

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 OF LAW
(MOTIONS RETURNABLE 25-26 JULY 2023)**

Date: 21 July 2023

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TO: THE SERVICE LIST

I. Issues to be Determined on 25-26 July 2023

1. There are two issues before the Court on 25-26 July 2023:
 - (a) whether the Authority ought to be given leave to deliver a notice of notices of default concerning certain non-payment defaults by PBDF;
 - (b) what, if any, additional disclosure is the Authority required to provide in connection with the Cross-Motion that will be heard in September of 2023.

A. Non-payment Defaults

2. On 16 June 2023, Her Honour directed that, by 30 June 2023, the Authority identify any non-payment related defaults by PBDF. **[16 June 2023 Endorsement, para 20(c), Authority Brief, Tab 1]** In a letter dated 26 June 2023, Gowling identified the non-payment related defaults. **[Rienas 17 July 2023 Affidavit, Exhibit D(C), Authority Brief, Tab 2]** PBDF provided no response whatsoever to the non-payment related defaults.
3. The Appointment Order made on 14 December 2021, prevents the Authority from issuing notices of default without the permission of the Court. **[Rienas 17 July 2023 Affidavit, Exhibit B, Authority Brief Tab 3]**
4. The Authority is seeking leave to issue a notice of default or notices of default concerning the identified non-payment defaults. This will set the stage for any issues relating to whether there are non-monetary defaults other than the payment

defaults already identified to be determined at the same time as the payment defaults and the Authority's right to terminate the Lease are determined.

5. The Lease requires that the Authority provide PBDF with notice of any the asserted non-monetary defaults in order to pursue termination based on the defaults.
[Lease, para 17.01, Rienas 17 July 2023 Affidavit, Exhibit A, Authority Brief, Tab 4]
6. A number of the non-payment defaults identified by the Authority, more so than any lingering effects of the Government's legislative response to the COVID pandemic, are having a negative impact on PBDF's business. This is impacting its ability to pay the Authority.
7. The construction of an interior wall in the duty free store in contravention of the Lease has damaged the premises.

B. Disclosure

8. PBDF has requested that the Court order that the Authority disclose:
 - (a) the minutes for the executive sessions of the board meetings held on 30 April, 28 May, 8 October and 19 November 2021 redacted only for privilege;
 - (b) 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 relating to the Lease, Art 18.07, rent abatement, rent relief, and/or any other similar form of relief for either PBDF or the operator of the US duty free store; and

- (c) unredacted copies of the lease and rent relief agreements as between the Authority and the operator of the US duty free store.

i. Privileged Minutes

- 9. The Minutes from 30 April, 28 May, 8 October and 19 November 2021 were not provided in redacted form because, once redacted, there is nothing relevant or of substance in the Minutes. To appease PBDF's concern, copies of the Minutes redacted for privilege and, in the case of the Minutes for 30 April 2023, to remove irrelevant confidential information relating to negotiations for the sale of property owned by the Authority were provided on 21 July 2023. **[See Rienas 21 July Affidavit, Exhibits A and B]**
- 10. Assuming that PBDF objects to the redactions made to the 30 April 2023 Minutes to remove the identity of the potential purchaser and the purchase price negotiations, the Authority will seek an order permitting the redaction.
- 11. An otherwise relevant document may be redacted where:
 - (a) the redacted material is irrelevant; and
 - (b) there is good reason why it should not be disclosed. [See *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789, *McGee v. London Life Insurance Co.*, 2010 ONSC 1408 and *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2022 ONSC 6435 (CanLII)]

Information is Not Relevant

12. The redacted information is not relevant—it has nothing to do with PBDF or the Lease.
13. The test to be applied by a court on a motion for a sealing order was set out by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII):

[38]...In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;*
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and*
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. [Sherman Estate v. Donovan, [2021 SCC 25](#) (CanLII), para 38]

Public Interest

14. A sale of property through a public request for offers is akin to a procurement process. In *City of Niagara Falls v. Ontario Lottery and Gaming Corporation*, 2018 ONSC 205, the Court found that it was appropriate to issue a sealing order over a request for proposal issued by the OLG:

[T]hat the need to preserve the confidentiality of the document arising in the context of a procurement process is in the public interest. I am prepared to accept that in the context of seeking appropriate bids, confidential information may be disclosed and that in order to ensure a fair process which results in appropriate bids, the confidential information needs to be protected. [City of Niagara Falls v. Ontario Lottery and Gaming Corporation, [2018 ONSC 205](#) (CanLII, para 9)]

Redaction is Necessary

15. There is no reasonable alternative to redacting the 30 April 2023 Minutes to protect the confidentiality of the information concerning the sale of the property.

Benefits Outweigh Negative Effects

16. There is no public interest in publicizing the information the 30 April 2023 Minutes.

ii. Written Communications

17. When he was examined on 30 May 2023, Mr. Clutterbuck was asked for an undertaking to produce “copies of any e-mails or text messages or other written communications between the board members and operational staff [between January of 2020 and December of 2021] that relates to the tenancies of [PBDF and DFA]”. **[Clutterbuck Transcript, Q 67, Authority Brief, Tab 5]** That request was “taken under advisement”.
18. On 7 June 2023, the Authority took the position that the documents PBDF requested that Mr. Clutterbuck went beyond what her Honour had ordered be disclosed. The Authority had already disclosed all non-privileged internal communications regarding: (a) Art 18.07; and (b) concessions under Art 18.07.
19. On 16 June 2023, Her Honour provided additional direction with respect to disclosure and directed that the Authority provided any additional disclosure that it was prepared to provide by 23 June 2023
20. On 23 June 2023, the Authority, through counsel, advised: (a) the Authority has over 80 employees; (b) the only employees with whom the directors would have communicated were Mr. Rienas and Ms Costa; (c) Ms Costa and Mr. Rienas had

in identifying the internal communications that had been produced: (i) conducted searches of their current and archived e-mails from 2020 and 2021 to identify relevant e-mails; and (ii) conducted “word-specific” searches of their current and archived e-mails. The Authority offered to conduct further “word-specific” searches. PBDF did not ask that the Authority conduct any additional “word-specific” searches. **[Rienas 17 July 2023 Affidavit, Exhibit D(B), Authority Brief, Tab 6 and Rienas 21 July 2023 Affidavit, para 7]**

21. On 30 June 2023, PBDF, through counsel, asserted that the undertaking: (a) was for communications relating to DFA as well and PBDF; and (b) included a request for communications among the directors and not just communications between the Authority’s operational staff and the directors. **[Rienas 17 July 2023 Affidavit, Exhibit D(D), Authority Brief, Tab 6]**
22. On 7 July 2023, the Authority, through counsel: (a) advised that the issues with respect to the relevance of information concerning the US Lease would, as per Her Honour’s 16 June 2023 direction, be determined on 25-26 July 2023; and (b) explained that the Authority did not have possession or control of the director’s individuals e-mail or text message accounts. **[Rienas 17 July 2023 Affidavit, Exhibit D(E), Authority Brief, Tab 7]**
23. On 19 July 2023, PBDF served its Motion requesting the Authority be directed to disclose 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 relating to the Lease, Art 18.07, rent

abatement, rent relief, and/or any other similar form of relief for either PBDF or the operator of the US duty free store.

24. The relevance of dealings between the Authority and DFA are addressed below.
25. PBDF is not entitled to the broad document production to which it would be entitled on an examination for discovery. [***Her Majesty the Queen in Right of Ontario v. Canadian Broadcasting Corporation*, [2018 ONSC 7100](#) (CanLII), para 11]** And the Court will compel a party to produce a document only where the document exists, is relevant and it is not unduly onerous to obtain the document. [**See, for example, *Her Majesty the Queen in Right of Ontario v. Canadian Broadcasting Corporation*, [2018 ONSC 7100](#) (CanLII), para 10]**]
26. There is no evidence to suggest that the additional communications that PBDF is asking the Court direct the Authority to produce even exist.
27. Mr. Clutterbuck's evidenced was:
 - (a) discussions took place between him and the General Manager—Mr. Rienas—on operational issues but he did not think that he ever spoke to anyone “below that level”; [**Clutterbuck Transcript, QQ 21 and 62, Authority Brief, Tab 5]**]
 - (b) the directors would talk amongst themselves, but matters of significance such as those involving PBDF took place only at meetings of the board; and [**Clutterbuck Transcript, QQ 21 and 62-64, Authority Brief, Tab 5]**]

(c) he recalled no direct communications between January of 2020 and December of 2021 relating to “the Duty Free store leases”. **[Clutterbuck**

Transcript, Q 66, Authority Brief, Tab 5]

28. Mr. Rienas has confirmed that: (a) the Authority does not communicate with directors *via* letter, fax or text message; (b) all written communications between the directors and the Authority flow through him and/or Ms Costa; (c) none of the Authority’s other employees has direct engagement with the directors; and (d) he has no knowledge of any communications between the directors and the Authority other than those involving him and Ms Coats, which have been disclosed. **[Rienas 21 July 2023 Affidavit, paras 6, 10 and 12]**

29. Mr. Clutterbuck was not specifically asked about written communications with Authority employees or among the directors. Mr. Rienas has, however, confirmed with each of the directors that: (a) none of them has had written communicated directly with any Authority employee other than Mr. Rienas and Ms Costa; (b) none of them has exchanged written communications with another director or directors concerning PBDF or DFA. **[Rienas 21 July 2023 Affidavit, para 13]**

30. Undertaking the searches that would be necessary for the Authority to confirm that the written communications PBDF is asking be produced do not exist would involving: (a) searching the e-mail accounts of over 80 Authority employees; and (b) accessing systems that are not in the possession or under the control of the Authority.

31. The time and expense involved in searching the current and archived e-mails over 80 individual employees over a two (2) year period to identify e-mails with non-officer employees that there is no evidence would exist is not proportionate to the importance or complexity of the issue. The issue before the Court in terms of the 2020 and 2021 time period is whether the Authority acting through **its officers as directed by the board** complied with Art 18.07.
32. In terms of communications among the directors, the directors do not have Authority e-mail accounts, Authority-owned computers or Authority-owned smart phones and use their personal or business e-mail accounts, computers and smart phones. **[Rienas 21 July 2023 Affidavit, para 11]**
33. The directors include a number of lawyers, the Commissioner of the New York State Transportation Authority and an Assistant Attorney General in the Office of the New York State Attorney General. **[Rienas 21 July 2023 Affidavit, para 12]**
The procedures that would have to be put in place to permit searches to be undertaken of computer systems belonging to law firms or the New York State Attorney General would be time consuming and would likely have to involve a third-party “referee”.
34. In terms of communications in the possession or under the control of the New York Department of Transportation and/or the New York Attorney General, the sovereign immunity and the *State Immunity Act* are likely triggered.

iii. **Relevance of US Lease**

35. PBDF must lay an evidentiary foundation to establish the relevance of the US Lease and the engagement between the Authority and DFA. [See *Business Development Bank of Canada v. IMEX Systems Inc.*, [2021 ONSC 6171](#) (CanLII), para 33]
36. Evidence that is not logically probative of a fact requiring proof—a fact in issue—is not relevant. [*Ontario v. Rothmans Inc.*, [2011 ONSC 2504](#) (CanLII), para 110 leave to appeal refused, [2011 ONSC 3685](#) (CanLII)] Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would appear to be in the absence of the evidence. [See *Business Development Bank of Canada v. IMEX Systems Inc.*, [2021 ONSC 6171](#) (CanLII), para 27]
37. The Cross-Motion involves the interpretation of Art 18.07 of the Lease. [See *Prism Resources Inc. v. Detour Gold Corporation*, [2022 ONCA 326](#) (CanLII), para 16]
38. The issues to be determined by the Court in September of 2023 are:
- (a) the meaning of Art 18.07 and whether it requires that the Authority provide PBDF with a rent abatement or merely to engage in a consultation; and
 - (b) what, if any, rent abatement is the Authority required to provide based on Art 18.07. [See Notice of Cross-Motion, Authority Brief, Tab 9 and 4 April 2023 Endorsement, Authority Brief, Tab 10]

39. It is difficult to see how:

- (a) the US Lease, which was negotiated in 1995 and does not contain a provisions comparable to Art 18.07;
- (b) the engagement between the Authority and DFA concerning the impact of COVID on DFA's business; or
- (c) what concessions the Authority was prepared to provide to DFA,

are probative of the any particular interpretation of Art 18.07 or, assuming as PBDF asserts Art 18.07 requires that the Authority grant a rent abatement, the rent abatement to which the Authority was required to agree. PBDF is asserting that the Art 18.07 requires that the Authority agree to a bespoke rent abatement based on the financial impact of COVID on PBDF's business and that the Court determine the applicable abatement(s).

IV. Other Issues

A. PBDF Disclosure

40. On 16 June 2023, Her Honour directed that the parties exchange lists of any remaining outstanding requests, deficiencies and/or production inquiries by 30 June 2023. **[16 June 2023 Endorsement, para 20(b), Authority Brief, Tab 1]** From the Authority's perspective, this was not possible because it has been unable to conduct cross-examinations of PBDF's witnesses.

41. On 23 June 2023, PBDF sent a letter indicating that there were at least 6,800 e-mails that had not been reviewed to determine their relevance. **[Authority Brief, Tab 11]** There has been no additional disclosure provided to PBDF

B. Going-forward Payments

42. On 16 June 2023, Her Honour directed that: (a) the Monitor provided a second “affordability report”; and (b) any concerns arising out of the Monitor’s second “rent affordability” report would be addressed on 25-July 2023. **[16 June 2023 Endorsement, paras 11 and 20(h), , Authority Brief, Tab 1]**
43. The ability of the Authority to raise—or even identify—issues with the Monitor’s analysis of “affordability” continues to be hampered by the fact that the Court has directed that PBDF’s financial information and the Monitor’s “affordability reports” be “sealed” such that the Authority does not have access to any of the information that is provided.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of July 2023.

E. Patrick Shea

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Lawyers for Buffalo and Fort Erie Public Bridge
Authority

Schedule

Rules of Civil Procedure, RRO 1990, Reg 194

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

State Immunity Act, RSC 1985, c S-18

2 In this Act,

“agency of a foreign state” means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

“commercial activity” means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

“foreign state” includes

- (a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
- (b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
- (c) any political subdivision of the foreign state;

“political subdivision” means a province, state or other like political subdivision of a foreign state that is a federal state.

3 (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

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