

**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**

**FACTUM OF THE APPLICANT, ROYAL BANK OF CANADA**

March 19, 2025

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, Ontario M5J 2T9

**Sanjeev P.R. Mitra (LSO # 37934U)**  
Tel: (416) 865-3085  
Email: [smitra@airdberlis.com](mailto:smitra@airdberlis.com)

**Jeremy Nemers (LSO # 66410Q)**  
Tel : (416) 865-7724  
E-mail: [jnemers@airdberlis.com](mailto:jnemers@airdberlis.com)

**Cristian Delfino (LSO # 87202N)**  
Tel : (416) 865-7748  
E-mail: [cdelfino@airdberlis.com](mailto:cdelfino@airdberlis.com)

*Lawyers for the Applicant, Royal Bank of Canada*

## PART I – NATURE OF THE APPLICATION

1. The Applicant, Royal Bank of Canada (“**RBC**”), makes an application for an Order, in substance, appointing msi Spergel inc. (“**Spergel**”) as receiver (in such capacity, the “**Receiver**”) without security, of all the assets, properties and undertakings of Peace Bridge Duty Free Inc. (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor, and all proceeds thereof (the “**Property**”) (collectively, the “**Receivership Order**”).

## PART II – FACTS

2. The Debtor is a privately-owned Ontario corporation formed on March 1, 2012 by way of amalgamation, with its registered office and mailing addresses located in Fort Erie, Ontario.

**Affidavit of Christopher Schulze sworn December 2, 2021 [Schulze Affidavit]  
at para. 3, Tab 4 of RBC’s Application Record dated December 3,  
2021.**

3. The Debtor operates a duty free shop located near the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York. The Debtor leases its operating location (the “**Premises**”) from The Buffalo and Fort Erie Public Bridge Authority (the “**Landlord**”). The Landlord is governed by a ten member board consisting of five members from New York State and five members from Canada.

**Schulze Affidavit, *supra* at paras. 4-5.**

4. The Debtor is indebted to RBC in connection with certain credit facilities made available by RBC to the Debtor pursuant to and under the terms of a credit agreement between RBC and the Debtor dated July 20, 2018, as amended on July 5, 2021 and October 8, 2021 (collectively, as same may have been further amended, renewed or restated from time to time, the “**Credit Agreement**”).

**Schulze Affidavit, *supra* at para. 6.**

5. To secure its obligations to RBC, including without limitation, under the Credit Agreement, the Debtor provided security in favour of RBC (collectively, the “**Security**”), including, without limitation, a general security agreement, registration in respect of which was duly made pursuant to the *Personal Property Security Act* (Ontario).

**Schulze Affidavit, *supra* at para. 7.**

6. On September 8, 2021, the Landlord delivered notices of default to the Debtor in respect of the Premises (the “**Landlord Default Notices**”), advising, amongst other things, that the Debtor had accumulated unpaid rental arrears of approximately \$5.9 million (the “**Landlord Arrears**”).

**Schulze Affidavit, *supra* at para. 9.**

7. After the Landlord Arrears were not cured by the deadline established in the Landlord Default Notices, RBC proceeded to make formal written demand on the Debtor for payment of its indebtedness to RBC by letter dated September 23, 2021 (the “**Demand Letter**”). The Demand Letter was accompanied by a notice of intention to enforce security (the “**BIA Notice**”) pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”).

**Schulze Affidavit, *supra* at paras. 10-11.**

8. RBC and the Debtor then entered into the credit amending and forbearance agreement (the “**Forbearance Agreement**”). One of the requirements of the Forbearance Agreement was that, by no later than November 15, 2021, the Debtor was to deliver to RBC evidence of a satisfactory arrangement between the Debtor and the Landlord in respect of the lease and the defaults thereunder. No such evidence was provided to RBC.

**Schulze Affidavit, at paras. 14-15.**

9. RBC then brought a receivership application, originally returnable on December 14, 2021, to appoint Spergel as receiver of all the Debtor's Property.

**Schulze Affidavit, at para. 2.**

10. On or about December 13, 2021, the Debtor proposed an adjournment of the receivership application to permit the Debtor to reach a commercial resolution with the Landlord. On December 14, 2021, on the consent of each of RBC, the Debtor and the Landlord, the receivership application was adjourned to January 17, 2022, subject to:

- (a) appointing Spergel as the Debtor's monitor (the "**Monitor**"); and
- (b) imposing a stay of proceedings in favour of the Debtor and its assets, property and undertakings (the "**Stay**").

**Affidavit of Benjamin Paul Gardent sworn January 15, 2024 [Gardent Affidavit] at para. 4, Tab 1 of RBC's Supplementary Application Record dated January 15, 2024.**

11. The Stay prevents the Landlord from distraining against the Debtor's goods or terminating the Debtor's lease while RBC's receivership application is adjourned.

**Gardent Affidavit, *supra* at para. 4.**

12. The return of the receivership application has been extended several times now throughout the last four years to permit time for the Debtor and the Landlord to resolve their dispute, but always subject to the Monitor's appointment and the Stay. This includes lengthy litigation between the Debtor and the Landlord, which the Debtor unsuccessfully appealed (the "**Appeal**").

**Gardent Affidavit, *supra* at para. 5.**

13. On April 19, 2024, on the request of the Debtor, an adjournment was agreed upon between RBC and the Debtor (with no position taken by the Landlord), pursuant to which the receivership application was to be scheduled to a date to be set at a case conference upon the earlier of a binding settlement between the Landlord and the Debtor (satisfactory to RBC) and the Court of Appeal for Ontario deciding the Appeal.

**Non-Confidential Responding Application Record of the Debtor dated March 27, 2025 at para. 7 and Exhibit “E”.**

14. In exchange for the adjournment, the Debtor agreed that, amongst other things, the Stay would continue pending the return of the receivership application and the Debtor would maintain a minimum cash balance in its accounts with RBC. The Debtor also executed and returned to RBC a consent to receivership (the “**Consent**”). A copy of the Consent will be uploaded to Case Center.

**Non-Confidential Responding Application Record of the Debtor dated March 27, 2025 at Exhibits “D” and “E”.**

15. On January 27, 2025, the Court of Appeal for Ontario released its decision in [\*Royal Bank of Canada v. Peace Bridge Duty Free Inc.\*](#), 2025 ONCA 54, which dismissed the Debtor’s Appeal.

**Non-Confidential Responding Application Record of the Debtor dated March 27, 2025 at para. 7 and Exhibits “D” and “F”.**

16. The Debtor has devoted significant financial resources fighting a losing battle with the Landlord. The Debtor’s amended cost outline for its motion with the Landlord held on November 1-3, 2024, reflects the Debtor having incurred approximately \$800,000 in legal fees and disbursements in connection with that motion.

**Gardent Affidavit, *supra* at para. 9 and Exhibit “C” thereto.**

17. The Debtor has failed to meet its financial covenants to RBC under the Credit Agreement since the Stay was imposed. RBC sent the Debtor non-tolerance/non-waiver letters as a result of this repeated failure. Despite being advised in the first of these letters that the Debt Service Coverage ratio had not been respected for the fiscal year ended December 31, 2021 (per 2022 reporting) and that such default needed to be remedied by no later than the end of the fiscal year ended December 31, 2022 (per 2023 reporting), the default was not remedied.

**Gardent Affidavit, *supra* at para. 11.**

18. RBC disagrees with the Debtor's calculation of its indebtedness owing to RBC. During the cross-examination of the Debtor's representative (Mr. Pearce) on February 26, 2024, Mr. Pearce was asked what was incorrect about RBC's calculation of the balance owing under the lease facility at the time. Mr. Pearce was unable to provide an answer and stated the Debtor simply "*didn't believe the HST and the interest.*"

**Cross-Examination of James Walter Pearce, at question 388.**

19. Moreover, during this cross-examination, RBC's counsel stated "*we are agreed there is nothing in here that provides that a payout relieves the debtor from paying the balance of the payments, rental payments, to the end of the term of the lease; correct?*" The Debtor's counsel replied "*I am not sure we fully agreed on that,*" but, when pressed, neither the Debtor nor its counsel was able to identify anything in the leasing documents that would allow the Debtor not to pay the remaining balance of the rental payments before it could exercise the option to purchase (for \$1).

**Cross-Examination of James Walter Pearce, at questions 416-417.**

20. The Monitor, in consultation with the Debtor, has determined that the difference in the amounts calculated by RBC versus those calculated by the Debtor appears to be the failure to account for outstanding HST and interest on the part of the Debtor.

**Report of the Monitor dated March 19, 2025 at para. 21(a).**

21. As of March 7, 2025, the amounts owed by the Debtor to RBC (excluding professional fees and expenses and accruing interest) are broken down as follows (collectively, the “**Indebtedness**”):

<b>Lease Line (including HST)</b>	\$1,928,433.27
<b>Letters of Guarantee</b>	\$575,900.00
<b>HASCAP</b>	\$795,187.19
<b>VISA Facilities</b>	\$19,639.47
<b>TOTAL</b>	<b>\$3,319,159.93</b>

**Report of the Monitor dated March 19, 2025 at para. 18.**

22. There are insufficient free funds to repay the entire exposure under the Credit Agreements.

**Report of the Monitor dated March 19, 2025 at para. 23.**

23. RBC has advised the Debtor on multiple occasions during the lengthy Stay of RBC’s preference to be indefeasibly repaid so that the receivership application need not proceed. However, the Debtor has not met its monetary and reporting obligations to RBC, has not honoured RBC’s demand for payment sent over three years ago and has not entered into arrangements satisfactory to RBC. The Debtor has also lost the Appeal not resolved matters with the Landlord.

**Gardent Affidavit, *supra* at paras. 12-13.**

**Non-Confidential Responding Application Record of the Debtor dated March 27, 2025 at para. 8 and Exhibit “F”.**

### **PART III – ISSUE**

24. The issue to be considered by this Court is whether it is just and convenient for this Court to appoint Spergel as receiver over the Property.

### **PART IV – LAW AND ARGUMENT**

#### *The Test for Appointing a Receiver*

25. RBC seeks the appointment of a receiver pursuant to subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act* (Ontario) (the “CJA”). Both statutes enable the Court to appoint a receiver and manager where such appointment is “*just or convenient.*”

**BIA, s 243(1); CJA, s 101.**



26. In determining whether it is “*just or convenient*” to appoint a receiver under either the BIA or CJA, Ontario courts have applied the decision of The Honourable Mr. Justice Blair in *Freure Village*. In that case, His Honour confirmed that, in deciding whether the appointment of a receiver is just or convenient, the court “*must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto,*” which includes the rights of the secured creditor under its security.

*Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 at para. 10 (Gen. Div. [Comm. List]) [*Freure Village*] (CanLII: <http://canlii.ca/t/1wbtz>).

27. In *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* and *Bennett on Receivership*, this Court listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

- (a) whether irreparable harm might be caused if no order is made, although as stated above, where the appointment is authorized by the security documentation, it is not essential for a creditor to establish that it will suffer irreparable harm if a receiver is not appointed;
- (b) the risk to the security holder taking into consideration the size of the debtor’s equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
- (c) the nature of the property;
- (d) the apprehended or actual waste of the debtor’s assets;
- (e) the preservation and protection of the property pending judicial resolution;
- (f) the balance of convenience to the parties;

- (g) the fact that the creditor has a right to appointment under the loan documentation;
- (h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- (i) the principle that the appointment of a receiver should be granted cautiously;
- (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- (k) the effect of the order upon the parties;
- (l) the conduct of the parties;
- (m) the length of time that a receiver may be in place;
- (n) the cost to the parties;
- (o) the likelihood of maximizing return to the parties; and
- (p) the goal of facilitating the duties of the receiver.

*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 at para 25 (CanLII: <https://canlii.ca/t/jsr2m>), citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para 25 (CanLII: <https://canlii.ca/t/26h6z>).

28. These factors are not intended to serve as a checklist, but rather a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient.

*RBC v. 2531961 Ontario Inc. et al.*, 2024 ONSC 1272 at para 13 (CanLII: <https://canlii.ca/t/k3kw2>).

29. Where the enumerated rights of the secured creditor under its security include the right to seek the appointment of a receiver (as in the present case), the burden on the applicant seeking the relief is relaxed. The Honourable Mr. Chief Justice Morawetz held in *Elleway Acquisitions* that:

[W]hile the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27  
[*Elleway Acquisitions*] (CanLII: <http://canlii.ca/t/g22q3>).

30. The Honourable Mr. Chief Justice Morawetz's holding in *Elleway Acquisitions* was further affirmed more recently in *iSpan Systems* by The Honourable Mr. Justice Osborne:

Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties [citations omitted].

*iSpan Systems LP*, 2023 ONSC 6912 at para. 31 [*iSpan Systems*] (CanLII: <https://canlii.ca/t/k0x62>).

*It is Just and Convenient to Appoint the Receiver*

31. RBC wishes to take any and all steps necessary to enforce its Security and realize on same. The Debtor has had more than ample time to repay the Indebtedness. More than three years have elapsed since the initial adjournment of the receivership application to permit the Debtor to reach a commercial resolution with the Landlord. Since that time, RBC has not received any evidence of a satisfactory arrangement between the Debtor and the Landlord. The Appeal, which has now been decided against the Debtor, has resulted in significant financial resources being deployed to a losing battle, which has eroded RBC's collateral.

Gardent Affidavit, *supra* at para. 10.

32. Further, during Mr. Pearce's cross-examination, RBC's counsel asked whether the Debtor had the financial resources to honour the monetary defaults under the lease with the Landlord. After undertaking to answer the question, Mr. Pearce later advised that the Debtor did not have the funds to address the \$5.9 million claimed by the Landlord in September of 2021. Additionally, Mr. Pearce undertook to advise whether the Debtor had the resources to pay the Landlord Arrears, and later advised that the answer to this is "*likely no*."

**Cross-Examination of James Walter Pearce, held virtually on February 26, 2024 at questions 170, 213.**

**Answers to Undertakings, Under Advisements, and Refusals Chart of James Walter Pearce taken from the Examination held the 26<sup>th</sup> day of February, 2024 at pages 1-2, 3.**

33. When a debtor executes a consent to a receivership (which the Debtor has done in the form of the Receiver Consent), courts have very recently held that commercial certainty expects a court to honour such negotiated agreements and consents. Indeed, as was held by The Honourable Justice M.A. Marion:

Negotiated forbearance agreements, including the use of consent orders, are an important part of insolvency practice. Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order.

***ATB Financial v. Mayfield Investments Ltd.*, 2024 ABKB 635 at para. 40 [ATB Financial] (CanLII: <https://canlii.ca/t/k7lmg>).**

34. At this stage, RBC believes that its only reasonable and prudent path forward is to take any and all steps necessary to protect the Property (including, without limitation, the Debtor's interest in the lease) by having a receiver appointed, and it is within RBC's rights under the Security to do so.

**Gardent Affidavit, *supra* at para. 14.**

35. Spergel is a licensed insolvency trustee and is familiar with the circumstances of the Debtor and its arrangements with RBC in its capacity as the Monitor. Spergel has consented to act as the Receiver should the Court so appoint it.

**Schulze Affidavit, at paras. 20-21.**

**PART V – RELIEF REQUESTED**

36. It is respectfully submitted that this Court should grant the Receivership Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19th day of March, 2025.




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**AIRD & BERLIS LLP**

Barristers and Solicitors  
 Brookfield Place  
 181 Bay Street, Suite 1800  
 Toronto, Ontario M5J 2T9

**Sanjeev P.R. Mitra (LSO # 37934U)**  
 Email: [smitra@airdberlis.com](mailto:smitra@airdberlis.com)

**Jeremy Nemers (LSO # 66410Q)**  
 E-mail: [jnemers@airdberlis.com](mailto:jnemers@airdberlis.com)

**Cristian Delfino (LSO # 87202N)**  
 Email: [cdelfino@airdberlis.com](mailto:cdelfino@airdberlis.com)

*Lawyers for the Applicant, Royal Bank of  
 Canada*

**SCHEDULE “A”****AUTHORITIES CITED**Jurisprudence

1. [\*Bank of Nova Scotia v. Freure Village on Clair Creek\*](#) (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Gen. Div. [Comm. List]).
2. [\*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.\*](#), 2013 ONSC 6866.
3. [\*iSpan Systems LP\*](#), 2023 ONSC 6212.
4. [\*ATB Financial v. Mayfield Investments Ltd.\*](#), 2024 ABKB 635.
5. [\*RBC v. 2531961 Ontario Inc. et al.\*](#), 2024 ONSC 1272.
6. [\*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited\*](#), 2022 ONSC 6186.
7. [\*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.\*](#), 2009 BCSC 1527.

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### **Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, s. 243**

##### **Court may appoint receiver**

**243** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

##### **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

##### **Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

### **Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

### **Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

### **Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

### **Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

### **Meaning of disbursements**

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

### **Courts of Justice Act, R.S.O. 1990, c. C-34, as amended, ss. 101 and 103**

### **Injunctions and receivers**

**101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

### **Certificate of pending litigation**

**103** (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2). R.S.O. 1990, c. C.43, s. 103 (1).

...

### **Order discharging certificate**

(6) The court may make an order discharging a certificate,



- (a) where the party at whose instance it was issued,
    - (i) claims a sum of money in place of or as an alternative to the interest in the land claimed,
    - (ii) does not have a reasonable claim to the interest in the land claimed, or
    - (iii) does not prosecute the proceeding with reasonable diligence;
  - (b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or
  - (c) on any other ground that is considered just,
- and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just. R.S.O. 1990, c. C.43, s. 103 (6).

**ROYAL BANK OF CANADA**

- and -

**PEACE BRIDGE DUTY FREE INC.**

Applicant

Respondent

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

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
**Proceedings commenced at Toronto**

**FACTUM OF THE APPLICANT**  
**(returnable March 27, 2025)**

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Sanjeev P.R. Mitra (LSO # 37934U)**  
Tel: (416) 865-3085  
Email: [smitra@airdberlis.com](mailto:smitra@airdberlis.com)

**Jeremy Nemers (LSO # 66410Q)**  
Tel: (416) 865-7724  
Email: [jnemers@airdberlis.com](mailto:jnemers@airdberlis.com)

**Cristian Delfino (LSO # 87202N)**  
Tel: (416) 865-7748  
Email: [cdelfino@airdberlis.com](mailto:cdelfino@airdberlis.com)

*Lawyers for the Applicant, Royal Bank of Canada*