



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

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

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE KIMMEL:

The Receivership Application and Its History

- [1] The Applicant, Royal Bank of Canada ("RBC"), seeks an Order 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").
- [2] This application has been outstanding since the fall of 2021. It was precipitated by notices delivered by the Debtor's landlord (the "Landlord") on September 8, 2021 (the "Landlord Default Notices") in respect of the premises from which the Debtor operates its duty free shop (the "Premises") located near the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York. The Landlord Default Notices disclosed that, amongst other things, the Debtor had accumulated unpaid rental arrears of approximately \$5.9 million as of September 2021 (the "Landlord Arrears").
- [3] 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").
- [4] Following a period of forbearance, RBC then brought this receivership application, originally returnable on December 14, 2021, to appoint Spergel as receiver of all the Debtor's Property. This application has been adjourned many times to afford the Debtor time to try to work out a resolution with, and to adjudicate its lease disputes with, the Landlord, which were ultimately determined in favour of the Landlord by both this court (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 7096 released on December 15, 2024) and in the Court of Appeal (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2025 ONCA 54, released on January 27, 2025).
- [5] The terms of the first adjournment of this application on December 14, 2021, which remain in place until today, were that there would be an order:
 - 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").

- [6] On April 19, 2024, at 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 on 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.
- [7] 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 in April of 2024 a consent to an order appointing a receiver (the "Consent").
- [8] No settlement has been reached between the Debtor and its Landlord. The Appeal was decided by the decision released on January 27, 2025, above.

The Debtor's Defaults

- [9] Since the Landlord Default Notices, the Landlord Arrears, as claimed by the Landlord, have increased (the Landlord's claims they are as high as \$17 million). The Debtor also has been ordered to pay costs to the Landlord for proceedings before this court and in the Court of Appeal totalling more than \$1 million, which remain unpaid. Regardless of the disagreement over the specific amounts, it is undisputed that the Debtor owes the Landlord many millions of dollars.
- [10] Despite its assertions that the RBC indebtedness is fully protected, and despite its recent efforts to pay down the debt and keep it current, the Debtor has not met all of its financial covenants to RBC under the Credit Agreement during these proceedings. RBC sent the Debtor non-tolerance/non-waiver letters, but the default has not been remedied. The Debtor has not met its monetary and reporting obligations to RBC, has not honoured RBC's demand for repayment sent over three years ago and has not entered into arrangements satisfactory to RBC for the repayment of the outstanding indebtedness.
- [11] As of March 7, 2025 the indebtedness that RBC claimed to be owing to it by the Debtor was \$3,319,159.93 (excluding professional fees and expenses and accruing interest), while the Debtor maintains that its total current indebtedness was only approximately \$2,516,000.00 (the "Indebtedness"). The discrepancy between the two amounts of the Indebtedness is attributed by RBC and the Monitor to certain taxes and some interest that are included in RBC's Indebtedness calculation but not in the Debtor's.
- [12] This discrepancy does not materially impact the court's analysis on this application. There is significant unpaid Indebtedness and no plan for its repayment, nor any cashflows to demonstrate how the Debtor will continue to service the Indebtedness to the Bank and pay its rent.

The Positions of the Parties and Stakeholders

- [13] RBC, supported by the information about the financial position of the Debtor contained in the Monitor's Fourth Report, has determined that there are insufficient free funds to repay the Debtor's entire exposure under its Credit Agreements with the bank. It maintains that it has acted in a fair and reasonable manner and that it is now just and convenient for Spergel to be appointed as Receiver over the Debtor's Property. Spergel consents to being appointed as Receiver. The Landlord supports the appointment of Spergel as Receiver.
- [14] As stated in the court's March 27, 2025 endorsement, but for the stay that prevents the Landlord from enforcing the rent arrears, the Debtor is clearly unable to meet its liabilities (which include the outstanding rent arrears and costs awards in favour of the Landlord), even accounting for disagreements about some of the inputs and assumptions used by the Monitor. The Stay will continue to operate against the Landlord if the Receiver is appointed, but the Landlord maintains that it will have other remedies available to it, including that it might decide to move to lift the Stay.
- [15] Faced with the prospect of the receivership at the last attendance on March 27, 2025, the Debtor indicated that it needed time to try to come up with a plan to repay or otherwise satisfy its Indebtedness to RBC, based on available cash or cash equivalents that could be applied towards those amounts owing in the near term. In that event, RBC had indicated that it might be prepared to withdraw its application for the appointment of the Receiver. It was the prospect of this that led the court to grant a brief adjournment of the receivership application on March 27, 2025 to April 8, 2025. However, the Debtor has not come up with a plan that is satisfactory to RBC and is in the same position now as it was on March 27, 2025.
- [16] The Debtor's position at both the March 27 and April 8 hearings was that, despite the clear terms of the RBC security that entitle it to appoint a receiver, and despite the Debtor's signed Consent to an order appointing a receiver, the court should exercise its discretion not to appoint a receiver in the circumstances of this case.
- [17] Counsel for Cindy Beam, the store manager and employee of the Debtor, Peace Bridge Duty Free ("PBDF"), appeared at the last minute to request an adjournment on March 27, 2025. The adjournment was granted for other reasons. Once again at the eleventh hour, materials were filed on behalf of Ms. Beam and another employee of the Debtor, Kathleen Clements. This time, they submitted that the court should only grant a limited appointment of Spergel as receiver, but not as manager, over only PBDF's cash and inventory.
- [18] The assertion of these employees, never before raised by any of the other parties to this receivership application that has been outstanding for many years, is that the appointment

of a receiver and manager over PBDF would result in the immediate shutdown of the Debtor's business by Canada Border Services Agency ("CBSA") if the Receiver is appointed without the prior consent and approval of CBSA to the Receiver taking over the Debtor's business of selling duty free items. This was raised for the first time in an Aide Memoire that the parties received no earlier than the evening prior to the April 8, 2025 return date and the court did not see until just prior to the hearing.

- [19] According to this late-filed Aide Memoire, licences to operate duty free shops are granted by the federal Minister of Public Safety and Emergency Preparedness pursuant to section 24 of the *Customs Act*. Duty free shops are regulated pursuant to the Duty Free Shop Regulations (the "Regulations") under the *Customs Act*. The Regulations identify who may apply for a license, the terms that may be imposed on any such license, and how licenses are cancelled. The statutory construction of the *Customs Act* and the Regulations suggest that only the existing Ministerially-approved licensee can operate the business.
- [20] CBSA's Memorandum D4-3-2: Duty Free Shop - Licensing provides that where a duty free shop is placed "under the control of a receiver", operations must stop unless two events occur: (a) the licensee must "request" the government to allow the receiver "be allowed [by the government] to continue the day-to-day operations of the shop" and, (b) the receiver must meet the requirements of the duty free shop program.
- [21] Section 9(1)(a) of the Regulations states that a receivership of a licensee is grounds for the suspension or cancellation of the duty-free shop licence which means it can no longer operate. According to the submissions of these employees, a "receiver" is defined in such a way that it could be interpreted to only apply to someone who is appointed to manage, operate, liquidate or wind up any business or property, or to manage and care for the affairs and assets, of a licensee. It is for this reason that they submit that a partial appointment of Spergel, over only the cash and inventory of PBDF, might avoid an immediate shutdown of the duty free store.
- [22] None of the other parties had time to consider or properly respond to this submission, but they briefly noted that the decision to suspend or cancel the Debtor's licence was discretionary. Further, the Monitor emphasized that its initial intention was not to step in and operate or manage the business of the Debtor. Even though the proposed form of receivership order gives it the option to do so, it is not required, and does not intend, to immediately do so.

The Court's Concerns

- [23] The court expressed surprise at the lack of any evidence about whether the government had been asked to approve the proposed Receiver coming in to manage the day to day operations of the PBDF shop, and the lack of any evidence about whether the CBSA had been notified about the possibility of the appointment of a receiver since the commencement of this application in the fall of 2021, since the Consent was signed in

April of 2024 or even since the receivership application was adjourned on March 27, 2025 to April 8, 2025, when it was explicitly stated in the endorsement that the court was inclined to grant the application and appoint the Receiver unless some arrangement was made in the intervening time to repay or otherwise satisfy the RBC Indebtedness such that RBC would be prepared to withdraw this application. Apparently, none of that occurred.

- [24] Faced with the prospect of the uncertainty about the ability of the Debtor's business to continue to operate if the requested order was granted on April 8, the court asked the employees and the Debtor to circulate to the other parties a proposed revised form of receivership order that they considered would alleviate this immediate concern, even if just for the short term. In their last minute filing, they had not included a proposed form of order. The court needed to see what exactly was being proposed by them, not just the concept of a partial receivership order. The court also asked for the Monitor to confirm, once the proposed form of partial receivership order had been provided, whether it would be prepared to accept that appointment.
- [25] This led to a flurry of emails and additional submissions about whether a full receivership or partial receivership should be granted, which the court had not invited and was not prepared to entertain. Eventually, a proposed blackline form of order was provided (received by the court on April 10, 2025), together with the Monitor's summary of the concerns of the other parties.
- [26] The proposed form of partial receivership order provided by the employees and the Debtor did not simply remove terms from RBC's proposed form of order, it also added terms. Those are the source of much, but not all, of the controversy. Neither RBC nor the Landlord are satisfied with the proposed revised form of order.
- [27] Of particular concern to the court are the following comments from the Monitor:
- a. The Monitor has concerns with the mandate as currently outlined in the draft Order.
 - b. All of the parties, including the Monitor, have expressed concern with the fact that there is no cash flow forecast available to the parties to assess the cash requirements and projected revenue of Peace Bridge. The Monitor has discussed these concerns with counsel to Peace Bridge who advises that they are prepared to work quickly with the Monitor to update the current cash flow forecast over the next 5 business days.
 - c. It is the Monitor's recommendation that time be given before any Order is granted to allow for the delivery of the cash flow forecast on or before April 17th so that the stakeholders can properly evaluate the impact of the proposed Order and the Monitor can more fully understand and evaluate its proposed mandate.

- [28] In addition to the above comments from the Monitor, it is clear from the comments of RBC and the Landlord summarized by the Monitor for the court that there will be issues regarding who will be permitted to see any cash flows that the Debtor prepares and there remain other concerns about timing and ongoing payments to both RBC and the Landlord. The bottom line is that the court had, perhaps naively, assumed that what the Debtor and the employees were proposing was just to remove some provisions or terms from the draft receivership order proposed by RBC to make it narrower, and that is clearly not what has been proposed. The court appreciates the efforts that have gone into trying to develop a form of more limited receivership order, but it is clear that this is not just a matter of scaling back some of the powers of the receiver to avoid the concern of the suspension or cancellation of PBDF's licence to operate a duty free shop while the Monitor develops a plan.
- [29] Furthermore, even with the proposed changes to the order for a limited appointment, there is no guarantee that the CBSA would not take the position that the licence to operate should be suspended or cancelled. In the meantime, this exercise has demonstrated to me that this scaled back limited appointment order is not a viable short term solution that can be put in place pending a decision from the CBSA regarding the continued operation of the duty free store.
- [30] That said, as I read the *Customs Act* and Regulations, the CBSA still has the discretion to allow the store to continue to operate. It is unfortunate that this was not addressed prophylactically but it remains open to PBDF and its employees and the Receiver to persuade CBSA not to suspend or cancel the licence to operate if the Receiver is appointed.
- [31] That leads the court back to the question of whether to grant the relief sought by RBC on this application and to appoint the Receiver.

Analysis

- [32] The appointment of a receiver is generally considered to be an extraordinary remedy, but is considered less so when it is merely the enforcement of an agreement already made: see *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27. That is so when the agreement is contained in the security, as is the case here, and even more so when there is, on top of that, a signed Consent to the appointment of the Receiver that was given in exchange for an accommodation (adjournment of this application) that the Debtor was granted and has enjoyed the benefit of now for longer than was ever intended or agreed to (well past the date on which the Court of Appeal's decision was rendered in January of this year).
- [33] Viewed holistically, the typical factors that are considered in the assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient, favour the appointment of the Receiver in this case: see *Kingsett Mortgage Corp. v. Maplevue*

Developments Ltd., et al., 2024 ONSC 1983, at paras. 24-25 12 2013 ONSC 5862 at para 2.

- [34] While the Debtor and its employees argue that the court should strive to recognize and protect the interests of RBC without the effective liquidation of the business and the loss of forty jobs, they have not demonstrated that there is any viable way to do this. The Debtor just keeps coming back with suggestions for how it might be able to make arrangements to satisfy RBC if it is given more time, but then when given the additional time, it is not able to do so. It now asserts that it “has sufficient cash collateral to repay *almost* all of its debt” to RBC, but that is not good enough from RBC’s perspective, nor does it address the significant debt that the Debtor owes to its Landlord.
- [35] Where there is a right of appointment, irreparable harm need not be demonstrated: See *RBC v. 2531961 Ontario Inc. et al* , 2024 ONSC 1272, at para. 13. The Bank is concerned about the erosion of its security and the ability of the Debtor to repay it, given the Debtor’s inability to do so or to negotiate a resolution of the dispute with its Landlord over the many years it has had to do so. Instead, significant amounts have been expended on legal fees (or costs awards have been made in respect of the Landlord’s legal fees) to fight what has thus far been a losing battle with the Landlord, while the indebtedness to the Landlord has increased exponentially.
- [36] While there has been a last minute new issue raised about the continuation of the licence to operate the duty free shop, if this were really a concern I would have expected it to have been raised and efforts made to address it long ago. It cannot serve as a reason not to appoint a Receiver at the eleventh hour. While I was prepared to entertain the possibility of a short term limited receivership to see if this issue could be addressed in an orderly manner with the CBSA, that did not prove to be practical for reasons outlined earlier in this endorsement. The time has come. A private receivership is not realistic in this case, given all that has transpired. A court appointment is necessary to enable the receiver to carry out its duties efficiently.
- [37] The Debtor contends that the court must still decide whether the agreement (or here, the Consent) to appoint a receiver is just and equitable before making the order, in light of the facts and law: see *Bank of Montreal v. Coopers Lybrand Inc.*, 1996 CanLII 12088, at paras 11-13. When considering the issue of whether a receiver 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: see *BG International Limited v. Canadian Superior Energy Inc.*, 2009 ABCA 127, at para 16. The Debtor proposes that this can be accomplished through the current Stay and continuation of the Monitor, or limiting any receivership to inventory and cash assets rather than the full business.

[38] In my view, the prospect of any realistic alternatives have been exhausted. Having now considered and balanced the rights of the bank, the Debtor and other stakeholders (including both the employees and the Landlord), having considered the potential effects of granting the requested receivership order, and having 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, including the rights of the secured creditor under its security, I have determined that it is just and convenient for a receiver to be appointed over the Property of the Debtor: see *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 and subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act* (Ontario) (the "CJA").

[39] Commercial certainty also supports the appointment of the Receiver in this case where the Debtor consented to it in a negotiated arrangement while represented by counsel. Agreements to consent orders such as this are common in the insolvency practice and the parties should be able to expect the court to uphold their bargains, barring unforeseen or special circumstances: see *ATB Financial v. Mayfield Investments Ltd.*, 2024 ABKB 635, at para. 40.

Order

[40] I will allow a brief further hiatus for the parties to see if there is something that can be done to satisfy CBSA. I will not sign the receivership order that RBC has requested until April 17, 2025. I will do so on that day.

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

KIMMEL J.

April 11, 2025