

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

**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.
(Scheduling Hearing Returnable November 29th, 2022)**

1. Peace Bridge Duty Free Inc. (“**PBDFI**”), operates (and has for more than 3 decades) the Peace Bridge Duty Free shop on the Canadian side of the Peace Bridge between Canada and the United States.
2. PBDFI operates under a court ordered stay dated December 14, 2021. PBDFI’s operations are monitored monthly by MSI Spergel Inc., the court appointed Monitor.
3. The Buffalo and Fort Erie Public Bridge Authority (“**Landlord**”), is an international government entity that manages the Peace Bridge and is the landlord of the PBDFI.
4. The Landlord is currently stayed from terminating the lease.
5. Three related outstanding motions exist in this proceeding, namely the Landlord motion for direction as to what arrears of rent (if any) are payable to the Landlord and for related relief,

the RBC receivership motion, and the PBDFI motion. Pleadings are outstanding in respect of all three motions.

6. The motions are not reasonably or properly heard independent of one another. The Landlord's motion is currently scheduled for December 9th, 2022,
7. PBDFI asks the court to set a new schedule which allows for the orderly development of a complete court record in order to put these matters properly before the court.
8. This litigation is a complex multi-million-dollar dispute. The Landlord seeks to destroy PBDFI's thirty plus year business in advance of the Court considering rights and obligations under the commercial lease.
9. There are a myriad of stakeholders, including PBDFI's owners, employees, suppliers, lenders, and the public who relies upon the facility operating as an amenity to travel.
10. PBDFI disagrees with the Landlord's assertion that it is not in compliance with its post stay order rent obligations.
11. No party but the Landlord alleges PBDFI is in breach of the stay order.
12. There is no urgency to this matter, and this complex litigation requires proper treatment by this court, including by way of completed pleadings.

Status of Pleadings

13. In September 2022, after nine months of relative silence, and after accepting rent paid to it each month during this process without complaint to this court or the Monitor; the Landlord sought a scheduling appointment to allow it to serve a motion seeking to lift the Stay for the purpose of terminating the PBDFI lease on the basis, principally, of an alleged non-payment of a portion of rent during the stay period of December 2021 to the then date of August 2022.

14. PBDFI denies that there are any rent arrears under the stay order that have accrued for that period, and states that it paid every month the normal rent which it had been paying the Landlord up to the time of the stay.
15. A scheduling hearing of the Landlord's motion took place October 5th, 2022.
16. At the scheduling appointment, and at the request of the Landlord, Justice Kimel ordered the Landlord's motion returnable on the first available date being December 9th, 2022, as at the time of the scheduling appointment PBDFI's motion was not before the court.
17. No timetable was agreed to as to the exchange of materials.
18. Justice Kimmel also did not set a date for the return of the RBC's receivership motion which RBC said must be heard contemporaneously with the Landlord's motion,
19. Justice Kimmel indicated the receivership motion could not be heard on December 9th, 2022 because of time restrictions.
20. However, mindful of the concerns raised at the hearing about potential issues with that date, Justice Kimmel directed the parties to return to her if necessary if they could not make this work.
21. Unfortunately, the parties have been unable to come to any scheduling agreement.
22. On October 7th, 2022, the Landlord served its motion record.
23. PBDFI advised prior to the October scheduling hearing that it proposed to deliver its cross-motion on or about November 4th. As the materials proved more complex than anticipated, it advised the parties the materials would be served the next week.

24. On November 13th, 2022, PBDFI served its cross motion and response. The motion record is 306 pages long and contains a 122-paragraph affidavit, which reflects the complexity of this matter.
25. No party has responded to the PBDFI motion as yet, although it surely requires a response from at least the Landlord.
26. RBC filed its original receivership application in December 2021, which materials are now outdated. For example, the collateral position of PBDFI has been materially improved over the past year including, without limitation, the payment to RBC of cash collateral of approximately \$850,000. If RBC is to pursue a receivership, up to date materials should be served to justify same, and such materials ought to be able to be responded to by the parties.
27. No such materials have as yet been filed by RBC.
28. No materials have been served by the court-appointed Monitor in response to any motion. We believe the Monitor is waiting for the parties to finalize pleadings before it responds.

Relief Sought in the Motions (emphasis added)

29. The Landlord's motion seeks the following:
 - a. Declaring that the Landlord is no longer bound by the restriction imposed by paragraph 11 of the Order dated December 14, 2021, as amended (the "Appointment Order") for the reason that the Tenant has not, since December 14, 2021, paid rent as required by the Building Lease dated July 28, 2016 (the "**Lease**") between the Landlord and the Tenant; or in the alternative,

- b. **An Order lifting the stay imposed by paragraph 9 so that the Landlord may exercise its remedies under the Lease, including terminating the Lease and evicting the Tenant;** or in the further alternative,
- c. An Order that the Tenant pay, within 10 business days, all rent payable with the Lease since December 14, 2021, and account for all subsidies received by the Tenant since December 14, 2021, without prejudice to the Landlord's rights in connection with rent owing by the Tenant for the period prior to December 14, 2021.

30. The PBDFI motion seeks the following:

- a. **An order staying the Authority's [Landlord'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.**
- b. **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.**
- c. 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.

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.

- d. **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:
 - i. The Canada Emergency Commercial Rent Assistance (“CECRA”) program period from April to September 2020;
 - ii. From October 2020 to November 8th, 2021, the day before the U.S.-Canada border reopened for non-essential travel (with restrictions);
 - iii. November 9th, 2021 to September 30th, 2022, when the Canadian government discontinued vaccine requirement for entry and use of the ArriveCAN app;
 - iv. October 1st, 2022 to the date to be determined when the U.S. border reopens for unvaccinated travellers.
- e. 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.
- f. 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 21st, 2020 to September 19th, 2021.

- g. **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.**
- h. **An order directing the parties to attend a mediation.**
- i. A sealing order in respect of Duty Free's financial information disclosed in support of the cross-motion; and
- j. An order directing how Base Rent payable will be calculated in the event of a future pandemic and subsequent Border Restrictions.

31. RBC's original motion sought an order:

- a. Appointing MSI Spengel as receiver without security, of all the assets, properties and undertakings of PBDFI [along with a Commercial List Standard Form Receivership Order which, inter alia, would stay the landlord from taking any enforcement steps.]

Relief Sought at Case Conference

- 32. In light of all the foregoing, it is the position of the PBDFI that the Landlord's motion cannot proceed unilaterally on December 9th, 2022. As such, PBDFI seeks to have the December 9th, 2022 date vacated. Rather, PBDFI submits the parties should return to a schedule which PBDFI originally proposed in respect of the PBDFI cross-motion (with the dates adjusted to reflect where things now stand in the calendar), which is set out as follows:
 - a. Landlord to file responding materials by January 12th, 2023;

- b. Parties to agree to select and engage a mediator before December 15th, 2022 for a mediation to be held in February 2023; and,
 - c. Case Conference, subject to judicial availability, to be held the week of February 13th, 2023 to schedule next steps.
33. The Landlord is not suffering any prejudice by the continuation of this process, and there is no urgency to this matter. The Landlord has been paid rent equal to 20% of Gross Sales and all additional rent when due each month in this process. The Landlord has not provided any objection to the court appointment Monitor. The Court appointed Monitor received monthly reports each month from the PBDFI confirming rent was paid and the amount that was paid.
34. The Landlord did not seek any relief until now, and it is perverse that it does so now as PBDFI is now paying a much higher amount of rent than earlier in this process, due to increased sales resulting from the subsidence of the pandemic and increased traffic across the bridge.
35. The Landlord's lease termination motion cannot be determined without first (or concurrently) determining the issues set-out in PBDFI's cross-motion. The RBC motion cannot be heard or responded to without knowing the court's position on the Landlord and PBDFI motions.
36. The complexity of this matter likely requires a full day and a half to two-day hearing in order for the PBDFI and the Landlord's motions to be resolved or perhaps even longer if the hearing must also account for the motion by RBC for the appointment of a receiver, which will be opposed by PBDFI. Currently only half a day is booked on December 9th and the court has already held that is insufficient to hear all three motions.
37. Finally, PBDFI has repeatedly asked the Landlord to attend mediation to see if a resolution is possible. The Landlord's refusal to do so is puzzling. In the circumstances, PBDFI believe the

Court should encourage the Landlord to attend mediation or at least include a case conference or mediation in the proposed schedule once more materials have been exchanged.

38. PBDFI believes the Court has the jurisdiction to make such an order for the benefit of all the parties and the stakeholders.

ALL OF WHICH ARE HEREBY SUBMITTED THIS 25TH DAY OF NOVEMBER BY:

A handwritten signature in dark ink, appearing to read 'D. T. Ullmann', is written above a horizontal line.

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
FREE INC.**
(Scheduling Hearing Returnable November 29, 2022)

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