



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:**

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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.

A handwritten signature in dark ink, appearing to read 'Kimmel J.', with a stylized, cursive script.

KIMMEL J.

June 16, 2023