

**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

**RESPONDING FACTUM OF THE RESPONDENT,
PEACE BRIDGE DUTY FREE INC.**

Date: March 24th, 2025

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

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PART I – OVERVIEW

1. Peace Bridge Duty Free Inc. (“**PBDF**” or the “**Company**”) seeks to apprise the Court of its current financial status in connection with Receivership Application commenced by the Royal Bank of Canada (“**RBC**” or the “**Bank**”). The Receivership Application seeks to appoint a Receiver over all of the property, assets and undertakings of the Company.
2. The Company operates a duty-free retail business at the Fort Erie border between Canada and the United States. Like many businesses in the retail sector, it was severely impacted by the COVID-19 pandemic, enduring an 18-month closure due to government-imposed border restrictions. As a result, when the Receivership Application was brought in 2021, the Company had only recently reopened and was still experiencing significant financial distress due to ongoing border restrictions and a corresponding decline in retail traffic.
3. The Company executed a Consent to Receivership (the “**Consent**”) nearly a year ago, on or about April 18, 2024. The Company’s ability to pay the RBC debt has changed and the amount of that debt has been reduced as payments have been made over the past year.

4. Regardless of the Consent, it is submitted that the Court still ultimately retains the discretion to determine whether a Receivership, over all of the Company's property, assets and undertakings, remains appropriate.

5. To assist the Court in making this determination, the Company has provided evidence through the Affidavit of Jim Pearce, sworn March 3, 2025 (the "**Pearce Affidavit**"), which outlines the Company's current financial standing and ability to satisfy its obligations to RBC. This evidence suggests that the broad Receivership as contemplated by the Consent may no longer be just and convenient in the circumstances. The Company's evidence differs from that provided by the Court appointed Monitor and provides a more accurate assessment, as set out below.

6. Given the Company's current financial position either the receivership application should be dismissed or the Court should direct a more proportionate approach— for example appointing a Receiver solely over its inventory and cash assets rather than the entire business—to better serve the interests of all stakeholders.

PART II – FACTS

History and Procedural Background

7. The Company was severely impacted by the COVID-19 pandemic and the resulting restrictions. Beginning in 2020, it faced an 18-month mandatory closure, which caused significant financial strain and disruption to its operations.¹

8. On or about December 3, 2021, RBC brought this Receivership Application to appoint msi Spergel Inc. ("**Spergel**") as Receiver over the Company's assets, properties and undertakings. This resulted in a Monitorship being established by the Order of Justice Pattillo, dated December 14,

¹ Affidavit of Jim Pearce sworn March 3, 2025 ("**March Affidavit**"), Confidential Responding Application Record dated March 3, 2025, Tab 1, para 9.

2021. The Company has operated under the Monitorship since that date until now, with Spergel as Monitor (in such capacity, the “**Monitor**”).²

9. During these proceedings, the Company and its landlord, the Fort Erie Public Bridge Authority (the “**Landlord**”), were engaged in a dispute regarding the abatement of rent to which the Company should be entitled to under its lease. On December 15, 2023, the Court issued a decision rejecting the Company’s interpretation of the lease, and on December 27, 2023, the Company filed a Notice of Appeal.³

10. Due to the pending Appeal, the Receivership Application, which was scheduled to be returned to this Court in January 2024, was adjourned on consent of the parties to April 26, 2024. However, on or about April 18, 2024, RBC consented to a further adjournment in exchange for the Company providing a Consent to Receivership pending the outcome of the Appeal.⁴

11. The Consent contemplates a broad Receivership over all of the business and assets of the Company. It states that the Company consents to: “(i) the immediate appointment by the Lender of a private receiver or receiver and manager in respect of the Debtor’s assets, properties and undertakings and any and all of the Debtor’s books and records (collectively, the “Assets”) and/or (ii) the immediate appointment by Court Order of an interim receiver, receiver or receiver and manager of the Assets pursuant to subsections 47(1) and 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*.”.⁵

12. In the meantime, the Company has been attempting to negotiate with the Landlord, and since the Endorsement of Justice Kimmel dated May 17, 2023 (the “**Kimmel Endorsement**”), has paid full rent under the terms of its lease in the sum of at least \$333,333.00 per month.

² March Affidavit, para 4.

³ March Affidavit, para 5

⁴ March Affidavit, paras 6-7

⁵ March Affidavit, Exhibit D.

13. In accordance with Justice Kimmel’s decision dated December 15, 2023, in which the Court “encourage[d]” the parties to continue negotiations “based on the essential terms of the Landlord’s March 2023 offer”,⁶ the Company has attempted to negotiate with the Landlord.

14. In particular, the Company provided the Landlord with a settlement offer in January 2024, while the appeal was still pending, which contained terms nearly identical *to the last offer made by the Landlord* prior to the conclusion of the rent dispute, and improved that offer by provided for a material amount for costs. The Company also provided further information in March 2024 and June 2024 to the Landlord in furtherance of that offer.

15. However, the Landlord has not accepted any offer made by the Company.⁷ As a result, the Company has been unable to resolve issues with the Landlord to date.

16. According to the Fourth Report, the Landlord has not responded to the Monitor’s inquiries regarding an updated statement of the amount owing to the Landlord by the Company, and any information with respect to potential settlement negotiations between the Landlord and the Company.⁸

Company’s Indebtedness to RBC

17. There are two facilities pursuant to which the Company’s indebtedness to RBC arises, neither of which are in default and for which all payments have been made when due:

- a. a lease facility (the “**Lease**”) which is a term debt and not payable on demand; and
- b. a Highly Affected Sectors Credit Availability Program loan facility (the “**HASCAP Loan**”), part of a program that provided businesses heavily hit by the COVID-19

⁶ [*Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 7096 at para. 157.](#)

⁷ March Affidavit, paras 24-29.

⁸ Fourth Report of the Monitor dated March 18, 2025 at para 23 (“**Fourth Report**”), para 25.

pandemic access of up to \$1 million in additional financing. This is 100% guaranteed by the Business Development Bank of Canada (“**BDC**”) and there is no risk to RBC.⁹

18. The Company has been compliant in providing regular reporting to the Monitor, as required by both RBC and the various orders in these proceedings. Furthermore, the Company has always maintained the minimum cash and inventory thresholds also required by this Court and RBC and has provided RBC with minimum cash amounts in their account, to ensure the Bank was comfortable that its position would not deteriorate while the Appeal was being decided.¹⁰

19. Currently the loan balances under the Lease and the HASCAP Loan are approximately \$1,757,000.00 and \$759,000.00, respectively. The total current indebtedness is thus approximately \$2,516,000.00 (the “**Indebtedness**”).¹¹ However, pursuant to the Monitor’s calculations, which include HST and interest which would accrue to the end of the lease term, the total Indebtedness for these facilities is \$2,723,620.46.¹²

Company’s Current Cashflow, GICs and Inventory

20. The Company currently has cash on hand or with the Bank in the total amount of approximately \$2,655,684.14 available to repay the Indebtedness, which include:

- a. the Company’s cash on hand, in the amount of approximately \$1,158,000.00, as shown by the Company’s CFI Report¹³; and
- b. the Company’s GICs held with RBC, in the total amount of approximately \$1,497,684.14.¹⁴

⁹ March Affidavit, paras 12-13.

¹⁰ March Affidavit, paras 13-14.

¹¹ March Affidavit, paras 15-16.

¹² Fourth Report, para 23.

¹³ March Affidavit, para 17.

¹⁴ March Affidavit at paras 18-19.

21. In addition, the Company maintains actual cash on hand in a safe at the Company in the amount of approximately \$300,000 which it uses for currency transactions conducted on site.

22. As noted above, in addition to the cash on hand, the Company has material inventory, which the Monitor has not taken into account but which is highly valuable.

23. The majority of the inventory is composed of tobacco and alcohol which can be returned at full value and is effectively cash; the balance of the inventory is made up of other high-value commodity items.¹⁵ As outlined in the Company's CFI Report, it is valued at approximately \$1.2 million.

24. The Bank has previously recognized the inventory had value and required the Company to maintain a minimum level of inventory at all times, which it did. It is therefore inconsistent with its prior position for the Bank to now not include the value of the inventory in considering its exposure in this matter.

25. Below is a chart comparing the Monitor's and the Company's calculation of realizable assets and actual debt:

	Monitor's Calculation	Company's Calculation
Cash	\$1,670,000.00 (not including GIC funds in the amount of \$647,684.14 and takes mid month value for cash)	\$2,655,684 (including all GIC funds and takes month start value for cash) ¹⁶
Cash Float	Value not included in Fourth Report	\$300,000 ¹⁷
Inventory	Value not included in Fourth Report	\$1,208,000.00
Total	\$1,670,000	\$4,163,648 (of which \$2,955,684 is cash)
Debt – Lease	\$1,928,433.27 (includes interest and HST to end of term)	\$1,757,000.00 (present day value of remaining payments)
Debt – HASCAP	\$795,187.19 (100% guaranteed by BDC)	\$759,000.00 (100% guaranteed by BDC)

¹⁵ March Affidavit, para 20; Confidential Exhibit "M".

¹⁶ March Affidavit, para 19.

¹⁷ Affidavit of Jim Pearce sworn January 24, 2024 ("January Affidavit"), Confidential Responding Motion Record dated January 24, 2024, Tab 1, para 79.

Total Debt including HASCAP	\$2,723,620	\$2,516,000
Total Debt minus HASCAP	\$1,928,433	\$1,757,000

26. As noted in the above chart, in both the Monitor's scenario and the Company's scenario the Bank is at minimal, if any, risk.

27. In particular, even under the Monitor's calculations, the Bank has no risk if one accepts the certainty of the HASCAP guarantee and includes the cash float omitted by the Monitor. The Monitor also took the mid month cash value, when cash is lower and inventory is increased.

28. The Monitor's calculation also ignores the fact that the Bank is holding more than \$640,000 in cash collateral against a phantom liability as noted above. On any realization, that money would presumably be seized by the Bank and applied to the debt immediately.

29. The Monitor also calculates the debt to the end of the lease term, and includes in their calculation the value of future HST payments which would be made in connection with each future payment and includes interest earned. This is not the appropriate way to consider the debt as it would be repaid upon the appointment of a receiver. If the debt is paid all at once, at it will be upon the Receiver's appointment and the seizure of the above referenced cash, no further interest would accrue and no future HST payments would be required. The Company calculates the present value of the debt.

30. The Company's financial records also demonstrate a strong upward trajectory, demonstrated by:

- a. a significant increase in the Company's net income for 2024 compared to 2023;
- b. a decrease in the Company's deficit for 2024 compared to 2023;
- c. a decrease in administrative expenses of nearly 50% since 2023;

d. a significant decrease in losses (before tax calculations) since 2023;

31. There is no reason to suspect the Company will not be able to continue to service its debts to RBC going forward as it has been doing without interruption through this entire process.

32. The Company currently employs nearly forty full-time employees, who are all at imminent risk of losing their jobs should the court grant the Receivership.¹⁸ As noted previously, there is no expectation that the Bank will or even could operate the business were a receiver appointed over the entire business as the Bank is asking the court to do.¹⁹

PART III – ISSUES

33. The sole issue before the Court is whether, notwithstanding the Consent to Receivership, the appointment of a Receiver remains just and convenient in light of the Company's current financial circumstances.

PART IV – LAW

Discretion of Court in Granting Consent Orders/Consent Judgments

34. Notwithstanding the parties' consent, the Court retains the discretion to assess the propriety of granting an order.

35. Courts have repeatedly held that a consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but a decision of the court. Any agreement between

¹⁸ March Affidavit, para 23.

¹⁹ January Affidavit, paras 90-91.

the parties must receive independent sanction of the court before it can become a judgment, and even if an issue is consented to by the parties, the Court is not obligated to follow it. The Court must still decide whether the agreement is just and equitable before making the order, in light of the facts and law.²⁰

36. A Court's function, ultimately, is not to just rubber-stamp a consent order when presented with it.²¹

37. At the time the Receivership Application was brought in 2021, the Company had only recently reopened following an 18-month closure. The financial distress it faced was not a result of mismanagement or systemic insolvency, but rather an external economic shock caused by government-imposed border closures. But for its unresolved issues with its landlord, the Company is a viable operating business, and it is meeting its obligations as they come due.

38. Even at the time the Company consented to the appointment of a Receiver nearly a year ago, its financial circumstances were vastly different from those that exist today. The Bank has been paid consistently and hold sufficient cash collateral to repay almost all of its debt, without even looking to material inventory value. It is uncontested that the Company has been making all of its payments when due, even its so called "full rent" payment.

²⁰ [*Bank of Montreal v. Coopers Lybrand Inc.*, 1996 CanLII 12088 at paras 11-13.](#)

²¹ [*Servus Credit Union Ltd v Proform Management Inc.*, 2020 ABQB 316 at para 57.](#)

The Appointment of a Receiver May Not be Just and Convenient in the Current Circumstances

39. Section 243 of the *Bankruptcy and Insolvency Act*, Canada (“**BIA**”) and section 101 of the *Courts of Justice Act* (“**CJA**”) govern the appointment of a Receiver and permit the Court to appoint a Receiver and Manager where it is just or convenient to do so.

40. A Receivership order should not be lightly granted, and the court must carefully balance the rights of both the applicant and the respondent as what is just and convenient can only be established by considering and balancing the position of both parties.²²

41. When considering the issue of whether a receiver and manager should be appointed, the court should:

- a. explore whether there are other remedies that could serve to protect the interests of the applicant;
- b. balance the rights of both the applicants and other stakeholders; and
- c. consider the effect of granting the draft Receivership order.²³

42. In *M&K Construction Ltd. v. Kingdom Covenant International* (“**M&K Construction**”), the court held that it was not just and convenient to appoint a Receiver in circumstances where appointing a Receiver would put an end to the respondent’s rights to continue their business, where

²² [*BG International Limited v Canadian Superior Energy Inc.*, 2009 ABCA 127](#) (“**BG International**”) at [paras 16-17](#).

²³ *BG International* at [para 16](#).

the property was not a diminishing asset and the value of the property exceeded the outstanding indebtedness. The appointment of a receiver would add significant expenses.²⁴

43. The same considerations apply in the present case. The Company has more than sufficient assets in cash collateral and inventory, to satisfy its obligations to RBC. Its inventory primarily consists of tobacco and alcohol, which are not diminishing assets and retain full return value. The Company's total assets exceed its indebtedness, ensuring RBC's security is not at risk.

44. In addition, the Bank holds a 100% zero risk guarantee from the HASCAP program, which program existed specifically to protect business such as this one. As such, the Bank's real exposure to loss should be reduced by this guarantee in considering the fairness of the Bank's motion.

45. The Bank's calculation of its debt is misleading. It includes in its debt calculation letters of credit as an outstanding obligation in the amount of \$575,900. However, in addition to being fully cash collateralized, those letters of credit only come due in the unlikely event the inventory of the Company is stolen or otherwise unaccounted for. This cannot happen while the Company is under monitorship, as it is now, and it could not happen if a receiver is appointed, who would obviously treat the inventory with due care. Therefore, there is no scenario under which RBC will ever be out of pocket for these funds. This is merely a debt on paper and should not be given any weight when considering RBC's true risk in this matter.²⁵

46. Furthermore, appointing a Receiver over the entire business would be unnecessarily disruptive and commercially unreasonable. As recognized in *M&K Construction*, the appointment

²⁴ [*M & K Construction Ltd. v. Kingdom Covenant International*, 2015 ONSC 2241](#), at [para 6](#).

²⁵ January Affidavit, paras 60 to 65.

of a Receiver should not be used to needlessly dismantle an operational and viable business, particularly where the lender's interests can be protected through less intrusive means. In this case, the Company has proposed alternative remedy—continuing the current stay or limiting any Receivership to inventory and cash assets rather than the full business—ensuring RBC's recovery while allowing the Company to continue its operations.

PART V – RELIEF REQUESTED

47. The Company recognizes that this is an unusual situation, especially given the Consent. However, it cannot be just or convenient to shut down a business on the application of the Bank, that is at no risk, when the real source of concern is the Landlord, who has taken no recent steps and is not engaging in negotiations. The Bank seems to be proceeding because of the length of this proceeding, rather than because of any real risk to it or any pressing defaults. Indeed, to the contrary, Company has been a model borrower throughout this process and has never missed a payment or violated a provision of the Court orders which were all made to the Bank's satisfaction, while being monitored to ensure there is no material change or risk. To suggest that in this circumstance, with this level of control and collateral, the Bank should be granted a receivership because of alleged immaterial covenant defaults, is unreasonable.

48. Given the foregoing evidence of the current condition of the Company, it is our submission that the most just and convenient approach is for the Court to continue the current proceeding and allow the company further time to negotiate with its Landlord and to continue to repay the Bank. There is no inherent need for an end date that should be seen as more important than saving this business. Sometimes restructuring takes time. This one clearly requires more time to get to the just result.

49. In the alternative, the Company recommends that the Court appoint the Bank as receiver over only the cash and inventory, while allowing the Company to continue to operate, with the benefit of the stay which sees the Bank repaid and allows for further negotiations with the Landlord.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of March 2025.

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

David T. Ullmann
Lawyers for the Respondent, Peace Bridge Duty Free Inc.

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, [2023 ONSC 7096](#)
2. *Bank of Montreal v. Coopers Lybrand Inc.*, [1996 CanLII 12088](#)
3. *Servus Credit Union Ltd v Proform Management Inc.*, [2020 ABQB 316](#)
4. *BG International Limited v Canadian Superior Energy Inc.*, [2009 ABCA 127](#)
5. *M & K Construction Ltd. v. Kingdom Covenant International*, [2015 ONSC 2241](#)

SCHEDULE “B” – RELEVANT STATUTES

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Section 47(1) - Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor’s property that is subject to the security to which the notice relates until the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor’s property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor’s property over which the interim receiver was appointed, and
- (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Section 243 - Secured Creditors and Receivers

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.43

Sec 101 - 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.

Terms

(2) An order under subsection (1) may include such terms as are considered just

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