

**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.
(Production Motion Returnable July 25th, 2023)**

Overview

1. Peace Bridge Duty Free Inc. (“**PBDF**”) seeks production of three categories of documents in accordance with Justice Kimmel’s June 16th, 2023 Endorsement. They can generally be described as:
 - a. minutes of four Authority Board meetings that have been identified by the Authority as relevant, with redactions for privilege as necessary;
 - b. written communication sent and received by members of the Authority’s board of directors between January 2020 to December 2021, relating to the Lease or rent relief for either: (i) PBDF; or (ii) American duty-free store tenant; and

- c. the rent relief agreement(s) granted to the Authority's American duty-free store tenant, along with the underlying lease.
2. The obligation to produce these records largely exists in the previous Endorsements, and with respect to the rent relief treatment given to the Authority's American duty-free store tenant, the records are directly relevant to allegations in the notice of cross-motion that the Authority arbitrarily gave preferential treatment to that tenant. The records also inform what may be reasonable and appropriate in terms of evaluating the performance of the Authority's contractual obligations under 18.07 of the Lease to consider the impact of the changes in Applicable Laws resulting from the Covid-19 pandemic on the Lease.

Production Request #1: Complete copies of the minutes of the April 30th, 2021, May 28th, 2021, October 8th, 2021, and November 21st, 2021 Authority Board meetings (“**Requested Minutes**”), redacted for privilege as necessary, that are identified in the index of the Authority's Disclosure Brief as being relevant and privileged¹:

3. The Requested Minutes were identified by the Authority in its Disclosure Brief produced in response to paragraph 17 of Justice Kimmel's April 4th, 2023 Endorsement as being relevant and privileged.²

¹ This request is included in question 93 at page 40 of the Transcript of examination of Tim Clutterbuck dated May 30th, 2023 (**Compendium, Tab 1**).

² Disclosure Brief Index, Exhibit “B” to the Affidavit of Cristina Fulop sworn July 19th, 2023 (**Compendium, Tab 2**).

G. Authority Board Minutes

1. 23 Jun 16
2. 28 Jul 16
3. 24 Apr 20
4. 29 Jan 21
5. 25 Oct 21

Privileged: 20 Nov 20, 17 Dec 20, 30 Apr 21, 28 May 21, 8 Oct 21 and 19 Nov 21

4. The Requested Minutes were identified by the Authority in its Disclosure Brief because they are captured by the disclosure direction at paragraph 17.b.ii. of the April 4th, 2023 Endorsement that directed the Authority to provide:

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

- ii. Regarding the requests made and responses given with respect to concessions to be provided/given under s. 18.07 of the Lease from and after the border restrictions came into effect (in the period from March 2020 to December 2021).
5. Paragraph 19.f. of Justice Kimmel's Endorsement dated June 16th, 2023, directed the parties that:

The court expects concerns about privilege being addressed through redactions, rather than the withholding of entire documents, on the basis that doing so would not be relied upon as a waiver of privilege, with challenges to the redactions to be brought forward together with any other privilege challenges in a focused manner for the court's consideration and direction. [emphasis added]

6. The Authority has maintained total privilege over the Requested Minutes. Although the Authority advised it would produce the April 30th, 2021 minutes with redactions (as PBDF has already agreed to at the last case conference and was directed in the June 16th, 2023 Endorsement), the Authority has not produced the document in

redacted form. The Authority continues to maintain total privilege in respect of the other Requested Minutes.³

7. With respect to Production Request #1, PBDF is simply seeking an order directing the Authority to produce records in accordance with the directions that have already been given by this court.

Production request #2: Complete copies of any and all written communications, including but not limited to, letters, faxes, emails and text messages sent or received by the Authority's board members for the period January 2020 to December 2021, inclusive, relating to the Lease, section 18.07 of the Lease, rent abatement, rent relief, and/or any other similar form of relief for either the Canadian or American duty-free store tenants⁴:

8. This request partially overlaps with the direction given at paragraph 17.b. of the April 4th, 2023 Endorsement.
9. In response to the request to disclose correspondence between members of the board of directors, the Authority asserted as a basis for not disclosing these communications that: (a) the directors are not given Authority email accounts so the relief should be sought against the individual directors personally; and (b) whether the impact of the Covid-19 pandemic and associated government regulations on the American duty-free store tenancy are relevant.⁵

³ July 7th, 2023 letter at page 2, Exhibit "N" to the Affidavit of Cristina Fulop sworn July 19th, 2023 (**Compendium, Tab 3**).

⁴ This request is slightly modified from q. 67 of p. 22-24 of the transcript of examination of Tim Clutterbuck dated May 30th, 2023 (**Compendium, Tab 4**).

⁵ July 7th, 2023 letter at page 1, Exhibit "N" to the Affidavit of Cristina Fulop sworn July 19th, 2023 (**Compendium Tab 3**).

10. Based on the position taken by the Authority, it appears that it may not have included any written communication to or from board members that did not include Ron Rienas or Karen Costa in its Disclosure Brief produced in response to paragraph 17.b. of the April 4th, 2023 Endorsement.

(a) *The Authority's Board of Directors' correspondence is producible*

11. The Authority's board of directors are the decision makers for the Authority and give direction to the Authority's operational staff.⁶
12. Whether emails were sent with an Authority domain email address, a gmail address or any other is irrelevant. The method of communication by directors of this quasi-government entity is not important, it is the content of the communication that matters.
13. Further, whether the Authority assigns email addresses to directors is entirely irrelevant to whether they sent or received texts, letters or faxes relating to the Lease and rent relief. These records, if they exist, ought to have been disclosed in the Authority's original Disclosure Brief ordered on April 4th, 2023.
14. To the extent there is any issue that the Authority ought to disclose these records, Rule 36.04 relating to taking evidence before trial defines a "party" in the case of a corporation as including "an officer, director or employee of the corporation"⁷, and under Rule 30.01(1)(b), a document shall be deemed to be in a party's power if that

⁶ Transcript of examination of Tim Clutterbuck dated May 30th, 2023 at p. 20-21 and p. 24 (**Compendium, Tab 5**).

⁷ [Rules of Civil Procedure, RRO 1990, Reg 194, s 36.04](#)

party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.⁸

15. The Authority cannot insulate its actions from scrutiny by having its directors use non-Authority email addresses. If the Authority's "decision makers" are unable to "obtain" and make themselves disclose their own communications relating to Authority business, it is unclear who would be in a better position to do so.
16. The Authority's position is inconsistent with the intent of the April 4th, 2023 Endorsement that a single representative attend a Rule 39.03 examination on behalf of the board of directors in the interest of a just and expeditious determination of the proceeding on its merits.
17. Should the court accept the Authority's position that PBDF must obtain relevant records from each of the members of the Authority's board of directors individually, PBDF requests leave to conduct further Rule 39.03 examinations to determine for the purpose of obtain these records. This is not PBDF's preferred approach, and would result in unnecessary cost and delay.

(b) Whether communications about rent relief relating to the impact of the Covid-19 pandemic and associated government regulations on the American duty-free store tenancy are relevant

18. This issue is addressed in production request #3.

⁸ [Rules of Civil Procedure, RRO 1990, Reg 194, s 30.01\(1\)\(b\)](#)

Production Request #3: Complete unredacted copies of the lease and rent relief agreements as between the Authority and its American duty-free store tenant⁹:

19. Paragraph 42 of the notice of cross-motion pleads as follows:

The Authority arbitrarily gave preferential treatment to its other Peace Bridge duty free tenant, the U.S. duty-free store. The Authority agreed to accept percentage rent only on an indeterminant basis and to defer all arrears of annual minimum rent to a later date.

20. The Authority, through counsel, acknowledged the relevance of the lease and agreements as between the Authority and the American duty-free store to the matters at issue in this proceeding.

MR. STANEK: Okay, so the — the undertaking I gave you with respect to the — to the agreement, same thing with respect to the lease, **I recognize the relevance of it, however there may be a restriction as to our ability to provide it.** And I need to — we will need to investigate that, but I will also undertake to advise as to what can be — what details of these arrangements, the lease and the agreement can be produced if any, okay? [emphasis added]¹⁰

21. The Authority has not advised what steps it has taken to investigate or what details can be produced. Instead, it reversed course and denied relevance.¹¹

22. Both stores are located at the same border crossing. They have the same landlord. They are affected by the same pandemic. Both were affected by government restrictions in response to the pandemic. However, they have resulted in

⁹ This request relates to questions 109 and 130 at pages 45 and 54 off the Transcript of examination of Tim Clutterbuck dated May 30th, 2023 (**Compendium, Tab 6**).

¹⁰ Transcript of examination of Tim Clutterbuck dated May 30th, 2023 at p. 45 (**Compendium, Tab 6**).

¹¹ June 23rd, 2023 letter at p. 4, Exhibit “K” (**Compendium, Tab 7**) and July 7th, 2023 letter at p.1, Exhibit “N” (**Compendium, Tab 3**) to the Affidavit of Cristina Fulop sworn July 19th, 2023.

significantly different outcomes. The American duty-free tenant is effectively a useful “control group” to compare the Authority’s treatment of PBDF.

23. The available evidence indicates the American duty-free store was in default of its agreement and paid approximately the same amount of rent to the Authority from April 2020 to December 2020. The American duty-free tenant paid \$269,587.66¹² and PBDF paid \$232,752.00¹³ in respect of that period (including Additional Rent and CERS), plus PBDF paid \$43,000 per month for HST, which is a further \$390,000.00 attributable to that period.¹⁴
24. It also appears the Authority permitted its American duty-free tenant to pay percentage rent only, in an amount considerably less than its base rent amount.¹⁵ In contrast, the Authority demanded immediate payment of amounts that it knew PBDF was unable to pay¹⁶ (despite giving direction to staff to proceed with a second deferral agreement¹⁷), and then the Authority threatened eviction in the face of the statutory eviction moratorium in Ontario.¹⁸
25. Subsection 18.07 of the Lease creates a contractual obligation for the Authority to take action in response to the change in Applicable Laws that materially affected

¹² April 27th, 2021 email and attachment p.13 of Exhibit #2 of the cross-examination of Karen Costa dated May 30th, 2023, Exhibit “C” to the Affidavit of Cristina Fulop sworn July 19th, 2023 (**Compendium, Tab 8**).

¹³ THRP-CERS Summary, Exhibit “D” to the November 13th, 2022 Affidavit of Jim Pearce (**Compendium, Tab 9**).

¹⁴ November 13th, 2022 Affidavit of Jim Pearce at. para 54 (**Compendium, Tab 10**).

¹⁵ Page 13 of attachment to April 27th, 2021 email, Exhibit #2 of the cross-examination of Karen Costa dated May 30th, 2023, Exhibit “C” to the Affidavit of Cristina Fulop sworn July 19th, 2023 (**Compendium, Tab 8**).

¹⁶ Transcript of examination of Tim Clutterbuck dated May 30th, 2023 at p.82 (**Compendium, Tab 11**).

¹⁷ November 20th, 2020 meeting minutes, Exhibit “I” to the Affidavit of Cristina Fulop sworn July 19th, 2023 (**Compendium, Tab 12**).

¹⁸ November 13th, 2022 Affidavit of Jim Pearce at. Paras. 61-62 (**Compendium, Tab 13**).

- PBDF's business. An issue before the court is what is the appropriate action to be taken by the Authority in terms of the impact on rent payable under the Lease. PBDF says that the action taken by the Authority to relieve its other duty-free store tenant from its rental obligations in similar circumstances is relevant to the consideration of what response is appropriate with respect to PBDF's Lease.
26. To the extent subsection 18.07 of the Lease involves an exercise of Authority discretion, it must do so reasonably. The Authority also has a duty of good faith and honest contractual performance.
 27. There is an obvious disparity in the Authority's approach to contractual performance between its two duty-free store tenants. The American duty-free store rent relief agreement(s) and its lease has been specifically raised in the pleading and PBDF must be allowed to pursue that allegation, particularly where the very existence of its business that has been operating for over 35 years is at risk because of the actions of governments and quasi-government entities.
 28. Further, the Authority included a redacted version of Report No. 869/20 at Tab F.3 of the Authority's Disclosure Brief, which enclosed an entirely redacted copy of the rent deferral agreement(s) between the Authority and American duty-free store. Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an important interest.¹⁹

¹⁹ [*McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408 \(CanLII\), at para 13](#)

29. Mr. Rienas's November 26th, 2022 affidavit describes the American duty-free tenant rent relief agreements and says that its first agreement was "similar" to what was provided to PBDF:

J. Authority has not Favoured the US Duty Free

40. In paragraphs 101 to 104 of his Affidavit Mr. Pearce asserts that: (a) the operator of the US duty free was, in 2021, paying only percentage rent; and (b) the Authority has given preferential treatment to the operator of the US duty free by requiring that PBDF pay the base rent required by the Lease. This is unfair. **The Authority negotiated an agreement with the operator of the US duty free that contemplated the temporary deferral of rent in 2021 similar to what was provided for in the First Rent Deferral.** There is now an agreement in place with the operator of the US duty free that provides for a much smaller rent abatement than has been offered to PBDF and the deferred rent owing by the operator of the US duty free is being repaid, with interest. [emphasis added]²⁰

30. As a matter raised in, or put in issue by the deponent in his affidavit, PBDF is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.²¹
31. If the agreements support the Authority's position, it should have no trouble producing the records to demonstrate it acted appropriately, even if it is done on a "counsel eyes only" basis at first instance.

ALL OF WHICH IS HEREBY SUBMITTED THIS 21st DAY OF JULY 2023 BY:



Brendan Jones

²⁰ November 26th, 2022 affidavit of Ron Rienas at para. 40 (**Compendium, Tab 14**).

²¹ [*Ontario v. Rothmans Inc.*, 2011 ONSC 2504 \(CanLII\), at para 143,](#)