

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

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

**BRIEF FOR ARGUMENT  
(MOTIONS RETURNABLE 25-26 JULY 2023)**

Date: 21 July 2023

**GOWLING WLG (CANADA) LLP**

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Lawyers for Buffalo and Fort Erie Public Bridge  
Authority

TO: THE SERVICE LIST

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TAB 1



SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL SLIP/ENDORSEMENT**

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

HEARING June 14 and 15 2023

DATE: \_\_\_\_\_

NO. ON LIST: 5

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

BEFORE JUSTICE: KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Sanjeev Mitra	Lawyer for RBC	smitra@airdberlis.com

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
David Ullmann	Lawyer for Peace Bridge Duty Free Inc./Tenant	dullmann@blaney.com
Brendan Jones		bjones@blaney.com

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Leanne M. Williams	Lawyer for msi Spergel Inc. in its capacity as Court-appointed Monitor of Peace Bridge Duty Free Inc.	lwilliams@tgf.ca
Mukul Manchanda	Monitor/Proposed Receiver	mmanchanda@spergel.ca
Christopher Stanek	Lawyer for Buffalo and Fort Erie Public Bridge Authority/Landlord	christopher.stanek@gowlingwlg.com
Patrick Shea		patrick.shea@gowlingwlg.com

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**ENDORSEMENT OF MADAM JUSTICE KIMMEL:****Issues Raised for Consideration**

1. There is a three day hearing scheduled before me on July 25, 26 and 27, 2023 for the Tenant's cross-motion. I will not repeat in this endorsement the history of the proceedings that led the scheduling of that motion. Pre-hearing steps leading up to that motion were timetabled in my endorsement of April 4, 2023.
2. One of those steps was a case conference to be held on June 14, 2023, "which shall be primarily to address evidentiary considerations for the hearing of the Cross-Motion, including whether any party considers that it might be necessary for the court to hear *viva voce* evidence from any of the witnesses. The parties should come to this case conference prepared to discuss any other logistics for the hearing, including any sealing orders that might be requested."
3. Unfortunately, these hearing logistics could not be addressed because the parties reported to the court that various deadlines have been missed in the timetable, specifically:
  - a. The May 26, 2023 deadline for completing r. 39.03 examinations; and
  - b. The June 7, 2023 deadline for completing cross-examinations.
4. These deadlines were missed because of concerns that the Tenant has about the sufficiency of documentary disclosure by the Landlord and the scope of inquiry that the Landlord was prepared to permit on the r. 39.03 examinations of its representatives. These concerns led the Tenant to adjourn the r. 39.03 examinations that had commenced. That, in turn, led to the delay of the cross-examinations which, without leave of the court, cannot proceed until the r. 39.03 examinations have been completed. While the Landlord decided not to conduct any r. 39.03 examinations itself, the sequencing is still applicable to its cross-examinations because the Landlord had exercised its right to examine the Tenant's Rule 30.03 witnesses.
5. The Landlord disagrees with the Tenant's complaints about the sufficiency of its production and disclosure, and observes that there are deficiencies in the Tenant's disclosure as well.
6. Detailed Aide Memoire's were filed for this case conference outlining a multitude of production and disclosure disputes.
7. In general terms, the Tenant was seeking certain directions from the court, but at the same time contending that no substantive orders about production issues could be made without a formal motion. The Tenant suggested that its cross-motion be adjourned to the fall, that the receivership motion currently scheduled for September 22, 2023 be adjourned and that the court time in July be used for production and refusals motions.
8. In general terms, the Landlord was seeking directions on all issues today with a view to requiring the parties to make whatever further disclosure the court might order within a week and complete all examinations by June 30, 2023. It was suggested that, with a compressed revised timetable for answering undertakings and the exchange of factums thereafter, the hearing dates in July for the Tenant's cross-motion could still be preserved.

**Interim Period: Without Prejudice Rent and the Monitor's Second Rent Affordability Report**

9. The Landlord has been consistent in its concerns raised about delaying the adjudication of the Tenant's cross-motion while the Tenant continues to enjoy the protection of what was supposed to be a temporary stay of proceedings that was put in place in December 2021 when the Monitor was

appointed. Beyond the concerns about the overall delay, the Landlord's concerns about direct prejudice from the Tenant's failure to pay the rent that the Landlord claims to be entitled to during the stay period (which is the very subject of the Tenant's cross-motion) were alleviated on a temporary and without prejudice basis by my endorsement of May 17, 2023 which directed "that the Tenant shall pay monthly rent in arrears directly to the Landlord on an interim basis commencing on June 1, 2023 and continuing until September 1, 2023 (the "Interim Period") of the greater of: (i) 20% of the Tenant's gross sales, and (ii) the specified minimum Base Rent under the Lease of \$333,333 plus HST."

10. Counsel for the Tenant had obtained instructions just prior to this case conference that the Tenant would agree to extend the Interim Period over which it will pay this without prejudice rent until the cross-motion is heard, and offered to work with the Monitor to prepare the second rent affordability report extending out the projections to the end of 2023 on an expedited timeline so that the court (and RBC) can be satisfied that this arrangement is sustainable if the cross-motion and receivership motion are adjourned.
11. The Tenant shall provide the Monitor with the necessary information to prepare this second rent affordability report by June 30, 2023 and the Monitor shall endeavour to have that report prepared and available for the parties' and the court's consideration in connection with the July 25 and 26, 2023 hearing dates (which are being re-purposed, as detailed below).

#### Adjournment of Tenant's Cross Motion and the Receivership Application

12. Because this case conference did not end until 6 pm on June 14, 2023, it was not possible to determine the court's availability to adjourn these motions. Accordingly, the parties were directed to re-attend upon the court's request the next day.
13. As a practical matter, it does not appear that the Tenant's cross-motion can realistically proceed on July 25, 26 and 27, 2023 given the state of the examinations.
14. The court is concerned about continuing delays and has thus now arranged the earliest possible dates in the fall for the cross-motion to be adjourned to which are September 19, 21 and 22, 2023.
15. The July 25 and 26, 2023 dates are being reserved to address production and disclosure and timetabling issues, as detailed below.
16. The intention when these matters were originally scheduled was that the receivership application would be heard after the Tenant's cross motion had been decided. The court's availability in the fall could end up pushing out the receivership application later than the parties are comfortable with, particularly given that the Landlord has been asked to agree to allow the stay to continue, even if it is successful on the Tenant's cross motion, until the receivership application is decided. RBC also may have its own concerns about delaying the receivership application depending on the results of the Monitor's second rent affordability report.
17. It was decided that the determination of a new date for the receivership application will be made when the parties are next before the court on July 25 and 26, 2023, when it is anticipated that the Monitor's second rent affordability report will be available.

#### Disclosure Issues and Issues to be Determined on July 25 and 26, 2023

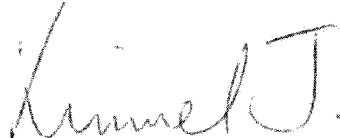
18. The Commercial Court does not schedule production and refusal motions. It deals with category based production and disclosure issues that require determinations on matters such as privilege and sealing and proportionality. Some of the concerns identified are about those types of issues. They will be determined by the court on July 25 and 26, 2023 if not resolved by the parties before then.
19. The following observations and expectations of the court are offered:

- a. Full documentary disclosure was not ordered.
- b. Some directions were provided in the court's April 4, 2023 endorsement about categories of expected disclosure, although that was not intended to be a closed list of all potentially relevant categories of production and disclosure.
- c. The court expects issues about missing documents within categories of produced documents to be identified and responded to in a timely manner before the examinations, and even if not satisfactorily resolved, to be explored by the parties during the examinations of witnesses familiar with the documents.
- d. The court expects parties to respond promptly to inquiries about documents that might no longer exist and the circumstances under which they ceased to exist, and to explore this during the examinations if considered relevant.
- e. The court expects documents in the identified categories that were withheld on grounds of privilege to be listed (as the parties appear now to agree upon).
- f. 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.
- g. Subject to legitimate proportionality and privilege considerations, the court expects questions asked during the examinations to be answered (even if under reserve of objection as to relevance).
- h. The court expects concerns about confidentiality (*vis-à-vis* the Tenant and/or *vis-à-vis* the public court file, the latter of which might give rise to limited sealing order requests) to be brought forward in focused manner for the court's consideration and direction. In the case of requests for disclosure of third party confidential information, consideration may need to be given to the rights and interests of those third parties and whether, and if so when, they may need to be given on notice.
- i. The court expects the parties to co-operate in identifying the appropriate witnesses to answer questions, having regard to their scope of direct knowledge.
- j. The court expects the parties to conduct focused examinations of witnesses; these are not discoveries.

20. With this guidance in mind, the following directions are provided in connection with the July 25, and 26 and September 19, 21 and 22, 2023 hearing dates:

- a. Any disclosure and production that has been previously requested and that the responding party is prepared to provide shall be provided by June 23, 2023;
- b. The parties shall exchange lists of any remaining outstanding requests, deficiencies and/or production inquiries by June 30, 2023;
- c. If the Landlord has other issues with the Tenant's performance of its obligations under the Lease, aside from the payment of rent, those should be identified at the same time as the disclosure deficiencies;
- d. The parties shall attempt to narrow the issues by providing as much information in writing as they can, on the record, in response to the disclosure, production or performance sought;
- e. Based on the list of outstanding issues, the parties shall agree upon a timetable for the exchange of materials that detail the issues that the court will be asked to decide on July 25 and 26, 2023 that ensures that all material has been exchanged and uploaded onto CaseLines by no later than July 21, 2023;
- f. If proportionality is a ground for non-disclosure, some evidence will be required to support that;

- g. If the Tenant is seeking disclosure of documents and information about the US Tenant's contractual arrangements and dealings with the Landlord, the only issue that the court will be asked to decide on July 25 and 26, 2023 is the question of relevance of that requested disclosure. No order for production will be made without the US Tenant having been put on notice;
  - h. Time will be reserved on July 25 or 26, 2023 to address any concerns arising out of the Monitor's second rent affordability report. In the meantime, and unless and until the court orders otherwise, the Tenant shall continue to pay the without prejudice monthly rent agreed to at the May 17, 2023 case conference;
  - i. The maximum number of pages of submissions from any party on **all issues** to be considered at the July 25 and 26 hearing shall be 25 pages double-spaced;
  - j. In the meantime, the parties shall also revise the timetable for the Tenant's cross motion and re-schedule the r.39.03 examinations and cross examinations for some time in August, and reschedule the exchange of the remaining material thereafter, so that it has all been delivered and uploaded into CaseLines by no later than September 15, 2023.
21. 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.



KIMMEL J.

June 16, 2023



TAB 2



26 June 2023

Sent by E-Mail ([Dullmann@blaney.com](mailto:Dullmann@blaney.com)  
[BJones@blaney.com](mailto:BJones@blaney.com))

E. Patrick Shea, LSM, CS Prof Corp  
Direct 416-369-7399  
[patrick.shea@gowlingwlg.com](mailto:patrick.shea@gowlingwlg.com)

**David T. Ullmann**  
**Brendan Jones**  
Blaney McMurtry LLP  
2 Queen Street East, Suite 1500  
Toronto, Ontario M5C 3G5

Dear Sirs:

**Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)**

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On 16 June 2023, Her Honour directed any additional disclosures and productions be provided by 23 June 2023. The Authority has complied with Her Honour's direction. We received nothing from PBDF except your letter dated 23, June 2023, which is addressed below.

On 16 June 2023, Her Honour also directed that by 30 June 2023: (a) the parties exchange a list of any remaining outstanding requests, deficiencies and/or production inquiries; and (b) the Authority identify any issues with PBDF's performance of its obligations under the Lease.

Can you please by close of business tomorrow—27 June 2023—advise as to what, if any, issues PBDF asserts remain with the information and documents provided by the Authority and on what basis PBDF believes it is entitled to any specific information or documents that has not already been provided so we can attempt to narrow the issues as directed by Her Honour?

With respect to PBDF's disclosures and productions, we have, of course, been unable to properly explore any deficiencies because the cross-examinations of Messrs Pearce and Mills were cancelled. We did, however, note what appear to be issues with PBDF's disclosures in the Aide Memoire filed for the attendance on 14 June 2023.

There will not doubt be undertakings requested of Messrs Mills and Pearce when they are cross-examined, but we will, at the very least, request the following information/documents:

- (a) the amount each shareholder received from PBDF by way of dividend or other distribution:
  - (i) from 1986 to November of 2016; and (ii) from November of 2016 to January of 2022;
- (b) the amount each shareholder contributed to PBDF by way of equity injection or loan from March of 2020 to January of 2022;
- (c) copies of all drafts of PBDF's proposal delivered in response to the RFP;



- (d) the specific changes in Applicable Laws that PBDF asserts triggered Art 18.07 and details of how each of those changes in Applicable Laws caused a material adverse effect on the business and operations of PBDF at the Leased Premises;
- (e) copies of all communications from PBDF to the Authority identifying a change in Applicable Laws asserting that Art 18.07 was triggered and requesting concessions under Art 18.07;
- (f) copies of all internal financial projections, models and business plans prepared by PBDF during the period March 2020 to December 2021;
- (g) copies of communications between PBDF and its auditor with respect to PBDF's obligation to pay rent under the Lease in calendar 2020 and 2021; and
- (h) copies of all communications between Mr. Pearce and Mr. Mills upon which Mr. Mills relies in making the statements in para 15 of his Affidavit sworn 1 January 2023.

We expect that PBDF will produce the forgoing information/documents in advance of any cross-examination of Messrs Pearce and Mills. If PBDF will not, can you please identify what grounds PBDF has for not producing the information/documents?

With respect to issues with PBDF's performance under the Lease, the Authority asserts that the following on-going breaches exist:

<b>Default</b>	<b>Art of Lease</b>
Failure to operate the duty free consistent with the Proposal.	9.02(n) and Proposal (Lease Schedule D).
Failure to provide food services.	9.02(n) and Proposal (Lease Schedule D) Tab E.
Altering the interior of the duty free without the prior written approval of the Authority. Specifically, installing a wall without approval.	12.02(a).
Failure to keep the Leased Premises in a first class condition.	9.02 (n) and 12.01(b).
Failure to spend at least \$1.25MM in capital refurbishments in Year 6 of the Lease-2022.	9.02(n) and Proposal (Lease Schedule D) Tab H.
Failure to spend at least \$1MM per year on marketing and sales initiative.	9.02(n) and Proposal (Lease Schedule D) Tab G



In addition to the foregoing, there have been other miscellaneous breaches of the Lease. For example, PBDF failed to provide audited financial for 2022 by the date required by Art 16.03(b) and failed to obtain the Authority's consent to grant a security interest in the Lease to RBC as required by Art 14.01.

We are in receipt of your letter dated 23 June 2023 referencing, for the first time, that there may be additional disclosures coming from PBDF. You will appreciate that your letter raises concerns with the quality of PBDF's disclosures.

Can you please advise as to how PBDF intends to address the fact that there may be additional disclosures?

We note that there were a number of pre-2017 e-mails included in your disclosures. Why were the disclosed e-mails "recoverable", but the 6,800 e-mails referenced in the e-mail attached to your letter not?

We also note that the e-mail attached to your letter appears to be in response to another e-mail or e-mails. Can you please provide all of the e-mails in the chain?

Finally, we note that Mr. Jenkins appears to have been instructed to only extract e-mails that contained the "gohara@dutyfree.ca" address. Why was the search limited to this e-mail address?

Sincerely,

**GOWLING WLG (CANADA) LLP**

A handwritten signature in black ink, appearing to read "E. Patrick Shea".

E. Patrick Shea, MStJ, LSM, CS

EPS:jm

cc. Christopher Stanek

57349251\1

TAB 3

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

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

THE HONOURABLE

)

TUESDAY, THE 14TH

JUSTICE PATTILLO

)

DAY OF DECEMBER, 2021

)

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

**ORDER**  
(appointing Monitor)

**THIS APPLICATION**, made by Royal Bank of Canada ("**RBC**") for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing msi Spergel inc. ("**Spergel**") as a monitor (in such capacity, the "**Monitor**") without security, of Peace Bridge Duty Free Inc. (the "**Debtor**"), was heard this day via Zoom videoconference because of the Covid-19 pandemic.

**ON READING** the affidavit of Christopher Schulze sworn December 2, 2021 and the exhibits thereto, and the affidavit of Jim Pearce sworn December 12, 2021 and on hearing the submissions of counsel for RBC, the Debtor, the Buffalo and Fort Erie Public Bridge Authority and such other counsel as were present, no one appearing for any other stakeholder although duly served as appears from the affidavit of service of Eunice Baltkois sworn December 3, 2021, the consent of the Respondent, and on reading the consent of Spergel to act as the Monitor.



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#### DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Monitor.

6. THIS COURT ORDERS that all Persons, including but not limited to Canada Border Services Agency and Canada Revenue Agency, shall be authorized to share information, with the Monitor, provided the Debtor shall be entitled to request and receive copies of all such information from the Monitor.

#### NO PROCEEDINGS AGAINST THE MONITOR

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Monitor except with the written consent of the Monitor or with leave of this Court.

#### NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Monitor or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

#### NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Monitor or affecting the Property are hereby stayed and suspended except with the written consent of the Monitor or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall prevent the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, except the Debtor from compliance with statutory or

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regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

#### **NO INTERFERENCE WITH THE MONITOR**

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Monitor or leave of this Court.

#### **CONTINUATION OF SERVICES**

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

#### **CASL**

12. THIS COURT ORDERS that any and all interested stakeholders in this proceeding and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in this proceeding, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to such other interested stakeholders in this proceeding and their counsel and advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).



TAB 4

BUILDING LEASE

BETWEEN

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

- AND -

PEACE BRIDGE DUTY FREE INC.

- (b) Without limiting the generality of the foregoing, the Tenant shall provide the Landlord with its most recent audited annual financial statements immediately upon request and in any event within one hundred and twenty (120) days of the end of each fiscal year of the Tenant.
- (c) The Tenant agrees to provide to the Landlord prompt notice of any impending financial difficulties that could lead to a secured creditor exercising, or providing notice of an intention to exercise, its remedies, including a notice under Section 244 of the *Bankruptcy and Insolvency Act* (Canada).

## ARTICLE XVII DEFAULT

### 17.01 Event of Default

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

- (a) the Tenant fails to pay any Rent when it is due and such failure continues for five (5) days after notice from the Landlord to the Tenant of such failure;
- (b) the Tenant fails to observe or perform any other of the terms, covenants, conditions or agreements contained in this Lease and such failure continues for ten (10) days after notice from the Landlord to the Tenant specifying the failure (except as set out in paragraphs (c)–(n), both inclusive, below where the Landlord shall have no obligation to provide such notice to the Tenant);
- (c) the Term or any of the goods, chattels or fixtures of the Tenant on the Leased Premises are seized or taken in execution or attached by any creditor;
- (d) a writ of execution or sequestration is issued against the goods, chattels or fixtures of the Tenant;
- (e) the Tenant makes a sale in bulk of all or a substantial portion of its assets other than in a Transfer approved by the Landlord;
- (f) the Tenant sells or disposes of the goods, chattels or fixtures or removes them or any of them from the Leased Premises without complying with Section 12.07;
- (g) the Tenant abandons or attempts to abandon the Leased Premises or the Leased Premises remain vacant for ten (10) consecutive days or more without the prior written consent of the Landlord;
- (h) the Leased Premises are used by any Person other than those Persons entitled to use them under this Lease;
- (i) the Tenant makes an assignment for the benefit of creditors or commits any act of bankruptcy as defined in the *Bankruptcy and Insolvency Act* (Canada) or any

TAB 5

**COPY**  
**Penfound Court Reporters**

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

Respondent

\* \* \* \* \*

**EXAMINATION FOR DISCOVERY**

of **TIM CLUTTERBUCK**, a non-party witness, herein,  
 at the office of Penfound's Inc.,  
 at St. Catharines, Ontario,  
 held on Tuesday, the 30<sup>th</sup> day of May, 2023,  
 at ten o'clock in the forenoon,  
 pursuant to an appointment.

\* \* \* \* \*

**APPEARANCES:**

Mr. Brendan Jones  
 (Blaney McMurtry LLP)

Counsel for the Respondent

Mr. Christopher Stanek  
 (Gowling WLG)

Counsel for the Buffalo and  
 Fort Erie Public Bridge Authority

\* \* \* \* \*

*Tim Clutterbuck - May 30, 2023*

communications for a variety of reasons, particularly the chairman and vice chairman will have discussions from time to time.

21. Q. With the staff or amongst themselves?

5 A. Normally through the general -- we'll talk amongst ourselves but normally we'd -- if we're talking to anyone we're talking to a general manager, I don't think we've ever spoken to anyone below that level.

10 22. Q. Okay. And sorry, what do you do -- what do you do for a living outside of the -- as a member of the board?

15 A. I'm currently retired, I retired in February of last year as the president of a steel company in Welland, Ontario. Alberta ASW. I currently do some consulting work, mostly on the management side.

20 23. Q. Okay. So sounds like it's fair to say you have considerable experience dealing with boards and ...

A. I've had some experience, for sure.

25 24. Q. And what's the -- can you help me out, what's the process for becoming a member of the board or is there a qualification for becoming a board member?

20

*Tim Clutterbuck - May 30, 2023*

any circumstance in which the Authority has thought -- has sought approval from the government?

A. No. Is that fair, okay.

MR. JONES:

62. Q. Now earlier you told me that either the chair or the vice chair might speak directly to the general manager and have communications I take it about operational issues with the Authority, is that what they would be ...

A. Things of that nature, yeah.

63. Q. Okay. And would they be -- include the leases or the tenancies for the Duty Free stores?

A. The issues associated with deciding on significant matters are all handled by the board. So discussions that might take place outside of that might be -- might be about timing of what we put on the agenda for the next meeting, whether we get council to support that discussion, those types of discussions occur around bigger issues like that. If we're talking about staffing at the border that might be something we can give advice on but not direction. There's no direction given outside -- outside the border so we -- we manage that way.

64. Q. Right. So it sounds like you'd be

21

*Tim Clutterbuck - May 30, 2023*

communicating about what is going to be dealt with  
...

A. Yeah.

65. Q. ... inside the meeting?

5 A. Yeah, and we might write recommendations  
about when it's a good time to get an opinion and  
things of that nature. So it's -- it might be a  
little bit more advisory but also support, but in  
fact it's -- there's no decisions made that aren't  
10 board approved.

66. Q. Okay. Now would -- during the covid  
pandemic from January 2020 until December 2021 would  
you have had any direct communications by email or  
text message or anything of that nature with the --  
15 with the staff relating to the Duty Free store  
leases?

20 A. I don't recall anything in that period for  
-- so the year of '20 I wasn't the chair I was the  
vice chair, but I don't recall any specific  
discussions that would have been anything other than  
clarification. It might have been -- help me  
understand what's in this document that I'm reading,  
that sort of thing I think is fair game, but other  
than that and -- and I'm trying to think if there was  
25 ever a time we may gone beyond the general manager,



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*Tim Clutterbuck - May 30, 2023*

typically not without him being fully aware of it, it might have been for a detail that perhaps would be better known by the finance person, so I'm not aware of anything that -- that hap -- transpired, I'm not saying it didn't happen, but it would be more clarification certainly, no direction.

67. Q. Okay.

MR. JONES: So Counsel, I'm going to request an undertaking for copies of any emails or text messages or other written communication between the board members and operational staff between that time period from January 2020 to December 2021 that relates to the Duty Free stores tenancies, both on the Canadian side and on the American side.

MR. STANEK: Why?

MR. JONES: What do you mean why?

MR. STANEK: Why do you want it?

MR. JONES: Well because it's relevant to ...

MR. STANEK: Why?

MR. JONES: ... the issue before the court.

MR. STANEK: Well why is it relevant to the issue before the court?

MR. JONES: Well the issue before the court is with respect to how the Authority managed the

23

*Tim Clutterbuck - May 30, 2023*

covid pandemic and specifically with respect to issues involving the Peace Bridge Duty Free lease and the operation of eighteen oh seven (1807) of that lease, and to the extent that issues about the lease are being discussed during the covid pandemic, that's why it'll be relevant.

MR. STANEK: You're asking us to search all communications between all board members and all staff members for a two year period because you say it somehow relates to how the -- how they managed covid, not your lease, to how it man -- how they managed covid, have I got that right?

MR. JONES: No, no I'm talking about emails and texts about this lease, the two leases.

MR. STANEK: Okay. They weren't sent to your client, so there's no -- you're not asking for communications to and from your client, you're talking about all -- all completely internal communications for two years concerning the lease?

MR. JONES: Correct.

MR. STANEK: Okay, I'm going to take that under advisement because I think that that is overly broad. Yeah, okay, that's what I've

24

*Tim Clutterbuck - May 30, 2023*

said. ^

MR. JONES: I mean it doesn't sound like it would have been an extraordinary amount of communication, it would have been dealing with ...

MR. STANEK: He has already told you that all the -- all business was conducted at board meetings, so I'm not sure why you think this is relevant.

MR. JONES: Right, and it's clarifying what issues were going to be addressed.

MR. STANEK: Mmhmm.

MR. JONES: And -- and that type of thing, or what the meaning of certain things were.

MR. STANEK: Mmhmm.

MR. JONES: So that I think puts it squarely in the -- in the scope of relevance.

MR. STANEK: Mmhmm.

MR. JONES:

68. Q. Okay, and I take it directions would be given from the board to the operational staff by way of resolution, is that right?

A. Yeah, motions.

69. Q. Motions and resolution?

A. Mmhmm.

TAB 6



23 June 2023

Sent by E-Mail ([Dullmann@blaney.com](mailto:Dullmann@blaney.com)  
[BJones@blaney.com](mailto:BJones@blaney.com))

E. Patrick Shea, LSM, CS Prof Corp  
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**David T. Ullmann**  
**Brendan Jones**  
 Blaney McMurtry LLP  
 2 Queen Street East, Suite 1500  
 Toronto, Ontario M5C 3G5

Dear Sirs:

**Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)**

On 16 June 2023, Her Honour directed that the Authority provide any further productions and disclosures by 23 June 2023.

**I. Refusals on Rule 39.03 Examinations**

**Karen Costa**

The only refusal from the Rule 39.3 examination of Ms Costa was to produce a copy of the second-place response to the RFP. The Authority will not produce that document. It is the Authority's position that it is not relevant to the issues that are before the Court and that issue will be resolved at the hearing on 25 and 26 July 2023. The second-place proposal does not includes reference to any rent deferral(s) or abatement(s) in the event that there is a change in legislation has an impact on the duty free store. Indeed, PBDF's own proposal included no request that such a provision be included in any lease between PBDF and the Authority. That request was made by PBDF after it was selected.

**Tim Clutterbuck**

The following are additional answer to undertaking and refusals given by Mr. Clutterbuck:

Undertaking	Page	Answer
To provide copies of any emails, text messages or other written communication between the board members and operational staff between January 2020 and December 2021 that relates to the Duty Free stores tenancies, both on	24	<p>The Authority believes that this request raises issues of proportionality. During 2020 and 2021 there were 12 individuals who held office as Directors, two of who are no longer serving as Directors. The Authority currently has over 80 employees.</p> <p>The only employees with whom Directors would have communicated involving operational issues are Mr. Rienas and Ms. Costa. Mr. Rienas is the General Manager. Ms. Costa is the CFO.</p>



Undertaking	Page	Answer
the Canadian side and on the American side.		Ms Costa and Mr. Rienas undertook searches of their current and archived e-mails from 2020 and 2021. These searches would have captured any e-mails received from the Directors. Aside from a generalized searches for e-mails relating to PBDF, specific searches were conducted using the following terms: "abatement", "deferral" and "18.07". If you wish to have any other (reasonable) word-specific searches conducted by Ms Costa or Mr. Rienas of their e-mails, we would be please to consider such a request.
To advise if there were brackets provided to staff with respect to what would be acceptable for the RFP process in 2016.	27	<p>The Authority engaged a fairness monitor/consultant to provide professional advice on the operation of the RFP process and to assist in the evaluation of the proposals submitted in response to the RFP. The consultant would have advised the Authority on the fairness of the RFP process. The consultant was not involved in the negotiation of the Lease or the drafting of Art 18.07.</p> <p>In addition, PBDF raised a legal issue with the right of the Authority to conduct the RFP and argued that the Authority was required to negotiate a lease with PBDF and could not issue an RFP. The Authority sought and obtained legal advice on that issue.</p>
To provide all reports and briefing notes that led to rent relief offers from the Authority to Duty Free.	37	See below.
To provide all the unredacted board minutes for the regular and executive board meetings from January 2020 to December 2021.	40	There were 39 meetings of the Authority's Board—22 regular meetings and 17 executive sessions—between January of 2020 and December of 2021. The Minutes of all meetings at which (a) Art 18.07 or its subject matter; or (b) requests made and responses given with respect to concessions to be provided or given under Art 18.07 were addressed have been produced.
To provide the unredacted version of the reports listed in the disclosure brief as privileged or advise what has been redacted and why, who authored the reports and who they were directed to.	65	See below.
To provide copies of video board meetings held over the internet.	87	Mr. Clutterbuck was referring to two separate matters: (a) use of Zoom for meetings; and (b) audio recordings. Zoom was used for meetings, but there were no Zoom recordings taken. The only recordings were audio and they were dealt with as per the responses to undertakings.

TAB 7



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Brendan Jones  
 D: 416-593-2997 F: 416-594-3593  
 BJones@blaney.com

June 30<sup>th</sup>, 2023

***Via Email***

Patrick Shea and Christopher Stanek  
 Gowling WLG (Canada) LLP  
 Barristers & Solicitors  
 1 First Canadian Place  
 100 King Street West  
 Suite 1600  
 Toronto, ON, M5X 1G5

Dear Counsel:

**Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)**

We are writing in response to your letters of June 23<sup>rd</sup> and 26<sup>th</sup>, 2023 and Justice Kimmel's June 16<sup>th</sup>, 2023 endorsement.

**Response to additional answers to undertakings of Tim Clutterbuck**

***Page 24 answer***

Regarding the question at page 24 of the transcript, the question relates to communications about the duty-free store tenancies on both the Canadian and the American side of the bridge. The Authority has not provided its documents that are responsive to the request in respect of the duty-free store on the American side of the Peace Bridge.

The question relates to communications between board members themselves and between Board members and Authority staff. The Authority has not provided any communications between Board members themselves regarding PBDF's tenancy during the requested time period or disclosed any attempt to obtain those records. All texts, emails, and summaries of verbal communications between all Board members at the relevant time related to either of the tenancies should be produced.

***Page 40 answer***

Regarding the question at page 40 of the transcript, the Authority's response purports to limit disclosure to the direction given in Justice Kimmel's April 4<sup>th</sup>, 2023 endorsement, which she expressly indicated was not intended to be a closed list of potentially relevant categories of production and disclosure.

Although you have indicated that all meetings at which (a) Art. 18.07 or its subject matter; or (b) requests made and responses given with respect to concessions to be provided or given under Art. 18.07 were addressed have been produced, the Authority's Document Brief identified six sets of Board meeting minutes over which privileged was claimed. To date, only two have been produced. The four outstanding Board meeting minutes are: April 30<sup>th</sup>, 2021, May 28<sup>th</sup>, 2021, October 8<sup>th</sup>, 2021 and November 21<sup>st</sup>, 2021.



TAB 8



7 July 2023

Sent by E-Mail ([BJones@blaney.com](mailto:BJones@blaney.com))

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**Brendan Jones**

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

Dear Mr. Jones:

**Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)**

Thank you for your letter of 30 June 2023. Your suggestion that the Authority is somehow not being co-operative is somewhat ironic insofar as you have not conceded on any of the issues you have raised and offered no practical solutions in terms of how to address the issues you have raised—you simply want the Authority to disclose everything you want to see.

**Page 24 Answer**

With respect to document relating to the US duty free, we believe that Her Honour has indicated that the relevance of this information/documentation will be determined at the up-coming attendance on 25-26 July 2023. We do not believe that the information/documentation is relevant and is properly redacted. We expect that you will file materials to establish the relevance of the information/documentation and serve the operator of the US duty free.

With respect to the e-mail between the Authority's director: (a) the directors are not given Authority-owned computers or phones and are not assigned Authority e-mail accounts; and (b) e-mail and texts sent from or received into the directors' personal accounts are not under the control of the Authority. We question how personal e-mail exchanges between directors can be relevant to corporate decisions made by the Authority. If you wish to obtain this information, you will need to bring a Motion seeking same on notice to the individual directors.

**Page 40 Answer**

We will, under separate cover, provide the Minutes from the "regular" meetings held between January of 2020 and December of 2021. You will note that they are, as we previously advised, of no relevance.

With respect to the executive sessions, we have produced all of the (non-privileged) Minutes from meetings at which the Lease and accommodations requested by or offered to PBDf under Art 18.07 were addressed.

TAB 9

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.

**THE GROUNDS FOR THE MOTION ARE:**

**The Parties and the tenancy**

1. Capitalized terms if not defined in this notice of cross-motion and supporting affidavit are as defined in the Lease.
2. Duty Free operates a duty-free shop on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York ("**Leased Premises**"), which it leases from the Authority. Duty Free has been operating the duty-free shop continuously since 1986, and in those thirty-five plus years, has paid the Authority an amount estimated to be in excess of \$84 million in total basic rental payments.
3. Prior to the COVID-19 pandemic, and for more than three decades, Duty Free operated a retail duty-free store that was open 24 hours a day, 365 days a year, and employed approximately 90 staff.
4. The Duty Free and the Authority entered into its most recent lease with respect to the Leased Premises on July 28<sup>th</sup>, 2016 for a further 15-year term commencing on November 1<sup>st</sup>, 2016 and ending on October 31<sup>st</sup>, 2031, subject to Duty Free's right to extend the Lease for a further five years ("**Lease**").

TAB 10





## SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

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

DATE: 4 April 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: RBC v. Peace Bridge Duty Free Inc.

BEFORE JUSTICE: KIMMEL

## PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Sanjeev Mitra	For RBC	<a href="mailto:smitra@airdberlis.com">smitra@airdberlis.com</a>

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
David Ullmann/ J. Wolf	For the Tenant Peace Bridge Duty Free	<a href="mailto:dullmann@blaney.com">dullmann@blaney.com</a> <a href="mailto:jwolf@blaney.com">jwolf@blaney.com</a>

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Patrick Shea	For the Landlord, the Peace Bridge Authority	<a href="mailto:patrick.shea@gowlingwlg.com">patrick.shea@gowlingwlg.com</a>
Leanne Williams	For msi Spergel Inc., the court appointed Monitor	<a href="mailto:williams@tgf.ca">williams@tgf.ca</a>
Mukul Manchanda	Monitor's representative	<a href="mailto:mmanchanda@spergel.ca">mmanchanda@spergel.ca</a>

---

### **ENDORSEMENT OF JUSTICE KIMMEL:**

1. This case conference was scheduled pursuant to the court's January 19, 2023 endorsement, which specified the following agenda of matters to be considered and addressed, post-mediation:
  - 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 the court's 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.
  - c. 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.
  - d. Directions regarding any proposed 39.03 examinations that are objected to in connection with the Tenant's cross-motion.
  - e. Directions 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. Directions 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.
2. The Landlord and Tenant each filed Aide Memoires in advance of this case conference which assisted framing the issues for the court's consideration. Each of these agenda items were addressed in the Aide Memoires, as well as some additional items. The court heard from counsel present and the provides herein a summary of the points addressed and the orders and directions arising therefrom.

### **Report on Mediation**

3. It was reported in the Aide Memoires that no settlement was reached at the mediation, with respect to any issues. The Tenant has said that it intends to make a further proposal to the Landlord. The mediator is available to continue the mediation if the parties consider that it would be productive. That shall not interfere with the timetable now set for the Tenant's Cross-Motion, unless both the Landlord and Tenant request a consent adjournment of same.

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

4. The Tenant wants the court to decide the issue of the costs of the Landlord's Stay Motion decided by endorsement dated January 16, 2023 (*Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327).
5. The Landlord suggests that the court's decision regarding the entitlement/quantum/scale of costs of that motion should be deferred and decided in conjunction with the costs of the Tenant's Cross-Motion. The Landlord's request is reasonable, in the circumstances, for the reasons outlined in its Aide Memoire.
6. The issue of the costs of the Landlord's Stay Motion shall be decided at the same time as the costs of the Tenant's Cross-Motion (now scheduled), or at such further and other time as the court may direct.

### Further Directions With Respect to Paragraphs 9 and 11 of the Appointment Order

7. The Landlord continues to argue that it should not be required to effectively finance the Tenant pending the determination of the Tenant's Cross-Motion, by virtue of the stay of proceedings and other restrictions imposed when the Receiver was appointed, which prevent the Landlord from exercising its remedies in respect of the Tenant's failure to pay Base Rent under the Lease, and other alleged breaches of the Lease by the Tenant. The Landlord's concerns are exacerbated the longer the process takes to a decision on the interpretation of section 18.07 of the Lease.
8. The court has to balance the Landlord's position against the Tenant's assertion that it cannot afford to pay the prescribed Base Rent and its contention that it is paying "normal" rent, which is all that it is required to pay by virtue of section 18.07 of the Lease and the events that transpired from and after March of 2020. This issue is raised squarely by the Tenant's Cross-Motion.
9. To alleviate the Landlord's concerns, the court has now scheduled the earliest available date to hear the declaratory relief sought by the Tenant's Cross-Motion (Lease interpretation issues, contained in paragraphs 1-6 and paragraph 11 of the Tenant's Cross-Motion), for three days July 25, 26 and 27, 2023.
10. The Landlord remains concerned about unrecoverable rent arrears that continue to accumulate and interest on past arrears (the interest alone it calculates to be approximately \$170,000 per month. This concern is of course dependent upon the Landlord's interpretation of the Lease prevailing. The Landlord is not satisfied that the Tenant is paying enough on an interim without prejudice basis, even with the Tenant's latest projections (which only approximates the level of Base Rent that the Landlord claims for a couple of months in the summer).
11. The court's January 16, 2023 Stay Motion Endorsement and January 19, 2023 case conference endorsement left open the question of what amount of rent the Tenant should be paying to the Landlord if the stay is to remain in place pending the decision of the court on the Tenant's Cross-motion. The court has previously indicated that it has jurisdiction to set the amount of rent to be paid by the Tenant during the stay period. While the Landlord does not accept that the Tenant's ability to pay should dictate the amount that the court determines is appropriate, as a practical matter, the court considers that to be a relevant data point and had anticipated that there might be evidence available at this case conference about the Tenant's ability to pay.
12. The Tenant has offered to pay for the cost of the Monitor to independently review and verify the Tenant's confidential cash flows (that have not been shared with the Landlord) and verify whether the Tenant is able to pay the Base Rent that the Landlord is requesting be paid, or any amount beyond 20% of its gross sales (which is what it has been paying and proposes to continue to pay until its Cross-Motion has been decided).
13. The Monitor has agreed to undertake this exercise and will provide its report to counsel for the Tenant and counsel RBC on or before May 5, 2023. The Tenant will review and advise within a week whether it accepts the Monitor's review and analysis. However, the Tenant has agreed that it will abide by any direction from the court regarding any increased amount of rent to be paid pending the court's determination of the Lease interpretation point on its Cross-Motion, based on the Monitor's report.
14. The parties shall attend a 30-minute case conference on May 17, 2023 at 9:15 a.m. at which time the court will consider and provide any further directions arising out of the Monitor's report (including any issues associated with the disclosure of that report to the Landlord, if the parties have not been able to come to terms upon which the report will be shared with the Landlord before then).

### Rule 39.03 Examinations

15. After some back and forth, it has been agreed that Mr. O'Hara will be examined by the Landlord. The Tenant will examine Ms. Costa and one other person to be designated from the Landlord's Board of Directors. Preferably, someone who was on the board at the time of the Lease negotiations in 2016 and during the March 2020 to December 2021 time frame. But if no such individual exists, or if the Tenant

prefers to examine the current Chairman of the Landlord it may do so, in lieu of this other board representative.

16. These Rule 39.03 examinations (3 in total) shall be completed by May 26, 2023. These should be scheduled as soon as possible to avoid conflicts for witnesses and counsel.

Timetabling Directions: Tenant's Cross-Motion

17. The Tenant requested an order for discovery-like production to be made by both sides. Given that this is a contract interpretation case in which context/factual matrix has some limited relevance but must be considered on an objective standard, the court has provided the following directions regarding limited-scope production to be made by the Landlord and the Tenant by May 5, 2023 (in advance of any examinations):
  - a. Documents exchanged between the parties and between their respective counsel, unless exchanged on a without prejudice/settlement basis (to be produced to each other to the extent not already appended as exhibits to affidavits already filed on the Cross-Motion):
    - i. In the time frame in which the Lease was being negotiated (circa 2016) that relate to s. 18.07 of the Lease or its subject matter; and
    - ii. In the time frame in which the boarder restrictions came into effect and thereafter (March 2020-December 2021) with respect to the effect and implementation of s. 18.07 of the Lease.
  - b. Non-privileged internal documents of the Tenant and the Landlord relating to approval and authorization:
    - i. Regarding s. 18.07 of the Lease or its subject matter when the Lease was being negotiated and signed (circa 2016). On the Landlord's side, this will also include communications between the Landlord and its external fairness advisor in the Lease RFP process; and
    - 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).
18. The court has not at this time made any ruling as to the admissibility or relevance of such documents, only that they shall be produced and available to be questioned upon. Redactions made be made on the face of any such produced documents for privilege.
19. The cross-examinations of all affiants shall be completed after the Rule 39.03 examinations (above) and on or before June 7, 2023. These should be scheduled as soon as possible to avoid conflicts for witnesses and counsel.
20. If the Tenant intends to deliver an expert report on issues relevant to the aspects of its Cross-Motion that are being adjudicated on July 25-27, 2023 (notice of Cross-Motion paragraphs 1-6 and 11, Lease interpretation issues) counsel shall agree by April 10, 2023 on a timetable for the exchange of expert reports that is completed by no later than May 30, 2023 so that the experts can be examined immediately after the completion of the other witness examinations.
21. The parties shall not refuse to answer questions on the cross-examinations or Rule 39.03 examinations on grounds of relevance. The objecting party may state the objection but the question shall be answered.
22. The parties shall attend a case conference on June 14, 2023 commencing at 9:00 a.m. (scheduled for no more than 45 minutes), which shall be primarily to address evidentiary considerations for the hearing of the Cross-Motion, including whether any party considers that it might be necessary for the court to hear *viva voce* evidence from any of the witnesses. The parties should come to this case conference prepared to discuss any other logistics for the hearing, including any sealing orders that might be requested.
23. Undertakings (and questions taken under advisement or refused that the objecting party is prepared to answer) shall be answered in writing by June 30, 2023.


24. The Tenant's factum (maximum 25 pages double spaced, including appendices) shall be delivered by July 7, 2023.
25. The Landlord's responding factum (maximum 30 pages double spaced, including appendices) shall be delivered by July 14, 2023.
26. The Tenant may deliver a reply factum (maximum 5 pages double spaced, including appendices) if there are matters of proper reply not anticipated and addressed in its initial factum, by July 21, 2023.
27. All materials is to be uploaded into the CaseLines bundle for this hearing by 4:30 p.m. on July 21, 2023. All materials must be hyperlinked (factums and indices to any records).

Timetabling Directions: Receivership Application

28. The Receivership application is now returnable on September 22, 2023. It may have to be adjourned if the court's decision on the Tenant's Cross-Motion has not yet been rendered. In the meantime, RBC's counsel does not intend to participate in the cross-examinations on the Tenant's Cross-Motion but RBC and the Tenant agree that the evidence from the Cross-Motion may be used on the Receivership application if and when it proceeds, to be supplemented by further evidence as either party may deem necessary, to be exchanged (and cross-examinations to be conducted) on a timetable to be agreed upon shortly after the Tenant's Cross-Motion has been heard so that the parties are ready to proceed with that application on September 22, 2023.
29. While the Landlord does not expect to directly participate in the Receivership application, it does have an interest in when it is heard, so counsel for the Landlord shall be kept apprised of any timetabling agreements regarding the Receivership application.

Conclusion

30. The parties shall abide by the above directions and orders and timetable. 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.



KIMMEL J.

TAB 11



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🌐 Blaney.com

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June 23<sup>rd</sup>, 2023

***Via Email***

Patrick Shea and Christopher Stanek  
Gowling WLG (Canada) LLP  
Barristers & Solicitors  
1 First Canadian Place  
100 King Street West  
Suite 1600  
Toronto, ON, M5X 1G5

Dear Counsel:

**Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)**

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We have been advised by our client that on June 22<sup>nd</sup>, 2023, they were contacted by their IT systems administrator, who advised that they may have found and be able to recover pre-2017 emails that were previously thought to be unrecoverable. A copy of the email received by our client is attached.

Our client is in the process of working with their systems administrator to try to recover the emails. At this point, we do not yet know if any of these emails will be relevant, privileged or otherwise producible and we will assess that if any further emails are recovered. To the extent relevant and producible emails can be located, they will be produced.

Yours very truly,

BLANEY MCMURTRY LLP

A handwritten signature in black ink, appearing to read "Brendan Jones".

Brendan Jones

BJ/gf  
Encl.

cc: David T. Ullmann and John C. Wolf

**From:** John D. Jenkins (PLEXIS) <jjenkins@plexisltd.com>  
**Sent:** June-22-23 8:45 AM  
**To:** Greg O'Hara <gohara@dutyfree.ca>; Greg O'Hara (Sympatico) <gregohara@sympatico.ca>  
**Cc:** Sandy Rienzo <SandyR@dutyfree.ca>  
**Subject:** Old Emails - Kind of a "Hail Mary"

Hi Greg,

When I was at the store recently, I came across an old set of backup files, from the old email server. These weren't exactly "*pretty*", but I was able to run a text search on all the .eml files (individual email messages were stored in .eml files) and extracted all the .eml files that contained your [gohara@dutyfree.ca](mailto:gohara@dutyfree.ca) address.

I'm in the process of importing/converting those into a folder in Outlook. Once that process is finished I will then export that folder to a .PST file that I'll put in your user folder so that you can then open up Outlook and then open that .PST file and examine the contents to see if these old emails you were asking me about awhile back, are in there.

I will let you know when the .PST file is ready, where it's stored, and what its name is.

It looks like the messages have a date range between 2012 and 2017. In total there are a little over 6800 messages.

If you happen to know the subject line of the email you are looking for, or any keywords that are associated with the messages, or any other email addresses that would be associated with the messages you're looking for, then I can run another search on the backup files, in case what you're looking for isn't in the messages I'm importing at the moment, assuming of course that what you're looking for is located within the backup files at all.

Let me know.

Regards,



John D. Jenkins





**ROYAL BANK OF CANADA**  
Applicant

-and-

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
TORONTO

**BRIEF FOR ARGUMENT OF  
BUFFALO AND FORT ERIE PUBLIC BRIDGE  
AUTHORITY**

**GOWLING WLG (CANADA) LLP**  
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