

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

**AIDE MEMOIRE OF THE AUTHORITY
(Attendance on 4 April 2023)**

1. The purposes of this Case Conference are to:
 - (a) report on the outcome of the Mediation that took place on 27 and 28 March 2023;
 - (b) consider whether the issue of the costs (if any) payable as a result of the Authority's Motion ought to be decided now or deferred until PBDF's Cross-Motion is determined;
 - (c) determine whether (i) the stay of proceedings in paragraph 9 of the Appointment Order should be lifted and/or the Authority relieved of the restrictions under paragraph 11 of the Appointment Order; (ii) the Appointment Order, should be vacated or terminated; and/or (iii)

the amount of “normal rent” that PBDF should be paying to the Authority pursuant to paragraph 11 of the Appointment Order pending the determination of the Cross-Motion;

- (d) determine PBDF’s objection to the Authority conducting Rule 39.03 examinations;
- (e) to consider the timetable for the Cross-Motion including: (i) cross-examinations; (ii) the exchange of expert reports (if any); (iii) the need for any *viva voce* evidence; (iv) the exchange of written submissions; and (v) hearing of the Cross-Motion; and
- (f) consider the return of RBC’s Application to appoint a receiver over PBDF.

Mediation was Not Successful

2. On 16 January 2023, the Court directed:

[54] I am directing the parties to engage a third-party mediator and ordering them to attend a mediation to facilitate their consultation and negotiation to see if there is a business resolution that can be reached. That shall take place by no later than March 31, 2023.

[55] The Landlord has already rejected the Tenant’s last proposal. The Tenant is directed to make a new proposal, supported by a business plan and financial information to be disclosed with appropriate confidentiality protections in place. That information can be provided on a confidential basis and compiled with the assistance of the court appointed Monitor who has been in receipt of the monthly financial reporting from the Tenant since the Appointment Order was made. The Tenant’s proposal shall be provided at least two weeks prior to the scheduled mediation date.

[56] If the Tenant wants to reach a business solution, it would be well-advised to consider the structure and terms of the Landlord’s last proposal and address them (through incorporation or by some explanation for not incorporating them) in its next proposal.

3. The parties attended a 2-day Mediation before Stephen Morrison on 27 and 28 March 2023 at a cost of over \$24,000. The Mediation was not successful.

Costs

4. The costs of the Authorities Motion should be decided after the Cross-Motion is determined.

5. The Cross-Motion was brought in response to the Motion and the two are inextricably linked. The Court found that it was not possible to determine the Motion without determining certain of the issues raised on the Cross-Motion.

6. On 16 January 2023, the Court wrote:

[60] The parties shall report to the court after the mediation as to its outcome. If unsuccessful, the court will provide further directions, including about : i) the lifting of the stay of proceedings in paragraph 9 of the Appointment Order and/or relieving the Landlord of the restrictions under paragraph 11, ii) vacating or terminating the Appointment Order, and/or iii) the amount of rent that the Tenant should be paying to the Landlord if the Appointment Order is to continue, based on the enhanced financial disclosure that the Tenant will provide to the Landlord in the context of the mediation and to the court (in accordance with the existing sealing order).

...

[79] Having considered the extensive written and oral submissions on both sides, I am concerned about the lack of specificity about the “normal rent” to be paid under paragraph 11 of the Appointment Order, given the history and lengthy period prior to the Appointment Order in which very little, if any, Rent was being paid. The context and circumstances of this case are complex and unique, occurring under the backdrop of unprecedented cross-border travel restrictions, the moratorium on enforcement of remedies under commercial leases, the government subsidies offered to commercial tenants, to name a few considerations.

...

[81] In these circumstances, no default of paragraph 11 of the Appointment Order has yet established.

7. On 25 January 2023, the Court reiterated:

c. As was indicated in paragraph 60 of my last endorsement, if the mediation has not successfully resolved some or all of the issues in dispute between the Landlord and the Tenant, the parties may provide further submissions (to be included in Aide Memoires and evidence to be filed in advance), and the court may provide further directions, regarding the stay and restrictions contained in, and “normal rent” payable under, the Appointment Order, including with respect to: i) the lifting of the stay of proceedings in paragraph 9 of the Appointment Order and/or relieving the Landlord of the restrictions under paragraph 11, vacating or terminating the Appointment Order, and/or iii) the

amount of “normal rent” that the Tenant should be paying to the Landlord pursuant to paragraph 11 of the Appointment Order if it is to remain in place pending the decision of the court on the Tenant’s cross-motion, based on the enhanced financial disclosure that the Tenant will have by that time provided in its further evidence on its cross motion and/or in materials provided in the context of the mediation and extracted for the court’s consideration (to be filed in accordance with the existing sealing order).

8. Assuming PBDF is found to be in breach of the Lease, under the Lease the Authority has a prima facie right to costs. **[Lease, Art 17.03]**

9. There is no prospect of the Authority actually recovering costs from PBDF. RBC claims priority over all of PBDF’s assets and property.

10. PBDF owes the Authority a significant amount of money. Any costs recoverable by PBDF should be set off against the rent owing. It would be unfair to order that the Authority pay costs of PBDF without regard to the millions owing by PBDF.

Utility of the Appointment Order/Relief from Stay

11. The Appointment Order serves no further purpose and is being abused by PBDF. It should be vacated. In the alternative, it should be varied to require that PBDF pay minimum rent as required by the Lease until the Cross-Motion is determined.

Vacating the Appointment Order

12. The Appointment Order was made, and the Authority stayed, on 15 December 2021 based on the assertion by PBDF that it wished to have an opportunity to reach a commercial agreement with the Authority. There were no attempts made by PBDF to reach a commercial resolution. When the Authority sought to lift the stay imposed by the Appointment Order, PBDF (again) asserted that it wanted to try to reach a commercial resolution with the Authority and requested that the Court order that the Authority attend a mediation.

13. A further two months later, there has been no commercial resolution and none appears possible. In the meantime: (a) PBDF continues to not pay minimum rent in accordance with the Lease; and (b) interest alone on the rent owing by PBDF is increasing at almost \$200K per month.

14. PBDF is only delaying the inevitable. There are other defaults under the Lease upon which the Authority intends to act once it is able to do so:

Defaults	Lease Provision(s)	Rectified
Failure to pay Rent. (Notice of Default dated 8 September 2021)	4.01 and 4.05	No
Failure to operate and manage the business in a manner consistent with Schedule D—Tenant's Proposal.	9.02(n)	No
Failure to keep the Leased Premises in a "first class condition".	12.01	No
Failure to obtain approval of the Landlord to alter the Leased Premises by "walling off" the food service section of the Leased Premises	12.02	No
Grant of security over the Lease to RBC without consent. Failure to request consent prior to granting security over Lease to RBC.	14.01	No

Minimum Rent until Cross-Motion Determined

15. At the very least, PBDF should be required to pay minimum rent in accordance with the Lease until the Cross-Motion is determined.

16. On 16 January 2023, the Court wrote:

[48] That said, it was not intended that the Appointment Order would continue indefinitely. It was predicated on a representation by the Tenant that it wished to engage in negotiations with the Landlord to reach a business resolution. It has now been more than a year since the Appointment Order was made and no business resolution has been reached. In fact, no new proposal has been presented by the Tenant since the Landlord rejected its last proposal prior to the Appointment Order being made.

[49] The Landlord has effectively been subsidizing the Tenant's business and it cannot be required to do so indefinitely. This is effectively putting the Landlord (an unsecured creditor) in the position of supporting the secured creditor in what the Landlord sees as an inevitable receivership situation.

[50] The Tenant argues that if there is no prospect of a business resolution then its cross-motion should be expedited so that the Rent payable under the Lease and any damages payable to the Tenant (which it seeks to offset against any accrued past Rent payable) can be determined. The Landlord's concern that this could entail another year of it having to involuntarily subsidize the Tenant's Rent while the issues raised by the Tenant's cross-motion are litigated is a valid concern.

[51] The Landlord should not be forced to subsidize the Rent payable under the Lease for another year based on a hotly contested interpretation of Article 18.07 of the Lease. This is unfair given that, if the Tenant ultimately loses, the Tenant will very likely not have the ability to pay the significant accumulated Rent arrears (estimated to be more than \$8.4 million already). In the meantime, the RBC's position is protected and is not being (further) compromised by the terms of the Appointment Order.

[52] The Tenant should not continue to benefit from the ambiguity that existed at the time of the Appointment Order about what "normal rent" was. Paragraph 28 of the Appointment Order allows the court to vary (lift) either or both of the stay and other restrictions contained in paragraphs 9 and 11. Paragraph 11 of the Appointment Order expressly gives the court the discretion to order any amount of Rent to be paid (in lieu of "normal rent"). I am prepared to consider these provisions and make appropriate orders after the mediation if necessary. However, the parties first need to make a concerted effort to reach an agreement.

17. By paying less than the minimum rent required by the Lease, PBDF is assuming that the Cross-Motion will be successful, that it will be found to owe \$0 in rent arrears and will be entitled to pay only percentage rent. If PBDF is not successful, the Authority will recover nothing from PBDF. Every month that passes that PBDF does not pay minimum rent, the Authority's financial exposure to PBDF increases. While the Court has discretion to impose this result, *queri* whether it is a proper exercise of that discretion to force the Authority to provide financial support to PBDF and its shareholders. If PBDF is successful and has "overpaid" rent, that support will be easily recoverable for the Authority.

18. On 25 January 2023, the Court directed that PBDF deliver any further evidence upon which it will rely for the purpose of the Cross-Motion by 10 February 2023. PBDF delivered an Affidavit sworn by Jim Pearce on 13 February 2023. Attached as Exhibit I to that Affidavit is a document prepared by PBDF that purports to show the company's operating results from April of 2020 to January of 2023. This is the only

additional financial information delivered by PBDF and does not refer to the cash that PBDF is holding. PBDF has chosen to not file its cash flow projections.

19. It has been over 18 months since the COVID-related restriction upon which PBDF relied in closing the duty free were lifted. Traffic over the Peace Bridge has increased to what the Authority considers to be pre-COVID levels, yet PBDF asserts its sales have still not returned and continues to blame COVID. The issue seems to lie with PBDF's business or the broader economy and not COVID.

20. Assuming PBDF does not have sufficient funds available in the short-term to pay minimum rent—and there is no evidence currently before the Court to establish that is the case—there is no explanation as to why PBDF's shareholders cannot contribute capital to PBDF. As between the Authority and PBDF's shareholders, it should be the shareholders that bear any financial risk associated with the inability of PBDF to pay the minimum rent required by the Lease pending the determination of the Cross-Motion.

21. As has already been noted by the Court on 16 January 2023: (a) PBDF cannot continue to benefit from the ambiguity concerning what the "normal rent" was at the time of the Appointment Order was made; and (b) it is unfair to force the Authority to subsidize PBDF and its shareholders.

22. In terms of what rent was "normal" rent, PBDF filed documents with the Federal Government and received rent subsidies based on the assertion that it was liable to pay \$333,333 in rent per month.

23. The risk that PBDF might not be able to pay rent as a result of actions by "civil authorities" was contemplated by the Lease. The Lease requires that PBDF maintain business interruption insurance for direct or indirect loss of earnings or profits attributable to prevention of access to the leased premises by civil authorities. **[Lease Art 11.01(c) and 11.02]** There has been no mention of PBDF as to why this insurance does not, as was intended, provide coverage that would allow PBDF to pay the rent contemplated by the Lease.

Scheduling of Cross-Motion

24. On 16 January 2023, the Court wrote:

[50] The Tenant argues that if there is no prospect of a business resolution then its cross-motion should be expedited so that the Rent payable under the Lease and any damages payable to the Tenant (which it seeks to offset against any accrued past Rent payable) can be determined. The Landlord's concern that this could entail another year of it having to involuntarily subsidize the Tenant's Rent while the issues raised by the Tenant's cross-motion are litigated is a valid concern.

25. The Cross-Motion involves the interpretation of the Lease—specifically Art 18.07—and, perhaps, ss. 80-86 of the *Commercial Tenancies Act* (the “CTA”). The Lease includes an “entire agreement” clause.

[Lease Art 2.04]

26. All of the further evidence upon which PBDF was to rely in support of the Cross-Motion was to be filed within three weeks of 19 January 2023. **[25 Jan 23 Endorsement para 5]** PBDF delivered an Affidavit sworn by Mr. Pearce on 13 February 2023.

27. PBDF has now indicated that it wishes to: (a) obtain an expert report; and (b) conduct Rule 39.03 examinations of the Authority's directors. The sole purpose of this is to further delay the hearing of the Cross-Motion while PBDF and its shareholders continue to benefit from the Appointment Order.

28. While objective evidence as to the commonly-understood facts that existed in 2016 may be relevant to establish the factual matrix that existed when Art 18.07 was agreed, opinion evidence is not required for the Court to interpret Art 18.07 or the CTA.

29. There is no evidence that the directors of PBDF have any evidence that is relevant to the interpretation of Art 18.07 or the CTA. At best, the directors can provide evidence as to what they were told by the Authority's management or confirm the correspondence attached as Exhibits to Mr. Pearce's 13 February 2023 Affidavit. The Authority does not object to PBDF undertaking a **focussed** Rule 39.03 examination of the Chair of the Authority's Board.

30. The Authority wished to conduct Rule 39.03 examinations of two individuals: (a) Greg O'Hara who is the principal of PBDF who was directly involved in the negotiation of the Lease and the consultation that took place as contemplated by Art 18.07; and (b) a lawyer whose "opinion" as to the meaning of Art 18.07 is relied upon by PBDF. The Authority has narrowed that to one individual—Mr. O'Hara. The examination of Mr. O'Hara will be focussed on his knowledge of the factual matrix that existed when the Lease was negotiated and the ability of PBDF's shareholders to provide financial support. The Authority will take the position that the opinion evidence of the lawyer is not admissible.

31. Assuming the Court permits PBDF to conduct extensive examinations and file opinion evidence, the Authority would like to bring a Motion seeking security for costs.

Scheduling RBC Application

32. The Authority has no submissions on the scheduling of RBC's Application. The Authority is not a party to, and will not particulate in, that Application.

APPENDIX A—Legislation

Commercial Tenancies Act, RSO 1990, c L.7

80 (1) *This Part applies to a tenancy in respect of which the landlord satisfies any of the following criteria:*

1. *The landlord is or was eligible to receive assistance under the Canada Emergency Commercial Rent Assistance for small businesses program.*
2. *The landlord is receiving or has received assistance under the Canada Emergency Commercial Rent Assistance for small businesses program.*
3. *The landlord would be eligible to receive assistance under the Canada Emergency Commercial Rent Assistance for small businesses program if the landlord entered into a rent reduction agreement with the tenant containing a moratorium on eviction.*
4. *The landlord would have been eligible to receive assistance under the Canada Emergency Commercial Rent Assistance for small businesses program as described in paragraph 1 or 3 if applications under that program were being accepted. This paragraph applies only if applications to the Canada Emergency Commercial Rent Assistance for small businesses program are no longer being accepted or if assistance is no longer available under the program.*

(2) *This Part applies to a tenancy that satisfies the prescribed criteria. However, sections 83 and 85 apply, with prescribed modifications, in respect of those tenancies only if so provided by the regulations.*

(3) *This Part applies despite any other Part of this Act or any provision in an agreement or any common law rule.*

81 (1) *Despite anything in this or any other Act, a judge shall not order a writ of possession that is effective during the non-enforcement period that applies in respect of a tenancy referred to in subsection 80 (1) or (2) if the basis for ordering the writ is an arrears of rent.*

(2) *Subsection (1) applies in respect of an action or application that was commenced before, on or after the day the applicable non-enforcement period begins.*

82 *No landlord shall exercise a right of re-entry in respect of a tenancy referred to in subsection 80 (1) or (2) during the applicable non-enforcement period.*

83 (1) *If a landlord exercised a right of re-entry during the period that begins on October 31, 2020 and ends immediately before the day subsection 1 (1) of Schedule 5 to the Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020 comes into force, the landlord shall, as soon as reasonably possible,*

- (a) *restore possession of the premises to the tenant unless the tenant declines to accept possession; or*
- (b) *if the landlord is unable to restore possession of the premises to the tenant for any reason other than the tenant declining to accept possession, compensate the tenant for all damages sustained by the tenant by reason of the inability to restore possession.*

(2) *If a landlord restores possession of a premises to a tenant under subsection (1), the tenancy is deemed to be reinstated on the same terms and conditions unless the landlord and the tenant agree otherwise.*

84 *No landlord shall, during the applicable non-enforcement period, seize any goods or chattels as a distress for arrears of rent in respect of a tenancy referred to in subsection 80 (1) or (2).*

85 *If, during the period that begins on October 31, 2020 and ends immediately before the day subsection 1 (1) of Schedule 5 to the Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020 comes into force, a landlord seized any goods or chattels as a distress for arrears of rent, the landlord shall, as soon as reasonably possible, return to the tenant all of the seized goods and chattels that are unsold as of the day subsection 1 (1) of Schedule 5 to the Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020 comes into force.*

86 (1) *A landlord who contravenes section 82 or 84 or who fails to comply with clause 83 (1) (a) or section 85 is liable to the person aggrieved for any damages sustained by the person aggrieved as a result of the contravention or non-compliance.*

(2) *For greater certainty, subsection (1) applies in addition to any other remedy available by law to the person aggrieved.*

Non-Enforcement Period - Prescribed Tenancies, O Reg 763/20

1. (1) *The prescribed date for the purposes of clause (a) of the definition of “non-enforcement period” in section 79 of the Act is the 45th day after the day this Regulation comes into force.*

(2) *The prescribed period for the purposes of clause (b) of the definition of “non-enforcement period” in section 79 of the Act is the period that begins on December 17, 2020 and ends on April 22, 2022.*

2. (1) *The following criteria are prescribed for the purposes of subsection 80 (2) of the Act:*

- 1. *The tenant has been approved to receive the Canada Emergency Rent Subsidy.*
- 2. *The tenant has provided proof of the approval referred to in paragraph 1 to their landlord.*
- 3. *Not more than 12 weeks have passed since the day the tenant was approved.*

(2) *For greater certainty, a tenancy may satisfy the criteria in subsection (1) in respect of more than one approval for the Canada Emergency Rent Subsidy.*

APPENDIX B—Document Excerpts

**COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation**

Your application has been received. Your confirmation number is: **756686**

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: **101851210 ZA0001**

Business name: **PEACE BRIDGE DUTY FREE INC**

Period covered: **2021-06-06 to 2021-07-03**

Filing date: **2021-09-20**

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$354,473.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$354,473.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$82,324.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$82,324.00
Line 200	Revenue drop for the current period	98.20%
Line 210	Revenue drop for the previous period	99.30%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$53,510.60
Line 310	Lockdown support (subsidy top-up)	\$0.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$53,510.60

**COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation**

Your application has been received. Your confirmation number is: 189476

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2021-05-09 to 2021-06-05

Filing date: 2021-09-20

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$354,431.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$354,431.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$82,275.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$82,275.00
Line 200	Revenue drop for the current period	99.30%
Line 210	Revenue drop for the previous period	99.20%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$53,478.75
Line 310	Lockdown support (subsidy top-up)	\$0.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$53,478.75

**COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation**

Your application has been received. Your confirmation number is: 439919

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2021-04-11 to 2021-05-08

Filing date: 2021-09-20

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$354,443.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$354,443.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$82,249.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$82,249.00
Line 200	Revenue drop for the current period	99.20%
Line 210	Revenue drop for the previous period	99.50%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$53,461.85
Line 310	Lockdown support (subsidy top-up)	\$0.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$53,461.85



Canada Revenue
Agency

Agence du revenu
du Canada



COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation

Your application has been received. Your confirmation number is: 989419

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2021-03-14 to 2021-04-10

Filing date: 2021-09-20

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$351,561.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$351,561.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$81,026.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$81,026.00
Line 200	Revenue drop for the current period	99.50%
Line 210	Revenue drop for the previous period	99.60%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$52,666.90
Line 310	Lockdown support (subsidy top-up)	\$0.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$52,666.90



COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation

Your application has been received. Your confirmation number is: 903311

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2021-02-14 to 2021-03-13

Filing date: 2021-09-07

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$349,834.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$349,834.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$79,287.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$79,287.00
Line 200	Revenue drop for the current period	99.60%
Line 210	Revenue drop for the previous period	99.70%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$51,536.55
Line 310	Lockdown support (subsidy top-up)	\$0.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$51,536.55



Summerside PE C1N 5Z7

0008599

Date Issued Aug 12, 2021
Business number 10185 1210 ZA0001

PEACE BRIDGE DUTY FREE INC
C/O KAREN SHAUBEL
P.O. BOX 339 STN MAIN
FORT ERIE ON L2A 5N1

Subject: Canada Emergency Rent Subsidy (CERS) - Notice of (re)determination (period covered: **January 17, 2021 to February 13, 2021**)

We determined that PEACE BRIDGE DUTY FREE INC is eligible for the rent subsidy for this qualifying period.

Your entitlement is **\$70,137.70** (under subsection 152(3.4) of the Income Tax Act).

If the amount showing on this notice is different from what you claimed, we will send you an explanation of the change separately.

For more information on the CERS program, go to **canada.ca/rent-subsidy**.

If you disagree and want to file an objection, you have 90 days from the date of this notice. To learn more about your objection rights, go to **canada.ca/cra-complaints-disputes**.

If you are late with filing any of your returns, we encourage you to file them as soon as possible. We use your tax information to determine your eligibility for benefit and credit payments.

We may also hold any refunds or credits you are entitled to until you file all your outstanding returns.

You must keep your books and records in case we ask to see them later. For more information on how to keep adequate books and records, go to **canada.ca/taxes-records**.

If you need more information about this notice, call us at **1-800-959-5525**.

Thank you,

Bob Hamilton
Commissioner of Revenue



COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation

Your application has been received. Your confirmation number is: **510972**

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: **101851210 ZA0001**

Business name: **PEACE BRIDGE DUTY FREE INC**

Period covered: **2021-01-17 to 2021-02-13**

Filing date: **2021-08-09**

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$349,737.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$349,737.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$79,058.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$79,058.00
Line 200	Revenue drop for the current period	99.70%
Line 210	Revenue drop for the previous period	99.60%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$51,387.70
Line 310	Lockdown support (subsidy top-up)	\$18,750.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$70,137.70



Summerside PE C1N 5Z7

0000698

Date Issued Jul 12, 2021
Business number 10185 1210 ZA0001

PEACE BRIDGE DUTY FREE INC
C/O KAREN SHAUBEL
P.O. BOX 339 STN MAIN
FORT ERIE ON L2A 5N1

Subject: Canada Emergency Rent Subsidy (CERS) - Notice of (re)determination (period covered: **December 20, 2020 to January 16, 2021**)

We determined that PEACE BRIDGE DUTY FREE INC is eligible for the rent subsidy for this qualifying period.

Your entitlement is **\$72,345.75** (under subsection 152(3.4) of the Income Tax Act).

If the amount showing on this notice is different from what you claimed, we will send you an explanation of the change separately.

For more information on the CERS program, go to **canada.ca/rent-subsidy**.

If you disagree and want to file an objection, you have 90 days from the date of this notice. To learn more about your objection rights, go to **canada.ca/cra-complaints-disputes**.

If you are late with filing any of your returns, we encourage you to file them as soon as possible. We use your tax information to determine your eligibility for benefit and credit payments.

We may also hold any refunds or credits you are entitled to until you file all your outstanding returns.

You must keep your books and records in case we ask to see them later. For more information on how to keep adequate books and records, go to **canada.ca/taxes-records**.

If you need more information about this notice, call us at **1-800-959-5525**.

Thank you,

Bob Hamilton
Commissioner of Revenue



COVID-19: Canada Emergency Rent Subsidy (CERS) - confirmation

Your application has been received. Your confirmation number is: 673086

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2020-12-20 to 2021-01-16

Filing date: 2021-07-07

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$352,501.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$352,501.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$82,455.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$82,455.00
Line 200	Revenue drop for the current period	99.60%
Line 210	Revenue drop for the previous period	99.40%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$53,595.75
Line 310	Lockdown support (subsidy top-up)	\$18,750.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$72,345.75



Summerside PE C1N 5Z7

0004734

Date Issued Feb 24, 2021
Business number 10185 1210 ZA0001

PEACE BRIDGE DUTY FREE INC
C/O KAREN SHAUBEL
P.O. BOX 339 STN MAIN
FORT ERIE ON L2A 5N1

Subject: Canada Emergency Rent Subsidy (CERS) - Notice of (re)determination (period covered: **November 22, 2020 to December 19, 2020**)

We determined that PEACE BRIDGE DUTY FREE INC is eligible for the rent subsidy for this qualifying period.

Your entitlement is **\$69,876.40** (under subsection 152(3.4) of the Income Tax Act).

If the amount showing on this notice is different from what you claimed, we will send you an explanation of the change separately.

For more information on the CERS program, go to **canada.ca/rent-subsidy**.

If you disagree and want to file an objection, you have 90 days from the date of this notice. To learn more about your objection rights, go to **canada.ca/cra-complaints-disputes**.

If you are late with filing any of your returns, we encourage you to file them as soon as possible. We use your tax information to determine your eligibility for benefit and credit payments.

We may also hold any refunds or credits you are entitled to until you file all your outstanding returns.

You must keep your books and records in case we ask to see them later. For more information on how to keep adequate books and records, go to **canada.ca/taxes-records**.

If you need more information about this notice, call us at **1-800-959-5525**.

Thank you,

Bob Hamilton
Commissioner of Revenue



Your application has been received. Your confirmation number is: **417530**

Your claim will be reviewed within 10 to 15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: **101851210 ZA0001**

Business name: **PEACE BRIDGE DUTY FREE INC**

Period covered: **2020-11-22 to 2020-12-19**

Filing date: **2021-02-19**

Claim summary

Line	Description	Amount
Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$345,156.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$345,156.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$78,656.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$78,656.00
Line 200	Revenue drop for the current period	99.40%
Line 210	Revenue drop for the previous period	99.60%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$51,126.40
Line 310	Lockdown support (subsidy top-up)	\$18,750.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$69,876.40



Canada Revenue Agency
Agence du revenu
du Canada

Canada

Your application has been received. Your confirmation number is: 972802

Your claim will be reviewed within 10-15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2020-10-25 to 2020-11-21

Filing date: 2021-01-12

Claim summary

Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$343,954.00
Line 130	Total eligible property taxes for the claim period	\$0.00
Line 140	Total eligible property insurance for the claim period	\$0.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$343,954.00
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$75,953.00
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$75,953.00
Line 200	Revenue drop for the current period	99.60%
Line 210	Revenue drop for the previous period	99.10%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$49,369.45
Line 310	Lockdown support (subsidy top-up)	\$18,750.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$68,119.45



Your application has been received. Your confirmation number is: 147705

Your claim will be reviewed within 10-15 business days. Any payment resulting from this application will be made using the direct deposit or mailing address information we have on file for your account.

Business number: 101851210 ZA0001

Business name: PEACE BRIDGE DUTY FREE INC

Period covered: 2020-09-27 to 2020-10-24

Filing date: 2020-11-30

Claim summary

Line 110	Number of properties eligible for the rent subsidy	2
Line 120	Total eligible rent for the claim period	\$304,663.16
Line 130	Total eligible property taxes for the claim period	\$4,636.00
Line 140	Total eligible property insurance for the claim period	\$3,530.00
Line 150	Total eligible interest on commercial mortgages for the claim period	\$0.00
Line 155	Total eligible expenses for the claim period (Line 120 + Line 130 + Line 140 + Line 150)	\$312,829.16
Line 160	Total qualifying rent expenses for the claim period (maximum \$75,000 per property)	\$76,547.44
Line 170	Maximum rent expenses that can be claimed for the claim period (lesser of: Line 160; \$300,000; and, if applicable, \$300,000 multiplied by the percentage assigned per the agreement among affiliated entities claiming the rent subsidy)	\$76,547.44
Line 200	Revenue drop for the current period	99.11%
Line 210	Revenue drop for the previous period	99.06%
Line 220	Subsidy rate (maximum 65%)	65.00%
Line 300	Base Canada Emergency Rent Subsidy (Line 170 * Line 220)	\$49,755.84
Line 310	Lockdown support (subsidy top-up)	\$0.00
Line 320	Total Canada Emergency Rent Subsidy (Line 300 + Line 310)	\$49,755.84

Gail Fairhart

From: David T. Ullmann
Sent: November 4, 2022 5:19 PM
To: 'LWilliams@tgf.ca'; Mukul Manchanda
Cc: 'Jim Pearce'; Greg O'Hara; John C. Wolf
Subject: November Results
Attachments: Blaney-Monitor report-Cashflow-Nov3rd.pdf; Blaney-Monitor report-Financials Oct2022.pdf

Follow Up Flag: Follow up
Flag Status: Completed

Leanne,

Here are the monthly report and cash flow from our client. As you can see, our client continues to meet the thresholds in the Order. Let me know if you have any concerns.

Have a nice weekend.

Regards,

David

David T. Ullmann
Partner

dullmann@blaney.com

📞 416-596-4289 | 📞 416-594-2437

From: Jim Pearce <JimP@dutyfree.ca>
Sent: November 3, 2022 3:37 PM
To: David T. Ullmann <DULLmann@blaney.com>; John C. Wolf <jwolf@blaney.com>; Greg O'Hara <gohara@dutyfree.ca>; Greg O'Hara (Sympatico) <gregohara@sympatico.ca>
Subject: Updates & Call time

David, the two Monitor reports are attached - the Nov3rd Cashflow&Inventory report and the October Financials.

Best,

Jim

Cashflow Report

	Oct 16-29		Variance	(000's)			
	Projected	Actual		w/e Nov5	w/e Nov12	w/e Nov19	w/e Nov26
Bank balance-opening	1,995	1,995		1,961	1,693	1,803	1,742
Receipts (Sales)	525	540	15	250	275	250	225
Total receipts	525	540		250	275	250	225
Cash requirements							
Trade payables	475	394	81	200	100	225	100
Rent-Percentage	-	-	-	243	-	-	-
Rent-CAM costs	10	10	-	-	-	-	10
Rent-HIA	-	-	-	-	-	10	-
Wages&Benefits	40	40	1	40	25	25	25
Payroll remittances	-	-	-	-	-	25	-
RBC Lease payment	77	77	-	-	-	-	-
HASCAP payment	4	4	0	-	-	-	11
Professional fees	25	31	(6)	-	25	-	25
Insurance	-	-	-	-	-	11	-
Misc payments/expenses	30	20	10	35	15	15	15
Total payments	661	575		518	165	311	186
Bank balance-ending	1,859	1,961	102	1,693	1,803	1,742	1,781

Notes:

Bank balance is net of \$850,000 held by RBC in a GIC and is net of cash collateral of \$625,900 held by the RBC.

Sales are projected at the current trend of down 50% of pre-pandemic levels. Actual sales may be greater depending on return of ordinary traffic and changes to government border policies.

Cashflow report does not account for possible receipt of tax refunds, returns, or amounts as due as a result of any reassessment of taxes paid or amounts received as timing and amounts are uncertain. Any such amounts would increase cash available for operations.

Rent is calculated at 20% of sales in accordance with past practice. Cash flow does not account for payment of rent arrears, to the extent of such arrears exist or are agreed to be paid. Negotiations with the landlord continue.

Professional fees assume the continuation of consensual negotiations in accordance with recent past practice. In the event there are contested issues requiring return to court or the need for a mediation, the professional fee spend could increase materially in response.

Inventory Report

	Oct 16-29		Variance	(000's)			
	Projected	Actual		w/e Nov5	w/e Nov12	w/e Nov19	w/e Nov26
Inventory-opening	1,209	1,209		1,258	1,316	1,286	1,289
Cost of Goods Sold	(247)	(254)		(118)	(129)	(118)	(106)
Purchases	275	303		175	100	100	125
Inventory-ending	1,237	1,258	21	1,316	1,286	1,269	1,288

Peace Bridge Duty Free Inc.
Income Statement
Year-to-Date October 31, 2022

Sales	8,624,306
Cost of Sales	<u>3,840,815</u>
Gross Margin	<u>4,783,491</u>
Store Expenses	
Rent	1,724,861
Wages & Benefits	963,347
Professional Fees	240,000
Insurance	150,000
Commercial Taxes	58,904
Utilities	67,982
Marketing	44,195
Store Supplies	52,133
Maintenance	52,890
Collection Fees	138,454
Computer Expense	29,750
Communications	21,152
Other Admin Expenses	36,375
	<u>3,580,043</u>
Other Income	
Gov't Subsidies-Rent 2021	141,472
Gov't Subsidies-Wages 2021	92,224
Gov't Subsidies-Rent 2022	245,636
Gov't Subsidies-Wages 2022	173,556
Misc Income	<u>241,641</u>
	<u>894,529</u>
Operating Income	<u>2,097,977</u>
RBC Lease Interest	132,197
HASCAP Interest	<u>34,064</u>
EBITA	<u>1,931,716</u>
Amortization	400,000
Corporate Taxes	<u>270,000</u>
Net Income	<u><u>1,261,716</u></u>

Peace Bridge Duty Free Inc.
Balance Sheet
As at October 31, 2022

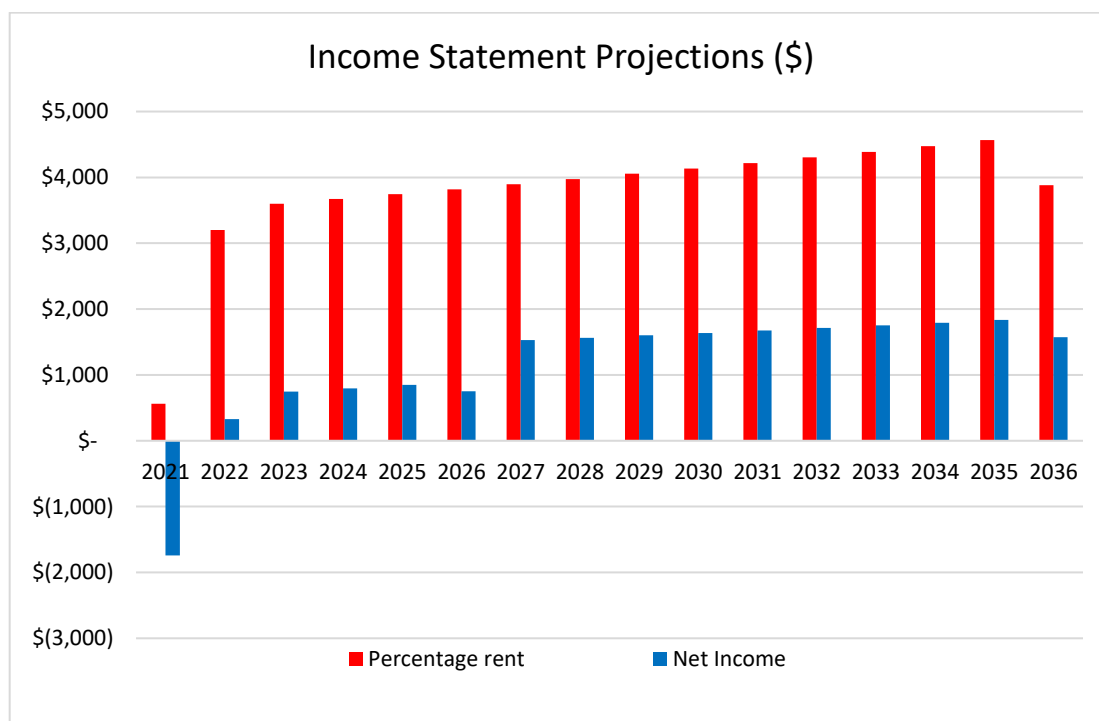
135

29

Assets	
Current	
Cash and equivalents	2,326,779
RBC-GIC	1,475,900
Misc Receivables	251,234
Inventory	1,214,613
Prepaid expenses	<u>307,461</u>
	5,575,987
Long-term	
Lease security deposit	50,000
Equipment and leaseholds	7,581,070
Less Accumulated Depreciation	<u>(2,244,754)</u>
	5,336,316
Future income taxes	<u>213,000</u>
	<u><u>11,175,303</u></u>
Liabilities	
Current	
Accounts payables	517,652
Rent payable	6,319,526
Accruals	<u>581,907</u>
	7,419,085
Long-term	
RBC Capital Lease	3,288,992
HASCAP Loan	1,000,000
Shareholders' equity	
Common Stock	21,000
Dividends	0
Current earnings	1,261,716
Retained earnings	<u>(1,815,489)</u>
	(532,773)
	<u><u>11,175,303</u></u>



PROPOSAL MADE TO:
THE BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY



Income Statement Projections	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2021-36
Sales	2,800	16,000	18,000	18,360	18,727	19,102	19,484	19,873	20,271	20,676	21,090	21,512	21,942	22,381	22,828	19,404	302,450
Margin	1,400	8,000	9,000	9,180	9,364	9,551	9,742	9,937	10,135	10,338	10,545	10,756	10,971	11,190	11,414	9,702	151,225
Expenses																	
Percentage rent	560	3,200	3,600	3,672	3,745	3,820	3,897	3,975	4,054	4,135	4,218	4,302	4,388	4,476	4,566	3,881	60,490
Wages & benefits	820	1,904	2,000	2,040	2,081	2,123	2,165	2,208	2,252	2,298	2,343	2,390	2,438	2,487	2,537	2,114	34,201
Severance estimation	500	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	500
RBC Lease payments	819	819	819	819	819	1,000	0	0	0	0	0	0	0	0	0	0	5,095
Insurance	300	300	306	312	318	325	331	338	345	351	359	366	373	380	388	323	5,416
Marketing	60	250	250	250	250	250	250	250	250	250	250	250	250	250	250	250	3,810
Bank & C/C fees	41	248	207	211	215	220	224	229	233	238	243	247	252	257	263	219	3,546
Commercial taxes	60	60	61	62	64	65	66	68	69	70	72	73	75	76	78	65	1,083
Other expenses	371	583	595	606	619	631	644	656	670	683	697	710	725	739	754	628	10,309
Total expenses	3,531	7,364	7,838	7,973	8,111	8,433	7,577	7,723	7,873	8,025	8,181	8,339	8,501	8,666	8,835	7,480	124,450
Operating Income	(2,131)	636	1,162	1,207	1,252	1,118	2,165	2,213	2,263	2,313	2,364	2,416	2,470	2,524	2,580	2,222	26,775
Amortization	222	191	152	130	102	100	100	100	100	100	100	100	100	100	100	100	1,898
Income taxes	(612)	116	263	280	299	265	537	549	562	575	589	602	616	630	645	552	6,468
Net Income	(1,741)	330	747	797	851	753	1,528	1,564	1,600	1,638	1,675	1,714	1,754	1,794	1,835	1,570	18,409

BUILDING LEASE

BETWEEN

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

- AND -

PEACE BRIDGE DUTY FREE INC.

ARTICLE I BASIC LEASE TERMS

1.01 Basic Lease Terms

- (a) Landlord: Buffalo and Fort Erie Public Bridge Authority

Address of Landlord:

- (b) Tenant: Peace Bridge Duty Free Inc.

Address of Tenant:

- (c) Leased Premises: The Building and the portion of the Lands as identified in Schedule "B".
- (d) Term: 15 years.
- (e) Commencement Date: November 1, 2016.
- (f) Termination Date: October 31, 2031.
- (g) Letter of Credit: \$50,000.
- (h) Extension Options: One option to extend the term for an additional period of five years.

ARTICLE II DEFINITIONS AND INTERPRETATION

2.01 Definitions

In this Lease and the schedules forming part of it, the following definitions apply:

- (a) **"Additional Rent"** means all money or charges which the Tenant is required to pay under this Lease (except Base Rent, Percentage Rent and Sales Taxes) whether or not they are designated "Additional Rent" whether or not they are payable to the Landlord or to third parties.
- (b) **"Additional Services"** means those services provided to the Tenant at its request, as additional services, which are not part of the services provided by the Landlord to the Tenant in accordance with the terms of this Lease and charged as Operating Costs including, but not limited to, maintenance, repair, janitorial or cleaning services. Additional Services also includes any services provided by the Landlord on behalf of the Tenant in respect of any obligations of the Tenant required under this Lease which the Tenant fails to observe and perform.
- (c) **"Adverse Effect"** means any one or more of:

- (i) impairment of the quality of the natural environment for any use that can be made of it;
 - (ii) injury or damage to property or to plant or animal life;
 - (iii) harm or material discomfort to any Person;
 - (iv) an adverse effect on the health of any Person;
 - (v) impairment of the safety of any Person;
 - (vi) rendering any property or plant or animal life unfit for human use;
 - (vii) loss of enjoyment of a normal use of property; and
 - (viii) interference with the normal conduct of business.
- (d) “**Alterations**” has the meaning ascribed to that term in Section 12.02.
- (e) “**Applicable Laws**” means any statutes, laws, by-laws, regulations, ordinances and requirements of governmental and other public authorities having jurisdiction over or in respect of the Leased Premises or the Property, or any portion thereof, and all amendments thereto at any time and from time to time, and including but not limited to the Environmental Laws.
- (f) “**Architect**” means the architect, engineer or land surveyor named by the Landlord from time to time.
- (g) “**Base Rent**” means the annual base rent payable by the Tenant and described in Section 4.02.
- (h) “**Building**” means the building located on the Lands as shown on Schedule B as it exists from time to time.
- (i) “**Building Systems**” means: (i) the equipment, facilities and all systems, services and installations from time to time installed in or servicing the Leased Premises (or any portion thereof) including, but not limited to: mechanical (including plumbing, sprinkler, drainage and sewage) and electrical systems and appurtenances thereto; utilities (including, without limitation, electricity, water, hydro and gas), lighting, sprinkler, life safety (including fire prevention, communications, security and surveillance); computer (including environmental, security and lighting control); and (ii) all machinery, appliances, equipment, apparatus, components, computer software and appurtenances forming part of or used for or in connection with any of such systems, services, installations and facilities including, but not limited to, boilers, motors, generators, fans, pumps, pipes, conduits, ducts, valves, wiring, meters and controls, and the structures and shafts housing and enclosing any of them.

breakage of or accident to machinery, any legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means, any act, omission or event, whether of the kind herein enumerated or otherwise, not within the control of such party, and which, by the exercise of control of such party, could not have been prevented. Insolvency or lack of funds on the part of such party shall not constitute an unavoidable delay.

2.02 Net Lease

This Lease is a completely carefree net lease to the Landlord. Except as otherwise stated in this Lease, the Landlord is not responsible for any costs, charges, expenses or outlays of any nature whatsoever arising from or relating to the Leased Premises, or the use and occupancy of the Leased Premises, or the contents or the business carried on in the Leased Premises; and the Tenant will pay all charges, impositions, costs and expenses of every nature relating to the Leased Premises.

2.03 Extended Meanings

Use of the neuter singular pronoun to refer to the Landlord or the Tenant is considered a proper reference even though the Landlord or the Tenant is an individual, a partnership, a corporation, or a group of two or more individuals, partnerships or corporations. The necessary grammatical changes required to make the provisions of this Lease apply in the plural sense where there is more than one Landlord or Tenant and to either corporations, associations, partnerships or individuals, males or females, will in all instances be assumed as though they were fully expressed.

2.04 Entire Agreement

There are no covenants, representations, warranties, agreements or other conditions expressed or implied, collateral or otherwise, forming part of or in any way affecting or relating to this Lease, save as expressly set out or incorporated by reference herein and this Lease and the schedules attached hereto constitute the entire agreement duly executed by the parties hereto.

2.05 Governing Law

This Lease shall be construed in accordance with and governed by the laws of the Province of Ontario and the laws of Canada applicable therein.

2.06 Time of the Essence

Time is of the essence of this Lease and each part of it.

2.07 No Limitation

Any statement or provision in this Lease followed by words denoting inclusion or example, such as "including" or "such as", and then listing or referring to specific matters or items shall not be read so as to limit or restrict the generality of such statement or provision regardless of whether or not words such as "without limitation" or "without limiting the generality of the foregoing" precede such list or reference.

The parties shall execute a lease extension agreement prepared by the Landlord to reflect the terms of the Extension Term.

ARTICLE IV RENT

4.01 Covenant to Pay

The Tenant will pay Rent as provided in this Lease, together with all applicable Sales Taxes, duly and punctually by way of electronic funds transfer ("EFT") from the Tenant's bank account. The Tenant undertakes to execute and deliver concurrently with this Lease such documentation as may be required by the Landlord and its bank in order to effect payment of Rent by EFT. Any invoice sent by the Landlord to the Tenant pursuant to the provisions of this Lease, other than for pre-authorized monthly Rent payments, shall be paid for by cheque to the Landlord at its address set out in Section 1.01(a) or as the Landlord otherwise directs.

4.02 Base Rent

The Tenant covenants and agrees to pay to the Landlord the annual Base Rent payable in twelve (12) equal monthly instalments on the first day of each month during the Term herein in advance together with all applicable taxes. For the first year of the Lease the Base Rent shall be \$4,000,000. The Base Rent for the second year and each succeeding year of the Lease shall be the greater of (i) \$4,000,000 or (ii) 75% of the aggregate of the Base Rent and the Percentage Rent payable by the Tenant to the Landlord for the immediately preceding Rental Year.

4.03 Percentage Rent

The Tenant covenants and agrees with the Landlord that the following Percentage Rent rates will apply for the initial Term of this Lease and for any Extension Term.

Annual Gross Sales	Percentage
\$0 - \$20,000,000	20%
\$20,000,000 - \$25,000,000	22%
>\$25,000,000	24%

The Tenant covenants and agrees with the Landlord that for each month (including any broken calendar month) of the Term or Extension Term, if applicable, the above percentage rates will be applied to the Tenant's Gross Sales during such monthly period (with the applicable percentage rate based on the Tenant's year to date Gross Sales for the then current Rental Year). If, during any month (including any broken calendar month) of the Term or the Extension Term the

calculation of Percentage Rent in such monthly period (based on the Tenant's year to date Gross Sales for the then current Rental Year) exceeds (i) the Base Rent payable for such period (based on the year to date Base Rent payable for the then current Rental Year) plus (ii) the amount of Percentage Rent previously paid by the Tenant for the then current Rental Year, the Tenant will within twenty-five (25) days following the conclusion of such monthly period, pay the resulting difference together with all applicable taxes, to the Landlord as Percentage Rent.

The Landlord and the Tenant agree that any money required to be paid as Percentage Rent as set forth in the Lease shall be deemed to be Rent and be collectible as Rent and the Landlord shall have the same remedies in respect of arrears of Percentage Rent as it has in respect to arrears of Base Rent.

For clarity, below is an example of the calculation of Base Rent and Percentage Rent in accordance with Sections 4.02 and 4.03 of the Lease:

Year	Gross sales	75% PY rent Calculation	Base rent Minimum	Calculated annual % rent	Additional % Rent due	Total rent Due
1	\$ 24,000,000		\$ 4,000,000	\$ 4,880,000	\$ 880,000	\$ 4,880,000
2	\$ 26,000,000	\$ 3,660,000	\$ 4,000,000	\$ 5,340,000	\$ 1,340,000	\$ 5,340,000
3	\$ 35,000,000	\$ 4,005,000	\$ 4,000,000	\$ 7,500,000	\$ 3,495,000	\$ 7,500,000
4	\$ 24,000,000	\$ 5,625,000	\$ 4,000,000	\$ 4,880,000	-	\$ 5,625,000
5	\$ 22,000,000	\$ 4,218,750	\$ 4,000,000	\$ 4,440,000	\$ 221,250	\$ 4,440,000
6	\$ 20,000,000	\$ 3,330,000	\$ 4,000,000	\$ 4,000,000	-	\$ 4,000,000

In the example above Base Rent and Percentage Rent would be as follows: in year one of the Lease Base Rent is \$4,000,000 and Percentage Rent is \$880,000; in year two Base Rent would be \$4,000,000 and Percentage Rent would be \$1,340,000; in year three Base Rent would be \$4,005,000 and Percentage Rent would be \$3,495,000; in year four Base Rent would be \$5,625,000 and Percentage Rent would be \$0; in year five Base Rent would be \$4,218,750 and Percentage Rent would be \$221,250; and in year six Base Rent would be \$4,000,000 and there would be no Percentage Rent.

In year four, because the annual calculated Percentage Rent is less than the Base Rent for that year, no additional Percentage Rent would be due. In year five, Base Rent is \$4,218,750 (greater of \$4,000,000 or 75% of prior year total rent). The total calculated Percentage Rent for year five is \$4,440,000. Because the calculated Percentage Rent is greater than the Base Rent, the difference of \$221,250 would be due as Percentage Rent for that year.

4.04 Accrual of Rent

Rent shall be considered as accruing from day to day hereunder from the Commencement Date. If it is necessary for any reason to re-calculate such Rent for an irregular period during the relevant Rental Year, an appropriate apportionment and adjustment shall be made on a per diem basis based upon a 365 day calendar year.

4.05 Rent and Payments Generally

All Rent and other payments by the Tenant to the Landlord of whatsoever nature required or contemplated by this Lease, which are payable by the Tenant to the Landlord, shall:

- (a) be paid when due hereunder, without prior demand therefor and without any abatement, set-off, compensation or deduction whatsoever (except as otherwise specifically provided for in this Lease);
- (b) be applied towards amounts then outstanding hereunder in such manner as the Landlord determines in its sole discretion;
- (c) bear interest at a rate equal to twenty-four percent (24%) per annum, calculated and payable monthly from the date such Rent or other payments became due to and including the date of payment;
- (d) an administrative charge of \$150.00 will be charged in connection with any late payment or returned cheque to cover the Landlord's additional administration costs;
- (e) in addition the Tenant shall pay all Sales Taxes. The amount of such Sales Taxes will be calculated by the Landlord in accordance with the applicable legislation and will be paid to the Landlord (or to the lawful taxing authority, as the Landlord may direct) on the due date of the amounts in respect of which such Sales Taxes are payable. All such payments shall be made prior to the date that the same shall become due and payable and any interest and any penalties assessed as a result of any default in or late payment of same shall be the sole responsibility of the Tenant. Notwithstanding any other provision of this Lease, the amount payable by the Tenant under this section shall be deemed not to be Rent but the Landlord shall have all of the same remedies for and rights of recovery of such amount as it has for the recovery of Rent under this Lease or otherwise; and
- (f) if the Commencement Date is on a day other than the first day of a calendar month or if the Term ends on any day other than the last day of the month, Rent for the fractions of a month at the Commencement Date and at the end of the Term shall be calculated on a pro rata basis.

4.06 Letter of Credit

The Tenant covenants that, on or before the Commencement Date, the Tenant shall deliver to the Landlord an irrevocable and unconditional letter of credit or other form of cash collateral security satisfactory to the Landlord (the "**Letter of Credit**") in favour of Landlord issued by a Schedule 1 Canadian chartered bank in the amount of \$50,000.00, which shall be held by the Landlord during the Term and any Extension Term. The Letter of Credit shall be in such form as is approved in advance by the Landlord. If at any time during the Term or any Extension Term, the Tenant defaults in the payment of any Rent or other amounts payable under this Lease or in the performance of any of its other obligations under this Lease or if this Lease is surrendered, terminated, disclaimed or repudiated whether by Landlord as a result of default of Tenant or in connection with any insolvency or bankruptcy of Tenant or otherwise, then Landlord at its option

9.02 Conduct and Operation of Business

The Tenant shall occupy the Leased Premises during the Term of the Lease and shall continuously and actively carry on the Permitted Use in the whole of the Leased Premises. In the conduct of the Tenant's business pursuant to this Lease the Tenant shall:

- (a) operate its business 24 hours a day, seven days a week, 365 days a year with due diligence and efficiency and maintain an adequate staff to properly serve all customers;
- (b) observe and obey the reasonable rules and regulations of the Landlord promulgated from time to time for reasons of safety, health or preservation of property or for the maintenance of the good and orderly appearance and operations of the Peace Bridge. Without limiting the generality of the foregoing, the Landlord, after consulting with the Tenant, may provide rules setting out where customers of the Tenant shall park their vehicles and may further provide for the orderly flow of traffic entering and exiting from the area of the Leased Premises provided such rules are reasonable and acceptable to the Tenant, acting reasonably. The Tenant agrees that it shall be responsible to provide any and all traffic direction required in or upon the Leased Premises.
- (c) abide by all reasonable rules and regulations and general policies formulated by the Landlord from time to time relating to the delivery of goods and merchandise to the Leased Premises;
- (d) not erect, maintain or display any signs or any advertising at or on the exterior of the Leased Premises without the prior written approval of the Landlord, such approval not to be unreasonably withheld;
- (e) keep the Leased Premises clean, neat and free of hazards and fire dangers at all times;
- (f) perform all landscaping and maintenance of all outside areas, including cleaning, line painting, snow and ice clearing and removal and salting of sidewalks, driveways and parking facilities and all lawn and garden maintenance;
- (g) provide policing, supervision and security as required;
- (h) maintain proper lighting in the parking facilities;
- (i) take any and all action necessary to prevent any of its employees from affecting the orderly flow of traffic in or upon the Leased Premises or any other lands owned by the Landlord;
- (j) dispose of all waste or recyclable material at a location in the Leased Premises at such times and in such manner as may be directed by the Landlord from time to time and in accordance with Applicable Law;

- (k) obtain a Licence and maintain its Licence in good standing;
- (l) provide adequate public restrooms for the anticipated number of travelers using the Peace Bridge, including persons who may not be patrons of the duty free shop;
- (m) in the event that the Tenant's Licence is terminated, revoked or suspended for any period of Time, or has expired, the Tenant shall cause its Licence to be reinstated or renewed within 60 days of such termination, revocation, suspension or expiration;
- (n) operate and manage the business at the Leased Property in a manner consistent with the Tenant's Proposal; and
- (o) abide by any and all directives of Canada Border Services Agency in regards to the conduct of the Tenant's business.

9.03 Nuisance and Waste

The Tenant shall not commit any waste upon, or damage to, the Leased Premises or commit any nuisance or other act or thing and will not perform any acts or carry on any practices which may damage the Leased Premises. The Tenant will not permit any odours, vapours, steam, water, vibrations, noises or other undesirable effects to emanate from the Leased Premises or any equipment or installation therein which, in the Landlord's opinion, are objectionable, and the Tenant will not cause any interference with the safety, comfort or convenience of the Landlord.

9.04 Observance of Law

The Tenant shall, at its own expense, comply with all Applicable Laws affecting the Leased Premises or the use or occupation thereof including, without limitation, police, fire and health regulations and requirements of the fire insurance underwriters. The Tenant shall carry out modifications, alterations or changes to the Leased Premises and the Tenant's conduct of business in or use of the Leased Premises which are required by any such authorities and shall keep its Licence in good standing.

9.05 Additional Services of the Landlord

The Tenant shall pay to the Landlord the costs of all Additional Services provided by the Landlord to the Tenant, together with an administration fee equal to fifteen percent (15%), forthwith on demand as Additional Rent.

9.06 Traffic Direction

In the event that the Landlord, after consultation with the Tenant, determines that additional traffic personnel are required as a result of the operations of Tenant, Landlord shall add such additional personnel as may be required, and Tenant and Landlord shall each pay one-half of the cost of such additional personnel.

disclaimer or earlier termination of this Lease; and, at the option of the Landlord, to the extent there is non-compliance with applicable Environmental Laws, any substance, including soil and groundwater contaminated by such Contaminants shall become the property of the Tenant.

- (b) The Tenant covenants and agrees to carry out at the request of the Landlord at its own cost and expense, remediation of all Contamination of the Leased Premises arising out of the Tenant's uses or occupation thereof so that the soil and groundwater condition of the Leased Premises and any affected areas beyond the Leased Premises or property owned or controlled by a third party, complies with remediation criteria set out in guidelines, policies, criteria or otherwise established under Environmental Laws. Risk assessment will not be used unless agreeable to the Landlord. This covenant shall survive the Termination Date.
- (c) At the option of the Landlord, the Landlord may itself undertake such work or any part thereof at the cost and expense of the Tenant and that cost and expense plus an administration fee equal to fifteen percent (15%) shall be paid to the Landlord forthwith on demand as Additional Rent; but having commenced such work, the Landlord shall have no obligation to the Tenant to complete such work.
- (d) The obligations of the Tenant hereunder relating to Contaminants shall survive any assignment, expiry, repudiation, disclaimer or earlier termination of this Lease. To the extent that the performance of those obligations requires access to or entry upon the Leased Premises, the Tenant shall have such entry and access after such expiry, repudiation, disclaimer or earlier termination only at such times and upon such terms and conditions as the Landlord may reasonably from time to time specify.

ARTICLE XI INSURANCE AND INDEMNITY

11.01 Tenant's Insurance

The Tenant will obtain and maintain the following insurance throughout the Term and any renewal or extension thereof:

- (a) "All risks" (including flood and earthquake) property insurance for the full replacement cost, insuring (a) all property owned by the Tenant, or for which the Tenant is responsible, and located within the Leased Premises including, but not limited to, fittings, fixtures, additions, alterations, partitions and all other Leasehold Improvements, and (b) the Tenant's furniture, inventory and equipment;
- (b) broad form boiler and machinery insurance on a blanket repair and replacement basis with limits for each accident in an amount equal to at least the replacement cost of the property with respect to all boilers and machinery owned or operated by the Tenant or by others (other than the Landlord) on behalf of the Tenant in the Leased Premises;

- (c) Business interruption insurance for a minimum period of twenty-four (24) months or such longer period that will reimburse the Tenant for direct and indirect loss of earnings and profit attributable to damage caused by the perils insured against under Subsections (a) and (b) above, and other perils insured by prudent tenants, or attributable to prevention of access to the Leased Premises by civil authorities;
- (d) Commercial general liability insurance under a standard commercial general liability form which shall include coverage against bodily injury, including death, and property damage. Such insurance shall:
 - (i) include extensions such as personal injury, blanket contractual liability, employers liability, owner's and contractor's protective liability, cross liability, severability of interests coverage, breach of warranty clause and non-owned automobile insurance;
 - (ii) cover the Tenant's use of the Leased Premises, including all of the Tenant's activities and operations therein and any other Persons performing work on behalf of the Tenant, and those for whom the Tenant is responsible at law;
 - (iii) be written on an "occurrence" form with inclusive limits of liability not less than Five Million Dollars (\$5,000,000.00) per occurrence or such higher limits as the Landlord may require from time to time;
 - (iv) include tenant's legal liability insurance covering the perils of "all risks" for the replacement cost of the Leased Premises, including loss of use thereof; and
 - (v) include standard automobile insurance covering third party liability with limits of liability not less than One Million Dollars (\$1,000,000.00) per accident, plus accident benefits, for all automobiles owned or operated by or on behalf of the Tenant; and
- (e) Any other form of insurance the Tenant, the Landlord or its Mortgagee may require from time to time, in form, in amounts insured, and for perils or risks insured against, which a prudent tenant would insure.

11.02 Requirements of Insurance

- (a) The policies required under Sections 11.01(a), 11.01(b), 11.01(c) and 11.01(d) above will also contain a waiver of all subrogation rights which the Tenant's insurers may have against the Released Persons whether or not the damage is caused by their act, error, omission or negligence.
- (b) All policies will:
 - (i) be placed with insurers acceptable to the Landlord, in a form acceptable to the Landlord;

- (ii) name the Released Persons and such other Persons as the Landlord may designate from time to time, as additional insureds;
 - (iii) be primary, and not excess or contributing with any other insurance available to the Landlord;
 - (iv) provide for deductibles which are acceptable to the Landlord;
 - (v) not be invalidated as respects the interests of the Released Persons, or any of them, by reason of any breach or violation of warranty, representation, declaration or condition contained in the policies, or any of them; and
 - (vi) contain a condition by insurers to notify the Released Persons in writing not less than thirty (30) days before any cancellation or material change in policy conditions is effected.
- (c) The Tenant will deliver certificates of insurance duly executed by the Tenant's insurers or their duly authorized representatives, evidencing that all such insurance described above is in full force and effect prior to going into occupancy of the Leased Premises and thereafter at least thirty (30) days prior to the expiry of the then current term of the insurance. Such certificates must confirm the limits and special conditions of such insurance as required by this Section. No review or approval by the Landlord of any such insurance certificates shall operate to derogate from or diminish the Landlord's rights under this Lease.

11.03 Sign Insurance

The Tenant shall insure and keep insured, at its expense, all signs relating to the Tenant's business placed or erected on the exterior of the Leased Premises for and in its name and in the name of the Landlord. The Tenant waives any right of complaint as to the form and location of the Landlord's existing signs.

11.04 Increase in Insurance Premiums

The Tenant will comply promptly with all requirements of the Insurer's Advisory Organization and of each insurer pertaining to the Leased Premises. If the occupancy of the Leased Premises, the conduct of business in the Leased Premises or any acts or omissions of the Tenant in the Leased Premises, or any part thereof, cause an increase in premiums for the insurance carried from time to time by the Landlord on the Leased Premises, the Tenant shall pay the increase as Additional Rent immediately after invoices for the additional premiums are rendered by the Landlord.

11.05 Cancellation of Insurance

If any insurance policy on the Leased Premises is cancelled, or threatened by the insurer to be cancelled, or if the coverage under any insurance policy is reduced in any way by the insurer because of the use or occupation of any part of the Leased Premises by the Tenant or by any occupant of the Leased Premises, and if the Tenant fails to remedy the condition giving rise to the cancellation, threatened cancellation or reduction of coverage within forty-eight (48) hours after

notice by the Landlord, the Landlord may either: (a) re-enter and take possession of the Leased Premises immediately by leaving upon the Leased Premises a notice of its intention to do so, following which the Landlord will have the same rights and remedies as are contained in Article XVII; or (b) enter upon the Leased Premises and remedy the condition giving rise to the cancellation, threatened cancellation or reduction of coverage, and the Tenant will immediately pay the costs and expenses to the Landlord, together with an administration fee equal to fifteen percent (15%) of such costs and expenses, which costs and expenses may be collected by the Landlord as Additional Rent, and the Landlord will not be liable for any damage or injury caused to any property of the Tenant or others located on the Leased Premises as the result of the entry. Such an entry by the Landlord is not a re-entry or a breach of any covenant for quiet enjoyment.

11.06 Landlord's Insurance

The Landlord will obtain and maintain the following insurance throughout the Term of this Lease and any renewal or extension thereof:

- (a) insurance on the Building and improvements and equipment contained therein owned or leased by Landlord or which Landlord desires to insure against damage by fire and extended perils coverage in those reasonable amounts and with those reasonable reductions that would be carried by a prudent owner of a reasonably similar premises, having regard to size, age and location;
- (b) broad form boiler and machinery insurance on a blanket repair and replacement basis with limits for each accident in an amount equal to at least the replacement cost of the boilers and machinery owned by the Landlord, including the HVAC System;
- (c) public liability and property damage insurance with respect to the Landlord's operations in the Leased Premises, in those reasonable amounts and with those reasonable deductibles, that would be carried by a prudent owner of a reasonably similar premises, having regard to size, age and location; and
- (d) such other forms of insurance which the Landlord or the Mortgagee considers advisable from time to time.

Despite this Section 11.06, and regardless of any contribution by the Tenant to the costs of insurance premiums: (i) the Tenant is not relieved of any liability arising from or contributed to by its negligence or its wilful acts or omissions; and (ii) no insurable interest is conferred upon the Tenant under any policies of insurance carried by the Landlord and the Tenant has no right to receive any proceeds of any such insurance policies. The costs of the Landlord's insurance under this Section 11.06 will be included in Operating Costs.

11.07 Loss or Damage

None of the Released Persons shall be liable for any death or injury from or out of any occurrence in, upon, at or relating to the Leased Premises, or damage to property of the Tenant or of others located on the Leased Premises, and will not be responsible for any loss of or damage to any property of the Tenant or others from any cause whatsoever, whether or not the death, injury, loss

or damage results from the negligence of the Released Persons, or any of them. Without limiting the generality of the foregoing, the Released Persons will not be liable for any injury or damage to Persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain, flood, snow or leaks from any part of the Leased Premises or from the pipes, appliances, plumbing works, roof, subsurface of any floor or ceiling or from the street or any other place, or from any dampness or by any other cause whatsoever. None of the Released Persons shall be liable for any damage caused by occupants of adjacent property, or the public, or caused by construction or by any private, public or quasi public work. All of the property of the Tenant kept or stored on the Leased Premises shall be kept or stored at the risk of the Tenant only, and the Tenant will indemnify the Released Persons and save them harmless from any claims arising out of any damages to that property including, but not limited to, any subrogation claims by the Tenant's insurers.

11.08 Indemnification of the Landlord

Despite anything to the contrary contained in this Lease, the Tenant will indemnify the Released Persons and save them harmless from and against any and all Claims (including loss of Rent payable by the Tenant under this Lease), in connection with loss of life, personal injury, damage to property or any other loss or injury whatsoever arising from or out of this Lease, or any occurrence in, upon or at the Leased Premises, or the occupancy or use by the Tenant of the Leased Premises, or any part thereof, or occasioned wholly or in part by any act or omission of the Tenant or by anyone permitted to be on the Leased Premises by the Tenant. If a Released Person, without fault on its part, is made a party to any litigation commenced by or against the Tenant, then the Tenant will protect, indemnify and hold the Released Person harmless and will pay all costs, expenses and reasonable legal fees (on a substantial indemnity basis) incurred or paid by the Released Person in connection with that litigation. The Tenant will also pay all costs, expenses and legal fees (on a substantial indemnity basis) that may be incurred or paid by the Landlord in enforcing the terms, covenants and conditions in this Lease, unless a court decides otherwise. This indemnity will survive the Termination Date.

ARTICLE XII MAINTENANCE, REPAIRS AND ALTERATIONS

12.01 Maintenance and Repairs and Replacement by the Tenant

The Tenant shall, throughout the Term and any extension or renewal thereof, at its sole cost, keep the Leased Premises in a first class condition, as required by the Landlord. The Tenant shall, at its sole cost and expense, maintain, repair and replace, as required, the following:

- (a) the whole of the Leased Premises including, but not limited to, entrances, and all glass, windows and doors, including their frames and mouldings;
- (b) all signs (both interior and exterior), partitions, trade fixtures and Alterations located in or upon the Leased Premises;
- (c) the exterior areas of and facilities on the lands included in the Leased Premises which include, without limitation, the parking areas, driveways, sidewalks, loading

areas, concrete aprons, curbs, gutters, access points, control gates, security barriers or fences, landscaped areas;

- (d) the structural components of the Building including, without limitation, the roof (including the roof deck and roof membrane), foundations, interior walls, interior concrete slab floors and exterior walls; and
- (e) all Building Systems.

If any of the foregoing repairs or replacements (excluding repairs or replacement of the HVAC System) are of a capital nature that are required as a result of the useful life of a capital asset coming to an end and are capable of being amortized by the Landlord according to generally accepted accounting principles, the Tenant may request that same be paid for by the Landlord and charged back to Tenant as Additional Rent with the costs of such items to be amortized over such period as determined by Landlord, provided that such determination is made in accordance with generally accepted accounting principles, on a straight line basis to zero and interest to be calculated and paid annually during the Term on the unamortized cost of such items in respect of which amortization is included at 4% per annum in excess of the Prime Rate. For greater certainty, capital repairs do not include (i) repairs necessary to keep an asset in as good working condition as such asset was as of the Commencement Date (reasonable wear and tear excepted); (ii) any wear on or elimination of parking lot lines, black topping or asphalt sealing, or tarring or asphaltting of cracks or holes or asphaltting of less than the entire of the driveway or parking lot; or (iii) any replacement of glass in the windows.

The Landlord shall cooperate with the Tenant so that in the performance of the Tenant's covenants in this Section 12.01 and the Tenant will have the benefit of any warranties held by the Landlord in respect of the Building.

12.02 Landlord's Approval of Alterations

- (a) Except as provided in Section 12.02(b), the Tenant will not make any repairs, alterations, replacements, Leasehold Improvements or improvements (collectively the "Alterations") to the Leased Premises without first obtaining the Landlord's prior written approval. Prior to commencing any Alterations, the Tenant will submit to the Landlord: (i) details of the proposed Alterations including drawings and specifications; (ii) any indemnification or security against liens, costs, damages and expenses the Landlord requires; and (iii) evidence that the Tenant has obtained the necessary consents, permits, licences and inspections from all governmental authorities having jurisdiction.
- (b) The Tenant shall not be required to obtain the Landlord's prior written approval for any minor decorations to the interior of the Building.
- (c) Alterations shall be performed at the Tenant's sole cost in a good and workmanlike manner by competent workmen, in accordance with the drawings and specifications approved by the Landlord and subject to the reasonable restrictions imposed by the Landlord, all in accordance with the Tenant Construction Criteria.

- (d) Despite anything to the contrary contained in this Section, the Landlord may, at its option, complete the Alterations. Upon completion of the Alterations, the Tenant will pay to the Landlord, upon demand, as Additional Rent, the cost of the Alterations as well as any fees related thereto as may be set out from time to time in the Tenant Construction Criteria, together with an administration fee equal to fifteen percent (15%) of such costs,

12.03 Landlord's Inspection

The Tenant permits the Landlord and its agents, upon reasonable prior notice to the Tenant and during normal business hours (except in emergency) of the Tenant without interference to the operations of the Tenant, to enter the Leased Premises to examine the condition, management and operation thereof. In addition to the Tenant's obligations under Section 12.01, the Tenant shall effect the maintenance and carry out any work referred to in that Section in accordance with notice from the Landlord following its inspection. The failure to give the notice does not relieve the Tenant from its obligations under Section 12.01.

12.04 Surrender of the Leased Premises

On the Termination Date or earlier termination of the Term, the Tenant shall peaceably surrender up the Leased Premises to the Landlord in first class condition, will deliver all of the keys for the Leased Premises to the Landlord and will inform the Landlord of all combinations of locks, safes and vaults, if any, in the Leased Premises. The Tenant shall also remove its trade fixtures and the Leasehold Improvements in accordance with the provisions of Section 12.07 at the Termination Date or earlier termination of the Term.

12.05 Repair where Tenant at Fault

Despite anything to the contrary contained in this Lease, if the Leased Premises or any part thereof, requires repair or replacement because of the act of the Tenant, the cost of such repair or replacement, together with an administration fee equal to fifteen percent (15%) of such cost, shall be paid by the Tenant to the Landlord as Additional Rent on demand.

12.06 Tenant Not to Overload Floors

The Tenant will not bring upon the Leased Premises, or any part thereof, any machinery, equipment, article or thing that by reason of its weight, size or use might in the opinion of the Landlord damage the Leased Premises and shall not at any time overload the floors of the Building.

12.07 Removal and Restoration by the Tenant

- (a) Any Leasehold Improvements made by the Tenant, or made by the Landlord on the Tenant's behalf, immediately shall become the property of the Landlord and will not be removed from the Leased Premises except that: (i) the Tenant may, during the Term, in the usual course of its business, and with the prior written consent of the Landlord, remove the trade fixtures which it has installed, but only if they have become excess for the Tenant's purposes or if the Tenant is substituting new and similar trade fixtures, and the Tenant is not in default under this Lease; (ii) the

recovering on its own account from the expropriating authority any award or compensation attributable to the taking or purchase of the Tenant's improvements, chattels or trade fixtures, or the removal, relocation or interruption of its business. If any such award made or compensation paid to either party specifically includes an award or amount for the other, the party first receiving the same shall promptly account therefor to the other.

ARTICLE XIV

ASSIGNMENT, SUBLETTING, PARTING WITH POSSESSION AND CORPORATE CONTROL

14.01 Transfers

The Tenant shall not assign this Lease in whole or in part, sublet all or any part of the Leased Premises or part with or share possession of all or any part of the Leased Premises to any Person, mortgage, charge or encumbrance of this Lease or the Leased Premises or any part of the Leased Premises or other arrangement under which either this Lease or the Leased Premises become security for any indebtedness or other obligation (in each case, a "Transfer" and any such assignee, sub-tenant, occupant or any other Person to whom a Transfer is to be made is a "Transferee") without the Landlord's prior written consent, which consent, subject to the Landlord's termination right set out in Section 14.02, shall not be unreasonably withheld. At the time the Tenant requests the Landlord's consent to a Transfer, the Tenant shall provide the Landlord with a true copy of the offer and any information the Landlord may require with regard to the reputation, financial standing and business of the proposed Transferee, together with payment of a non-refundable Landlord's administrative fee as determined from time to time by the Landlord (which fee is currently One Thousand, Two Hundred and Fifty Dollars (\$1,250.00) plus applicable Sales Taxes). This restriction on Transfer also applies to any Transfer by operation of law.

14.02 Landlord's Option to Terminate

Within thirty (30) days following the date the Tenant requests the Landlord to consent to a Transfer and provides all the information required by the Landlord in order to consider such request, the Landlord shall notify the Tenant in writing (i) whether or not it elects to terminate this Lease or such part of it as is the subject of the Transfer and (ii) the date of such termination of this lease, if applicable. If the Landlord elects to terminate this Lease or such part of it as is the subject of the Transfer, the Tenant shall, within fifteen (15) days after receipt of the Landlord's notice of its election to terminate, notify the Landlord whether it shall: (i) refrain from the Transfer; or (ii) accept the termination of this Lease or such part of it as is the subject of the Transfer. If the Tenant fails to deliver its notice within the fifteen (15) day period, this Lease, or such part of it as is the subject of the Transfer, shall be terminated upon the date for termination provided for in the Landlord's notice. If the Transfer relates only to part of the Leased Premises, and this Lease is terminated as to that part, then the Tenant shall be required, at its sole cost and expense and subject to the terms of Section 12.02, to demise the Leased Premises to permit such termination to occur. If the Tenant advises the Landlord that it intends to refrain from the Transfer, then the Landlord's election to terminate this Lease, or such part of it as is the subject of the Transfer, will have no effect.

paid during that month by the Tenant under this Lease, the Tenant will pay the deficiency, which shall be calculated and paid monthly in advance on or before the first day of each month. No re-entry or taking possession of the Leased Premises by the Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of that intention is given to the Tenant. Despite any reletting without termination, the Landlord may at any time afterwards elect to terminate this Lease for the previous breach. If the Landlord at any time terminates this Lease for any breach, in addition to any other remedies it may have, it may recover from the Tenant all damages it incurs by reason of the breach including, without limitation, the costs of recovering the Leased Premises, solicitors' fees (on a substantial indemnity basis) and the worth, at the time of the termination, of the excess, if any, of the amount of Rent and charges equivalent to Rent required to be paid under this Lease for the remainder of the Term over the then reasonable rental value of the Leased Premises for the remainder of the Term.

- (c) The Landlord may remedy, or attempt to remedy, the default of the Tenant and in so doing may make any payments due or alleged to be due by the Tenant to third parties and may enter upon the Leased Premises to do any work or other things therein or thereon, in which case all the Landlord's costs and expenses, together with an administration fee of fifteen percent (15%) of such costs and expenses, shall be payable on demand by the Tenant as Additional Rent. The Landlord will not be liable for any loss or damage resulting from any action or entry by the Landlord under this Subsection 17.02(c) and will not be considered to have breached any covenant for quiet enjoyment.
- (d) The Landlord may recover from the Tenant the full amount of the current month's instalment of Rent together with the next three (3) months' instalments of Rent, all of which shall be deemed to be accruing on a day-to-day basis, and shall immediately become due and payable as accelerated Rent, and the Landlord may immediately distrain for such accelerated Rent together with any other Rent arrears.

17.03 Expenses

If legal action is brought for recovery of possession of the Leased Premises, for the recovery of Rent or any other amount due under this Lease, or because of the breach of any other terms, covenants or conditions contained in this Lease on the part of the Tenant to be kept or performed, and a breach is established, the Tenant shall pay to the Landlord all the expenses incurred in connection with it, including solicitor's fees (on a substantial indemnity basis), unless a court otherwise awards.

17.04 Waiver of Exemption from Distress

Despite anything to the contrary contained in this Lease or the provisions of applicable legislation, none of the goods and chattels of the Tenant on the Leased Premises at any time and from time to time during the Term, or any extension or renewal thereof, shall be exempt from levy by distress for Rent in arrears and the Tenant hereby waives any rights it has or might otherwise have under any such applicable legislation in that regard. If any claim is made for such an exemption by the

the day upon which the notice, demand, request, consent or other instrument is delivered, or, if mailed, then seventy-two (72) hours following the date of mailing and the time period referred to in the notice begins to run from the time of delivery or seventy-two (72) hours following the date of mailing. Either party may at any time give notice in writing to the other of any change of address of the party giving the notice and upon the giving of that notice, the address specified in it shall be considered to be the address of the party for the giving of notices under this Lease. If the postal service is interrupted or is substantially delayed, or is threatened to be interrupted, any notice, demand, request, consent or other instrument will only be delivered in person.

18.04 Registration

The Tenant will not register this Lease or any notice thereof on title to the Lands without the prior written consent of the Landlord and the Landlord's approval of the form and content of such registration.

18.05 Quiet Enjoyment

Provided the Tenant pays the Rent and other sums provided for under this Lease, and observes and performs all of the terms, covenants, and conditions on its part to be observed and performed, the Tenant will peaceably and quietly hold and enjoy the Leased Premises for the Term without hindrance or interruption by the Landlord or any other Person lawfully claiming by, through or under the Landlord subject, however, to the terms, covenants and conditions of this Lease.

18.06 Landlord's Co-Operation and Access

The Landlord will make commercially reasonable efforts to assist the Tenant with any reasonable request for co-operation in increasing the revenue to be generated from the Leased Premises, provided that such requests do not result in any interference with the Landlord's operations. The Landlord shall co-operate in order to allow vehicular traffic including cars, trucks and motor coaches, free and open access to the duty free shop operated at the Leased Premises.

18.07 Regulatory Changes

In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect on the business operations of the Tenant at the Leased Premises, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

18.08 Unavoidable Delay

Notwithstanding anything to the contrary contained in this Lease, if any party hereto is *bona fide* delayed or hindered in or prevented from performance of any term, covenant or act required hereunder by reason of Unavoidable Delay, then performance of such term, covenant or act is excused for the period of the delay and the party so delayed, hindered or prevented shall be entitled to perform such term, covenant or act within an appropriate time period after the expiration of the period of such delay. However, the provisions of this Section 18.06 do not operate to excuse the Tenant from the prompt payment of Rent and any other payments required by this Lease.

CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2023 ONSC 327

COURT FILE NO.: CV-21-00673084-00CL

DATE: 20230116

SUPERIOR COURT OF JUSTICE - ONTARIO

ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *Sanjeev Mitra*, for the Applicant

John Wolf and David Ullman, for Peace Bridge Duty Free Inc. (Tenant)

Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority (Landlord)

Mukul Manchanda and Leanne Williams, for The Monitor

HEARD: January 5, 2023

ENDORSEMENT

**(LANDLORD'S MOTION TO LIFT STAY/RESTRICTIONS
UNDER APPOINTMENT ORDER)**

The Landlord's Motion

[1] The Buffalo & Fort Erie Public Bridge Authority (the "Authority" or the "Landlord") is the owner and operator of the Peace Bridge in Fort Erie, Ontario. The Authority entered into a lease with Peace Bridge Duty Free Inc. ("PBDF" or the "Tenant") dated July 28, 2016 (the "Lease"). PBDF used the leased premises to operate a duty-free store at the Peace Bridge border crossing. PBDF had been the Tenant of the premises since 1986 under prior lease agreements.

[2] The Lease requires that PBDF pay Rent (as defined in the Lease). Rent is comprised of Base Rent, Percentage Rent and any applicable sales taxes, property taxes, operating costs and utilities (also sometimes referred to as "Additional Rent"). The minimum annual Base Rent is \$4 million, or \$333,333 per month. The Base Rent amount under the Lease was proposed by PBDF as part of a Request for Proposal ("RFP") process undertaken by the Authority in 2016. PBDF's response to the RFP, containing its proposal to pay, inter alia, \$4 million per annum in minimum annual Base Rent, was attached to and forms part of the Lease.

[3] The Tenant asserts that the proposed (and agreed upon) amount of minimum annual Base Rent was predicated upon an estimate of 20% of the gross sales anticipated when the Lease was entered into. However, the specified minimum annual Base Rent in the Lease and the RFP was not tied to any formula and there was no guarantee given in respect of gross sales or bridge traffic.

[4] The Tenant's business was materially and adversely affected by the COVID-19 travel restrictions introduced by the Canadian and United States governments in March 2020. The land border was closed for over a year to all non-essential travel, until August 9, 2021 (on the Canadian side) and November 8, 2021 (on the American side). The re-opening of the border in August 2021 was gradual. The border restrictions were lessened but not entirely eliminated at that time.

[5] The Tenant closed the duty-free store on March 21, 2020. It partially re-opened on or about September 19, 2021. There were some attempts to negotiate a business resolution to the dispute that arose between the Landlord and Tenant about the Rent payable from and after March 21, 2020. However, no agreement was reached.

[6] The Landlord asserted that the Tenant was in default of its obligations under the Lease. That triggered an event of default under the Tenant's credit facilities and resulted in this application by the Royal Bank of Canada ("RBC"), the largest secured creditor of PBDF, for the appointment of a receiver over PBDF's assets and property. The application was adjourned on terms that included the appointment of a monitor instead of a receiver, by order of this court dated December 14, 2021 (the "Appointment Order").

[7] One of the purposes of the Appointment Order was to afford the Tenant more time to try to reach a commercial resolution of the Lease dispute with the Landlord. With no resolution after almost a year, this motion was brought by the Landlord by a Notice of Motion dated October 5, 2022.

[8] By my endorsement of December 9, 2022, a hearing was scheduled on January 5, 2023 to determine the relief sought by the Landlord's Notice of Motion in sub-paragraphs 1(a) and (b). The Landlord seeks a declaration that it is no longer bound by paragraph 11 of the Appointment Order to continue to allow the Tenant to remain in the leased premises because of the Tenant's failure to pay Base Rent in accordance with the terms of the Lease (which the Landlord asserts the Appointment Order required the Tenant to do) and/or an order lifting the stay of proceedings imposed by paragraph 9 of the Appointment Order to enable the Landlord to exercise its remedies for default, including terminating the Lease and evicting the Tenant.

Factual Background

The COVID-19 Travel Restrictions and Article 18.07 of the Lease

[9] As a result of the global COVID-19 pandemic, the Canadian and United States governments announced travel restrictions that severely curtailed traffic across the Peace Bridge starting in mid-March 2020.

[10] The Lease contains the following provision:

18.07 Regulatory Changes

In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect on the business operations of the Tenant at the Leased Premises, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

[11] The Tenant's position in response to the Landlord's motion (and in support of its cross-motion, described later in this endorsement) is heavily dependent upon this provision of the Lease and what the Tenant contends its implications are for the Rent payable under the Lease as a result of the COVID-19 travel restrictions that the Tenant say caused it to close the duty-free store between March 21, 2020 and September 2021.

[12] The Landlord does not agree that the Tenant had to close the duty-free store. The Landlord maintains that the Tenant's decision to close was a business decision. However, whether the store closed or not, the Landlord acknowledges that the travel restrictions imposed by both the Canadian and United States governments in response to the COVID-19 pandemic in March 2020 caused a material adverse effect on the business and operations of the Tenant.

[13] The Landlord disagrees with the Tenant's interpretation of Article 18.07 of the Lease. The Landlord maintains this Article imposes only a duty to consult not a duty to agree to amend the Tenant's obligations under the Lease with respect to the payment of Rent.

Rent Deferral, Forebearance Agreements and the Initial Exchange of Proposals

[14] Shortly after the initial COVID-19 travel restrictions were introduced, the Landlord and Tenant entered into an initial rent deferral agreement dated April 27, 2020. Under this deferral agreement, the Tenant agreed to pay Additional Rent throughout the Rent Deferral Period (as defined in that agreement), including without limitation, all operating costs and property taxes. The "Deferred Rent" was to eventually be repaid, with interest on specified terms. This agreement also obligated the Tenant to apply for and take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including rent assistance etc.

[15] The rent deferral agreement allowed the Tenant to defer paying the Base Rent until the expiry of the Rent Deferral Period on July 3, 2020. Thereafter, the parties attempted to negotiate a new rent deferral agreement, but that was never finalized. The Landlord indicated to the Tenant in November 2020 that it was looking for greater assurances about the unpaid (deferred portion of) Rent dating back to April 2020 and going forward.

[16] In the meantime, the Tenant continued to pay what it had agreed to pay under the April 2020 rent deferral agreement. As a result, very little Rent was paid by the Tenant (aside from basic utilities and taxes) in this time-frame since the Tenant was not earning any revenue and took the position that, despite there being no new rent deferral agreement, the terms of the first rent deferral agreement continued to apply.

[17] The Landlord did not agree to this and reserved its rights (relying upon, *inter-alia*, the non-waiver provisions contained in Article 2.17 of the Lease). However, it was not in a position to enforce its rights due to legislation that had been put in place to protect commercial tenants. The

Landlord was subject to the provincial moratorium on the eviction of commercial tenants that was not lifted in April 2022.

[18] After the Tenant re-opened the duty-free store in September 2021, the Tenant continued to pay the Additional Rent it had been paying (e.g. utilities and taxes) and also began to pay rent equal to 20% of its gross sales.

[19] The Tenant entered into a Credit Amending and Forebearance Agreement made as of October 8, 2021 with the RBC (the “Forebearance Agreement”). The preamble to that agreement stated that the Tenant had requested the bank to forebear “so that the Borrower has the opportunity to remain in business with a view to curing all defaults (including, without limitation, curing all defaults under the Lease, as defined herein).”

[20] The Landlord was not a signatory to the Forebearance Agreement. Under that agreement, the Tenant agreed to deliver, by no later than November 15, 2021, evidence satisfactory to the RBC that an agreement had been entered into with the Landlord concerning the defaults under the Lease to ensure that the Landlord would not terminate the Lease before the end of its current term.

[21] The Landlord and Tenant exchanged proposals in October 2021 in an attempt to reach an agreement about past due and continuing Rent owing. The Landlord rejected the Tenant’s request to eliminate Base Rent from the Lease and to eliminate most of the Rent arrears for Base Rent. It offered various alternatives to reduce and/or defer the Base Rent payable. No agreement was reached by November 15, 2021.

[22] The RBC terminated the Forebearance Agreement and commenced this application for the appointment of a receiver.

The Appointment Order

[23] The Tenant and the RBC agreed to adjourn the RBC’s receivership application on terms that included the appointment of a monitor (the “Monitor”), more particularly described in the Appointment Order. The Tenant agreed to the appointment of the Monitor to allow it further time to try and reach a commercial resolution with the Landlord. The Tenant represented to RBC and the court at that time that it believed a commercial resolution could be reached with the Landlord and that its ability to make a credible and reasonable proposal to the Landlord would be enhanced over the next few months if it was given some time to do so.

[24] The Appointment Order includes, *inter alia*, the following provisions:

- a. Paragraph 9: A stay and suspension of all rights and remedies against PBDF or affecting the Property.
- b. Paragraph 11: A restraint on all persons with agreements with PBDF for the supply of goods and/or services from discontinuing, altering, interfering with or terminating same provided that in each case the “normal prices or charges” for all such goods or services received after the date of the Appointment Order are paid by PBDF in accordance with normal practices of PBDF or such other practices as may be agreed upon by the supplier or service provider and PBDF, or as may be ordered by the court.

- c. Paragraph 28: A come come-back provision, permitting any interested party, including, without limitation, the RBC and the Debtor, to apply to the court to vary or amend the Appointment Order or discharge the Monitor on not less than seven (7) days' notice to the Monitor, the Debtor, the RBC and any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

[25] The Landlord was aware of and did not object to the terms of the Appointment Order. It expected that the Tenant would come forward with a further proposal despite the parties not having reached an agreement up until that time.

After the Appointment Order

[26] After the Appointment Order was made, the Tenant continued to pay the Additional Rent and further rent based on 20% of gross sales by way of direct deposit. The Landlord continued to indicate that this was not sufficient and had not been agreed to.

[27] The Tenant proposed that the parties engage an outside mediator to assist them in reaching a resolution of the Rent dispute. A December 24, 2021 communication from the Tenant about the parameters of the proposed mediation confirmed that the Tenant was still hoping to negotiate new lease terms:

We plan to write to you with more fulsome information after Christmas and to propose a further meeting with clients to try to address a commercially reasonable LAA having regard to subjective ability to pay, and with objective reference to how the market place is assisting other duty free stores.

[28] The Landlord indicated in its December 30, 2021 correspondence that:

Any proposal must include a provision for the repayment of the arrears and go-forward rent supported by a detailed business plan and personal guarantees from individual(s) with financial means and/or third-party security. Once we have seen such a proposal with this supporting information, we are prepared to re-visit whether there is room for settlement and whether a mediator may be able to assist with any negotiations.

[29] No such proposal was made by the Tenant, but it continued to pay by direct deposit Additional Rent and rent equal to 20% of its gross sales. In early January 2022, the Landlord notified the Tenant in writing that it had not previously accepted, and did not accept, that the Tenant was paying the correct amount of Rent due. This position was reiterated by the Landlord periodically thereafter and prior to the Tenant and the RBC returning to court to extend the stay under the Appointment Order.

[30] The Appointment Order was amended two times, each of which continued without change to paragraphs 9 and 11. The first amendment (on January 17, 2022) adjourned the receivership application to March 23, 2022. The second amendment (on March 23, 2022) adjourned it to a date to be set by the court on or after June 23, 2022. The Landlord was aware of the proposed terms of each iteration of the Appointment Order and did not raise any objection to those orders being made

or continued, although it did continue to communicate with the Tenant that the correct amount of Rent was not being paid.

The Positions of the Parties

The Landlord's Position

[31] The Landlord claims to be owed in excess of \$8.4 million in unpaid rent. This includes over \$1.2 million in calculated minimum Base Rent payable under the terms of the Lease since the Appointment Order was made. It is understood that the Landlord has not waived its rights in connection with any claims for Rent owing by the Tenant for the period prior to December 14, 2021. That is an issue for another day, which has not been raised by either the Landlord's or the Tenant's motions.

[32] Sub-paragraphs 1(a) and (b) of the Landlord's Notice of Motion raise threshold questions that require the court to determine whether the amount of Rent that the Tenant has paid since the Appointment Order is in compliance with the Appointment Order, and, if not, whether the Landlord should be relieved of the stay/restrictions imposed by the Appointment Order and permitted to exercise its remedies.

[33] The Landlord insists that the Tenant was obligated by the Appointment Order to pay the minimum annual Base Rent (amortized monthly) in accordance with the terms of the Lease.

The Tenant's Position

[34] The Tenant disputes this. It argues that there is no scenario under which it was obligated by the Appointment Order to pay the specified Base Rent under the Lease. The Tenant contends that the Appointment Order required it to pay exactly what it had been paying prior to that Order: Additional Rent (of approximately \$10,800 per month for utilities and taxes) plus the greater of (i) 20% of its gross sales and (ii) the government rental assistance it received. The Tenant maintains that it has paid those amounts (admittedly not the Base Rent specified in the Lease).

[35] Further, the Tenant maintains that if the amount it paid was not the amount it was required to pay under the Appointment Order, the determination of the amount it should have paid requires an adjudication of at least some of the broader issues raised in the Tenant's cross-motion, not presently before the court.

[36] I have directed that the Tenant's cross-motion will be timetabled at a case conference scheduled to proceed on January 19, 2023. The cross-motion seeks the determination of various issues dependent upon the interpretation of Article 18.07 of the Lease. These interpretive issues will likely require the court to engage in an evidentiary assessment. Thus, a more fulsome evidentiary record that considers the factual matrix from which the Lease arose is necessary for the court to decide the cross-motion.

The Competing Interpretations of Article 18.07

[37] The Tenant takes the position that Article 18.07 of the Lease amounts to a contractual obligation on the part of the Landlord to “reasonably reconsider the impacted terms of the Lease, including Article IV of the Lease dealing with Base Rent” in the face of the border restrictions that caused a Material Adverse Effect on the Tenant’s business. In its cross-motion, the Tenant asserts the Landlord has breached this obligation by failing to enter into reasonable, or any discussions about the impact of the border restrictions as they evolved, individually and collectively, on Base Rent payable under the Lease. The Tenant further asks the court to make a declaration of whether any, and if so, what amount, of Base Rent is due and payable under the Lease for various different periods before and after the date of the Appointment Order.

[38] The Landlord disputes this interpretation and the allegation that it has breached any of its obligations. The Landlord maintains that Article 18.07 contains only a duty to consult, which it has discharged. Further, the Landlord maintains that even if it breached its duty to consult, the Tenant’s remedy is in damages only. There is no scenario under which the Landlord accepts that this Lease provision translates into a duty on the part of the Landlord to re-negotiate the Rent payable under the Lease.

[39] The parties also disagree about whether the progression of changes in laws, regulations or guidelines by the two governments that lessened the travel restrictions were each a new change in the Applicable Laws under Article 18.07. If those changes were captured by Article 18.07 as the Tenant contends, they would each trigger a “new” obligation on the Landlord to discuss the impact of those changes on the Lease with the Tenant. Whereas the Landlord contends that only the initial restrictions triggered the obligation to consult under Article 18.07.

The Positions of the RBC and the Monitor

[40] The RBC supports the Tenant’s position that the stay/restrictions should not be lifted, but argues in the alternative that if the stay is lifted that should, in turn, be held in abeyance to allow the RBC to bring back on its receivership application.

[41] The Landlord has agreed that it will not take any enforcement steps even if the stay/restrictions under the Appointment Order are lifted, pending the return of the RBC’s receivership application.

[42] The January 19, 2023 case conference has been set aside for the court to provide further directions about whatever remains to be determined in the two motions (the Landlord’s motion and Tenant’s cross-motion) and the receivership application.

[43] The Monitor takes no position and considers its role to be informational only. It is concerned that all stakeholders be treated equally and that the stay/restrictions not be lifted only in favour of the Landlord and not in favour of other stakeholders. However, the Monitor is content that the “standstill” that the RBC has requested, and that the Landlord has agreed to, will achieve that objective.

Summary of Outcome

[44] For the Landlord to succeed on the threshold issues raised by sub-paragraphs 1(a) and (b) of its Notice of Motion, given the way in which the motions have been structured and timetabled, would require the court to conclude that the Tenant was required by the Appointment Order to pay the minimum Base Rent under the Lease each month commencing in January 2022 (the first month after the Appointment Order was made).

[45] The Appointment Order is not sufficiently clear to allow me to make that determination. The concept of “normal rent” typically payable under orders that include standard language equivalent to paragraph 11 is not readily applied to the circumstances of this case and the manner in which the parties conducted themselves as a result of the unprecedented border restrictions that were imposed at the outset of the COVID-19 pandemic.

[46] While the Landlord did not waive (but rather, expressly reserved) its rights with respect to the eventual payment of minimum annual Base Rent accruing due both before and after the Appointment Order, the Landlord did not insist at the time of the Appointment Order (or at any point when it was amended thereafter) on a specific provision regarding the amount of Rent to be paid during the pendency of that order.

[47] The Tenant had not paid the annual minimum Base Rent since March 2020, more than eighteen months prior to the Appointment Order. On that basis alone, I am unable to conclude at this time that the “normal rent” paid by the Tenant for the use of the leased premises prior to December 14, 2021 was the annual minimum Base Rent payable under the Lease.

[48] That said, it was not intended that the Appointment Order would continue indefinitely. It was predicated on a representation by the Tenant that it wished to engage in negotiations with the Landlord to reach a business resolution. It has now been more than a year since the Appointment Order was made and no business resolution has been reached. In fact, no new proposal has been presented by the Tenant since the Landlord rejected its last proposal prior to the Appointment Order being made.

[49] The Landlord has effectively been subsidizing the Tenant’s business and it cannot be required to do so indefinitely. This is effectively putting the Landlord (an unsecured creditor) in the position of supporting the secured creditor in what the Landlord sees as an inevitable receivership situation.

[50] The Tenant argues that if there is no prospect of a business resolution then its cross-motion should be expedited so that the Rent payable under the Lease and any damages payable to the Tenant (which it seeks to offset against any accrued past Rent payable) can be determined. The Landlord’s concern that this could entail another year of it having to involuntarily subsidize the Tenant’s Rent while the issues raised by the Tenant’s cross-motion are litigated is a valid concern.

[51] The Landlord should not be forced to subsidize the Rent payable under the Lease for another year based on a hotly contested interpretation of Article 18.07 of the Lease. This is unfair given that, if the Tenant ultimately loses, the Tenant will very likely not have the ability to pay the significant accumulated Rent arrears (estimated to be more than \$8.4 million already). In the

meantime, the RBC's position is protected and is not being (further) compromised by the terms of the Appointment Order.

[52] The Tenant should not continue to benefit from the ambiguity that existed at the time of the Appointment Order about what "normal rent" was. Paragraph 28 of the Appointment Order allows the court to vary (lift) either or both of the stay and other restrictions contained in paragraphs 9 and 11. Paragraph 11 of the Appointment Order expressly gives the court the discretion to order any amount of Rent to be paid (in lieu of "normal rent"). I am prepared to consider these provisions and make appropriate orders after the mediation if necessary. However, the parties first need to make a concerted effort to reach an agreement.

[53] The negotiations to date have been paralyzed by each side's pre-conceptions of what an acceptable business solution would entail. These pre-conceptions have prevented any meaningful negotiation regarding the past Rent payable and Rent to be paid going forward under the Lease. While there is no requirement to mediate, the limited communications between the Landlord and the Tenant have been to some extent at cross-purposes and might have more success if facilitated through a skilled intermediary. While not the Landlord's first choice, when asked, the Landlord indicated it would attend a mediation if the court so ordered.

[54] I am directing the parties to engage a third-party mediator and ordering them to attend a mediation to facilitate their consultation and negotiation to see if there is a business resolution that can be reached. That shall take place by no later than March 31, 2023.

[55] The Landlord has already rejected the Tenant's last proposal. The Tenant is directed to make a new proposal, supported by a business plan and financial information to be disclosed with appropriate confidentiality protections in place. That information can be provided on a confidential basis and compiled with the assistance of the court appointed Monitor who has been in receipt of the monthly financial reporting from the Tenant since the Appointment Order was made. The Tenant's proposal shall be provided at least two weeks prior to the scheduled mediation date.

[56] If the Tenant wants to reach a business solution, it would be well-advised to consider the structure and terms of the Landlord's last proposal and address them (through incorporation or by some explanation for not incorporating them) in its next proposal.

[57] The Landlord shall respond to the Tenant's proposal at least one week prior to the scheduled mediation date.

[58] The proposals (and any others that may follow) shall be included as part of the filed mediation briefs, in addition to any further briefs for the mediation that the mediator may request.

[59] In the meantime, the Tenant's cross-motion shall be scheduled and pre-hearing steps shall be scheduled to proceed in tandem with the mediation. The parties shall attend the January 19, 2023 case conference having previously exchanged their respective concrete proposals for a realistic, but expeditious timetable to complete all necessary pre-hearing steps for the cross-motion.

[60] The parties shall report to the court after the mediation as to its outcome. If unsuccessful, the court will provide further directions, including about : i) the lifting of the stay of proceedings in paragraph 9 of the Appointment Order and/or relieving the Landlord of the restrictions under paragraph 11, ii) vacating or terminating the Appointment Order, and/or iii) the amount of rent that the Tenant should be paying to the Landlord if the Appointment Order is to continue, based on the enhanced financial disclosure that the Tenant will provide to the Landlord in the context of the mediation and to the court (in accordance with the existing sealing order).

Analysis

[61] The Landlord has framed its motion primarily on the question of the interpretation of paragraph 11 of the Appointment Order and whether the Tenant's failure to pay the specified minimum Base Rent under the Lease amounts to a breach of that paragraph, thereby relieving the Landlord of the obligation to continue allowing the Tenant to avail itself of the benefits of the Lease.

[62] Although deferred, the essence of what the Landlord ultimately seeks is to be permitted to terminate the Lease and evict the Tenant. These are enforcement remedies that might require the court to lift the stay imposed under paragraph 9 of the Appointment Order. The Landlord makes the distinction that paragraph 11 of the Appointment Order restrains its contractual remedies while paragraph 9 restrains its creditor enforcement (and statutory) remedies. In any event, the two heads of relief give rise to overlapping considerations as they are both effectively seeking to lift a stay or other restrictions on the exercise of the Landlord's contractual and statutory remedies.

[63] The Tenant recognizes that there are three grounds upon which the court could lift the stay or restrictions under the Appointment Order:

- a. If the Tenant is in default of its obligation to pay "normal rent" under the Appointment Order; and/or
- b. If the purpose of stay has been exhausted or spent; and/or
- c. If the balance of convenience favours doing so, having regard to the relative prejudice that will be suffered by each of the Landlord and the Tenant.

Is the "normal rent" to be Paid by the Tenant the Base Rent Payable under the Lease?

[64] The issues on this motion turn on the interpretation of paragraph 11 of the Appointment Order. Namely, what were the "normal prices or charges" for Rent paid by the Tenant in accordance with the normal practices that existed at the time of the Appointment Order ("normal rent").

[65] The Landlord argues that, absent its agreement in writing to the Tenant paying some other amount of Rent (of which there was only one, that expired in July 2020) normal rent is and can only be the minimum Base Rent under the Lease.

[66] The Landlord argues that it is untenable for the court to conclude that "normal rent" is the amount that the Tenant unilaterally was paying for three months prior to the Appointment Order after it re-opened the duty-free store in September 2021, over the Landlord's objection. This would impose a commercially unreasonable interpretation on this otherwise standard provision of the

Appointment Order, by allowing a debtor to continue to breach a contract that it was in breach of at the time of the order.

[67] The Landlord relies on *Citizens Bank of Rhode Island v. Paramount Holdings Canada Company* (2008), 41 C.B.R. (5th) 131 (Ont. S.C.), at paras. 31 and 33, aff'd, 2008 ONCA 891, 48 C.B.R. (5th) 211. In this case, the court rejected the idea that the identical provision in an order appointing a receiver contemplated the continuation of a pre-order payment practice that had been adopted by the debtor but that was not provided for in the applicable agreements.

[68] The Landlord argues that the purpose and effect of the standard provisions contained in paragraphs 9 and 11 of the Appointment Order is to maintain essential contracts and preserve the value of PBDF's business, notwithstanding prior breaches, as long as payment is made to suppliers in the normal course going forward after the Appointment Order. This, according to the Landlord, requires payment of the minimum Base Rent under the Lease, and entitles the Landlord to terminate the Lease for any failure to do so: see *Cosgrove-Moore Bindery Services Ltd. (Re)* (2000), 48 O.R. (3d) 540 (S.C.); *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, 2010 BCCA 469, 10 B.C.L.R. (5th) 235; and *Quest University Canada (Re)*, 2020 BCSC 921.

[69] The Landlord asks the court to adopt the approach taken in *101297277 Saskatchewan Ltd. v. Copper Sands Land Corp.*, 2022 SKQB 39 in connection with an identical provision contained in an order appointing a receiver. In that case, the court looked for the objectively determinable and contractually agreed price payable for the goods or services, which in the case of a tenancy, was determined to be the rent payable in accordance with the applicable lease: see also *Boutiques San Francisco Inc., Re* (2004), 5 C.B.R. (5th) 174 (QC CS), at paras. 96-105.

[70] The Landlord acknowledges that, if the Lease contained a rent adjustment clause that had been triggered, then the court might be able to conclude that the "normal rent" was something other than the Base Rent prescribed (see *Copper Sands*, at para. 37). However, there is no rent adjustment clause in the Lease. The Landlord disputes the Tenant's assertion that Article 18.07 can or should be read as an obligation to adjust the Rent payable under the Lease. Nor does the Lease allow the Tenant to unilaterally determine the Rent payable even if that article could be construed as a rent adjustment clause.

[71] The words "consult" and "consultation" have been judicially considered to involve "a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information": see *Lakeland College Faculty Association and Board of Governors of Lakeland College*, 1998 CanLII 29705 (AB CA), at paras. 37-38. The court must look at the objective meaning of those words: see *Shaun Developments Inc. v. Shamsipour*, 2018 ONSC 440, 94 R.P.R. (5th) 15, aff'd, 2018 ONCA 707, 94 R.P.R. (5th) 44; see also *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922, at paras. 28-33.

[72] The Tenant argues that it would not be objectively or commercially reasonable to equate "normal rent" with minimum Base Rent in this case, when, at the time of the Appointment Order, minimum Base Rent had not been paid for over eighteen months (since March 2020), during a period in which there was recognition by the Landlord that the Tenant would be entitled to some Rent relief, even if not yet determined. This is not a situation of a couple of months of default, followed by an appointment order requiring the normal prices to resume.

[73] The Tenant insists that this would not have been a reasonable or viable term for it to have agreed to because it could not afford to pay that amount of Rent. The Landlord challenges this, and points out that the Tenant's limited financial disclosure in the fall of 2022 suggests that the Tenant could afford to pay minimum Base Rent based on its financial projections. The Tenant counters that the Landlord is over-simplifying matters based on incomplete financial information (for example, it was suggested that the previous forecasts included non-recurring income for government incentives and assistance).

[74] The Landlord argues that the incomplete financial disclosure is the Tenant's own doing, by its refusal to make full financial disclosure. The Tenant proffers various excuses for this non-disclosure, but ultimately asks for the opportunity to make that case if the court is going to consider what the Tenant could afford to pay in the determination of what the Tenant should pay.

[75] Given what is at stake, and even though this complication of incomplete financial disclosure is arguably of the Tenant's own making, the court is not prepared to decide the Landlord's motion on the basis of adverse inferences to be drawn from the Tenant's failure to make complete financial disclosure. This situation has arisen in the context of an accelerated hearing of the Landlord's motion where there are other related issues that have been left to be decided on the Tenant's cross-motion, including the very question of what Rent was payable under the Lease after the COVID-19 travel restrictions were imposed in March 2020, if not the Base Rent.

[76] If not Base Rent, then for purposes of this motion, the Tenant maintains that court can either conclude that normal rent was what the Tenant had started to pay when the store re-opened in September 2021 (20% of gross sales), or that it should be some other amount that the court must determine with the benefit of more fulsome financial information.

[77] The Tenant notes that there are often standard provisions included in appointment orders that specify exactly what the debtor is to pay under a lease that is in default (e.g. specify what the "normal rent" to be paid will be going forward), which the Landlord could have insisted upon in this case but did not, thereby leaving the term "normal rent" open to interpretation.

[78] The court observes that this omission is not entirely the Landlord's responsibility, as the whole purpose of the Appointment Order was to address the Tenant's inability to pay the Rent due under the Lease. In these circumstances, the Tenant could (and arguably should) equally have made sure that it was clear what "normal rent" it was to pay going forward.

[79] Having considered the extensive written and oral submissions on both sides, I am concerned about the lack of specificity about the "normal rent" to be paid under paragraph 11 of the Appointment Order, given the history and lengthy period prior to the Appointment Order in which very little, if any, Rent was being paid. The context and circumstances of this case are complex and unique, occurring under the backdrop of unprecedented cross-border travel restrictions, the moratorium on enforcement of remedies under commercial leases, the government subsidiaries offered to commercial tenants, to name a few considerations.

[80] Just because the Landlord did not waive its right to claim Rent arrears accruing due, and even reserved its right to be paid more Rent than what the Tenant was paying after the Appointment

Order was made, that does not necessarily mean that it was reasonably and objectively intended that the minimum Base Rent was to be the normal rent that the Tenant would be required to pay during what was clearly supposed to be a temporary stay to allow for further negotiations. It would be premature for the court to conclude based on the current evidentiary record and submissions that the normal rent was and could only be the minimum Base Rent payable under the Lease.

[81] In these circumstances, no default of paragraph 11 of the Appointment Order has yet established.

[82] I have not addressed the various submissions on the alleged lack of good faith dealings against the Landlord by the Tenant following the imposition of the COVID-19 cross-border travel restrictions. They are raised in the Tenant's cross-motion, and if successful, might form the basis of a damages claim. Insofar as the issues on the present motion, the alleged lack of good faith on the part of the Landlord is only conceivably relevant in support of the Tenant's request for the court to direct the parties to mediate to try to reach a business resolution. I have made that order for other reasons, discussed earlier and in the next section of this endorsement. Therefore, it is not necessary (nor would it likely be possible) to consider these allegations on this motion.

Has the Purpose of the Stay and the Appointment Order Itself Been Exhausted or Spent?

[83] Another ground upon which the court could lift the stay could be because its purpose has been exhausted or spent. The uncontroverted evidence is that the purpose of the Appointment Order (and the stay) was to afford the Tenant a further opportunity to reach a commercial resolution with the Landlord regarding the Rent arrears and ongoing Rent payable. No one suggests that the attempts to reach a commercial resolution were intended to go on indefinitely, nor should they be permitted to.

[84] Each side accuses the other to be at fault for their failure to reach a commercial resolution. Each was waiting for something from the other, with the result that there were only very limited communications since the Appointment Order. Regardless of the reasons, the lapse of more than one year since the Appointment Order was made with little or no meaningful communication towards a resolution is counter-productive.

[85] I am not satisfied that there has (yet) been a meaningful effort by either side to reach a commercial resolution. The purpose of the Appointment Order and stay is not yet exhausted or spent, but the time has come to engage in that meaningful effort, which will also provide an opportunity for the Landlord to (further) consult with the Tenant about the adverse effects on the Tenant's business due to the introduction of or change in cross-border travel laws and regulations and the impact of such to the Lease.

[86] Given the history of dealings between the parties, it is not reasonable to expect the parties will be able to make meaningful efforts on their own, and it is therefore appropriate that they do so with the assistance of a professional mediator.

[87] The Tenant agreed during oral argument that if the court ordered the parties to mediate, it would partially accede to the Landlord's conditions (previously indicated) that the Tenant make a proposal and business plan in advance. The Tenant proposes to enlist the assistance of the Monitor

to prepare and present the financial information that has already been provided to the Monitor by the Tenant.

[88] The mediation is to take place by March 31, 2023 (additional directions have been provided earlier in this endorsement at paragraphs 53-60).

[89] After the mediation, the parties shall report back to the court at a further case conference. A date may be scheduled for that further case conference at the January 19, 2023 case conference when the Tenant's cross-motion is timetabled.

[90] At that post-mediation case conference, the court will provide further directions concerning the continuation of the stay and other restrictions under the Appointment Order and/or the continuation of the Appointment Order itself. The court may also make an order regarding how much rent is to be paid if the Appointment Order is to continue.

The Balance of Convenience and Equities

[91] There is no statutory test for lifting the stay or restrictions on the Landlord imposed by the Appointment Order. In comparable circumstances, courts have considered the totality of the circumstances and the relative prejudice to the debtor and the creditor: see *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCSC 723, at para. 17.

[92] The Landlord claims that its prejudice is greater. The Landlord claims that it is an unsecured creditor effectively forced to finance the Tenant's continued operation for the benefit of its secured creditor, the RBC, by allowing the Tenant to continue to pay less than the Base Rent prescribed by the Lease while preserving the RBC's security.

[93] The Tenant contends that its prejudice will be the loss of its business because it cannot afford to pay the minimum Base Rent if that is what the court determines it was and is required to pay. The insufficiency of the evidence about the Tenant's ability to pay minimum Base Rent since the Appointment Order was made is reviewed earlier in this endorsement. Conceptually, it is difficult to see how requiring the Tenant to pay what it is obligated to pay amounts to unfair prejudice to the Tenant. However, what the Tenant is obligated to pay is a larger question that is, at least in part, to be determined on the Tenant's cross-motion, the timing of which will be better known after the January 19, 2023 case conference.

[94] If the Tenant is going to continue to assert that it will be prejudiced by an order requiring it to pay rent that it cannot afford, the Tenant offered to, and should, be better prepared to address the question of how much Rent it can afford to pay as that too may be relevant to any consideration of the equities going forward.

[95] The Monitor was asked, and confirmed, that while it has received the required financial disclosure from the Tenant in accordance with the Appointment Order, that information is not presently before the court, nor has the Monitor done the analysis to determine whether the Tenant could afford to pay Base Rent from and after December 14, 2021, although such analysis could be undertaken.

[96] Further, the Tenant's financial information provided to the Monitor is subject to a confidentiality and sealing order. All parties agreed at the hearing that an exception could be carved out to allow the Tenant's financial information to be disclosed to the Landlord in the context of the court's adjudication of the disputes between the Landlord and the Tenant. Such a disclosure should include continued protections to avoid public filings or disclosure because of the competitively sensitive nature of that information.

[97] The Landlord accepts that the court would have the jurisdiction to temporarily adjust the amount or timing of Rent payable under the Lease pursuant s. 20 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 when considering a request for relief from forfeiture, if determined to be necessary and a proper balancing of the Landlord's interest in being paid the contractual Rent and the Tenant's interest in preserving its business. However, this is not a relief from forfeiture application: see *Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, 2022 ONCA 585, at paras. 43, 45.

[98] Nonetheless, by the conclusion of the oral argument, all parties had agreed that the court has the authority under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and/or the express terms of paragraph 11 of the Appointment Order to make an interim order as to the amount of Rent payable by the Tenant, which may not be the specific minimum Base Rent prescribed by the Lease.

Exercise of the Landlord's Remedies

[99] The Landlord, at this time, is only seeking a remedy for the Tenant's failure to pay minimum Base Rent from and after December 14, 2021 when the Appointment Order was made in accordance with paragraph 11 of that order.

[100] The Landlord has both contractual and statutory rights to terminate the Lease upon the Tenant's failure to pay rent due: see s. 18(1), *Commercial Tenancies Act*. See also *Hudson's Bay Company*, at para 32.

[101] These remedies can only be exercised if the stay and restrictions under the Appointment Order are lifted. That will not happen until at least the scheduled date for the post-mediation case conference.

[102] In its December 9, 2022 endorsement, the court specified that, even if it has rendered its decision by January 19, 2023 (which is not guaranteed), and if the Landlord is successful on its motion, the stay contained in the Appointment Order will remain in effect until at least the January 19, 2023 case conference and for a reasonable period thereafter to allow the applicant to bring back on its application to appoint a receiver before the Landlord takes any enforcement steps. The court assumes that the RBC will be seeking a similar standstill arrangement in the event that any order is made at the post-mediation case conference or thereafter if the stay or the Appointment Order are in jeopardy of being set aside or terminated.

[103] The Monitor is concerned that the stay not be lifted in favour of one creditor to the exclusion of other creditors as this would create an unfairness. However, the effective standstill and intended receivership application provide a practical solution to these concerns.

Conclusion

[104] The January 19, 2023 case conference will be used to timetable the Tenant's cross-motion which shall proceed in tandem with the mediation and shall be timetabled on a realistic, but expedited, basis. The parties shall exchange proposed timetables and meet and confer before the case conference with a view to agreeing on as much as possible before attending this case conference.

[105] If at or following the court ordered mediation, the parties are able to resolve their dispute about any one or all of the Rent arrears pre-December 14, 2021, the Rent arrears and post-December 14, 2021 and/or the Rent continuing to be payable by the Tenant as a result of the COVID-19 cross-border travel restrictions, the Tenant's cross-motion may be amended or withdrawn as appropriate to reflect what has been agreed and the timetable can be amended accordingly, thereafter.

[106] Failing agreement, the court may provide further orders and directions at or after the post-mediation case conference.

[107] The parties agreed to exchange their cost outlines for this (the Landlord's) motion by Friday, December 13, 2022 and the court assumes they have done so. If time permits, the parties may address the court at the January 19, 2023 case conference regarding their respective proposals for how the costs of this motion should be determined.

[108] 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.



Kimmel J.

Date: January 16, 2023



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL

HEARING

DATE: January 19, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: RBC v. PEACE BRIDGE DUTY FREE INC

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

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ENDORSEMENT OF JUSTICE KIMMEL:

1. This case conference was scheduled to address matters arising out of my previous endorsements, including my most recent endorsement of January 16, 2023.
2. Further to the court's direction, Peace Bridge Duty Free Inc. ("PBDF" or the "Tenant") and the Buffalo & Fort Erie Public Bridge Authority (the "Authority" or the "Landlord") are in the process of booking a mediation which is expected to be completed by March 28, 2023. That mediation shall be briefed in accordance with the directions contained in my January 16, 2023 endorsement.
3. As directed by my last endorsement, the Landlord and Tenant have also reached an agreement about the procedure for addressing the issues raised in the Tenant's cross-motion (notice of motion dated November 13, 2022). In its cross-motion, the Tenant seeks the determination of various issues and damages, dependent upon the interpretation of Article 18.07 of the subject Lease which, in turn, the court has indicated will require a more fulsome evidentiary record that considers the factual matrix from which the Lease arose, as well as conduct of the parties since March 2020 given the allegations of a failure to negotiate or consult in "good faith".
4. The relief sought by the Tenant against the Landlord on its cross-motion falls procedurally outside of the within receivership application, to which the Landlord is not a party. In the interests of efficiency, recognizing that the separate proceeding would be brought before this court in any event, the parties have reached the following agreement regarding the court's jurisdiction and binding nature of the adjudication of the issues raised and to be decided on the Tenant's cross-motion (provided by the parties on January 25, 2023):

For the purpose of the Tenant's Cross Motion the Landlord is a Respondent to that motion and the court shall have jurisdiction to grant the relief sought against the Landlord by the Tenant therein, including, without limitation, with respect to damages, if any, to which the Tenant might be entitled. The Landlord and the Tenant agree that the question of the interpretation of rent payable under the Lease and the amount, if any, of any damages to which the Landlord is entitled to offset rent owing under the Lease as determined at the Cross Motion (or in any appeal arising therefrom) shall be binding on the parties for all purposes.

5. As the court previously directed, the Landlord and Tenant have agreed that the Tenant shall deliver any further evidence upon which it intends to rely on its cross-motion within three weeks of the case conference held on January 19, 2023 and the Landlord shall deliver its responding evidence and record on the cross-motion within two weeks thereafter. This evidence may also be used at the mediation.
6. The parties shall all re-attend at a case conference before me that has been scheduled for two hours commencing at 10:00 a.m. on April 4, 2023. Aide Memoires shall be filed in advance of no more than ten pages double spaced by each participating party. The Aide Memoires and any other materials intended to be referred to at this case conference shall be uploaded by each party into the appropriate bundle for this case conference by no later than noon on April 3, 2023.
7. Matters that ,au be addressed at the post-mediation case conference include:
 - a. A report from the parties about any aspects of their disputes that have been resolved;
 - b. The costs of the Landlord's stay motion (decided by my January 16, 2023 endorsement) and whether those costs should be decided now or deferred to be decided in connection with the

Tenant's cross-motion. In addition to the timing of the decision regarding the costs of the stay motion, the court may hear brief submissions, if time permits, on any other aspects of the question of costs not already addressed in the costs outlines filed for the landlord's stay motion. The court was asked not to decide the matter of costs of these two motions until at least this further case conference, at or after which directions, or a decision, regarding these costs may be provided by the court.

- c. As was indicated in paragraph 60 of my last endorsement, if the mediation has not successfully resolved some or all of the issues in dispute between the Landlord and the Tenant, the parties may provide further submissions (to be included in Aide Memoires and evidence to be filed in advance), and the court may provide further directions, regarding the stay and restrictions contained in, and "normal rent" payable under, the Appointment Order, including with respect to: i) the lifting of the stay of proceedings in paragraph 9 of the Appointment Order and/or relieving the Landlord of the restrictions under paragraph 11, ii) vacating or terminating the Appointment Order, and/or iii) the amount of "normal rent" that the Tenant should be paying to the Landlord pursuant to paragraph 11 of the Appointment Order if it is to remain in place pending the decision of the court on the Tenant's cross-motion, based on the enhanced financial disclosure that the Tenant will have by that time provided in its further evidence on its cross-motion and/or in materials provided in the context of the mediation and extracted for the court's consideration (to be filed in accordance with the existing sealing order).
 - d. Submissions may be made, and directions provided, regarding any proposed 39.03 examinations that are objected to in connection with the Tenant's cross-motion.
 - e. Submissions may be made, and directions provided, regarding the timetabling of the cross-examinations, the exchange of expert reports (if any), the need for any *viva voce* evidence, the exchange of written submissions and the eventual hearing of the Tenant's cross-motion.
 - f. Submissions may be made, and directions provided, regarding the timetabling of the receivership application and any other matters arising in connection with the receivership application and/or the continuing role of the Monitor.
8. 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.



KIMMEL J.

January 25, 2023

ROYAL BANK OF CANADA

Applicant

-and-

PEACE BRIDGE DUTY FREE INC.

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
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