

**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.
(Motion Returnable December 9th, 2022)**

Introduction

1. The court has asked the parties to argue:

“...whether [it is appropriate] 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...”

2. It is the position of the Tenant that the motion on January 5 should not proceed and the January 5th date should be used to set a schedule which allows for all issues to be resolved on in a single proceeding. In the interim, the status quo, being the payment of Normal Rent as has been paid for the past 16 months (including the 12 months under this proceeding) can continue with minimal or no prejudice to the Landlord.

3. Peace Bridge Authority (“**Landlord**”) seeks to lift the stay of proceedings for the express purpose of terminating its Lease with the Peace Bridge Duty Free Inc. (“**Tenant**”) on the basis of the non-payment of minimum Base Rent (\$333,000 plus HST/month) during these court proceedings (“**Termination Motion**”).
4. The Tenant responds that Normal Rent (being all additional rent, all taxes and 20% of Gross Sales) has been paid and accepted by the Landlord for the last 16 months since the Tenant re-opened for business in September 2021, and that this is in accordance with the Court order which has governed this process for 12 months and which the landlord has not opposed or questioned until now.
5. The Ontario Court of Appeal has affirmed, in the Hudson Bay case cited by the Landlord, that Judges of the Commercial List have discretion under section 101 of the Court of Justice Act (the section used in this case) to adjust the amount and or timing of rent paid pending the outcome of litigation between a landlord and tenant.
6. In any event, the Landlord’s suggestion that rent is owing will be shown to be false upon a proper review of the Lease and its terms, and on a full review of the record. If no rent is owing, then there is certainly no prejudice to the Landlord from the continuation of the stay. In fact, the prejudice arising from the passage of time may ultimately be shown to have prejudiced the Tenant, who has rights against the Landlord given its aggressive and potentially illegal behaviour in this matter.
7. This is, in fact, a contractual interpretation dispute. The overriding objective of contractual interpretation is to determine “the intent of the parties and the scope of their understanding”.

The court should direct the parties to compile a full record so that it can address the factors from Sattva in order to interpret the agreement.¹

8. The Landlord is contractually obligated to act in good faith to adjust the Lease obligations having regard to the impact of Border Restrictions which are “...an unanticipated introduction of or a change in any Applicable Law...” that caused a material Adverse Effect on the tenant’s business thereby triggering subsection 18.07 of the Lease.
9. A determination of the obligations of the parties under subsection 18.07 of the Lease and all other claims in the Cross Motion is therefore critical to this dispute.
10. The court also needs to consider whether or not a receiver ought to be appointed over the business if the stay is lifted in favour of the Landlord. The prejudice to the Tenant is materially amplified if the effect of lifting the stay will be to have the business turned over to a liquidating receiver.
11. It is the intention of the Tenant to oppose the appointment of a receiver. The Landlord feints that it will consent to the appointment of a receiver, but the terms under which it will do so, in particular the suggestion that the Landlord have priority for all allegedly unpaid rent, is without legal basis and almost certainly unacceptable to the Bank.

Status of Proceedings

12. The Termination Motion is currently reserved to be heard, if the court decides it should proceed, on January 5th 2023. The Cross Motion is not yet scheduled. There is no agreement yet as to what the “more limited aspects of the Tenant Cross Motion” are, or how they can be extracted from the Cross Motion.

¹ [Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 \(CanLII\), \[2014\] 2 SCR 633](#), at para. 47.

13. The motion to determine whether or not to appoint a receiver is currently scheduled to occur after the proposed motion to lift the stay. The final materials for the receivership motion, which will be contested, are outstanding. In fact, the Bank has yet to serve its materials in that regard.
14. There is also disagreement as to whether the Cross Motion can be heard by this court, with the Landlord asserting that the Tenant Cross Motion, must be heard outside of these proceeding in another court, because the Landlord is not a named party to these proceedings.
15. The Landlord says it has not responded to the Cross Motion. There have been no examinations as yet with respect to either motion but the Landlord has advised on December 7th, 2022 in writing that it intends to conduct an examination, even though the record is likely not yet complete on that motion.

The Nature of the Lease Dispute Makes it Inappropriate to Bifurcate

16. Contrary to the Landlord's position, this is not a simple dispute in which there is an agreed upon amount of rent which has gone unpaid. On the contrary, the Court officer has attested to the fact that the Tenant has been paying rent monthly during this process. Indeed, the amount of rent paid to the Landlord has steadily increased.
17. Even the Landlord concedes in its materials that the question of whether or not the Tenant is paying rent due by the Lease is connected to the question of what the obligations of the parties are under the Lease which in turn are tied to the interpretation of various specific sections under the Lease noted in the Cross Motion. The interpretation of those sections under the Lease are directly tied to the conduct of the parties, both before and during the current court process.

18. The conduct of the parties should also be viewed through the requirements under the Lease to consult, to be reasonable, and the requirements of the common law, such as the requirement to act in good faith and estoppel.
19. The Lease requires the Court to consider the actions of the governments and its impact on the business of the Tenant.
20. A key issue is the application of subsection 18.07 of the Lease. It should be noted this subsection was NOT initially in the draft lease contained with the Landlord's RFP materials but was specifically negotiated when the Landlord declined to guarantee minimum traffic levels. The section reads:

“18.07 Regulatory Changes

In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect (sic) 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.”

21. That subsection was specifically added to the Lease, presciently it now seems, to account for changes in the ability of the Tenant to pay rent, or the fairness of any rent charged to the Tenant, in the event of change(s) of Applicable Laws causing material Adverse Effects on the Tenant's business
22. This matter in large part turns on whether or not the Landlord met its obligations under that subsection, and whether or not that subsection requires the Landlord to reasonably adjust the base rent payable under the Lease having regard to Gross Sales and traffic. If so, is Normal Rent the rent which ought to be paid? The Tenant says yes, as it is the exact same percentage as the Base Rent is calculated upon. If not, did the Tenant over or underpay rent? The court cannot make this determination without the issues and evidence to be raised in the Cross motion.

Judicial History of the Dispute Orders Followed and Rent Paid

23. This is a dispute which has already once been considered by this court, namely in December 2021 this Court found the issues to be sufficiently complex that the court imposed a stay on the Landlord's ability to enforce its Lease and encouraged the parties to find a solution during that stay. In the intervening 12 months the Landlord simply ignored all Tenant or Tenant's agent's proposals to meet or mediate, and ignored this court process, until deciding in September 2022 (some 4.5 months after the commercial lease eviction moratorium expired) to schedule a case conference which lead to its motion.
24. On the initial court appearance in December 2021, the court ordered that the Landlord's rights be stayed (along with all other parties with claims against the Tenant). The Landlord was present at that hearing, had an advance copy of the order sought, and sought no amendment to that Order.

Landlord Never Sought any Standard Order in respect of Rent

25. In a debtor proceeding, such as a CCAA proceeding or a proposal proceeding (to which the Landlord in its factum equates this proceeding), landlords routinely seek an order specific to the payment of rent. The following standard order provision is in the Commercial List Model CCAA Order:

“THIS COURT ORDERS that until a real property lease is disclaimed [or resiliated] in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.”

26. A Model CCAA order also includes Section 17 which reads:

THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicant 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 Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, 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 Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

27. Section 17 quoted above is identical to section 11 in the Monitor Order in these proceedings.

It is also standard in a model receivership order. However, as noted, in the CCAA landlords do not rely on section 17 as an order which directs the payment of rent.

28. The Landlord has failed to follow the convention to seek the form of order which would protect the payment of rent in the manner they now claim was due during these proceedings.

No Order sought by Landlord at Subsequent Hearings

29. The matter returned to court on January 17th, 2022. Prior to the attendance the Landlord received the Tenant's letter of January 14th outlining the Tenant's view of the Lease issues and proposing a mediation. The Landlord also received Normal Rent before that hearing. The Landlord was also advised that the Monitor was to be given powers to be more involved in the Landlord Tenant dispute. The Landlord did not respond to the Tenant's proposal but did attend court. Again, the Landlord raised no issue.

30. The third time this proceeding returned to court, in March 2022, the parties sought to appear before Justice Penny. The Landlord was advised of this planned attendance but elected not to attend this hearing. Having heard there was nothing from the Landlord, the parties were able

to proceed in writing. Again, the Landlord was silent despite having received Normal Rent for the preceding six months.

Court Officer Reports Rent is Being Paid

31. At each of the January 17th attendance and the March 22nd attendance, the Monitor filed a report.
32. The Monitor in its first report in January 2022, confirmed to the court three relevant things. First, it confirmed that the Tenant “continues to dispute the rental arrears and the current rent owing.” Secondly, it confirmed that over the cash flow period, being the three-month period ending in March 2022, the Tenant projected paying the Landlord “\$290,000” in the aggregate. This is clearly much less than the \$333,000 plus HST per month the Landlord now claims should have been paid. Third, the Monitor reported that it was being asked by the court to monitor and report on the negotiations between the Landlord and Tenant. The report was served on the Landlord.
33. In March the Monitor produced a further report for the Court which advised that the Tenant has prepared a cash flow which confirmed the Tenant’s compliance with the Appointment Order. The cash flow continued to show payment of percentage rent i.e Normal Rent. The Monitor’s report also confirmed that the Monitor was in communication with the Landlord. The Monitor also confirmed that the Landlord did not respond to communications from the Tenant related to the hearing. The Monitor also confirmed in its report that the Tenant was intending to pay \$424,000 in rent, in the aggregate, over the 4 months of the cash flow projection. The report was served on the Landlord.
34. In accordance with the Court orders, the Tenant provided monthly reports to the Monitor which included a cash flow which confirmed, among other things, the amount of rent being

paid. Each cash flow showed percentage rent being paid. The Monitor did not attend court at any time to alert the Court that the Court Order was being violated, because it was not being violated. The Monitor had asked for and received a copy of the Lease and had received updates from the Tenant with respect to the ongoing attempts at negotiation, as required by the Court order.

35. When the Landlord finally asked the Monitor in late July to agree to lift the stay for non-payment of rent, it is significant to note that the monitor said, “No”.

Landlord Did not Proceed with Urgency

36. The Landlord did not act as though it’s concerns about rent were urgent. It took until July 26th 2022, four months following the lifting of the moratorium on commercial eviction in April 2022, to raise the issue of a Termination Motion. The Landlord missed a scheduled call to discuss its July 26th letter attended by the other parties on August 10th 2022. On August 15th the rescheduled call was held and the Landlord indicated it would serve its final motion record in a week or so. A draft notice of motion was served on or about August 19th and a draft affidavit was served later on or about September 8th, 2022. The parties attended court on October 5th and the landlord had still not finalized its motion materials, which were finally served on October 7, 2022, at which time the Tenant knew with certainty what issues it had to answer.

37. In short, the Landlord took several months to prepare and file the “simple” Termination Motion. The Tenant responded on Sunday November 13th with a response and Cross Motion, only 5 weeks later. The Landlord had previously informed the parties as to the estimated date of service of the Cross-Motion (around Friday November 4th, 2022) and subsequently also advised of additional time required by the complexity of the Cross-Motion materials. The

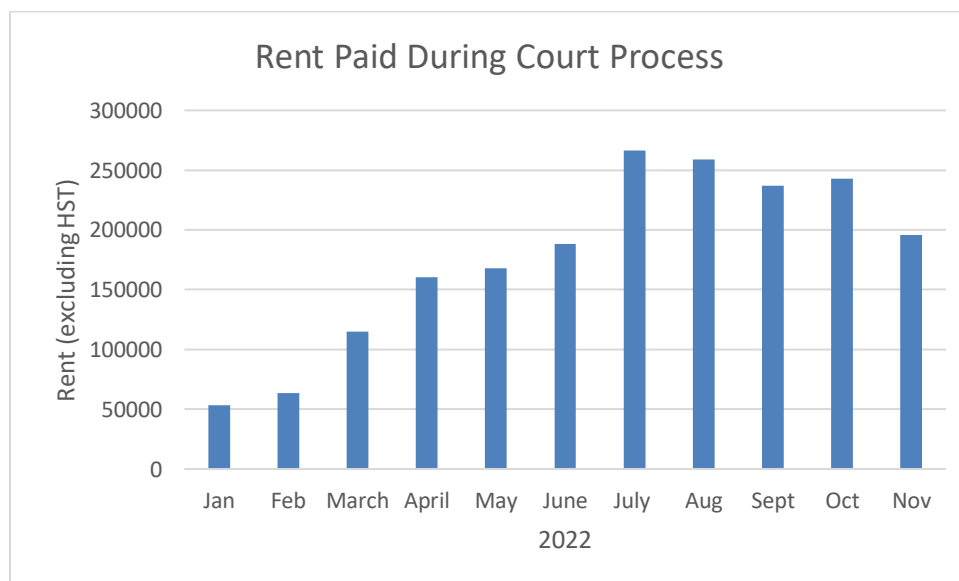
Landlord did not respond for a further 2 weeks, and only did so on the eve of the most recent series of court attendances. The Tenant responded to the Landlord within 5 days.

38. The Landlord accuses the Tenant of delay, but any objective review of the timeline confirms the Tenant has responded in a timely manner.

Lift Stay and Prejudice

39. In order to lift the stay, the Landlord must show that it is suffering material prejudice. However, the truth is that as this process has gone on, the prejudice to the Landlord (if there is any, which is strictly denied) is declining.

40. Set out below is a graph which highlights the rent paid by the Tenant during this process. It is clearly an upward trend. Ignoring November for the moment (as that rental amount was anomalously impacted by a colossal snow storm) it is clear that the delta between what the Landlord says it is owed and what it is being paid is shrinking. It has shrunk dramatically since the beginning of this process. As such, the prejudice to the Landlord is diminishing more or less monthly, and the tenant is coming into the busiest season of its retail year.



41. By comparison, if the court were to lift the stay, it knows the Landlord intends to immediately terminate the Lease, thereby ending the business of the Tenant, which is obviously an extreme prejudice, or it would consent to the appointment of a liquidating receiver, thereby also ending the business of the Tenant, causing a severe financial loss to its owners who invested \$ 6 million dollars refurbishing the Premises, which is again an extreme prejudice. The business employs as many as 90 people.
42. It is also worth considering the nature of this specific business and its impact on the community. It provides a specific and unique function, namely providing duty free sales to those who cross the Canadian border. If a liquidating receiver was appointed upon the Landlord's termination of the Lease, RBC has indicated it will not direct a receiver to operate the business but will liquidate the inventory by in large part returning liquor and other product to suppliers.
43. The evidence is that it would likely be half a year or more before another licence could be issued. One can also speculate that the absence of duty-free services at the Peace Bridge would impact travel patterns, as those seeking to use duty free and cross at one of the three Niagara area bridges would now be forced to cross at the other two location.
44. It is cold comfort to say that the prejudice to the Tenant is off set by replacing a functioning business with a legal remedy for relief from forfeiture and damages at some point in the future.

Court Order was Followed

45. Respectfully, the Tenant has acted in compliance with the court order as it understood it and as the Monitor applied it. Even if the Landlord's position were correct and the rent had been short paid (which is expressly denied) it would still be inappropriate to lift the stay now for past wrongs. The Landlord has been directly involved in this process at all points and is a

sophisticated party. To allow it to wait in the weeds, until the arrears become untenable, only to spring up now and demand payment of an amount it knows the Tenant may not be able to pay, cannot be endorsed by this Court.

46. Doing so would be a violation of the building blocks approach that Justice Morawetz advocated in the Target CCAA should be applied when dealing with a proceeding in which orders are made upon which parties rely. Those building blocks of a restructuring are not to be cast aside lightly.

[Target Canada Co. \(Re\), 2016 ONSC 316](#), at para 81

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

47. Here, the parties have acted in reliance on the fact that the previous court orders were appropriate and that following them was appropriate. It is not available to the court in this circumstance to hold retroactively that the order was violated in the manner that the Landlord suggests.
48. The court could interpret the Lease now and decide now that the amount of rent to be paid going forward should be different than the amounts paid to date, but it can only do that if it is able to determine what the correct rent is, which, as noted above, it cannot determine without looking at the entire relationship between the Landlord and Tenant, and by applying the Lease terms agreed by the parties in contemplation of a change in Applicable Laws materially impacting the Tenant's business.

Why should the Existing Process end only to Start Another with the Same Goal?

49. The Landlord and Tenant both agree there is a material dispute about how the Lease is to be interpreted, and applied. However, the Landlord's approach to the hearing of the Cross Motion is inefficient. The Landlord urges that the question of the Landlord's conduct and the correct interpretation of the Lease should be done elsewhere and later. Essentially the Landlord suggests that the stay be lifted, the Lease be terminated, everyone should lose their jobs and the store should close, just so the Tenant can then appear in a different court and start a new piece of litigation against the Landlord for exactly the same issues that are already before this Court and seek a new stay or injunction from that Court. Why is this reasonable?
50. In comparison, the Tenant suggests that this matter can be heard promptly before the Commercial List, at which point all issues between the Landlord and Tenant can be adjudicated. The Landlord suggests wrongfully that the Tenant is stalling, but that is not the case.
51. The process proposed by the Tenant is consistent with Rule 1.04 (1) and (1.1) of the Rules of Civil Procedure which promote the parties and the court to act in a just, most expeditious and least expensive determination of the issues in proportion to the importance and complexity of the issues and to the amounts involved in the proceeding.

ALL OF WHICH ARE HEREBY SUBMITTED THIS 8TH DAY OF DECEMBER BY:



David T. Ullmann

ROYAL BANK OF CANADA

and

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

PEACE BRIDGE DUTY FREE INC.

Applicant

Respondent

Email address of recipient: See Service List

**ONTARIO
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(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**AIDE MEMOIRE OF PEACE BRIDGE DUTY
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(Motion Returnable December 9, 2022)

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