease, including breach of section 18.05 (Quiet Enjoyment), and failing to provide the main inducement under the Lease to Duty Free, which was the ability to carry on the only Permitted Use, being the operation of a duty-free shop, at the Leased Premises for the period from March 21<sup>st</sup>, 2020 to September 19<sup>th</sup>, 2021.
8. An order for damages payable by the Authority to Duty Free resulting from the Authority's wrongful threat of eviction during the non-enforcement period under Part IV of the *Commercial Tenancies Act*, that caused this receivership application and all expenses and other damages arising from that application.
9. An order directing the parties to attend a mediation.
10. A sealing order in respect of Duty Free's financial information disclosed in support of the cross-motion.
11. An order directing how Base Rent payable will be calculated in the event of a future pandemic and subsequent Border Restrictions.

12. Costs of this motion on a substantial indemnity basis.
13. Such further and other relief as counsel may request or as this Honourable Court may seem just.

**TAB C**

**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

**COST SUBMISSIONS BRIEF OF PEACE BRIDGE DUTY FREE INC.**

Your Honour,

As per your direction at the January 5<sup>th</sup> hearing in this matter, attached please find our cost outline. The cost outline seeks costs in the amount \$43,243.40 on a substantial indemnity basis on the assumption that we will be successful on the motion.

Set out below are our brief submission in support of the payment of this cost award.

***Cost Submissions***

First, an important caveat. Although the litigation between the Authority and Duty Free began in earnest on October 7<sup>th</sup> when the Authority served its lift stay motion, and although there were three case conferences thereafter, we are of the view that the majority of the costs incurred to and until December 9<sup>th</sup> were incurred in the greater litigation between the parties, being the litigation as to the correct interpretation of the lease and the issues in the cross motion. That issue was not addressed on January 5<sup>th</sup>. As such, we are reserving our costs in respect of that work done to and until that issue is decided. Our costs herein are solely costs related to the lift stay motion that was heard on January 5<sup>th</sup>. In that regard, as per the costs outline, the costs sought are only for the period after December 9<sup>th</sup>, which includes the revision of the factum, related research, review of the case law the Authority insisted be part of the lift stay motion, and the attendance at the hearing. We are not, for example, seeking any costs related to the preparation of the affidavits served in aid of the cross motion or the original factum, which costs are substantial and reserved for the main motion.

We do not yet have Your Honour's decision from the January 5<sup>th</sup> motion. Obviously, we would only be entitled to costs if we are successful on the motion. We consider success on this motion an outcome where the Court refuses to lift the stay. The Authority's motion sought only the lifting

of the stay. If the stay remains in place, even if the court orders some kind of interim or go forward payment, the motion has failed.

In our view, this motion was unnecessary. Your Honour held three extended case conferences, on November 29<sup>th</sup>, November 30<sup>th</sup>, and December 9<sup>th</sup>, at which your Honour, and the parties considered and reconsidered the issues. It became clear at those case conferences that the real issue in dispute was not whether or not the stay needed to be lifted, but rather how to allow the parties to litigate the main issue. The lifting of the stay would not resolve the issues between the parties. The court signaled as much to the parties on December 9<sup>th</sup> by cancelling the receivership motion, indicating that the stay would, at a minimum continue to January 19<sup>th</sup>, and advising the parties it would hold a case conference on January 19<sup>th</sup> to consider how to proceed with the main motion. Despite this, the Authority insisted on proceeding with its motion, which motion was essentially moot.

In addition, as set out in the attached, on December 16<sup>th</sup> we made a settlement offer to the Authority with respect to the motion. It was without prejudice but we are providing it as it is the usual practice to produce such settlement offers in cost submissions. The settlement offer also indicated that if they proceeded we would seek costs of the motion.

As set out therein, our client offered:

“For the interim period, starting on January 1, 2023 until the matters in issue between our clients are resolved or there is a further order of the court, the Duty Free will pay to the Monitor in Trust, the difference, if any, between a minimum base rent \$235,000/month plus all additional rent, and Normal Rent being 20% of sales plus all additional rent. The \$235,000/monthly threshold represents the rounded average normal rent paid for the last six months (July to December). The average monthly rounded Normal Rent for September to December was \$217,000. In exchange your client would withdraw their motion. “

The offer received no response and no counter offer. Your Honour may also recall that I suggested to counsel for the Authority at the hearing on January 5<sup>th</sup> in open court that perhaps he and I could reach a resolution as to an appropriate amount of interim rent and he just shook his head and said no. There has been no proposal towards resolution from the Authority since January 5<sup>th</sup>.

Your Honour did indicate that you might consider maintaining the stay and ordering the payment of rent in an interim amount. However, your Honour considered that you did not have the record before you to decide what would be an appropriate amount of rent for the interim period.

As you can see from the settlement offer, we anticipated that the Court might direct the parties to such a resolution and proposed a level of rent on an interim basis which is higher than the current Normal Rent. As the settlement offers sets out:

“As your client will know, the months of January and February and March tend to be weaker sales months and the months thereafter much stronger. As you know from the chart we attached to our Aide Memoire, the rent paid in January and February and March last year was materially less than the \$235,000 amount on offer (although COVID had a stronger impact on sales in those months

last year than our clients anticipate for this year). As such, the proposed payment in this offer likely represents a material improvement over what would otherwise be payable under the status quo for at least the next 3 or 4 months.”

This offer should have rendered the motion pointless. It was objectively fair and mitigated (or we would say eliminated) any possible prejudice to the Authority from the continuation of the process.

In the event the court orders that the stay remain in place and that minimum payments be made, we would still consider that to be a success for Duty Free under the motion. In that regard, any such order should note the following from the settlement offer:

“The parties would agree that the delta between Normal Rent and minimum base rent of \$235,000/month (being the funds payable to the Monitor) would ultimately be payable to your client in priority to the Bank if the court ultimately finds your client is entitled to those amounts as rent; or if our client’s position succeeds, they would be returned to our client.”

If the court orders the stay to continue and the parties to mediate, that should also be viewed as success by Duty Free, as Duty Free has requested mediation in this matter since January of 2022 and the Authority has steadfastly rejected it.

Finally, we encourage the court to reject the position taken by the Authority at the hearing that costs should be in the cause or set off against rent. In this instance, where the Authority persisted in pursuing a motion it knew to be moot, against an opponent with limited resources and in the face of a settlement offer, it would not be appropriate for them to do so on a “Free pass” basis. The intransigence of the Authority and its unwillingness to negotiate were the cause of this motion and they should pay, forthwith, the costs they caused to Duty Free before they take any further steps in the litigation. If that is not the case the Authority will have been given licence to further obstruct this process and waste time and money on a without consequence basis, which will not facilitate the resolution of this matter.

**RESPECTFULLY SUBMITTED THIS 13<sup>TH</sup> DAY OF JANUARY 2023 BY:**

A handwritten signature in dark ink, appearing to read 'D. Ullmann', is written above a horizontal line.

David T. Ullmann



**From:** David T. Ullmann

**Sent:** December 16, 2022 5:26 PM

**To:** Shea, Patrick <Patrick.Shea@gowlingwlg.com>

**Cc:** John C. Wolf <jwolf@blaney.com>; Brendan Jones <BJones@blaney.com>; Greg O'Hara <gohara@dutyfree.ca>; 'Jim Pearce' <JimP@dutyfree.ca>

**Subject:** Without Prejudice Offer re Jan 5 motion

Without Prejudice

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Patrick,

I hope you might privately agree that it is very unlikely the court will lift the stay on your client's motion on January 5<sup>th</sup>. I believe Justice Kimmel signalled quite strongly that even if she found that it may be the case that your client has not received the correct rent, she is unlikely to lift the stay on your motion. We also believe the court wants this entire matter resolved before the Commercial List. The scheduling of the case conference on Jan 19 and the vacating of the receivership return date are also pretty strong indicators of our views above. If your motion proceeds, our client will seek costs.

Nonetheless, my clients are interested in seeing if we can find a solution to your motion which will then allow the parties to focus on the more material litigation between them. Without prejudice to our respective client's position with respect to what the correct amount of monthly rent is or arrears are or the other matters in dispute, the Duty Free is prepared to agree to the following interim solution.

For the interim period, starting on Jan 1, 2023 until the matters in issue between our clients are resolved or there is a further order of the court, the Duty Free will pay to the Monitor in Trust, the difference, if any, between a minimum base rent \$235,000/month plus all additional rent; and Normal Rent being 20% of sales plus all additional rent. The \$235,000/monthly threshold represents the rounded average normal rent paid for the last six months (July to December). The average monthly rounded Normal Rent for September to December was \$217,000. In exchange your client would withdraw their motion.

As your client will know, the months of January and February and March tend to be weaker sales months and the months thereafter much stronger. As you know from the chart we attached to our Aide Memoire, the rent paid in January and February and March last year was materially less than the \$235,000 amount on offer (although covid had a stronger impact on sales in those months last year than our clients anticipate for this year). As such, the proposed payment in this offer likely represents a material improvement over what would otherwise be payable under the status quo for at least the next 3 or 4 months.

The parties would agree that the delta between Normal Rent and minimum base rent of \$235,000/ month (being the funds payable to the Monitor) would ultimately be payable to your client in priority to the Bank if the court ultimately finds your client is entitled to those amounts as rent; or if our client's position succeeds, they would be returned to our client.

I look forward to hearing from you. If the motion can be resolved we would like to resolve this issue before we spend any more time preparing for the Jan 5 hearing, so we would ask for your response no later than Tuesday, Dec 20, 2022.

Regards,

David

 **Blaney  
McMurtry** LLP 2 Queen Street East | Suite 1500  
Toronto, Ontario M5C 3G5

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David T. Ullmann  
Partner

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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

**COSTS OUTLINE**

The Respondent provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

		Partial Rate*	Substantial Rate**
Fees (as detailed below)	\$	\$27,802.74	\$41,704.11
Disbursements	\$	\$1,539.29	\$1,539.29
<b>Total</b>	<b>\$</b>	<b>\$29,342.03</b>	<b>\$43,243.40</b>

\*Partial Rate calculated at 60% and \*\*Substantial Rate calculated at 90%.

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- The amount claimed and the amount recovered in the proceeding

See Costs Submissions

- The complexity of the proceeding

See Costs Submissions

- The importance of the issues

See Costs Submissions

- The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

See Costs Submissions

- Whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

See Costs Submissions

- A party's denial of or refusal to admit anything that should have been admitted

See Costs Submissions

- The experience of the party's lawyer

NAME OF LAWYER	ROLE	YEAR OF CALL	PARTIAL INDEMNITY RATE*	SUBSTANTIAL INDEMNITY RATE**	ACTUAL RATE
David T. Ullmann (DTU)	Lawyer/Partner	1999	\$405.00	\$607.50	\$675.00
John C. Wolf (JCW)	Lawyer/Partner	1989	\$477.00	\$715.50	\$795.00
Brendan Jones (BJ)	Lawyer/Partner	2009	\$291.00	\$436.50	\$485.00
Ariyana Botejue (AB)	Clerk	N/A	\$105.00	\$157.50	\$175.00
Monah Shadid (MS)	Student	N/A	\$111.00	\$166.50	\$185.00

- Fees: the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

January 5, 2023 – Motion: All steps with respect to research and preparation of Factum; Preparation and attendance at motion incurred after December 9, 2022.

Persons	Hours	Partial Indemnity Rate*	Substantial Indemnity Rate**
DTU	24.1	\$9,760.50	\$14,640.75
JCW	20.3	\$9,683.10	\$14,524.65
BJ	13.5	\$3,928.50	\$5,892.75
MS	11.1	\$1,232.10	\$1,848.15
Subtotal:		\$24,604.20	\$36,906.30

HST @ 13%:	\$3,198.54	\$4,797.81
<b>Total:</b>	<b>\$27,802.74</b>	<b>\$41,704.11</b>

\* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- Any other matter relevant to the question of costs

See Costs Submissions

### LAWYER'S CERTIFICATE

**I, DAVID T. ULLMANN, CERTIFY** that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

**Date:** January 13, 2023



**Mr. David T. Ullmann**

**BLANEY MCMURTRY LLP**  
Barristers & Solicitors  
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Email: [bjones@blaney.com](mailto:bjones@blaney.com)

Lawyers for the Respondent

**To:** The Service List

**ROYAL BANK OF CANADA**  
Applicant

and

**B-1-1803**  
Court File No. CV-21-00673084-00CL  
**PEACE BRIDGE DUTY FREE INC.**  
Respondent

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
Proceeding commenced at Toronto

**Costs Outline of Peace Bridge Duty Free Inc.**

**BLANEY MCMURTRY LLP**  
Barristers & Solicitors  
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Lawyers for the Respondent

**ROYAL BANK OF CANADA**  
Applicant

and

**PEACE BRIDGE DUTY FREE INC.**  
Respondent

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
Proceeding commenced at Toronto

**Costs Submissions Brief of Peace Bridge Duty Free Inc.**

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Lawyers for the Respondent

**TAB D**



**CONFIDENTIAL**

# **TAB E**

## EXHIBIT I

	PBDF Sales	Cost of Sales Wages (net) Expenses	RBC Lease	Add'l Rent	Rent	Net
Jan2020	920,345	(435,666)	(68,282)	(6,541)	(333,333)	76,523
Feb2020	977,455	(468,306)	(68,282)	(8,167)	(333,333)	99,367
Mar2020	553,247	(234,029)	(68,282)	(8,167)	(333,333)	(90,564)
Jan-Mar2020	2,451,048	(1,138,001)	(204,846)	(22,875)	(999,999)	85,326
Apr2020.	0	(31,833)	0	(8,167)	0	(40,000)
May2020	0	(31,833)	0	(8,167)	0	(40,000)
Jun2020	0	(31,833)	0	(8,167)	0	(40,000)
Jul2020	0	(31,833)	0	(8,167)	0	(40,000)
Aug2020	0	(31,833)	0	(8,167)	0	(40,000)
Sep2020	0	(31,833)	0	(8,167)	0	(40,000)
Oct2020	0	(31,833)	(68,282)	(8,167)	0	(108,282)
Nov2020	0	(31,833)	(68,282)	(8,167)	0	(108,282)
Dec2020	0	(31,833)	(68,282)	(8,167)	0	(108,282)
Apr-Dec2020	-	(286,498)	(204,846)	(73,502)	-	(564,846)
Total 2020	2,451,048	(1,424,500)	(409,692)	(96,377)	(999,999)	(479,520)
Rent 20%						
Jan2021	0	(51,833)	(68,282)	(8,167)	-	(128,282)
Feb2021	0	(50,950)	(68,282)	(9,050)	-	(128,282)
Mar2021	0	(50,950)	(68,282)	(9,050)	-	(128,282)
Apr2021	0	(50,950)	(68,282)	(9,050)	-	(128,282)
May2021	0	(49,188)	(68,282)	(10,812)	-	(128,282)
Jun2021	0	(49,188)	(68,282)	(10,812)	-	(128,282)
Jul 2021	0	(49,188)	(68,282)	(10,812)	-	(128,282)
Aug2021	0	(49,188)	(68,282)	(10,812)	-	(128,282)
Sep2021	97,691	(148,845)	(68,282)	(10,812)	(19,538)	(149,787)
Oct2021	309,754	(274,877)	(68,282)	(10,812)	(61,951)	(106,168)
Nov2021	545,927	(422,963)	(68,282)	(10,812)	(109,185)	(65,316)
Dec2021	571,208	(435,604)	(68,282)	(10,812)	(114,242)	(57,732)
	1,524,579	(1,683,723)	(819,384)	(121,816)	(304,916)	(1,405,260)
Jan2022	266,652	(258,326)	(68,282)	(10,812)	(53,330)	(124,099)
Feb2022	317,739	(273,870)	(68,282)	(10,812)	(63,548)	(98,773)
Mar2022	574,900	(409,863)	(68,282)	(10,812)	(114,980)	(29,037)
Apr2022	803,466	(540,664)	(68,282)	(10,812)	(160,693)	23,015
May2022	839,157	(557,795)	(68,282)	(10,775)	(167,831)	34,473
Jun2022	942,743	(612,517)	(68,282)	(10,775)	(188,549)	62,621
Jul2022	1,332,856	(789,771)	(68,282)	(10,775)	(266,571)	197,457
Aug2022	1,295,437	(771,810)	(68,282)	(10,775)	(259,087)	185,483
Sep2022	1,189,993	(739,297)	(68,282)	(10,775)	(237,999)	133,641
Oct2022	1,214,518	(750,824)	(68,282)	(10,775)	(242,904)	141,734
Nov2022	980,000	(635,600)	(68,282)	(10,775)	(196,000)	69,343
Dec2022	860,000	(579,374)	(68,282)	(10,775)	(172,000)	29,569
	10,617,461	(6,919,709)	(819,384)	(129,449)	(2,123,492)	625,427
Jan2023	695,000	(485,364)	(68,282)	(10,775)	(139,000)	(8,421)
Apr 2020 to Jan2023	12,837,041	(9,375,294)	(1,911,896)	(335,541)	(2,567,408)	(1,353,099)

## Total Apr2020 to Jan2023 Summary

	Base rent version		Percentage rent version
Sales	12,837,041	Sales	12,837,041
Costs&Expenses	(11,287,190)	Costs&Expenses	(11,287,190)
Add'l rent	(335,541)	Add'l rent	(335,541)
Base rent	(11,333,322)	Percentage Rent	(2,567,408)
Net loss	(10,119,013)	Net loss	(1,353,099)

Note: Net loss does not include deductions for professional expenses related to the process, additional funds posted as security to RBC as per court order and anticipated taxes.