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

ONTARIO
SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

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 BRIEF OF PEACE BRIDGE DUTY FREE INC.

(Case Conference returnable February 9, 2024)

Date: February 8, 2024	**BLANEY MCMURTRY LLP** Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5 **David T. Ullmann** (LSO #42357I) Tel: (416) 596-4289 Email: dullmann@blaney.com **John Wolf** (LSO #30165B) Email: jwolf@blaney.com **Brendan Jones** (LSO #56821F) Email: bjones@blaney.com Lawyers for the Respondent

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Introduction

1. The purpose of this Aide Memoire is to seek Orders from the Court related to the Decision of Justice Kimmel dated December 15, 2023 and the related costs decision. The parties have not been able to agree on the forms of Order.

2. Capitalized terms are as defined in the Lease or this Aide Memoire.

Status

3. We are counsel to Peace Bridge Duty Free Inc. (the "**PBDF**") in this matter. On November 1st to 3rd, 2023, this court heard argument as the correct interpretation of the Lease and as to what was or was not reasonable in connection with rent payable in respect of same viewed through the lens of the impact of the covid-19 pandemic on the business of PBDF.

4. On December 15th, 2023, Justice Kimmel released Her decision dismissing the PBDF

interpretation of the Lease (the "**Decision**"). A copy of the Decision is attached hereto as **Tab 1**.

5. At paragraph 160 of the Decision Justice Kimmel held as follows:

> [160] In light of the Landlord's undertaking not to take any enforcement steps pending the return of the Receivership Application (and the continuing stay) so that there is no uncertainty in the interim, if the Tenant continues to operate its duty free store from the Leased Premises, it shall continue to pay the agreed upon without prejudice rent for the Ramp Up Period, subject to further orders of this court. A similar order for the payment of rent pending the return of the Receivership Application was made in the Interim Rent Endorsement, but the amounts to be paid should during this interim period now align with what the parties have agreed to and have been following during the Ramp Up Period.

6. At several points during the proceeding and in the materials set forward by the Peace Bridge Authority (the "**Landlord**"), it was agreed by all parties that it was reasonable that a reduced rent be paid during the so called "Ramp Up" period (being the period since re opening the store after the Covid 19 shut down, to the present and beyond). The Ramp Up period schedule (the "**Ramp Up Schedule**") for rent was as follows:

> • **Ramp-up of Base Rent.** Art 4.03 will be amended to provide for the following Base Rent:
>
> Lease Year ending 31 Oct 2022—Base Rent of $2MM or 20% of sales, whichever is greater.
>
> Lease Year ending 31 Oct 2023—Base Rent of $2.5MM or 20% of sales, whichever is greater.
>
> Lease Year ending 31 Oct 2024 —Base Rent of $3MM or 20% of sales, whichever is greater.
>
> Lease Year ending 31 Oct 2025—Base Rent of $3.5MM or 20% of sales, whichever is greater.
>
> From and after the Lease Year ending October 31st, 2026, Base Rent will be payable in accordance with the Lease.

7. As set out above, under the Ramp Up Schedule, for the lease year starting November 1st, 2023 to and until October 31st 2024, the base rent was to be set at the greater of $3 million or 20% of sales. This translates into a Monthly minimum rent amount of $250,000.

8. PBDF has paid rent for January and February in accordance with the Ramp Up Schedule and in accordance with the direction of the Ccourt in paragraph 160 of the decision.

9. On January 23rd, 2024, PBDF provided a form of Order for approval to the Landlord

which acknowledged that the motion had been dismissed and contained the direction given by the court with respect to rent pending the return of the receivership period.

10. PBDF also provided a cost order following the Court's cost decision which was released on January 17th, 2024. A copy of the costs decision is attached hereto as **Tab 2**.

11. Both forms of order are attached hereto as **Tab 3**.

12. The Landlord rejected the form of cost order and the dismissal order and refused to approve same with respect to form or content.

13. On January 29th, 2024, at the request of RBC, the receivership was adjourned to April 26, 2024.

14. On December 29th, 2023, PBDF filed a Notice of Appeal in respect of the Decision with the Court of Appeal, out of an abundance of caution within the time required under the most conservative possible time requirement to file an appeal, as set out therein.

15. On January 26th, 2024, within the 30 days required by the Court of Appeal following the filing of Notice, PBDF filed the materials necessary to perfect its appeal with the Court of Appeal. The materials as filed included a placeholder because the form of Order had not been issued.

16. On January 30, 2024, the Court of Appeal advised that the Appeal was not properly perfected because the Order appealed from was not included.

17. On February 1, 2024, the Court of Appeal advised the Appeal would be dismissed for delay unless a consent was received from the Landlord or there was a further order of that Court.

18. On February 6th, 2024, PBDF asked the Court for a case conference to settle the forms of order.

19. On February 7th, 2024, PBDF wrote the Landlord to seek their consent to extend the time for filing an appeal. The Landlord has refused to provide this consent.

20. The correspondence between the Landlord and Tenant with respect to the forms of

order and the request for consent is attached hereto as **Tab 4**.

21. PBDF believes that in the Decision the Court deliberately considered the appropriate amount of rent to be paid pending the return of the receivership application and considered in particular the admission by all parties that the Ramp Up rent was the reasonable rent to be paid in the circumstances.

22. PBDF's form of Order exactly mirrors the language provided by the Court in paragraph 160.

23. The court has, from time to time in this proceeding, issued various endorsements and decisions that have ordered various amounts of rent to be paid which the Court deemed appropriate at those times. The direction provided in the Decision is no different. PBDF submits it is proceeding in accordance with the Court's direction.

24. Section 160 of the Decision is part of the overall balancing of interests considered by the Court in reaching its decision and cannot be changed on its own without reconsidering the entire Decision.

25. The proper remedy for the Landlord, who apparently disagrees with the Court's decision, is an appeal, not to withhold its consent to the form of order.

26. Based on a recent decision of the British Columbia Court of Appeal decision (IE CA 3 Holdings Ltd. v. NYDIG ABL LLC, 2024 BCCA 38 (CanLII)) attached hereto as **Tab 5,** it is still available for the Landlord to file a cross appeal if it disagrees with this order, even at this late date. PBDF would not object the Landlord doing so would and would provide its consent to the appeal being late filed.

27. With respect to the cost order, there's an apparent dispute as to the impact of the pending stay. Both as a result of the appeal being filed and as a result of the ongoing stay in these proceedings the Landlord cannot enforce the cost award at this time. We submit this is what the Court was referring to in paragraph 41 of the cost decision.

28. PBDF requires orders of this Court in order to proceed with the appeal. As such we request that the court issue the orders in the forms presented to the Landlord attached here to at **Tab 3**, which accurately reproduce the language from the decisions in question.

29. Ongoing without prejudice negotiations between the landlord and PBDF continue on the basis of the offer attached to the Affidavit of Jim Pearce dated January 24th, 2024, which was filed in the receivership proceedings before this Court. A copy of the offer is attached hereto as **Tab 6**. The offer includes continuing to pay rent in accordance with the Ramp Up schedule.

ALL OF WHICH IS HEREBY SUBMITTED THIS 8th DAY OF FEBRUARY 2024 BY:

David Ullmann

TAB 1

CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2023 ONSC 7096
COURT FILE NO.: CV-21-00673084-00CL
DATE: 20231215

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *David T. Ullmann, John Wolf and Brendan Jones,* for Peace Bridge Duty Free Inc., the Moving Party

E. Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority, Respondent on Motion

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023

REASONS FOR DECISION
PEACE BRIDGE DUTY FREE CROSS-MOTION
(LEASE DISPUTE)

[1] The economic effects of the COVID-19 pandemic were immediate and far reaching. The law and the courts have limits on what can be done to address contractual breaches caused by one party's inability to perform its contractual obligations in circumstances where their contract does not prescribe what will happen and the parties themselves have been unable to reach an agreement upon accommodations satisfactory to both. Despite the parties' inability to agree, this commercial tenancy has survived longer than many others because of the appointment of a monitor and a stay of proceedings granted as an interim measure in the context of a receivership application commenced by the Tenant's first secured lender. The Landlord did not initially oppose the stay which was granted, in part, because of a particular Lease provision that the parties agree required them to negotiate to try to preserve the tenancy. With the parties having done so in good faith, and failed, the court cannot force the parties to amend their lease or impose terms that are inconsistent with its express provisions.

[2] These are sophisticated commercial parties who found themselves in a dramatically changed economic environment in which the compromises that each was willing to make to try to preserve the tenancy were not enough to satisfy the other. Neither the Landlord nor the Tenant is at fault or to blame for the devastating effects that the COVID-19 pandemic and resulting border restrictions had on this Tenant's duty free business, nor can they be faulted for looking out for their own economic interests in their negotiations. Each did so while also making a good faith effort to preserve the

tenancy. The parties came very close to a final agreement, but unfortunately could not come to terms about the reduced Base Rent to be paid for the approximately eighteen month period in which the Tenant's duty free store was closed. The parties cannot be forced by the court to make an agreement, nor can the court impose upon them a new agreement, simply based on a Lease provision pursuant to which "the Landlord agree[d] to consult with the Tenant to discuss the impact of [the] introduction of or change in Applicable Laws to the Lease."

Procedural History

[3] By endorsements dated January 25 and April 4, 2023 (the "Scheduling Endorsements") , this court directed that the dispute between Peace Bridge Duty Free Inc. (the "Tenant" or "PBDF") and the Buffalo and Fort Erie Public Bridge Authority (the "Landlord" or the "Authority") in respect of the July 28, 2016 lease (the "Lease") of the duty-free shop at 1 Peace Bridge Plaza, Fort Erie on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York (the "Leased Premises") be heard within this receivership application as a matter of convenience and with the consent of all affected parties (rather than commencing a separate application). The parties agreed, and the court endorsed on January 25, 2023, as follows in this regard:

> 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.

[4] A stay of proceedings against the Tenant was ordered on December 14, 2021 when this receivership application was adjourned and a monitor was instead appointed (the "Appointment Order"). The Tenant issued a notice of cross-motion dated November 13, 2022 (the "Cross-Motion") in response to the Landlord's motion to lift the stay of proceedings under the Appointment Order, in furtherance of the Landlord's desire to terminate the Lease for alleged defaults by the Tenant. The Scheduling Endorsements identified specific paragraphs of the relief sought by the Tenant in its Cross-Motion (1–5 and 11) to be adjudicated in this first stage of the Lease dispute. The parties to the Lease dispute are the Landlord and the Tenant. The applicant is not directly participating but has an interest in the outcome of this dispute. The receivership application has been adjourned in the meantime and is currently expected to return at the end of January 2024.

The Lease Dispute

[5] The Lease dispute revolves around the interpretation of s. 18.07 of the Lease, which provides that:

> 18.07 Regulatory Changes

> In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect (sic) 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.

[6] The parties agree that section 18.07 was triggered as a result of the COVID-19 pandemic and the bridge and border closure to non-essential traffic that was initially implemented effective March 21, 2020 for 30 days and subsequently extended (as discussed further below). Both the Landlord and the Tenant understood and intended that s. 18.07 could result in rental adjustments in the appropriate circumstances, taking into account the impact on the Tenant's business operations.

[7] Prior to the COVID-19 pandemic, for more than three decades, PBDF operated a retail duty-free store open 24 hours a day, 365 days a year, and employed approximately 90 staff.

[8] Starting in March of 2020 governments in both the U.S. and Canada enacted emergency border restriction legislation and related regulations that impacted the Peace Bridge border crossing ("Border Restrictions"). The Peace Bridge border crossing was closed to non-essential traffic from Canada to the United States ("U.S.") from March 21, 2020 to November 8, 2021. During this period only essential travelers, predominantly day crossing workers, who had no eligibility to purchase any duty-free products, were permitted to cross the border at the Canadian side of the Peace Bridge, virtually eliminating all PBDF's potential customers.

[9] The parties agree that these Border Restrictions caused material adverse effects on the Tenant's business operations and that s. 18.07 of the Lease became engaged.

[10] PBDF's retail store was closed from March 21, 2020 until September 19, 2021. It opened in September in the expectation of the conditional easing of restrictions on non-essential travelers into the U.S., which occurred on November 8, 2021. PBDF defines the "Closure Period" to be the period from March 21, 2020 to November 8, 2021. The final Border Restriction, which was the requirement for persons travelling from Canada into the United States to be fully vaccinated, was lifted effective May 11th, 2023.

[11] The Tenant invoked s. 18.07 of the Lease in April 2020. The discussions initially were centered around on two Rent Deferral Agreements (defined below). After the Tenant's duty free store re-opened in September 2021 the Landlord and the Tenant began to focus the discussions and negotiations on the rent to be paid by the Tenant both during the Closure Period and going forward. Proposals were exchanged. The parties attended a court ordered mediation in March of 2023. Their discussions and negotiations continued until at least August of 2023.[1] No agreement was reached.

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[1] The last exchange of proposals in the evidentiary record for this Cross-Motion took place between March and August 2023. Although initially made on a without prejudice basis, the proposals exchanged up to August 2023 have been introduced into evidence without objection and both sides have relied upon them. Both counsel referred to the fact that further offers were exchanged between the parties after August of 2023 (from the Landlord on September 26, 2023 and

[12] By the time of the hearing, the parties had been able to reach an agreement in principle about the rent payable during the period commencing in November of 2021 and continuing until October 31, 2026, during which the Tenant would "Ramp Up" to paying $4 million per annum in Base Rent as required under the Lease (the "Ramp Up Period"), as follows:

- From and after the Lease Year ending 31 Oct 2022—Base Rent of $2M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2023—Base Rent of $2.5M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2024—Base Rent of $3M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2025—Base Rent of $3.5M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2026, Base Rent will be payable in accordance with the Lease.

[13] However, this agreement in principle was subject to the parties reaching an agreement about the rent payable during the Closure Period. The Tenant says that it paid what it could during that period (a total of $544,000) and should not have to pay any more given that the duty free store was closed as a result of the Border Restrictions. The Tenant made some offers that would have resulted in it paying some more rent to the Landlord for the Closure Period over the life of the Lease, but those offers also involved an extension of the term of the Lease and an amendment to remove the requirement to pay Minimum Base Rent under the Lease. The Landlord made some offers that would have required the Tenant to pay some more rent for the Closure Period in the very short term, or to pay this "deferred rent" over a longer period of up to two years but with interest and security. The Landlord did not agree to extend the term of the Lease.

[14] The primary question that remains to be decided in this Lease dispute is whether the Landlord acted reasonably and in good faith in its consultations with the Tenant regarding the rent to be paid by the Tenant during the Closure Period. There is also a dispute about whether the court can order the remedy that the Tenant seeks and decide and impose upon the parties the Rent to be paid by the Tenant during the Closure Period in substitution for what the Lease provides, the very issue that the parties have been unable to agree upon.

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from the Tenant on October 13, 2023), but those remain off the record and without prejudice. The court has not been apprised of the terms of these later offers and they have not been considered in this decision. They may be relevant when it comes time to deal with costs.

The Positions of the Parties

The Tenant's Position

[15] The Tenant contends that the Landlord did not act reasonably and in good faith in its consultations with the Tenant regarding the Rent (as defined in the Lease) to be paid by the Tenant during the Closure Period. The Tenant relies upon the impact of the change in Applicable Laws that led to the closure of the duty free store for eighteen months (from mid-March 2020 to early November 2021) that was immediate and catastrophic. The Tenant had no revenues, no business and no operations. It applied for all available government subsidies and assistance and paid those subsidies plus the HST on the full rent payable under the Lease to the Landlord, which it maintains is all that could reasonably be expected of it during the Closure Period in the circumstances.

[16] The Tenant maintains that what it has paid to the Landlord for the Closure Period is all that it should be required to pay and that the Landlord's insistence on anything more (at the time or in its proposals that required the payment of any "back rent" or "deferred rent" for that period) was unreasonable. The Tenant maintains that the operation of s. 18.07, taking into account the negative impacts that the Border Restrictions had on the Tenant's business operations during the Closure Period, required a temporary suspension of Base Rent payable under the Lease for the entire Closure Period in order to preserve the tenancy. Percentage rent was not payable because there were no sales. Additional Rent (which was minimal) was paid from the government subsidies and, at the request of the Landlord, the Tenant paid HST in accordance with the requirements of the Canada Revenue Agency ("CRA").

[17] The Tenant also contends that the Landlord was not acting reasonably or in good faith in that:

a. From very early on in the Closure Period and throughout, the Landlord continued to make demands for immediate (or very short term) payments of Base Rent accruing;

b. While the Tenant maintains that a demand for any amount of Base Rent during the Closure Period was unreasonable, even when the Landlord moderated its position and asked for a portion of the Base Rent accruing due during the Closure Period, the amounts demanded in the early offers were unreasonable and, even when the amounts were reduced, the proposed payment terms in all of the Landlord's offers were unreasonable;

c. The Landlord threatened enforcement of its remedies (including remedies that were eventually rendered unlawful by a Province-wide statutory moratorium, such as taking possession of the Leased Premises and terminating the Lease); and

d. The Landlord was looking for ways to terminate the Lease and replace the Tenant during the Closure Period, rather than to reach an agreement to preserve the tenancy, and was not just acting to protect its own commercial interests and contractual rights.[2]

[18] The Tenant now asks the court to make the following orders[3]:

a) An order that, having applied section 18.07 and considering the adverse effects that the Border Restrictions had on the Tenant's sales, the rent actually payable by the Tenant during the Closure Period was equal to 20% of sales [which were zero], plus all additional rent and government assistance and that nothing further is owing for the Closure Period by the Tenant.

b) An order that having applied section 18.07 and considering the adverse effects the Border Restrictions had and continue to have on the Tenant's sales, the Ramp Up schedule accepted in paragraphs 41 and 44 of the factums of the Tenant and the Landlord respectively, reflects the reasonable application of section 18.07 to the circumstances of this case in the Ramp Up period and that the parties are to comply with that schedule for the payment of rent to and until the Lease year commencing Nov 1, 2026, when the schedule has no further impact.

c) An order that having applied a) and b) to the amounts actually paid, any overpayment by the Tenant should be set off by the Tenant against rent next due and any underpayment should be repaid to the Landlord in a reasonable period of time having regard to the ability to pay.

[19] The Tenants ask, in the alternative to b) above, that the court determine (based on the evidentiary metrics in the record[4]) and order the terms upon which rent is to be paid for the Closure Period, whether those be as last proposed by the Tenant or as last proposed by the Landlord, or such other terms as the court deems just. In paragraph 6 of the Cross-Motion, the Tenant asks, in the event

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[2] In support of this contention, the Tenant asks the court to admit and consider the expert report of Ms. Hutcheson of JCWG who opines that the Landlord would be economically worse off if it ran an RFP and selected a new tenant to operate a duty free store on the Peace Bridge in the current economic climate, than if it retained the Tenant even under the terms that the Tenant last proposed. The Landlord objects to this expert report being admitted and argues that it should be given no weight, for various reasons addressed later in these reasons.

[3] The specific orders sought are a variation on the relief in the Tenant's Notice of Cross-Motion which seeks the court's determination of: (a) whether, as a result of the application of s. 18.07, Base Rent was payable by PBDF; and, if so (b) what amount of the Base Rent PBDF was required to pay for: (i) April to September 2020; (ii) October 2020 to 8 November 2021; (iii) 9 November 2021 to 30 September 2022; and (iv) 1 October 2022 to 11 May 2023. The relief has evolved, as have the specific assertions, in light of events that unfolded while the Cross-Motion was pending. The court's April 4, 2023 scheduling endorsement directed that paragraphs 1-6 and 11 of the Cross-Motion be adjudicated at this preliminary phase

[4] One evidentiary data point that the Tenant relies upon in support of what it contends the "reasonable" rent should be for the Closure Period is the expert opinion of Ephraim Stulberg. The Landlord objects to the relevance of, and to any weight being given to, this expert's opinion for various reasons addressed later in these reasons.

that arrears of Base Rent are determined to exist, for an order that those arrears be amortized over the balance of the term of the Lease.

[20] The Tenant contends that it would be a commercially unreasonable interpretation and implementation of s. 18.07 of the Lease if the court were to find that a failure of the parties to reach an agreement due to the unreasonable offers and/or lack of good faith on the part of the Landlord leaves the Tenant in the position of either having to agree to unreasonable terms or to defend allegations of being in breach of the Lease and seek relief from forfeiture, but with no recourse to the court to impose reasonable terms that ought to have been agreed to.

[21] The Tenant argues that the court has the power to do this through its power to interpret, implement and give effect to s. 18.07 and its objective of preserving the tenancy in the face of unforeseen and unprecedented circumstances that gave rise to the changes in Applicable Laws and the resulting material adverse effects on the Tenant's business operations. The Tenant says that the court can do this even if it does not find the Landlord to be in breach of its obligations under s. 18.07 or its contractual, statutory or common law duty of good faith.

The Landlord's Position

[22] The Landlord maintains that it was not required, by virtue of s. 18.07 of the Lease or otherwise, to temporarily suspend the requirement to pay any Base Rent payable under the Lease for the entire Closure Period.

[23] It is the Landlord's position that there is no reasonable interpretation of s. 18.07 that: (i) requires it to waive or suspend the payment of Base Rent; or (ii) automatically amends the Lease to remove or suspend the requirement to pay Base Rent. The suspension of Base Rent during the Closure Period was a cornerstone of the Tenant's position throughout most of the negotiations that the parties have engaged in since March 2020 and has been the biggest obstacle to reaching an agreement, from the Landlord's perspective.

[24] The Landlord does now agree that some rent abatement was appropriate but not a complete abatement. The Landlord denies that it was looking for ways to terminate the tenancy. It says, to the contrary, the Landlord did not take any steps to re-possess the Leased Premises or terminate the Tenancy despite the Tenant's steadfast unwillingness to pay any Base Rent during the Closure Period, the Tenant's default under both the First and Second Deferral Agreements (defined below) and its attempt to use the pandemic crisis as an excuse to renegotiate the Lease so to eradicate the Base Rent requirement permanently and extend the Lease term. Rather, the Landlord says that, while it did become impatient with the Tenant and made some demands, it did not take any enforcement steps and continued to make offers to the Tenant while waiting for the Tenant to make and revise its proposals and provide financial information to inform the continuing discussions.

[25] The Landlord maintains that its offers were reasonable when made, having regard to the situation, the Tenant's position and the information the Tenant made available to the Landlord at the time. The Landlord disputes the Tenant's premise that the ultimate resolution must be one that reflects the Tenant only paying the rent that it can "afford" in a given year or that the effect of s. 18.07 of the Lease was to guarantee that the Tenant would be profitable in the aftermath of the COVID-19 pandemic during the Ramp Up Period.

[26] The Landlord argues that the financial burden on the Tenant for its lost revenues during the Closure Period can be accommodated through deferred rent and interest and other terms while still preserving the tenancy. The Landlord is prepared to share part of that burden, as reflected in its most recent offers, but was not prepared to take on the entire risk of the Tenant's ability to pay its share without some interest and security.

[27] The Landlord maintains that it acted in good faith during these discussions with the Tenant and that its offers were reasonable. It maintains that it was entitled to negotiate from the starting premise of the agreed upon Lease terms and that it was not obligated to renegotiate the Lease to make the permanent changes that the Tenant was asking for when the Tenant finally came to the negotiating table. The Landlord points to the First and Second Deferral Agreements that the Tenant signed, which recognized that rent would be deferred, not completely abated, while the duty free store was closed. The Landlord eventually agreed to accept 50% of the Base Rent otherwise payable during the Closure Period, to be paid in the short term based on outside financing or investment to be obtained by the Tenant, or over the longer term with interest and security. The Landlord argues that there is a range of what would be reasonable to expect the Tenant to pay in rent during the Closure Period and that its offers were within that range.

[28] The Landlord asks that the Tenant's motion be dismissed because there is no basis for any finding of breach or that it did not act reasonably or in good faith. Having failed to accept the Landlord's offers of lease concessions, the Tenant remains obliged to comply with its obligations under the Lease and pay Rent in accordance with the Lease. However, since the Tenant is the subject of a stay in the receivership application, the Landlord acknowledges that it will not be in a position to act precipitously and terminate the Lease or re-possess the Leased Premises and the parties will still have the opportunity to try to reach a negotiated resolution. In the meantime, the Tenant may also consider whether it is appropriate to bring an application for relief from forfeiture.

[29] In the alternative, the Landlord submits that, even if it is found to have been in breach of the Lease or its duty of good faith to the Tenant, the court cannot re-write the Lease or impose new terms that have not been agreed to by the parties. It is the Landlord's position that the court does not have the power to impose new Lease terms, whether they be those proposed by the Tenant, those proposed by the Landlord or any others that the court deems appropriate. The only remedy available to the Tenant, according to the Landlord, is a claim in damages.

[30] The Landlord asks that if there is a finding of breach, any determination of damages be ordered to be adjudicated in a second phase of the Cross-Motion with the benefit of a complete evidentiary record and, if deemed appropriate, expert evidence. In the meantime, subject to the position of the applicant RBC regarding its receivership, the court would in those circumstances have the power to make an interim order regarding the rent to be paid by the Tenant (as it did previously in the May 17, 2023, the "Interim Rent Endorsement").

Matters that the Parties Agree Upon

[31] As the Lease dispute evolved, the parties were able to agree on certain matters that are relevant to its determination, including that:

a. The Border Restrictions and associated regulations (that were initially enacted on March 21, 2020 and subsequently extended and expanded) were unanticipated changes in Applicable Laws that caused a material adverse effect on the Tenant's business operations at the Leased Premises and triggered s. 18.07 of the Lease.

b. The Tenant closed its duty free store on March 21, 2020. While the parties do not agree upon whether the Tenant was required to close its store, there is no suggestion that it was unreasonable for the Tenant to have done so. All but two of the Canadian side land border crossing duty free stores closed around the same time. The two that remained open had unique reasons for doing so.

c. The Tenant was within its rights to invoke s. 18.07 of the Lease in April 2020.

d. The purpose of s. 18.07 of the Lease is to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent.

e. Under s. 18.07 the Landlord was required to consult with the Tenant to discuss the impact of the Border Restrictions.

f. The parties commenced discussions in April 2020 about the rent to be paid by the Tenant while its duty free store was closed but were not able to reach an agreement.

g. It would be appropriate to afford the Tenant some Rent concessions under s. 18.07 as a result of the Border Restrictions.

h. In making any decision with respect to Lease concessions to be made in favour of the Tenant as a result of the Border Restrictions, the Landlord was required to be reasonable and act in good faith.

The Lease

[32] A contractual provision such as s. 18.07 of the Lease must be interpreted in context. It does not exist in a vacuum.

[33] Appendix 2 to these reasons includes excerpts of select Lease provisions, for ease of reference.

[34] By way of overview, the Lease requires that PBDF pay Rent, 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.

[35] 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. The RFP required that those submitting bids agreed to pay Base Rent of at least $2.5 million plus Percentage Rent. PBDF responded to the RFP and offered to pay Base Rent of $4 million plus Percentage Rent. The Authority selected PBDF as the successful bidder. 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.

The Facts

The Parties

[36] The Authority is the owner of the Peace Bridge, an international bridge that crosses the Canada-US border between Fort Erie, Ontario and Buffalo, New York.

[37] The Authority is an international entity created by the State of New York and the Government of Canada. It is governed by a 10-member Board of Directors consisting of five members from New York State and five members from Canada appointed by the Governor-in-Council as recommended by the Minister of Transport (the "Board").

[38] The Canadian and New York State governments are equal stakeholders in the Authority, and are also responsible for many of the Applicable Laws, including the Border Restrictions. The assets of the Authority will eventually revert to the Canadian and New York governments.[5]

[39] PBDF is a closely held company with four shareholders, each of which is represented on the company's Board. PBDF has operated the duty free store on the Canadian side of the Peace Bridge since 1986.

Previous Findings of this Court

[40] The Landlord brought a motion to lift the stay put in place by the Appointment Order to enable the Landlord to exercise its remedies for default, including terminating the Lease and evicting the Tenant. See *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327. The motion was heard on January 5, 2023 and was dismissed by the court's endorsement dated January 16, 2023, the "Lift Stay Endorsement").

[41] Various findings were made in the Lift Stay Endorsement wherein the court decided not to remove the restrictions contained in paragraphs 9 and 11 of the Appointment Order, but rather to expedite the hearing of this Cross-Motion. A summary of some of the findings relevant to this Cross-Motion is as follows:

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[5] The parties disagree about whether the Landlord is a "Government Authority" as defined in paragraph 2.01 (t) of the Lease. The Tenant contends the Landlord is because its controlling shareholders are the New York and Canadian governments. The Landlord says it is not itself a governmental agency, board, tribunal, ministry or department within the defined meaning of "Government Authority" under the Lease, even if its shareholders may be and even if some of its board members are government officials, employees, servants or agents. Neither side suggested that whether the Landlord is, or is not, a Government Authority is material to the court's determination of the Lease dispute. The Lease provisions that make reference to "Government Authority" are not relevant to this Lease Dispute. No finding is made, one way or the other, on this point. The Border Restrictions, like many other Applicable Laws, were enacted by Government Authorities. In this case both the Landlord and the Tenant were negatively impacted by these changes in the Applicable Laws.

a. 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. [para. 4]

b. The Tenant closed the duty-free store on March 21, 2020. It partially re-opened on or about September 19, 2021.

c. 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 [the "First Deferral Agreement"]. 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. [para. 14]

d. The rent deferral agreement allowed the Tenant to defer paying the Base Rent until the expiry of the Rent Deferral Period on July 31, 2020. Thereafter, the parties attempted to negotiate a new rent deferral agreement [the "Second 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. [para. 15]

e. 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 timeframe 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. [para. 16]

f. The Landlord did not agree to this and reserved its rights (relying upon, *inter alia*, the non-waiver provisions contained in s. 2.17 of the Lease). However, for much of the relevant time while this Lease dispute was pending the Landlord was not in a position to enforce certain of its rights due to legislation that had been put in place to protect

commercial tenants by imposing a Province-wide moratorium on the eviction and termination of commercial tenants. [at para. 17][6]

g. 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. [para.18]

h. 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"). [para. 6]

i. The Tenant entered into a Credit Amending and Forbearance Agreement made as of October 8, 2021 with the RBC (the "Forbearance 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)". [para. 19]

j. The Landlord was not a signatory to the Forbearance 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. [para. 20]

k. 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. [para. 21]

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

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[6] This moratorium was imposed by temporary amendments to the *Commercial Tenancies Act*, R.S.O. 1990, c. L-7 that were repealed on December 8, 2022. The Landlord was also prevented from exercising its enforcement rights by the Stay imposed under the Appointment Order.

m. 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. [para. 26]

n. The 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 did not result in an agreement. [para. 5]

o. 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 [lift stay] motion was brought by the Landlord by a Notice of Motion dated October 5, 2022. [para. 7]

p. 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. [para. 53]

[42] The parties were directed by the court's Lift Stay Endorsement to attend a mediation by March 31, 2023, which they did. They did not reach an agreement.

Detailed Factual Chronology

[43] The Landlord and the Tenant both acknowledge that many of the facts that they assert and rely upon in support of their respective positions and submissions are not in dispute. In addition to the facts summarized at the outset of these reasons that frame the Lease dispute and the findings previously made in the Lift Stay Endorsement, a more detailed chronology has been extracted from the evidence and exhibits filed and is summarized at Appendix 1 to these reasons. This outlines the uncontroverted events and dealings between the parties commencing when the Border Restrictions came into effect in March of 2020 and continuing until the exchange of proposals made by each of the Landlord and the Tenant between March and August 2023.

[44] The negotiations that ensued over this more than three year time frame did not resolve the entire Lease dispute. However, in the course of these negotiations the parties did reach an agreement in principle on the Ramp Up of Base Rent to be paid between November 2021 and October 2026, which was to be part of an overall agreement that was to include the Rent to be paid during the Closure Period (described earlier in these reasons).

The Rent that has Been Paid by the Tenant

[45] The Rent that the Tenant has paid since March 2020 is as follows:

a. Since March of 2020, PBDF paid all Additional Rent owing under the Lease to the Authority, in the sum of approximately $10,800 per month, including during the Closure Period.

b. Since reopening its retail store, PBDF has paid (over and above the Additional Rent), on a without prejudice basis, the greater of all COVID-related rent assistance it was eligible for and received or 20% of its monthly Gross Sales.

c. PBDF applied for every government program in respect of commercial rent assistance available to it and paid all sums received to the Landlord as Rent. However, the rental assistance programs available to PBDF represented a small percentage of full Rent payable under the Lease.

d. The Rent Deferral Agreements provided: "Repayment of the Deferred Rent shall commence on the Restart Date. The aggregate amount of Deferred Rent together with interest thereon at the rate of 4% per annum shall be amortized over the Amortization Period and repaid by the Tenant in equal consecutive monthly instalments on the first day of each month from and including the Restart Date, without abatement or set-off, in the same manner as Rent."

e. Even though the Second Deferral Agreement was not signed by the Authority, PBDF operated as if Rent had been deferred as contemplated by the Second Rent Deferral Agreement and continued to pay the Additional Rent and remit the COVID-19 subsidies that it received to the Landlord.

f. However, PBDF did not comply with the First or the Second Deferral Agreements in terms of repaying to the Authority the rent deferred thereunder after the expiry of the Rent Deferral Period on March 31, 2021.

g. Taking into account what was paid by PBDF to the Authority during the Closure Period, the amount of Deferred Rent that accrued under the Lease but was not paid during the period April 2020 to September 2021 was $5.7 million.

h. At the request of the Authority in or about July 2022, PBDF paid the HST on 100% of Base Rent payable under the Lease, amounting to $43,000 per month from April 2020. The HST payments were remitted to the CRA.

i. Various interim without prejudice arrangements were put in place regarding the payment of Rent by the Tenant during the course of this application after it was commenced in December 2021, with the result that:

    i. For the first Ramp Up Period (November 2021 to October 2022) the Tenant paid percentage rent in amount of $1,977,217 (there was also an upward sales adjustment of $2,119), plus a further government subsidy payment of $16,412 for that period, which amounts to approximately $2 million.

j. In the Lease year ending October 31, 2023, the Tenant is on pace to pay the $2.5 million of Base Rent specified for the second Ramp Up Period (November 2022 to October 2023). The amounts paid by the Tenant during this period were paid pursuant to court orders that required the Tenant, on a without prejudice basis, to pay the Base Rent specified in the Lease after the Monitor had provided a rent affordability assessment that indicated that the Tenant was financially able to make these payments.

Analysis

Basic Principles of Contract Interpretation

[46] The court must strive to interpret the Lease as a whole, giving effect to all of its provisions harmoniously under the lens of commercial reasonableness. The parties agree on the general principles of contract interpretation that include these among other concepts. I was reminded of the summary of those principles that was conveniently included in an earlier decision of mine (*8254125 Canada Inc. v. Celernus Investment Partners Inc*., 2019 ONSC 3144, 92 B.L.R. (5th) 291, at paras. 8 and 9):

> [8] … The leading contract interpretation case from the Supreme Court of Canada, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, provides the following guidance (at paras. 47-48 and 57-58, with reference to various principles and authorities):
>
> a. the overriding concern is to determine the mutual objective intent of the parties and the scope of their understanding as expressed in the words of the contract;
>
> b. the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract;
>
> c. the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;
>
> d. the meaning of the words can be derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by it. The meaning of the document is not necessarily the same thing as the dictionary meaning of its words; the meaning of the document is what the parties using the words against the relevant background would reasonably have understood those words to mean;
>
> e. the court should have regard to the surrounding circumstances and the factual matrix when interpreting a written contract;
>
> f. the surrounding circumstances should consist only of objective evidence of the background facts at the time of the execution of the

> contract; that is, facts that were known or reasonably ought to have been within the knowledge of both parties at or before the date of contracting;
>
> g. in a commercial contract the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the nature of the relationship between the parties both before and after the contract is entered into, the context, and the market in which the parties were operating; and
>
> h. the surrounding circumstances (factual matrix) should never be allowed to overwhelm the words of the agreement and should not be used to deviate from the text such that the court effectively creates a new agreement.
>
> [9] The respondent also relies on recognized contract interpretation principles that have been developed in the context of contracts between commercial parties and recently summarized in the case of *Shaun Development Inc. v. Shamsipour*, 2018 ONSC 440, 94 R.P.R. (5th) 15, at para. 46, affirmed, 2018 ONCA 707, 94 R.P.R. (5th) 44:
>
> a. the court presumes that the parties have intended what they have said;
>
> b. the court construes the contract as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> c. the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties;
>
> d. the court should interpret a contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity;
>
> e. extrinsic evidence may be resorted to in order to clear up an ambiguity; and
>
> f. while the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

Factual Matrix, Parol Evidence and the Landlord's Objections

[47] Considerable evidence and written and oral submissions were devoted to assisting the court in the interpretation of s. 18.07 of the Lease. Much of this focus was on the factual matrix, which is understood "to include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made." See *Weyerhaeuser*

Company Limited v Ontario (Attorney General), 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, citing *Sattva Capital Corp.*, para. 47.

[48] By the time of the hearing, the parties had agreed that the purpose of s. 18.07 of the Lease is: *to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent.* The Tenant describes this provision as a "safety valve". The Landlord does not disagree with this characterization. It is agreed that some Rent relief is appropriate where the Tenant's ability to pay rent is impacted.

[49] The Tenant also tendered evidence about discussions between the parties concerning s. 18.07 of the Lease and evidence of the subjective understandings and intentions of the persons responsible for negotiating the Lease for the Tenant. The Landlord objected to much of this evidence (a brief was filed outlining the paragraphs of the Mills and Pearce affidavits that contained objectionable evidence, much of it being of this character). Insofar as that evidence is about the purpose of s. 18.07 of the Lease, the evidence about that, and the objections to it, were largely overtaken by the agreement regarding that purpose (above).

[50] In terms of the genesis of s. 18.07 of the Lease, the uncontroverted evidence establishes that it was not included in the draft lease attached to the RFP, but was added to the Lease by the Landlord at the request of the Tenant. There were no changes to the wording of s. 18.07 from the time it was added to the draft Lease by the Landlord to when the Lease was signed.

[51] The Tenant tendered evidence about a meeting held on July 18, 2016 between the Landlord's and Tenant's representatives, at which various provisions of the then draft Lease were discussed before it was signed, including the proposed wording of s. 18.07. Notes were made and emails were exchanged, about which the Tenant's affiants have given evidence regarding their understandings at the time. They thought that the Landlord had agreed that there would be a Rent abatement if the changes in Applicable Laws affected the Tenant's business in such a way as to warrant it. While the Landlord has not always supported this interpretation of s. 18.07 and does not agree that this Lease provision requires a full Rent abatement, by the time of the hearing it had accepted that a reasonable application of this Lease provision in the circumstances of this case could entail a partial Rent abatement.

[52] There is a longstanding, traditional rule that evidence of contract negotiations is inadmissible when interpreting a contract: see *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, at para. 100, Côté and Brown JJ. (dissenting). The Tenant challenges this, pointing to the dissenting judges' observation that this rule "sits uneasily" next to the approach from *Sattva* that directs courts to consider the surrounding circumstances in interpreting a contract. The Tenant urges the court to adopt a more liberal interpretation of these rules of evidence about subjective intent and parol evidence since the Supreme Court of Canada stated in *Sattva* (at para. 47): "…the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine 'the intent of the parties and the scope of their understanding'."

[53] Even accounting for subsequent cases that have found that this passage of *Sattva* may open the door to consideration of parol evidence to inform how the contract would have been understood by a reasonable person at the time it was signed (see, for example: *Corner Brook (City) v. Bailey*,

2021 SCC 29, 17 B.L.R. (6th) 1, at paras. 56–57; and *Huber Estate v. Murphy*, 2022 BCCA 353, 46 R.P.R. (6th) 175, at paras. 33–36[7]), in this case the evidence that the Tenant has tendered about the pre-contractual negotiations primarily relates to the understood objectives and principles of implementation of s. 18.07 of the Lease that the parties now agree upon for the most part.

[54] Insofar as the Tenant has tendered evidence that goes beyond the acknowledged commercial purpose and genesis of s. 18.07 of the Lease, I do not find this evidence of the subjective understandings and intentions of the Tenant's representatives to be particularly helpful, either generally or specifically. Generally, because one party's subjective understandings and intentions do not assist the ultimate goal of ascertaining the objective commercial purpose and intent. Specifically, as discussed in more detail below, some of the Tenant's evidence does not actually support the outcome that the Tenant urges upon the court, and is, in some respects, inconsistent with other express provisions of the Lease.

[55] For example, evidence that purports to show the Tenant's desire and intention for there to be a provision in the Lease (specifically, s. 18.07) that correlated the minimum Base Rent with its actual sales (such that it would be guaranteed to have sufficient revenues to pay minimum Base Rent due under the Lease in the event of a change in Applicable Laws that adversely affected its business) does not assist the court. The court must give commercial meaning and effect to the entire Lease that includes express and unambiguous provisions of the Lease requiring the payment of a specified amount of minimum Base Rent that, unlike Percentage Rent, was not tied to any particular revenues or sales levels.

[56] Further, the suggestion that there was an understanding that this desire or intention that the minimum Base Rent be tied to actual sales was intentionally not expressly included in the Lease so as to maximize the prospects of recovery under business interruption insurance runs up against the entire agreement clause contained in s. 2.04 of the Lease. As well, the Tenant's desire that there would, in such circumstances, be an abatement rather than a deferral of Rent is in conflict with s. 4.05(a) that states that there will be no Rent abatements except as expressly provided for in this Lease.

[57] The Tenant's evidence that the amount of Rent it offered to pay in the RFP was largely based on traffic and revenue expectations as attached at Schedule D to the Lease is a one-sided view of how the Base Rent was arrived at. The Tenant seeks to introduce evidence about its own rationale for offering, in its response to the RFP, to pay $4 million per year in minimum Base Rent. This amount is said to be tied to its projections that the annual sales would exceed $20 million every year based on historic sales performance (under its own preceding lease of the Leased Premises). Specifically, the Tenant states that the rent provisions of the Lease were based on historic traffic and sales as well

[7]In both of these cases the question of whether pre-contractual negotiations are admissible was not decided because the evidence about those negotiations was not considered to be material to the outcome. The situation is the same in this case. The open question about whether *Sattva* has diluted or done away with the parol evidence rule remains to be considered in a case where it might make a difference to the outcome whether the evidence of contractual negotiations is admitted or not.

as sales projections premised on the free flow of traffic over the bridge and the existing Applicable Laws.

[58] While the Landlord was also aware of the historic sales performance and could mathematically calculate that the minimum Base Rent that the Tenant offered to pay of $4 million is 20% of $20 million, the Tenant acknowledges that this calculation and the assumptions that it made in arriving at its proposal for minimum Base Rent were not specifically discussed with the Landlord. Nor was this calculation or the premise that it was predicated on achieving a specific level of annual gross sales specified in the Lease. Yet, it is on the strength of this evidence that the Tenant argues that it should pay no Base Rent during the Closure Period because the $4 million in minimum Base Rent that it offered to pay was, from the Tenant's perspective, supposed to reflect 20% of its anticipated minimum gross sales, and during the Closure Period, it had no sales (20% of zero is zero).

[59] This is pure evidence of the Tenant's subjective intention and understanding, which it admits was not directly shared with or communicated to the Landlord. All of the authorities cited by both sides consistently reinforce the basic tenet of contract interpretation that: the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. There is good reason for this. When a dispute arises the parties inevitably will have differing accounts of this and will have been motivated by different goals and objectives. The court's role once the dispute has arisen is to determine it objectively and reasonably, not what was subjectively understood or intended.

[60] The Landlord objects to the admissibility of the evidence of the Tenant's subjective understandings and intentions as improper parol evidence (offside of the entire agreement clause in s. 2.05 of the Lease and also the authorities that have shaped the factual matrix to be an entirely objective interpretive tool). I agree that this evidence is problematic and, even if admitted, it should be given little or no weight.

[61] Some of the Landlord's other evidentiary objections are to statements of inadmissible hearsay evidence on points of contention and statements of opinion about industry matters that the Tenant's witnesses were not properly qualified as experts to testify about. This too is problematic from an evidentiary perspective and should be given little or no weight.

[62] The Landlord did not bring a formal motion to strike the paragraphs of the Tenant's affidavits that it objects to. While no specific paragraphs of the Tenant's affidavits that were objected to have been struck out, little or no weight has been given to that evidence in this decision, for the reasons stated above.

[63] However, these evidentiary rulings are largely immaterial to the outcome of this case because the Landlord now acknowledges much of what the Tenant seeks to rely upon this evidence for in terms of interpreting and giving meaning and effect of s. 18.07 of the Lease. Considering the evidence as a whole, the parties essentially agree that:

a. In the event of a change in Applicable Laws that materially and adversely impacted the Tenant's business (e.g., sales), the parties would act reasonably and in good faith to make appropriate changes to the Lease, which may include changes to Base Rent.

b. Section 18.07 would be applied to address the Tenant's concerns about the impact on its sales and to adjust the Lease, including by reducing the Base Rent payable in appropriate circumstances in a fair and equitable manner.

[64] The parties disagree about how those principles should be applied to the circumstances of this case. What the Tenant can and should be required to pay in Base Rent for the Closure Period (and over what period of time should those amounts be paid and on what terms) is at the core of this Lease dispute. Fundamentally, the Landlord and Tenant disagree about whether what the Tenant can afford to pay is determinative of what is reasonable, and, even if it is, they disagree about how to determine what the Tenant can afford and whether the concept of affordability requires that the Tenant be profitable. The evidence that the Landlord objected to does not assist in the determination of these questions, which I will now address within the broader framework of the issues as the parties have framed them.

The Issues

[65] Since the parties agree that s. 18.07 of the Lease:

a. was engaged as a result of the Border Restrictions and the resulting adverse effects on the Tenant's business; and

b. gives rise to a substantive right/obligation to make adjustments to the Rent payable by the Tenant in the circumstances of this case, taking into consideration the extent of the Adverse Effect on the Tenant's business,

the court need not decide these, which are the first two of four issues that the Tenant has identified.

[66] The following issues remain to be determined, having regard to the positions of the parties[8]:

1. What was the impact to the Lease of the Border Restrictions and resulting adverse effects on the Tenant's business, and does that affect the Base Rent payable by the Tenant as a result?

2. Did the Landlord breach s. 18.07 of the Lease?

3. Did the Landlord fail in its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered?

    i. Was the Landlord working with the Tenant to try to preserve the Tenancy or with the ulterior motive of terminating the Lease?

[8] The first and last of which the Tenant has identified and the others arise from the Landlord's position in response.

ii. Were the Landlord's demands, proposals and other dealings with the Tenant unreasonable?

4. What remedy is available to the Tenant?

   a. If the Landlord breached its duty of good faith and/or s. 18.07 of the Lease, is the Tenant's only recourse to claim damages and/or seek relief from forfeiture?

   b. Is it open to the court to determine what, if any, Base Rent is owing for the Closure Period and the terms on which it should be paid[9], and if so, what is the appropriate amount for the Tenant to pay before the Ramp Up Period and on what terms?

      i. If the Landlord has breached its duty of good faith and/or s. 18.07 of the Lease;

      ii. If the Landlord has not breached its duty of good faith and/or s. 18.07 of the Lease.

Issue #1: What was the Impact on the Lease of the Border Restrictions and Resulting Adverse Effects on the Tenant's Business and Does that Affect the Base Rent Payable?

[67] According to the Tenant, the adverse effects of the Border Restrictions should inform the Rent accommodations to be afforded to the Tenant under s. 18.07 of the Lease.

[68] The Landlord does not agree that the Tenant had to close its duty free store when the Border Restrictions came into effect, but it does not contest that it was reasonable for the Tenant to have done so. As a result, the Tenant had no sales and no revenue from its business operations at the Leased Premises for virtually the entire Closure Period (the duty free store did re-open in September 2021 when the Canadian government lifted its travel restrictions but travel remained restricted for duty free customers going from Canada to the U.S. until the end of the Closure Period on November 8, 2021).

[69] The Tenant's internal forecasts at the time of the RFP had projected sales well in excess of $20 million annually for the duration of the Lease. Its actual annual sales from 2016-2019 did not achieve its targets but, when averaged over the three Lease years immediately preceding the COVID-19 pandemic, the total sales for 2017-2019 were in excess of $60 million (so an average of more than $20 million per year). In contrast, the Tenant's annual sales were nil from April 2020 until August 2021 (such that the annual sales in the 2020 and 2021 Lease years, limited to the preceding and

[9] If it is open to the court to determine what Base Rent the Tenant should be paying as a result of the Border Restrictions and adverse effects, there is no need to decide what Base Rent the Tenant should pay during the Ramp Up Period, after the Tenant's duty free store re-opened in the fall of 2021, because the parties have agreed on what that should be.

subsequent months, were comparably much lower). Its annual sales in 2022 were approximately $10.82 million.

[70] Upon re-opening the duty free store, it has taken some time for the bridge traffic and duty free sales to ramp up. Since September 2021, the Tenant's sales have steadily increased but have still not returned to the pre-pandemic levels. The Tenant's projections given to the Landlord in March and August 2021 forecast that its annual sales would not reach $20 million until the 2029 Lease year, although it was projecting positive cash flows starting in 2023.

[71] The Tenant contends that, if subsection 18.07 of the Lease is triggered, in the appropriate circumstances: (1) Base Rent would be reduced during the time the business was affected; (2) minimum Base Rent should be reduced to a level that it could afford to pay, taking into consideration the impact of changes of sales, *such that the Tenant would not be asked to operate at a loss due to the level of Base Rent being charged during the time its business was affected; (3) the reduced Base Rent would be abated, not deferred*. The italicized contentions are what the Landlord disagrees with.

[72] Having regard to the provisions of the Lease as a whole, it is not a commercially reasonable interpretation of the Lease to say that when there are no sales there will necessarily be no Base Rent payable and that it will be entirely abated rather than deferred. That interpretation is directly in conflict with both the entire agreement clause (s. 2.04) and the no abatement clause (s. 4.05(a)). I do not consider the interpretation that the Tenant propounds to reflect how the Lease would have been understood by a reasonable person at the time it was signed and, for the reasons outlined earlier, the Tenant's evidence regarding its own subjective understandings and intentions in this regard cannot be given any weight in support of this contention.

[73] Even if the Tenant's evidence of subjective intent and understanding in the course of the negotiations leading up to the signing of the Lease were to be admitted and considered, it does not lead to the inevitable outcome that the Tenant propounds, which would be an assurance that the Tenant would never have to operate at a loss and/or that requires a complete abatement of all Base Rent for the entire Closure Period.

[74] When the provisions of the Lease are read together and harmoniously, a commercially reasonable interpretation of the Lease must respect the clearly intended distinction between Base Rent and Percentage Rent. The Lease provisions could have been drafted to reflect an agreement that Base Rent was 20% of annual gross sales as long as they were at or close to $20 million; that is not what the Lease provides for. It provides (at s. 4.03) that a minimum Base Rent of $4 million per year is payable and that Percentage Rent is only payable if, upon the application of the agreed upon percentage to the Tenant's Annual Gross Sales in a given year, it exceeds the Base Rent Minimum of $4 million in a given year.

[75] It is mathematically correct that Percentage Rent is thus only payable if gross sales exceed $20 million in a given year, but the Lease does not provide for the converse, that the minimum Base Rent is not payable if gross sales are less than $20 million in a given year. In fact, in 2018 and 2019 the Tenant's gross sales were less than $20 million and it made no request to reduce the amount of Base Rent payable in those years. As the Tenant acknowledges, the conduct of the parties in the performance of the Lease can be considered in the court's interpretation of the Lease if the court considers there to be any ambiguity about whether the text and factual matrix of the Lease required

that Base Rent be considered to be a percentage of assumed annual gross sales of a minimum of $20 million. See *Weyerhaeuser*, at para. 116. In this case, if there was an ambiguity, that evidence would militate further against the Tenant's interpretation.

[76] Nor is it a commercially reasonable interpretation of the Lease to say that when there are no sales due to an unexpected change Base Rent will necessarily be abated rather than deferred, given that there are other provisions of the Lease that contemplate circumstances in which the Tenant might have little or no sales. Section 18.08 (Unavoidable Delay in the performance of the Tenant's obligations under this Lease) expressly states that an unavoidable delay does "not operate to excuse the Tenant from the prompt payment of Rent and any other payments required by this Lease", and there is an independent provision of the Lease that states that rent will never be abated except in circumstances where the Lease expressly provides for an abatement (at s. 4.05).

[77] The Tenant's contentions (to the effect that s. 18.07 of the Lease must be interpreted and applied so as to render all Base Rent abated during the Closure Period) are not accepted by the court. Accordingly, the court must go on to consider the allegations that the Landlord breached its duty of good faith and/or breached its obligations under s. 18.07 of the Lease in the manner in which it conducted itself after the Border Restrictions came into effect.

Issue #2: Did the Landlord breach s. 18.07 of the Lease?

[78] There is no dispute that the Landlord engaged in discussions with the Tenant about the adverse effects that the Border Restrictions had on the Tenant's business operations and offered some accommodations to the Tenant as a result. On a strict reading of s. 18.07 that is all that this provision of the Lease expressly requires the Landlord to do, although it did more.

[79] The Tenant contends that when s. 18.07 is triggered, as it was when the Border Restrictions came into effect, there is a positive obligation on the Landlord to make applicable changes to the rent payable to give effect to the impact to the Lease. The Tenant further contends that s. 18.07 of the Lease must require more than idle discussion, which is to give effect to the intention of the parties that there be an actual change to the Lease terms when the circumstances dictate.

[80] The Landlord acknowledges that it had an obligation under s. 18.07 of the Lease to provide reasonable rent relief in the circumstances, and that its compliance with its obligations under 18.07 of the Lease depends on whether its actions to give effect to that provision were reasonable and undertaken in good faith.

[81] The Tenant points to the following further acknowledgments by the Landlord that:

a. its conduct in making various rent relief offers was in furtherance of s. 18.07 of the Lease.

b. there was an impact to the Lease, and that a significant rent abatement was appropriate, not only for past rent, but future rent moving forward.

c. the magnitude of the adverse impact on the business would influence what level of consideration would be given to the Tenant in response to changes in regulations.

[82] Initially, the agreed upon accommodations were embodied in the First Deferral Agreement. Even though the Second Deferral Agreement was never signed by the Landlord, it did not take any enforcement action while the Tenant performed its obligations under the terms of that agreement. Further, even after the second Deferral Period ended the Landlord did not take any immediate enforcement action. Offers were exchanged back and forth and the *status quo* persisted for over a year.

[83] The Landlord did not give formal notice of its intention to take any enforcement steps until September 2021. By then, its recourse was restricted by the Province-wide moratorium on any eviction or termination of a commercial tenancy such as this. After the moratorium was lifted, the Landlord eventually came to court to seek a lifting of the stay of proceedings imposed in the Receivership Application so that it could then take enforcement action, but that was not until late 2022 and into early 2023, after the Tenant's store had re-opened and the parties had still been unable to reach an agreement about what the accommodations to the Tenant should be.

[84] As previously described, the recognized purpose of s. 18.07 of the Lease is to to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent. The Landlord was engaging with the Tenant in negotiations about the past and future Rent to be paid under the Lease in light of the Border Restrictions. During the periods of negotiation both before and after the duty-free store re-opened the Landlord was engaged with the Tenant in discussions and negotiations. The parties' positions evolved over time, as did their appreciation and understanding of the implications and effects of the COVID-19 pandemic.

[85] As I have found in the previous section of these reasons, s. 18.07 did not require a complete rent abatement of all Base Rent during the Closure Period as the Tenant contends. Nor does preserving the Tenancy necessarily mean that the Tenant was entitled to maintain some minimum guaranteed level of profitability (e.g. only required to pay percentage rent). The Tenant's insistence upon a complete abatement of Base Rent during the Closure Period and continued requests to eliminate the minimum Base Rent from its Lease created a significant obstacle to reaching an agreement. These were not terms that were required to preserve the tenancy.

[86] Conversely, the Landlord points to the Tenant's own sales projections provided during the course of their negotiations in defence of its demands for the payment of some Deferred Rent during the Closure Period. These projections are said to allow for the possibility of financing these payments in the short term against the Tenant's own future projected profitability. The Landlord's offers allowed for this to be achieved through external financing sources or equity infusions or, if the Landlord was going to have to effectively finance these payments by allowing them to be paid over time, then the Landlord required that its financing be supported by the security of personal guarantees. While these terms were not desirable to the Tenant, I do not find them to be objectively commercially unreasonable. The tenancy was not being terminated; it was just going to be less profitable over the life of the Lease. This reflects the harsh reality of the impacts of the COVID-19 pandemic that affected the economics of the Lease for both parties.

[87] The fact that the parties were not able to reach an agreement does not mean that the Landlord breached s. 18.07 of the Lease. Put another way, the Tenant has not established that the Landlord breached s. 18.07 of the Lease in the circumstances of this case where the Landlord did engage in discussions and negotiations with the Tenant with a view to reaching an agreement to amend, or

provide temporary relief from, some of the Lease terms to account for the adverse effects that the Border Restrictions had on the Tenant's business. Section 18.07 does not prescribe a formula for a Rent adjustment and does not provide a metric (e.g. sales or revenues) from which it is to be determined. It simply requires the Landlord to act in good faith and reasonably in its consultation and negotiations with the Tenant regarding Rent relief, having regard to the adverse effects on the Tenant's business, which it did do.

Issue #3: Did the Landlord fail in its duty to act in good faith in its dealings with the Tenant after s. 18.07 was triggered?

[88] This issue raises a number of sub-issues, namely:

a. What is the duty of good faith?

b. Was the Landlord working with the Tenant to try to preserve the Tenancy or with the ulterior motive of terminating the Lease?

c. Were the Landlord's demands, proposals and other dealings with the Tenant unreasonable?

[89] These will each be addressed in turn.

a. What is the Duty of Good Faith in Contract Performance and the Exercise of Contractual Discretion

[90] There is an organizing principle of good faith that recognizes a duty to perform a contract honestly. This duty means "that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". See *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 62–63.

[91] In addition to the common law, s. 2.15 of the Lease, requires any discretion or approval or consent powers to be reasonably exercised by the Landlord. There is also a duty to act in good faith under the BIA when dealing with a debtor (such as the Tenant) that would have been triggered once the receivership application had been initiated in December 2021.

[92] The Supreme Court of Canada held in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1 that:

> [4] The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion. This will be made out, for example, where the exercise of discretion is arbitrary or capricious, as Cromwell J. suggested in *Bhasin* in his formulation of the organizing principle of good faith performance. According to Bhasin, this duty is derived from the same requirement of corrective justice as the duty of honest performance, which requirement demands that parties exercise or perform their rights and obligations under the contract having appropriate regard for the legitimate contractual

> interests of the contracting partner. Like the duty of honest performance observed in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, the duty recognized here is one that applies in a manner Cromwell J. referred to as doctrine in *Bhasin*, i.e., the duty applies regardless of the intentions of the parties (*Bhasin*, at para. 74).
>
> …
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> [77] I add, however, the following comment as a general guide. For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement - e.g., matters relating to "operative fitness, structural completion, mechanical utility or marketability" - the range of reasonable outcomes will be relatively smaller (Greenberg, at p. 762). For contracts that grant discretionary power "in which the matter to be decided or approved is not readily susceptible [to] objective measurement - [including] matters involving taste, sensibility, personal compatibility or judgment of the party" exercising the discretionary power - the range of reasonable outcomes will be relatively larger (Greenberg, at p. 761). I emphasize, however, that this comment should operate as a general guide, not a means to categorize unreasonableness.

b. The Landlord's Motives and the Purposes of s. 18.07

[93] The Tenant alleges that the Landlord held the ulterior motive of seeking to terminate the Lease while it engaged in the discussions and negotiations with the Tenant from and after March 21, 2020. Having regard to the acknowledged purpose of s. 18.07 to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent, if the Landlord had this ulterior motive, it would not have been acting in good faith as it was required to do when it engaged in those discussions and negotiations. The Tenant also contends that the Landlord's proposals to the Tenant were not reasonable and were not made in good faith. This is disputed by the Landlord. The court must make a finding regarding the Landlord's alleged failure to act in good faith as it is a central consideration in the determination of this Cross-Motion.

[94] For this, the Tenant places reliance primarily upon the following conduct of the Landlord during the Closure Period:

a. The demands made by the Landlord of the Tenant throughout, but particularly during the Closure Period, that the Tenant could not reasonably be expected to meet in terms of the amounts or timing for payment, such as demanding payment of full Rent on April 1, 2020, threatening default proceedings on May 6, 2020, threatening to issue a formal notice of default of November 13, 2020, demanding on December 9, 2020 that the Tenant pay $1 million in unpaid rent by December 31, 2020 and the remaining accrued and unpaid and future accrued rent by March 31, 2021 (later in December offering the option of a longer deferral and repayment terms), issuing notices of default on September 8, 2021 for both monetary and non-monetary defaults, and threatening to exercise default remedies under the Lease on November 21, 2021.

b. The November 20, 2020 resolution of the Board of Directors of the Authority approving the Second Deferral Agreement, which the Landlord then did not sign despite this approval, and instead used as leverage to try to extract an immediate payment from the Tenant in respect of the Deferred Rent, which demand the Board only later approved after it had already been made.

c. The removal from the December 17, 2020 Board minutes of any reference to the Board's resolution "THAT in the event of default by Peace Bridge Duty Free, and subject to legal review, staff be authorized to negotiate lease terms with the 2nd bidder in the June 2016 RFP process" out of concern that "should this end up in court the last paragraph appears pre-determinative and could be construed as the PBA having a plan to oust PBDF. What happens in the event of default can be determined by the Board at a later date." This is compounded by the Landlord's acknowledgement that it did later reach out to that second-place bidder sometime in August of 2021.

d. Applying the Tenant's security deposit to the outstanding Base Rent and demanding that it be replenished.

e. An internal email dated March 21, 2021 between the Landlord's CFO (Ms. Costa) and General Manager (Mr. Rienas) contemplating what the Landlord's options might be if the Tenant does not re-open the store and an agreement is not reached on Back Rent, including the possibility of eviction once the restrictions had been lifted, because of a concern that the Tenant was intending to engage in a long, drawn out re-negotiation of the Lease.

f. An internal email dated March 31, 2021 between Ms. Costa and Mr. Rienas speculating about the *Commercial Tenancies Act* eviction moratorium and the Landlord's course of action in light of it.

[95] The starting point for this analysis has to be a recognition that the Landlord is entitled to act in its own economic interests. After considering the trilogy of cases from the Supreme Court of Canada dealing with the organizing principle of good faith under Canadian common law (*Bhasin*, *Callow* and *Wastech*), the court in *2343680 Ontario Inc. v. Bazargan,* 2021 ONSC 6752 offered (at para. 28) the following observations:[10]

a. Canadian common law has a long history of respecting private ordering and the freedom of contracting parties to pursue their own self-interest. The principle of good faith must be applied in a manner consistent with this history. The pursuit of economic self-interest, often at the expense of others, is not necessarily contrary to the principle of good faith. (*Bhasin,* para. 70; *Wastech*, para. 73);

[10] This is a shorter list of selected extracts from the longer summary of dealings between the parties outlined at Appendix 1 to these reasons.

b. A duty of honest contractual performance does not impose obligations of loyalty or trust. It is not a fiduciary duty. It does not mean that parties cannot legitimately take advantage of bargains they have reached. But it does mean that parties must not lie or knowingly mislead each other (*Bhasin*, paras. 60 and 65);

c. Tethering the good faith analysis to a consideration of what was reasonable according to the parties' own bargain tends to prevent the analysis from "veering into a form of ad hoc judicial moralism or 'palm tree' justice." (*Wastech*, para. 74.); and

d. Honest performance requires that the exercise of contractual discretion he carried out in a manner consistent with the purposes for which it was granted. Said another way. that it be carried out reasonably. The assessment of reasonableness may be expressed in the following question: was the exercise of discretion unconnected to the purpose for which the contract granted discretion? If the answer is yes, then the exercise of discretion has not been carried out in good faith. (*Wastech*, para. 69).

[96] From the Landlord's perspective, important context for these actions can be found in the following extracts that illustrate that the Landlord was under economic pressures of its own as a result of the Border Restrictions:

a. From its June 20, 2020 letter to Canadian government officials, in which the Authority (as co-signatory) described the situation from its perspective since the border closure on March 21, 2023 as follows: "…car traffic has declined by 95% and truck traffic has declined by 22%. The Canadian Duty Free stores have been closed and the U.S. Duty Free stores are seeing only a small fraction of their normal business. Both federal governments have deemed our bridges an essential service to maintain critical bi-national supply chains. Accordingly, we are required to keep the border crossings operating while the revenues required to do so have been decimated."

b. From its internal March 21, 2021 email, in which Ms. Costa elaborated upon the financial concerns that the Landlord was facing:

> The longer the time goes on that they do not pay rent and refuse to open the store, I will have to book additional amounts as bad debt as their ability to pay and their desire to remain a going concern are in question as well as the fact that they are in default of the Lease and the rent deferral agreement. As it stands now, we do not have the commercial volume or cost cutting ability to make up the revenue shortfall (the amount I will need to reserve) when it comes to calculating the debt service coverage ratio. If the DSCR it is not met by the time we prepare the budget, we will have to institute another toll increase to make up for the shortfall in revenue in this next budget cycle which may have adverse impacts on traffic volumes.

[97] The Tenant says that the Landlord's demands were unreasonable and intended to force the Tenant out by making it impossible for the Tenant to meet them. However, even if the Landlord's demands were aggressive and its representatives were playing hardball with the Tenant at times, its

demands were grounded in the Lease terms that the Tenant had not only agreed to, but proposed, terms the Tenant is now seeking to renegotiate (e.g. to not pay any minimum Base Rent).

[98] The Tenant complains that the Landlord offered more favourable terms to the US duty free tenant at the Peace Bridge, but ignores that the lease terms for that tenancy were very different. The starting point for the consultations and negotiations has to be the specific provisions of the contract at issue, not how some other party was treated under some other contract.

[99] The Tenant points to its expert (Ms. Hutcheson of the J.C. Williams Group) who proffers the opinion that the Net Economic Return ("NER") to the Landlord would be far better under the current Lease terms with the Tenant than the NER that the Landlord could expect after running a new RFP and seeking out a new Tenant in the aftermath of the COVID-19 pandemic (comparing for the lease years of 2024-2031). From this, the Tenant asks the court to infer that the Landlord was not acting in its own economic interests when it made demands that it knew the Tenant could not meet during the Closure Period with the (alleged) agenda of "ousting" the Tenant.

[100] I find that the Landlord has provided a reasonable and credible explanation for its conduct that renders the expert analysis of little value or weight. The Landlord says it was not approaching the matter of an alternative tenant for the Leased Premises from a comparative perspective, but was instead looking at this from the perspective of damage control if the tenancy could not be preserved.

[101] The fact that its Board was concerned with the optics of how that contingency planning might look if recorded in their meeting minutes is not inconsistent with the Landlord's stated motive of damage control. Furthermore, there is no evidence to suggest that anything came of this overture to the prospective tenant who placed second in the RFP, which occurred a number of months after the December 2020 Board meeting. The Landlord says that it was protecting its position in the event that no satisfactory agreement could be reached with the Tenant and that it was considering how best to mitigate its losses in that event. The very fact that it continued to engage with the Tenant after this meeting, making proposals and counterproposals to the Tenant, is inconsistent with the Tenant's theory that the Landlord was not trying to preserve the Tenancy.

[102] On balance, I do not find that the expert evidence about the economics of an alternative tenancy supports the inference that the Landlord was acting out of malice or for an improper purpose (rather than for the legitimate purpose of protecting its own economic interests) where the consideration of the alternative tenancy was, as here, not to replace the Tenant that might otherwise continue, but rather to replace the Tenant that was unable to continue.

[103] The Landlord's recognition that there were a variety of potential outcomes and its exploration of a contingency plan, even one that could be less economically favourable to the Landlord, does not support an inference or finding that the Landlord was motivated in its dealings with the Tenant by a desire or intention to oust the Tenant. The Landlord denies that it has such motivation.

[104] Ms. Hutcheson also opines that:

a. PBDF is paying (as at June 2023) 3.7 times to 12.8 times the leasing rate for commercial retail units in Fort Erie.

b. PBDF appears to be paying the highest gross sales-to-rent ratio in the Canadian Duty Free sector, based on her discussions with Jim Pearce of PBDF and the absence of any statistical data to the contrary. According to Mr. Pearce, and based on the hearsay evidence of Mr. Pearce, Ms. Hutcheson suggests that the standard currently being achieved in Canada in the duty free sector for gross sales-to-rent ratios ranges from 10% to 16%.

c. Compared to the average gross sales-to-rent ratio in the Canadian retail sector which ranges from 6 to 10%, the Base Rent obligations of PBDF at 157.3% in 2020, 251.2% in 2021, and 36.96% in 2022 are 3.7 to 41.9 times higher.

[105] While this further evidence is not entirely directed to the implication of ulterior motives to the Landlord, I will take the opportunity here to also address the objection of the Landlord to the evidentiary foundation of this aspect of Ms. Hutcheson's opinion evidence. This evidence is predicated in part upon information from an internal witness of the Tenant (Mr. Pearce) about standard gross sales to rent ratios for duty free stores in Canada. However, Mr. Pearce is not an industry expert. Further, he originally provided direct evidence on other topics, but not about this.

[106] After the Tenant's expert's report was delivered, the Landlord was not afforded a reasonable opportunity to cross-examine Mr. Pearce, despite the court's direction that it be permitted to do so after the Cross-Motion was adjourned and the timetable was amended to allow for the late delivery of expert reports from the Tenant. Offering to produce Mr. Pearce to be cross-examined in writing (or in person less than a week before the motion) was not compliant with the court's September 6, 2023 scheduling endorsement, in which the cross-examination of Mr. Pearce was expressly contemplated and required to have been scheduled sufficiently in advance so as to ensure that the exchange of factums, including the reply factum, could be completed by October 27, 2023.

[107] The Landlord should not be faced with having to contend with this expert opinion when it was not afforded an appropriate opportunity to challenge its foundation, in circumstances where the independent expert, Ms. Hutcheson, admitted that she has no expertise in the duty free retail space. Without it, the opinion evidence of Ms. Hutcheson about the comparable rent ratios in the duty free sector is not supported and cannot be relied upon. Her evidence about comparable rent ratios outside of the duty free sector is of limited utility given the acknowledged market differences.

[108] In any event, what this expert is ultimately saying is that the Rent that the Tenant agreed to pay under the Lease is too high in the current market. I do not find this aspect of her opinion evidence to be helpful to the determination of the issues that I must decide. The Lease does not prescribe a "market rate" adjustment to the Rent payable.

c. *The Demands and Proposals*

[109] Beyond the allegation that the Landlord was acting with the ulterior motive of trying to oust the Tenant, the Tenant contends that the Landlord was not acting reasonably or in good faith in that it made unreasonable demands of, and proposals to, the Tenant during the Closure Period and beyond.

[110] This court has been struggling with what it means to negotiate in good faith since long before the recent Supreme Court of Canada pronouncements on this subject. Cumming J. considered this in *Canada Trustco Mortgage Co. v. 1098748 Ontario Ltd. (c.o.b. Canyyz Properties Ltd. Partnership)*

(1999), 23 R.P.R. (3d) 82 (Ont. Gen. Div.), at paras. 24–25. He held that, as a matter of contractual interpretation, the lease agreement in that case should be interpreted to contain an obligation to negotiate renewal terms in good faith, but the evidence there did not establish a breach of this obligation:

> The position at common law is that there may well be an implied term of a contract that the parties will act in good faith in the performance of their obligations. However, it is problematical as to whether there is any duty of good faith in the negotiation of a contract.
>
> The lease in question, however, contemplates a potential further agreement that is based in part on the previous and continuing contractual relationship of the parties. The inclusion of a term to negotiate following the exercise of the parties' option to renew must give rise to something. This approach is consistent with the values of commercial efficacy and certainty that I outlined above. It is appropriate to interpret the provision in question here as demonstrating the intention of the parties to preserve the goodwill of their former contractual relationship. A previous relationship and an agreement to negotiate on renewal terms and conditions may not allow the court to infer what those terms and conditions would be, but the context imparts a duty of the parties to negotiate in good faith for renewal terms and conditions following exercise of the renewal option. By "duty of good faith" I mean nothing more than a requirement that the parties not negotiate in bad faith.

[111] This is not conceptually that different from the assertion in this case by the Tenant that the Landlord was not acting reasonably or in good faith (which the Landlord acknowledges it was required to do under s. 18.07 of the Lease) because it made unrealistic and aggressive demands for the payment of Base Rent during the Closure Period and threatened to exercise its enforcement remedies. These demands and threats are summarized in more detail in Appendix 1 to these reasons and variously, above.

[112] After making an initial demand for unpaid Base Rent payable on April 1, 2020, the Landlord offered to defer (not abate) Base Rent under the First Deferral Agreement. A similar offer was made in the Second Deferral Agreement. The Landlord's explanation for why this Second Deferral Agreement was drafted and proposed but ultimately never signed by the Landlord does appear to be consistent with the Tenant's theory that the Landlord was trying to extract something more from the Tenant despite having its Board's approval to sign the Second Deferral Agreement.

[113] As noted earlier in these reasons, this could be described as an aggressive negotiating tactic. This followed some earlier unrealistic demands for immediate payment of Deferred Rent accruing during the Closure Period, in amounts that the Landlord knew the Tenant did not itself have the resources to fund and would have to seek outside financing or investment to meet. However, one cannot lose sight of the fact that, while these demands by the Landlord may have been aggressive and unrealistic, the Landlord was still demanding less of the Tenant than its full performance under the Lease.

[114] Ultimately and despite not having signed it, the Landlord allowed the Tenant to operate for a long time under the terms of the Second Deferral Agreement, well past the expiry of the agreed upon Deferral Period (the latest of which was to March 31, 2021), which afforded the Tenant relief from the strict terms of the Lease (for example, deferring the minimum Base Rent and relieving it of the requirement under s. 9.02 to continue to operate from the Leased Premises after the Tenant closed the duty free store).

[115] The Tenant's first proposal made in January 2021 sought to amend the Lease permanently to eliminate all Base Rent, for the past and the future. This included an abatement of the Deferred Rent that it had agreed to pay under the two Deferral Agreements it had signed. The Landlord immediately advised the Tenant that these terms were not acceptable. The Tenant did not deliver its promised formal proposal until August 21, 2021 (despite having promised to deliver it in June). This proposal contained the same proposed amendments to the Lease that the Landlord had rejected in January 2021.

[116] This was not well received by the Landlord and precipitated the Landlord's September 8, 2021 Notices of Default, the Tenant's Forbearance Agreement with RBC that required it to reach a resolution with the Landlord to preserve the Lease by November 15, 2021, and the Tenant's October 15, 2021 proposal in which it offered to pay some of the Deferred Rent from the Closure Period and a payment schedule for increasing Base Rent over the Ramp Up Period now that the duty free store had re-opened. As part of this proposal, some permanent amendments to the Lease were also requested by the Tenant, most significantly, a five year extension. Negotiations continued, but because no agreement was reached, the RBC sought the Appointment Order.

[117] The next proposal from the Tenant was not made until March 2023 and it reverted to the position of no Base Rent being paid during the Closure Period and sought amendments to the Lease provisions for future Base Rent. This led to a further round of negotiations and eventually to an agreement in principle for Rent payable during the Ramp Up Period, but no final agreement on the past unpaid Base Rent (up until November 2021, including during the Closure Period). The Tenant's last on the record proposal made in August 2023 included a request for two five-year Lease extension options.

[118] Over the course of the more than three years of negotiations, the Landlord's demands were moderated over time. The Landlord eventually offered to split the burden of the Base Rent payable during the Closure Period 50/50 with the Tenant. The Tenant says this is not a real accommodation because that amount ($2.7 million) represents more Base Rent to be paid to the Landlord during the Closure Period than what the Tenant has already negotiated to pay for an equivalent time during the first part of the Ramp Up Period after the duty free store re-opened. The Landlord says the Rent abatement and deferral that is reflected in the Ramp Up Period was part of an overall deal that, from its perspective, had to include some payment of Deferred Rent from the Closure Period, even though the store was closed and there were no revenues.

[119] I agree with the Landlord that the agreement regarding the Rent to be paid in the Ramp Up Period was part of a package. Thus, disconnecting them and comparing the two periods is not particularly helpful, especially when the negotiations were being undertaken against the backdrop of a reservation of strict legal rights on both sides.

[120] Despite its threats of remedial action, the first formal notice of the Landlord's intention to take enforcement steps was not provided to the Tenant until September 8, 2021. Further, even after giving formal notice of its intention to exercise of enforcement remedies eighteen months into the negotiations with no agreement in sight (in the fall of 2021), the Landlord continued to engage with the Tenant in negotiations that allowed for the partial abatement of Deferred Rent. The Landlord made offers and attempted to elicit offers from the Tenant and was engaged in discussions with the Tenant. The Landlord's offers included compromises that recognized the implications of the Border Restrictions on the Tenant's ability to generate sales revenue.

[121] The Landlord effectively did allow the Tenant to pay what it could (the subsidy money it received of $544,000 plus HST which was for CRA purposes calculated based upon the full Base Rent Payable) while reserving its rights. In the meantime, while the Base Rent payments were under negotiation the Landlord effectively agreed to amendments or waivers of ss. 9.02 (continuous operations) and 4.05 (no abatement) to accommodate the Tenant's situation as a result of the Border Restrictions.

[122] During the Closure Period, while the Landlord's on the record positions were aggressive and at times unrealistic in terms of the demanded amounts and time allowed for payment, the Landlord's accommodations offered to the Tenant in respect of the Closure Period were within the range of possible accommodations for the parties to consider. The Landlord was entitled to negotiate from the starting position that the Tenant should make some arrangements to pay the Deferred Rent, which the Tenant had agreed to pay under the Deferral Agreements (and then did not pay).

[123] Likewise, while the Tenant's demands for full abatement of Base Rent during the Closure Period and for more permanent amendments to the Lease (including the removal of Base Rent altogether and to only pay percentage rent after re-opening, while also asking for options to extend the Lease term) go beyond what the court considers to be reasonable for the preservation of the Lease as a result of the Border Restrictions, they too were within the range of possible accommodations for the parties to consider.

[124] As was noted by the Court in *Wastech* (at para. 77), some types of contractual discretion (e.g. those relating to "taste, sensibility, personal compatibility or judgment of the party") will be less susceptible to objective measurement than others (e.g. those relating to "operative fitness, structural completion, mechanical utility or marketability"). There will be a relatively larger range of reasonable outcomes as a result of exercising the former types of discretionary power.

[125] No one could appreciate the full implications and effect of the COVID-19 pandemic while it was unfolding, especially in the early weeks and months. The pandemic was unprecedented and early on no one predicted that it, or that the Border Restrictions, would last as long as they did. Hindsight should not be used to assess at too granular a level the reasonableness of positions and offers as they evolved during these unprecedented times. The Tenant's positions at one extreme and the Landlord's positions at the other extreme of the range of possibilities made the prospect of a successful deal coming out of the parties' s. 18.07 discussions more challenging but not impossible. It is not uncommon in commercial negotiations for parties to take extreme positions while attempting to negotiate a compromise.

[126] As I have previously found, the preservation of the tenancy did not necessarily require the abatement of all Base Rent during the Closure Period or a guarantee that the Tenant will be profitable in every Lease year. Cash flow is important but can be supplemented from a variety of sources. Profitability over the life of the Lease might be a relevant consideration in assessing the impacts of the Border Restrictions and appropriate Rent accommodations, but I do not find it to have been unreasonable for the Landlord to insist upon the payment of some discounted Base Rent amounts that had been deferred during the Closure Period that still allowed for a return to profitability for the Tenant over time.

[127] The Landlord says that it did take into consideration the Tenant's own revenue forecasts for the duration of the Lease term in the proposals it made, that would have enabled the Tenant to operate at a loss to pay some of the Deferred Rent accruing during the Closure Period over some of the Ramp Up Period and eventually still become profitable within the Lease term. The Landlord estimates the total value of what it offered to the Tenant is the equivalent of an abatement of two years' Rent under the Lease, in addition to the additional time to pay.

[128] Having considered the totality of the evidence regarding accommodations to be afforded to the Tenant in light of adverse effects that the Border Restrictions had on the Tenant's business, the Tenant has not met its burden to demonstrate, on a balance of probabilities, that the Landlord was not acting in good faith with a view to trying to preserve the tenancy in the course of the consultations and negotiations with the Tenant either during or after the Closure Period.

Issue #4: What remedy is available to the Tenant?

a) No Breach, No Remedy for Breach

[129] Since I have not found that the Landlord breached its duty of good faith or s. 18.07 of the Lease, there is no need to decide what the remedy would have been if the court had found otherwise. However, I will briefly address the arguments and how the court would have approached the remedial aspects of the breaches alleged.

[130] The Landlord argues that the only remedies available to the Tenant would be damages or a direction from the court to continue negotiating towards an agreement.

[131] The Tenant contends that the Landlord's approach would result in s. 18.07 of the Lease being read in a way that renders it meaningless, resulting in a commercially absurd result having regard to the objective of preserving the tenancy, because: the Tenant must either agree to the Landlord's last and best offer (even if not reasonable and not made in good faith) or be stuck in a perpetual state of negotiation if it wants to preserve the tenancy, but face the risk default in the meantime if it is unable to pay the Rent demanded by the Landlord in accordance with the terms of the Lease in the absence of any new agreement (or let the damages accrue if it can afford to wait out the negotiations).

[132] The Tenant points to the adage that a commercial contract must be interpreted as a whole document "in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective" (*2651171 Ontario Inc. v. Brey*, 2022 ONCA 148, 468 D.L.R. (4th) 545, at para. 16). It should also be interpreted in a manner that is commercially reasonable and avoids commercial absurdity (*Harvey Kalles Realty Inc. v. BSAR (Eglinton) LP*, 2021

ONCA 426, at para. 6; *Weyerhaeuser*, at para. 65). These principles are sound. They can be reconciled by stepping back and looking at the broader context.

[133] The duty to negotiate honestly and exercise contractual discretion in good faith has been held to serve legitimate commercial purposes, even if it does not lead to an agreement. Wilton-Siegel J. observed in *Molson Canada 2005 v. Miller Brewing Company.*, 2013 ONSC 2758, 116 O.R. (3d) 108, at para.101 that:

> There may well be circumstances where injunction or other equitable relief is an appropriate remedy, for example, where the purpose of such covenant [to negotiate in good faith] is to provide a period of time in which to allow one party to try to convince the other party to enter into the contemplated agreement. Further, there may be circumstances where out-of-pocket expenses, or similar costs, are an appropriate remedy, even if the court can neither write an agreement for the parties or award damages for the loss of the economic benefits that would have been received if the parties had reached an agreement."

[134] The Landlord postulates that the law has changed since this decision and that the court would in this case also have the ability to award damages for breach of s. 18.07 of the Lease (if proven), which would be another way to avoid the commercially absurd result that the Tenant is concerned about. The damages may be for the loss of the tenancy and the benefit of the Lease (e.g. if the Landlord seeks to re-possess the premises and/or terminate the Lease for the Tenant's failure to pay the prescribed Rent under the Lease and the Tenant is unable to obtain relief from forfeiture) or the damages may be for the difference between a reasonable amount of Rent for the Tenant to have paid and to continue to pay to preserve the tenancy, and what the Tenant otherwise pays under the terms of the Lease until the damages can be determined.

[135] I agree with the Landlord that this would have entailed a second phase to determine the damages, with the benefit of properly admissible expert evidence from both sides.[11] There is no need for that second phase in light of the court's finding that the Landlord is not in breach of s. 18.07 and did not breach its duty of good faith.

[11] The Tenant's Cross-Motion sought damages for different alleged breaches (not the breach of s. 18.07) which were deferred.

b) *Is it open to the court to determine what, if any, Base Rent is owing for the Closure Period and the terms on which it should be paid, and if so, what is the appropriate amount for the Tenant to pay and on what terms?*

i. *If the Landlord has breached its duty of good faith and/or s. 18.07 of the Lease;*

ii. *If the Landlord has not breached its duty of good faith and/or s. 18.07 of the Lease. [e.g. to order its implementation?]*

[136] Having found no breaches by the Landlord of s. 18.07 of the Lease or its duties of honest performance and to exercise contractual discretion in good faith, the remaining question is whether the court can nonetheless determine and impose adjusted Rent for the Closure Period.[12]

[137] The Landlord's position is that the court cannot, regardless of whether there is a finding of breach or not, determine the Base Rent to be paid during the Closure Period and effectively amend the Lease to impose new terms on the parties in the absence of any objective benchmarks or parameters upon which those new terms can be determined.

[138] The Tenant's position is that the court can in either scenario, and must do so and make an order declaring the amount of Rent to be paid by the Tenant during the Closure Period so as to give effect to s. 18.07 as a matter of its implementation, even if there has been no breach.

[139] The Tenant argues that because of the inherent uncertainty of unanticipated extraordinary events, the parties left the details regarding the adjustments to the Rent provisions under the Lease to be made as circumstances required over the life of the Lease as a matter of practical necessity. Section 18.07 of the Lease could not prescribe a specific formula or method for calculating the Rent adjustments because it was not possible to predict at the time the Lease was signed what the changes to Applicable Laws might be and what their impact on the Tenant's business operations might be.

[140] Now that the impacts are known, the Tenant asks that the court determine those adjustments to fill in the gaps that the parties were unable to agree to and implement s. 18.07 of the Lease. The Tenant says that to implement and give effect to s. 18.07 of the Lease, the court can determine the reasonable and appropriate adjustment to the Rent in a fair and equitable manner that is proportionate to the magnitude of the effect on the business and having regard to what the Tenant can afford to pay based on its sales.

[141] The Tenant relies as authority for this upon *Winsco Manufacturing Ltd. v. Raymond Distributing Co. Ltd.*, [1957] O.R. 565 (Sup. Ct.), in which the court stated in the context of pricing

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[12] As noted earlier, if it is open to the court to determine what Base Rent the Tenant should be paying as a result of the Border Restrictions and adverse effects, then it does not need to decide what Base Rent the Tenant should pay during the Ramp Up Period, after the Tenant's duty free store re-opened in the fall of 2021, because the parties have agreed on what that should be.

in an exclusive supply agreement, "The parties did not intend further negotiations as to terms before it was to come into effect, but rather that it was to become a complete obligation *eo instanti*, leaving certain details, as a matter of practical necessity, for adjustment as circumstances required during the lifetime of the contract" (at para. 34 in the online version). I do not find this case to be particularly helpful or analogous as it arose in a different context, and s. 18.07 of the Lease clearly did intend for further discussions and negotiations by its express terms.

[142] However, as was observed in *Wastech* (at para. 77), and in other cases, there may be existing objective parameters within which determinations of what is reasonable and appropriate in the circumstances can be made by the court. The Landlord concedes that the court can intervene to impose a specific result on parties who agree to negotiate (or discuss) if the parties have agreed to objective criteria that can be applied by the court to determine the appropriate result, with reference to: *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 48 B.L.R. 212 (BCCA), *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93, 344 O.A.C. 363; and *1284225 Ontario Limited v. Don Valley Business Park Corporation*, 2023 ONSC 5595. However, the Landlord contends that, in the absence of objective criteria, the most the court can do is determine whether a party has complied with its obligation to negotiate—or in this case discuss.

[143] While s. 18.07 of the Lease does not expressly provide objective criteria for evaluating the impact of the Border Restrictions on the Lease, the Tenant asks the court to have regard to the factual matrix surrounding the formation of the Lease for the standards to determine the Base Rent that should be paid during the Closure Period. See *Molson*, at para. 116–18. This would require the court to determine that an understanding existed at the time the Lease was signed about how the Base Rent payable under the Lease would be impacted by a temporary closure of the Tenant's duty free store that could, in turn, inform the interpretation of s. 18.07 of the Lease.

[144] In this regard, the evidence that the Tenant seeks to rely upon to inform the interpretation of s. 18.07 is the evidence about the negotiations in and around the July 18th, 2016 meeting, including Mr. Pearce's "ask" for a good faith and reasonable adjustment to rent as appropriate in a fair and equitable manner, and Ms. Costa's email response which was to refer to s. 18.07 of the Lease. Even if this evidence is admissible, it does not provide a proper evidentiary foundation from which the court can determine what a reasonable adjustment to the Rent payable would be for the Closure Period. There is no benchmark from which to determine what is "fair and equitable" mentioned in the Lease or in the factual matrix evidence that the Tenant seeks to rely upon.

[145] What the Tenant really wants the court to have regard to is its subjective intention and understanding at the time the Lease was entered into, that the Base Rent, while not part of the Percentage Rent, was based on its historical experience and forecasted minimum annual sales of $20 million, and that the minimum Base Rent was to be 20% of that, or $4 million. Earlier in these reasons it was determined that this was not admissible factual matrix evidence. Nor do I consider the mathematical derivative (that 20% of $20 million in sales is equal to $4 million) to be an objectively reasonable or appropriate benchmark to use to calculate the Base Rent payable during the Closure Period (which the Tenant contends should be zero, being 20% of zero sales).

[146] The Tenant's own expert, Mr. Stulberg, was asked to prepare a report analyzing its ability to pay rent during: a) the period from March 2020 to December 2022, and b) in 2023, as a result of the decline in its revenues due to government-imposed restrictions on international travel following the

outbreak of the COVID-19 pandemic. He conceded in his report (at para. 55) and on cross-examination: "There is no standard or definitive metric that can be applied to determine what a reasonable level of rent would be for the period that was affected by COVID."

[147] Mr. Stulberg's approach was to analyze the Tenant's ability to pay based on an assumed baseline profitability level, but there is no evidence in the Lease or the factual matrix evidence that was tendered that this was the basis on which the parties intended that a rent adjustment under s. 18.07 would be determined. Furthermore, Mr. Stulberg was not provided with material evidence about the Tenant's own projections, nor did he consider whether the parties had agreed to any minimum level of profitability. He was also not made aware of the on the record offers that the Tenant had made to the Landlord when he opined about what the Rent that he considered to be reasonable for the Tenant to pay. In these circumstances, I can place little or no weight on Mr. Stulberg's opinion about what a reasonable Rent for the Tenant to pay might be.

[148] Even if this expert opinion evidence could be considered reliable, it would only be relevant and useful if the court could order the Tenant to pay and the Landlord to accept a different amount of Rent than what the Lease prescribes for the Closure Period. I have determined that it is not appropriate in the circumstances of this case for the court to impose Rent adjustments for the Closure Period as a result of the Border Restrictions. There is nothing in the Lease to suggest that the parties wished to give up their right to agree (or not) on certain terms.

[149] What the Tenant is asking the court to do is re-write the Lease to substitute its determination of reasonable Base Rent to be paid during the Closure Period in the absence of any objective benchmarks in the Lease (or apparently at all according to the Tenant's expert Mr. Stulberg) that the court could apply to determine the "reasonable" Base Rent. The Tenant's position is that the court can objectively conclude that, because its store was closed and it was not making any sales as a result of the Border Restrictions, that impact dictates that the Tenant should not have to pay any of the $4 million annual Base Rent that it agreed to pay under the Lease. I am not prepared to re-write the Lease in this manner. It effectively eliminates the distinction between Base Rent and Percentage Rent in the Lease.

[150] While the impacts of the change in Applicable Laws (the Border Restrictions) on the Tenant's business operations (the closure of the duty free store) are to be discussed and taken into consideration by the parties the Landlord did not, by agreeing to this, give up all of its rights under the Lease. The court will not re-write the parties' contract or impose terms inconsistent with what the parties agreed to without a clear agreement and direction from the parties to do so. The Lease does not provide for this, expressly or by implication. The court will not make a contract for the parties out of terms which are absent, indefinite or illusory. There must be reasonable certainty as to the intended terms of an agreement to agree, such as the amount of rent to be paid, if the court is to be asked to impose an agreement upon the parties. See *Winsco Manufacturing*, at para. 28.

[151] The Tenant also seeks to rely upon the doctrine of part performance because the parties have been paying roughly what had been agreed to during the Ramp Up Period pending the outcome of this Cross-Motion. This is suggested as an alternative basis for the court's jurisdiction to step in and complete their agreement for them, where they have not been able to do so. In *Winsco Manufacturing*, the court determined (at para. 28 of the online version):

> The law requires the parties to make their own contract and the court will not make a contract for them out of terms which are absent, indefinite or illusory. But, within the principles stated, terms will, however, be implied and particularly where there has been part performance: *Oxford v. Provand* (1868), L.R. 2 P.C. 135; *Kelly v. Watson*, 61 S.C.R. 482, 57 D.L.R. 363, [1921] 1 W.W.R. 958; *Ledyard v. McLean* (1863), 10 Gr. 139.

[152] I am unable to apply this reasoning to the agreement in principle reached in this case regarding the Ramp Up Period that the parties have been following during these proceedings. The without prejudice agreement in principle regarding the Rent to be paid during the Ramp Up Period was expressly made under a reservation of rights and, from the Landlord's perspective, subject to the parties reaching a further agreement on the Rent to be paid in respect of the Closure Period. To use that as a benchmark after the fact to determine the Base Rent to be paid during the Closure Period would undermine the essence of a without prejudice agreement such as was made.

[153] The parties have not been able to agree on a reasonable adjustment to Base Rent to account for the adverse effects of the Border Restrictions on the Tenant's business operations during the Closure Period, and the court is unable to implement s. 18.07 of the Lease by imposing a Base Rent adjustment because there is no benchmark or metric upon which to do so.

[154] The court asked whether the parties wished to make arguments that the Lease was frustrated. They both advised that they did not consider the doctrine of frustration to have any application.

[155] In the absence of a finding that the Landlord is in breach of its obligations, the only remedy available to the Tenant is one that would implement the intended purpose of s. 18.07 of the Lease that the parties engage in discussions with a view to preserving the tenancy. While the court strives to give effect to all provisions of a contract and presumes that the parties intended them to have legal effect,

the court cannot force the parties to reach an agreement if they are unable to do so, having made reasonable efforts (which they have done). It may be that there is no reasonable basis upon which the tenancy can be preserved in the aftermath of the COVID-19 pandemic. Unfortunately, many other commercial tenancies suffered a similar fate. If there is a reasonable basis upon which the tenancy can be preserved, the parties remain at liberty to continue their negotiations, subject to other steps and proceedings that may follow this decision.

[156] The Tenant asked at the conclusion of the hearing that, at the very least, the court order that the terms of the tenancy be continued on the basis of the Landlord's last proposal (or at least the last one that was in evidence, which was made in March 2023 and stated to expire after ninety days). While the Tenant may not have considered that offer to be reasonable at the time, it is the only metric or benchmark that the court could apply that the Landlord has propounded to be reasonable. The Tenant would prefer this outcome to the alternative of having to seek relief from forfeiture.

[157] The court cannot turn back the clock and order this offer from the Landlord, which has lapsed, to now be implemented. The Landlord has indicated since the early days of the Scheduling Endorsements that, if it is successful, it will not take any steps arising out of the court's decision on

this Cross-Motion until the Receivership Application has been heard. I understand that the Receivership Application has been scheduled for the end of January 2024. The stay of proceedings against the Tenant remains in effect. That timing creates a further opportunity for the Landlord and Tenant to continue their negotiations, which the court would encourage them to do based on the essential terms of the Landlord's March 2023 offer, updated to reflect relevant changes and the passage of time since then.

Summary of Outcome

[158] For the foregoing reasons, I dismiss the Tenant's Cross-Motion and decline to grant the orders that it seeks (as outlined in paras. 18 and 19 of these reasons).

[159] On the specific issues raised on this motion, I hold as follows:

1. The Border Restrictions did result in adverse effects on the Tenant's business, both during the Closure Period and during the Ramp Up Period, that warranted some adjustment to the Base Rent payable by the Tenant.

2. The Landlord did not breach s. 18.07 of the Lease by refusing to agree to abate all Base Rent otherwise payable during the Closure Period. Section 18.07 does not require that the Base Rent be adjusted based on a fixed percentage of the Tenant's sales or revenues or that it be reduced to a level that guarantees a minimum level of profitability to the Tenant.

3. The Landlord did not breach its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered. The Landlord has not been found to have been acting with the ulterior motive of terminating the Lease. Nor were the Landlord's demands, proposals and other dealings with the Tenant unreasonable having regard to the acknowledged objective of attempting to preserve the tenancy and when considered in the context of the dealings between the parties and the evolution of their positions over time.

4. No Remedy is granted:

    a. Given that there is no finding of breach by the Landlord, there is no need for the court to decide what remedy might have been available to the Tenant if there had been a finding of breach.

    b. Without the parties having agreed at the time of contracting as to how such determination could be made, and in the absence of any established benchmarks, the court cannot determine and impose upon the parties an amount of Base Rent to be paid by the Tenant during the Closure Period, or terms upon which it is to be paid, that are different from what the Lease requires. The court cannot re-write or amend the Lease for the parties, nor can it force the parties to do so. Nor is that level of intervention by the court necessary in order to implement and give commercial meaning and effect to s. 18.07 of the Lease. Section 18.07 was implemented over the course of the three

> years of consultations and negotiations; it is not rendered meaningless just because the parties have not been able to reach an agreement.

[160] In light of the Landlord's undertaking not to take any enforcement steps pending the return of the Receivership Application (and the continuing stay) so that there is no uncertainty in the interim, if the Tenant continues to operate its duty free store from the Leased Premises, it shall continue to pay the agreed upon without prejudice rent for the Ramp Up Period, subject to further orders of this court. A similar order for the payment of rent pending the return of the Receivership Application was made in the Interim Rent Endorsement, but the amounts to be paid should during this interim period now align with what the parties have agreed to and have been following during the Ramp Up Period.

[161] If there are issues arising from this decision that require further clarification or directions from the court prior to the return of the Receivership Application, any party may contact the Commercial List office to arrange a case conference before me to consider the same.

Costs

[162] The April 4, 2023 Scheduling Endorsement directed that the costs of the Landlord's Lift Stay Motion (decided by the court's January 16, 2023 endorsement) are to be decided at the same time as the cost of this Cross-Motion.

[163] The parties were to have completed their exchange of Cost Outlines and originating and reply Cost Submissions by December 1, 2023 and to advise the court by December 8, 2023 if any aspects of costs had been agreed, or if not, how they are proposing to have the issue of costs determined.

[164] The parties confirmed on December 12, 2023 that they had exchanged their Cost Submissions and Outlines and had been unable to reach any agreement regarding any aspects of the costs of either the Lift Stay Motion or the Cross-Motion. The parties have indicated that they wish the court to consider their cost submissions after the decision has been released. The Tenant relies in support of its cost submissions upon offers made prior to the Cross-Motion that were not in evidence. The court has not seen or considered any offers that were not in evidence in reaching this decision.

[165] Unless the Landlord has further submissions to make regarding relevant settlement offers that the court has not yet received, the court will, in due course, render a decision on costs based on the written submissions that have now been exchanged and provided to the court as of December 12, 2023.

[166] I am grateful for the thorough and thoughtful submissions of counsel on both sides that have greatly assisted in the writing of this decision.

KIMMEL J.

Date: December 15, 2023

APPENDIX 1

CHRONOLOGY OF DEALINGS BETWEEN THE PARTIES

The following is a summary of the events and dealings between the parties commencing at the time the Border Restrictions came into effect in March of 2020 and continuing until August 2023 which was when the last offer that has been disclosed to the court was sent between the Tenant and the Landlord. The bolding indicates demands made by the Landlord that the Tenant considers to have been unreasonable at the times made.

a. When the Canada-US border was closed to non-essential traffic in March of 2020, PBDF closed the duty free store. PBDF did not discuss closing the duty free store with the Authority or advise that it was closing the store until after it had done so.

b. The Authority did not initially agree to defer payment of Rent for April of 2020. On April 1, 2020 the **Landlord wrote to the Tenant indicating that there was no provision for abatement of Rent in the Lease and that the Landlord was requiring payment of rent in accordance with the Lease terms**.

c. PBDF thereafter invoked s. 18.07 in a letter dated April 3, 2020 and requested a meeting to discuss the unprecedented situation.

d. A meeting was arranged and took place on April 11, 2020. Following that meeting, the Landlord sent a draft of the First Deferral Agreement on April 16, 2020 that provided for a Rent Deferral Period that would expire on July 31, 2020 (the "Deferral Date").

e. The Tenant responded with a counter-proposal on April 21, 2020, by which it asked for an option to extend the Deferral Date out as far as April 2021 if the border had not opened to non-essential travel and the traffic levels had not substantially recovered by then.

f. The Landlord responded to the Tenant's suggested changes to the First Deferral Agreement the same day, April 21, 2020, noting among other things that **the Landlord is not a bank and if the Tenant requires additional assistance it should be looking to traditional financial institutions.**

g. At the Tenant's request, its counter-proposal for the First Deferral Agreement was put to the Authority's Board and rejected. Instead, the Board approved the version that the Landlord had provided. The Tenant was advised of this on April 24, 2020.

h. Following a period of non-communication from the Tenant, the Landlord sent an email to the Tenant on May 6, 2020 with the following demand: "As you no longer appear to be interested in the rent deferral agreement that the PBA Board approved on April 24, 2020, please submit the April 1, 2020 and May 1, 2020 rent payments as required by the lease. **Failure to do so by the close of business tomorrow will result in the PBA initiating formal default proceedings under article 17.01 of the lease.**"

i. The Tenant sent back the signed First Deferral Agreement to the Landlord on May 6, 2020 with a cover email indicating that there was still a need for further discussions about the implications.

j. On August 18, 2020, the Tenant wrote to the Landlord, noting that the First Deferral Agreement had expired and suggested that the Deferral Date should be extended until the month after the border is fully re-opened.

k. On October 29, 2020 the Landlord wrote to the Tenant about the need for a new deferral agreement and various other matters.

l. The Landlord followed up two weeks later on November 13, 2020 with a draft of the Second Deferral Agreement, noting the Tenant's lack of response to the October 29, 2020 email and various defaults by the Tenant under the Lease and stating: "Failure to respond by November 18, 2020 to this e-mail and my earlier e-mail of October 29, 2020 describing how you will address the issues raised in both e-mails **will result in the PBA issuing a formal notice of default in the manner prescribed by Article 18.03**."

m. On November 16, 2020 the Tenant responded, asking why it had become urgent after the Landlord had waited months to send the draft Second Deferral Agreement. The Tenant also commented substantively that the Deferral Date should be extended to expire on March 31, 2021 rather than December 31, 2020, then only a few weeks away.

n. The Authority amended the proposed draft Second Deferral Agreement to extend the Deferral Date from April 1, 2020 to March 31, 2021 (or earlier if the Tenant's duty free store opened earlier) and to allow for a two year payback after re-opening. This draft Second Deferral Agreement was approved by its Board by a resolution on November 20, 2020. That day, General Manager of the Landlord, Mr. Rienas, wrote to the Tenant stating: "The Board has tentatively approved the rent deferral agreement conditional on getting greater assurances as to receiving unpaid rent. As you know, zero rent has been paid since April 1, 2020. To that end the Authority is requesting the financial information requested in Articles 16.03 a), b) and c) of the lease. Please provide by no later than Tuesday November 25."

o. The Tenant's 2019 financial statements and an HST reimbursement were also requested by the Landlord and the Tenant provided those to the Landlord on November 23, 2020.

p. PBDF signed the Second Deferral Agreement in November 2020, but the Authority did not.

q. After having received on December 8, 2020 certain financial and other information that the Landlord had requested from the Tenant, Mr. Rienas wrote on December 9, 2020 to provide comments on what had been received and advised the Tenant's representative (Mr. Pearce) that: "[**the Authority] is not prepared to be PBDF's bank and are not prepared to defer all of the rent payments till March 31, 2021.**

Accordingly, the [Authority] is demanding payment of 1/3 of the outstanding 2020 rent, amounting to $1 million, by December 31, 2020 with the balance of the 2020 unpaid rent and anticipated 2021 unpaid rent to be deferred to March 31, 2021."

r. On December 17, 2020, the Board resolved to demand a partial rent payment from PBDF in the amount of $1 million by December 31, 2020 and to develop with legal counsel a rent repayment schedule and associated guarantees of full payment.

s. On December 21, 2020, **the Landlord demanded that the Tenant pay $1 million of the Rent that had been deferred under the Deferral Agreements by December 31, 2020 and a further $2.13 million in deferred Rent on a schedule to be agreed, and demanded that the Tenant start paying the full Base Rent under the Lease as of January 1, 2021.**

t. The Tenant wrote to the Landlord on December 23, 2020 requesting the opportunity to discuss an extension of the rent deferral and the expected payment schedule.

u. The Landlord wrote back to the Tenant on December 29, 2020 explaining it was "fully aware of the business challenges during the Covid-19 pandemic" and had taken those into consideration in the offer it made on December 21, 2020.

v. On December 30, 2020 the Tenant sent a further response, noting certain objections and making it clear that the Tenant was not in a position to make the short term payments that had been demanded by the Landlord. The Tenant indicated it would provide the Landlord with its business plan by January 15, 2021 and suggested that a meeting be arranged thereafter.

w. On January 15, 2021, PBDF provided financial projections to the Authority and made proposals to the Authority to address: (i) Rent payable under the Lease going forward; and (ii) repayment of the deferred rent by PBDF. This business plan was accompanied by the Tenant's sales projections. The Tenant's projections showed that it would become profitable in the short term if the Lease was amended as the Tenant was suggesting, predicated upon a permanent reduction in the Base Rent payable.

x. On January 19, 2021, the Authority advised the Tenant that the "proposed financial business plan of eliminating Base Rent and moving to only % rent is unacceptable. It also ignores all the rent currently owed to the Peace Bridge Authority (PBA). Even in the rent deferral agreement that expired on July 31, 2020, PBDF agreed to pay deferred rent with Interest over time. Your plan is also silent on accessing federal government relief programs like the Business Credit Availability Program (BCAP) and the Highly Affected-Sectors Credit Availability Program (HASCAP)." The Authority further noted that the minimum Base Rent of $4 million was a key factor in the Tenant's RFP proposal having been selected and that it was "not prepared to alter the basis upon which the concession awarded. To do so would be unfair to the other bidders in the procurement process."

y. On March 25, 2021, the Tenant referenced its previous proposal and cash flow projections (and provided new ones that were substantively the same as the previous ones, but extended over a longer projection period and some numbers rounded) and asked for a mediation or more formal meeting with the Landlord to discuss them. The parties exchanged further letters between April 1 and 13, 2021, at which time the Landlord indicated that it wanted to wait to meet until the Tenant could provide its audited financial statements, which had been delayed.

z. The Tenant provided further financial information to the Landlord on May 6, 2021. The parties met on May 13, 2021 and the Tenant indicated that it needed time to meet with RBC and provide its next proposal. The Landlord asked for it by June 1, 2021.

aa. The Tenant's formal proposal was eventually delivered, but not until August 21, 2021. The proposal sought an abatement of all rent from March 21, 2020 until the Tenant's duty free store re-opened and then a switch to percentage rent only (no minimum Base Rent) after the store opened, and various other terms. This was accompanied by financial projections from the Tenant that were consistent with the previous ones it had provided.

bb. The Landlord acknowledges it reached out sometime in August 2021 to the prospective tenant that had put in the second place response to the RFP in 2016 to see if they would still be interested in operating a duty free store on the Canadian side of the Peace Bridge. Nothing came of this.

cc. **On September 8, 2021, the Authority issued notices of default**, for both monetary and non-monetary defaults by the Tenant, stating that it would exercise its remedies under the Lease arising from the alleged defaults, all of which arose during the Closure Period.

dd. Those notices resulted in a default by PBDF under its creditor facilities with the RBC.

ee. PBDF reopened the Canadian duty free store shortly after these notices of default were received in September 2021.

ff. On September 20, 2021 the Tenant sent the Landlord proof that it had applied for government assistance under the Canada Emergency Rent Subsidy ("CERS"), and confirmed amounts received under CERS had been remitted to the Landlord. The Tenant's CERS applications were based on the full monthly minimum Base Rent payable under the Lease ($333,333.33).

gg. On September 30, 2021 the Tenant advised the Landlord that it would be making a further proposal to address Rent during Closure Period by October 15, 2021.

hh. In the meantime, the Tenant and the RBC entered into the Forbearance Agreement dated October 8, 2021 that contemplated that PBDF would reach a resolution with the Authority to preserve the Lease by November 15, 2021.

ii. Although the Landlord was not privy to the Forbearance Agreement when it was being negotiated and signed, that agreement authorized the RBC to communicate directly with the Landlord, and the RBC did so.

jj. On October 15, 2021 the Tenant made a further proposal to the Landlord, in which the Tenant for the first time offered to pay $2 million in Base Rent for the Closure Period over the full and extended term of the Lease without interest (to be paid off in monthly installments commencing on January 15, 2023). The Tenant also proposed a schedule for payments to Ramp Up to annual Base Rent of $4 million over time, and a five-year extension of the Lease term from its current end-date of October 2031 to October 2036. This proposal also asked for an amendment to the rent terms to remove the requirement that sub-leases to food service pay 20% of their sales.

kk. This was countered by the Landlord on October 26, 2021. The Landlord offered a different Ramp Up for future rent, and proposed that 50% of the unpaid rent from the Closure Period ("Back Rent") be paid upon execution of the amendment to the Lease, with any HST credits received to be applied to the remaining Back Rent outstanding. The Landlord agreed that the Lease could be amended to allow for food service sub-tenant rents to be at market rates, approved by, and payable to, the Landlord. No extension of the Lease term was agreed to.

ll. The Tenant made a further counter proposal on November 16, 2021. The Tenant asked for certain adjustments to the Landlord's proposed Ramp Up regarding future rent, and agreed to pay Back Rent of $2 million, to be treated as a no-interest loan paid off in monthly installments commencing on November 15, 2022 and continuing to October 15, 2036, upon the provisos that: (i) the Lease be amended to grant the Tenant "two options to extend the term for two additional periods of five years each"; and (ii) confirmation from the Landlord that all other amounts owing as Back Rent are waived, including those rents subject to the rent deferral agreement dated April 27, 2020. The Tenant also asked that the HST payments/repayments be handled in the normal course rather than as part of any agreement regarding Back Rent. The Tenant agreed to the Landlord's proposed amendments regarding the food service sub-tenants.

mm. No agreement was reached. The failure of PBDF to reach a resolution with the Authority by November 15, 2021 triggered a default under the Forbearance Agreement with RBC.

nn. The Landlord's counsel wrote to RBC on November 21, 2021 stating: "I am writing to advise that our client has been unable to resolve issues concerning the default of its tenant, Peace Bridge Duty Free Inc., **and our client intends to exercise its remedies under the default provisions of the Lease**. As you have previously requested, please accept this correspondence as advance notice of our client's intention."

oo. RBC brought this Application seeking to appoint a receiver in December 2021. In response to this application, PBDF requested from the court further time to reach a commercial resolution with the Authority. On December 14, 2021, the Appointment

Order was made, which included a stay for the purpose of providing a further opportunity to PBDF to try to negotiate a commercial arrangement with the Authority.

pp. The Landlord wrote to the Tenant on August 2, 2022 reminding it of the "offer to provide an abatement equal to 50% of the unpaid rent that accumulated during PBDF's COVID-related shutdown … conditional on there being an arrangement in place … concerning payment of the remaining 50%. We wish to be clear that our client is not prepared to grant an abatement of more than 50% and is not required to justify that business decision to PBDF." It was also noted that if the Tenant wished "to present a proposal for the payment of the remaining 50% of the unpaid rent that accumulated during PBDF's COVID-related shutdown, we require that it do so within 15 business days. Any such proposal must provide for regular monthly payments against the arrears over a maximum of 24 months and must include either a third-party guarantee from a solvent guarantor or security. Detailed going-forward financial modelling for the business and specifics with respect to any security or guarantee, including proof of the guarantor's solvency, must be included with any proposal."

qq. The Landlord entered into a lease amending agreement with the tenant for the US duty free store at the Peace Bridge in late 2022, effective January 1, 2023. The original lease for the US duty free store had a built-in rent abatement because monthly rent was based on the previous year's revenue. The US duty free tenant did not have a minimum base rent amount payable. The U.S. duty free store never closed. Its lease amending agreement required payment of some of the rent that had been deferred under its lease, for the period April 1, 2020 to December 31, 2022 during which the Landlord agreed to waive 80% of the rent that was otherwise payable. The Tenant agreed to repay its share of this deferred rent over five years with interest and was given the option for an additional 10 years of lease extension.

rr. On March 13, 2023 the Tenant made a proposal to the Landlord pursuant to the court's direction in advance of the court ordered mediation, which did not offer anything for Back Rent. The Tenant did so on the basis that it was not prepared to abandon its litigation position that nothing was payable by it during the Closure Period (subject to receiving the Landlord's mediation position and to further negotiation at the mediation), for the period from December 2021 to the date of any settlement of the litigation. What the Tenant offered was to forgo its damages claims and to waive its right to pursue its litigation costs for this period. For the Go Forward Period (after any settlement), the Tenant proposed a permanent amendment to the Lease to provide for minimum Base Rent of $2.5 million (instead of $4 million) with Percentage Rent over and above that based on different sales levels than currently provided for in the Lease. This proposal also contemplated releases on both sides including directors, officers, shareholders etc.

ss. On March 21, 2023 the Landlord made a counter-proposal to the Tenant for payment of 75% of the rent accruing due during the Closure Period up to November 1, 2021 to be paid within 90 days (with some alternatives offered to address tax considerations) and a further adjustment to the proposed Ramp Up from 2021 to 2025 (with amounts due from prior periods covered by the Ramp Up, in 2021, 2022 and 2023 to be paid

within 60 days). No options for Lease term extensions were provided for. This proposal asked for the sub-leases for food service providers to be executed within 60 days.

tt. On August 22, 2023 the Tenant made a further proposal to the Landlord with reference back to the Landlord's proposal of March 21, 2023 and providing supporting calculations, in which the Tenant offered to pay $2,851,500, being 50% of the rent arrears for the period up to November 2, 2021 ($1 million within 60 days, $1 million a year later and the balance two years later) and agreed to most of what the Landlord proposed for the Ramp Up, with small adjustments and more time to pay amounts past due. This proposal provided for an amendment to the Lease to add two five-year Lease extension options. The Tenant asked for more time to secure the sub-leases to food service providers. This was a time limited offer that was open until the then anticipated hearing date of the Cross-Motion on September 19, 2023.

uu. On September 26, 2023 the Landlord made its last proposal to the Tenant, which was Without Prejudice and is not in evidence.

vv. On October 13, 2023 the Tenant made its last proposal to the Landlord which was Without Prejudice and is not in evidence.

APPENDIX 2

(LEASE EXCERPTS)

2.01 Definitions

(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.

(c) "Adverse Effect" means any one or more of: (vii) loss of enjoyment of a normal use of property; and (viii) interference with the normal conduct of business.

(g) "Base Rent" means the annual rent payable by the Tenant and described in Section 4.02.

(t) "Governmental Authorities" means all applicable federal, provincial and municipal agencies, boards, tribunals, ministries, departments, inspectors, officials, employees, servants or agents having jurisdiction and "Government Authority" means any one of them.

(ee) "Percentage Rent" means the percentage rent payable by the Tennant and described in Section 4.03.

(ii) "Rent" means collectively the Base Rent, Percentage Rent and Additional Rent payable under this Lease.

(zz) "Unavoidable Delay" means any delay by a party in the performance of its obligations under this Lease caused in whole or in part by any acts of God, strikes, lockouts or other industrial disturbances, acts of public enemies, sabotage, war, blockades, insurrections, riots, epidemics, washouts, nuclear and radiation activity or fallout, arrests, civil disturbances, explosions, unavailability of materials, 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.

2.04 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.

2.15 Reasonableness

Except as may be otherwise specifically provided in this Lease, whenever the Landlord or the Tenant is required to use its discretion or to consent or approve any matter under this Lease, the Landlord and the Tenant agree that such discretion shall be reasonably exercised and that such approval or consent will not be unreasonably or arbitrarily withheld or delayed.

2.17 Amendment and Waiver

No supplement, modification, amendment, waiver, discharge or termination of this Lease is binding unless it is executed in writing by the party to be bound. No waiver of, failure to exercise, or delay in exercising, any provision of this Lease constitutes a waiver of any other provision (whether or not similar) nor does any waiver constitute a continuing waiver unless otherwise expressly provided.

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 .....

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.

…

[Percentage Rent is only payable if it exceeds the Base Rent Minimum of $4 million in a given 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); ...

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; ...

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 [*sic*] do not operate to excuse the Tenant from the prompt payment of Rent and any other payments required by this Lease.

The Tenant's Proposal in Response to the RFP appended as Schedule D to the Lease included at Tab F the Tenant's forecasted sales in the Lease Term to be:

Forecasted Sales ($ million)

Year	1	2	3	4	5	6	7	8	9	10
Sales	26.3	29.8	30.5	31.3	32.1	32.9	33.7	34.5	35.4	36.3

TAB 2

CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2024 ONSC 372
COURT FILE NO.: CV-21-00673084-00CL
DATE: 20240117

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *David T. Ullmann, John Wolf and Brendan Jones,* for Peace Bridge Duty Free Inc., the Moving Party

E. Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority, Respondent on Motion

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023 (Written Cost Submissions dated November 24 and December 1, 2023)

COSTS ENDORSEMENT (LEASE DISPUTE)

The Lease Dispute: Summary of the Positions and Outcome

[1] This lease dispute between the parties was adjudicated over three days (in the procedural context of a Cross-Motion by the Tenant, Peace Bridge Duty Free Inc.) and decided by reasons of this court released on December 12, 2023 (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 7096). Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in those reasons for decision.

[2] A brief overview of the issues in dispute and the court's rulings provides some context for the court's decision on costs.

[3] This lease dispute revolved around the interpretation of s. 18.07 of the subject Lease, which provides that:

> 18.07 Regulatory Changes
>
> In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect (sic) 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.

[4] The parties agreed that section 18.07 was triggered as a result of the COVID-19 pandemic and the resulting Peace Bridge and border closure to non-essential traffic that was implemented by the U.S. and Canadian governments effective March 21, 2020 for 30 days and subsequently extended. They agreed that these Border Restrictions caused material adverse effects on the Tenant's business operations.

[5] The parties were in agreement that s. 18.07 of the Lease:

a. was engaged as a result of the Border Restrictions and the resulting adverse effects on the Tenant's business; and

b. gives rise to a substantive right/obligation to make adjustments to the Rent payable by the Tenant in the circumstances of this case, taking into consideration the extent of the Adverse Effect on the Tenant's business.

[6] Prior to the hearing, the parties reached an agreement in principal regarding the Rent to be paid during the Ramp Up Period, subject to reaching an agreement on the Rent to be paid for the Closure Period.

[7] The Tenant argued that the Landlord (the Buffalo and Fort Erie Public Bridge Authority) had not acted reasonably and in good faith in its consultations with the Tenant regarding the Rent (as defined in the Lease) to be paid by the Tenant during the Closure Period. As a result, the Tenant asked the court to make the following orders on its Cross-Motion:

a) An order that, having applied s. 18.07 and considering the adverse effects that the Border Restrictions had on the Tenant's sales, the rent actually payable by the Tenant during the Closure Period was equal to 20% of sales (which were zero), plus all additional rent and government assistance and that nothing further is owing for the Closure Period by the Tenant.

b) An order that having applied s. 18.07 and considering the adverse effects the Border Restrictions had and continue to have on the Tenant's sales, the Ramp Up schedule accepted in paragraphs 41 and 44 of the factums of the Tenant and the Landlord respectively, reflects the reasonable application of s. 18.07 to the circumstances of this case in the Ramp Up period and that the parties are to comply with that schedule for the payment of rent to and until the Lease year commencing Nov 1, 2026, when the schedule has no further impact.

c) An order that having applied a) and b) to the amounts actually paid, any overpayment by the Tenant should be set off by the Tenant against rent next due and any underpayment should be repaid to the Landlord in a reasonable period of time having regard to the ability to pay.

[8] The Landlord disagreed.

[9] The Landlord maintained that there was no reasonable interpretation of s. 18.07 that: (i) required it to waive or suspend the payment of Base Rent; or (ii) automatically amended the Lease to remove or suspend the requirement to pay Base Rent. The suspension of Base Rent during the Closure Period was a cornerstone of the Tenant's position throughout most of the negotiations that the parties engaged in after March 2020 and that was the biggest obstacle to reaching an agreement, from the Landlord's perspective.

[10] The Landlord maintained that its offers were reasonable when made, having regard to the situation, the Tenant's position and the information the Tenant made available to the Landlord at the time. The Landlord disputed the Tenant's premise that the ultimate resolution had to be one that reflected the Tenant only paying the rent that it could "afford" in a given year and that the effect of s. 18.07 of the Lease was to guarantee that the Tenant would be profitable in the aftermath of the COVID-19 pandemic during the Ramp Up Period.

[11] The court found that just because the parties were not able to reach an agreement did not mean that the Landlord breached s. 18.07 of the Lease. The Tenant failed to establish that the Landlord breached s. 18.07 of the Lease in the circumstances of this case. The Landlord did engage in discussions and negotiations with the Tenant with a view to reaching an agreement to amend, or provide temporary relief from, some of the Lease terms to account for the adverse effects that the Border Restrictions had on the Tenant's business.

[12] The Landlord asked that the court dismiss the Tenant's Cross-Motion because there was no basis for any finding of breach or that it did not act reasonably or in good faith. The court ultimately accepted the Landlord's position and dismissed the Tenant's Cross-Motion.

[13] The Tenant requested, in the alternative to the relief it sought as described in paragraph 7(b) above, that the court determine and order the terms upon which Rent was to be paid for the Closure Period based on the offers that had been exchanged between the parties in the course of their negotiations. The Landlord challenged the court's jurisdiction to determine and impose upon the parties the Rent to be paid by the Tenant during the Closure Period in substitution for what the Lease provides, the very issue that the parties had been unable to agree upon.

[14] There were a number of evidentiary objections that the court had to rule upon. Many of them were ultimately not material to the outcome because the Landlord eventually acknowledged much of what the Tenant sought to rely upon as "factual matrix" evidence to interpret and give meaning and effect of s. 18.07 of the Lease. The parties eventually were in agreement that the meaning and effect of s. 18.07 required that:

a. In the event of a change in Applicable Laws that materially and adversely impacted the Tenant's business (e.g., sales), the parties would act reasonably and in good faith to make appropriate changes to the Lease, which may include changes to Base Rent.

b. Section 18.07 be applied to address the Tenant's concerns about the impact on its sales and to adjust the Lease, including by reducing the Base Rent payable in appropriate circumstances in a fair and equitable manner.

[15] However, the positions and arguments advanced by the Tenant complicated certain other evidentiary aspects of the Lease dispute. Its allegations of a lack of good faith on the Landlord's part

led it down a path of attempting to attribute ulterior motives to the Landlord that were never proven. That led to production demands and added time to the cross-examinations. It also led to some disputes over the relevance of expert and factual matrix evidence that the Tenant tendered.

[16] The Tenant proffered expert evidence about the comparative net economic returns for the Landlord, between what the Tenant was proposing and what the Landlord could achieve if it undertook an RFP to find a new tenant. But the court ultimately found that the Landlord had provided a reasonable and credible explanation for its conduct and contingency planning (e.g. considering the prospect that it might need to look for a new Tenant) that rendered the expert evidence to be of little value or weight.

[17] That same expert's evidence in another area, about the comparable rent ratios in the duty free sector, was also challenged by the Landlord. The expert's opinion was predicated in part upon hearsay information from an internal witness of the Tenant (Mr. Pearce, who is not an industry expert) about standard gross sales to rent ratios for duty free stores in Canada. This witness had sworn an affidavit but did not provide the direct evidence himself and then did not make himself available within a reasonable time (as the court had directed) to be cross-examined. In any event, the crux of this expert's evidence, that the Rent that the Tenant agreed to pay under the Lease was too high in the current market, was not particularly helpful to the determination of the issues in question since the Lease did not prescribe a "market rate" adjustment to the Rent payable.

[18] Section 18.07 of the Lease does not expressly indicate objective criteria for evaluating the impact of the Border Restrictions on the Lease. The Tenant asked the court to have regard to what it attempted to characterize as the factual matrix surrounding the formation of the Lease for the standards to determine the Base Rent that should be paid during the Closure Period. In this regard, the Tenant sought to rely upon what was ultimately determined to be inadmissible evidence about the Lease negotiations.

[19] These evidentiary disputes added time and expense to the ultimate determination of the Lease dispute for both sides.

[20] On the specific issues raised on the Cross-Motion, the court eventually ruled as follows:

1. The Border Restrictions did result in adverse effects on the Tenant's business, both during the Closure Period and during the Ramp Up Period, which warranted some adjustment to the Base Rent payable by the Tenant.

2. The Landlord did not breach s. 18.07 of the Lease by refusing to agree to abate all Base Rent otherwise payable during the Closure Period. Section 18.07 does not require that the Base Rent be adjusted based on a fixed percentage of the Tenant's sales or revenues or that it be reduced to a level that guarantees a minimum level of profitability to the Tenant.

3. The Landlord did not breach its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered. The Landlord has not been found to have been acting with the ulterior motive of terminating the Lease. Nor were the Landlord's demands, proposals and other dealings with the Tenant unreasonable having regard to

the acknowledged objective of attempting to preserve the tenancy and when considered in the context of the dealings between the parties and the evolution of their positions over time.

4. No Remedy was granted:

    a. Given that there is no finding of breach by the Landlord, there is no need for the court to decide what remedy might have been available to the Tenant if there had been a finding of breach.

    b. Without the parties having agreed at the time of contracting as to how such determination could be made, and in the absence of any established benchmarks, the court cannot determine and impose upon the parties an amount of Base Rent to be paid by the Tenant during the Closure Period, or terms upon which it is to be paid, that are different from what the Lease requires. The court cannot re-write or amend the Lease for the parties, nor can it force the parties to do so. Nor is that level of intervention by the court necessary in order to implement and give commercial meaning and effect to s. 18.07 of the Lease. Section 18.07 was implemented over the course of the three years of consultations and negotiations; it is not rendered meaningless just because the parties have not been able to reach an agreement.

Costs Analysis

[21] Early in 2023 the Landlord brought a motion to lift the stay of proceedings so that it could exercise certain enforcement remedies under the Lease arising out of the non-payment of Rent by the Tenant that was heard on January 5, 2023. That motion was dismissed by an endorsement dated January 16, 2023 (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327). In an April 4, 2023 Scheduling Endorsement, the court directed that the entitlement/quantum/scale of any costs of the Landlord's Lift Stay Motion should be decided in conjunction with and at the same time as the court decides the costs of this Cross-Motion.

[22] The parties completed their exchange of Cost Outlines and originating and reply Cost Submissions for both the Lift Stay Motion and the Cross-Motion and advised the court that no aspects of the costs had been agreed upon and that they were seeking a decision of the court based on their written submissions. Their costs submissions were made without knowing the outcome of the Tenant's Cross-Motion or the court's reasoning for its decision. The parties' Cost Outlines and submissions were reviewed and considered by the court after the decision on the Cross-Motion had been rendered.

The Landlord's Position on Costs

[23] The Landlord, if successful, asked for an award of substantial indemnity costs of $269,178.68 (based on 75% of its full indemnity fees) inclusive of applicable taxes. The Landlord also seeks $20,160.54 in disbursements (inclusive of applicable taxes). This covers its legal fees and disbursements for the Cross-Motion and all interim attendances and steps (including the court ordered mediation and the July 25–26 procedural motion). The court's previous directions indicated that the costs of the mediation be "in the cause" of the Cross-Motion, meaning that the successful party on

the Cross-Motion could claim those costs. The court similarly ordered that the costs of the July 25–26 procedural motion be "in the cause" of the Cross-Motion, or as further directed by the court. Those costs of the Landlord have also been included in the Costs Outline submitted.

[24] There was a last minute adjournment of the Cross-Motion on September 6, 2023, as a result of which the court ordered that the Landlord would be entitled to its costs thrown away in any event of the cause, which have been calculated on a full indemnity basis to be $8,930.00 for the appearance that day plus estimated (re)preparation time of $13,300, which is also included in the Landlord's Bill of Costs. It would appear that these amounts were included in the Landlord's Costs Outline on a substantial indemnity basis although it claims to be entitled to more. The court will be ultimately guided by what is claimed in the Costs Outline as that is where the final amount of costs claimed by the Landlord is derived from. This is noted because it reflects a reduction from what the Landlord might have otherwise claimed.

[25] The Landlord certified its all-inclusive substantial indemnity costs of the Lift Stay Motion to be $18,516.75 (representing 75% of its all-inclusive full indemnity costs of $24,690.00 for that motion). The Landlord submits that there should be no costs of that motion, even though the stay was not lifted pending the determination of this Cross-Motion. Its position is that there was no successful party on that motion and that each party should bear their own costs.

[26] The Landlord argues that its Lift Stay Motion was necessary because of a lack of clarity about what the "normal" Rent that the Tenant was paying, and would therefore be required to continue to pay, at the time of the Initial Order and in the face of the Tenant's continuing refusal to pay the Landlord anything other than what it was receiving under government assistance programs (and eventually HST remittances). Ultimately, as a result of that motion and steps taken and directions provided from the court thereafter, the Tenant did start to pay more than it had been paying, albeit on an interim without prejudice basis.

[27] The Landlord claims to be entitled to substantial indemnity (as opposed to partial indemnity) costs throughout based on s. 17.03 of the Lease, which provides that the Landlord is *prima facie* entitled to recover its costs on a substantial indemnity basis in matters involving: (a) the recovery of rent; or (b) other breach of the Lease where a breach is established.

The Tenant's Position on Costs

[28] The Tenant, if successful on its Cross-Motion, asked to be awarded substantial indemnity costs (on the assumption that its success would be tied to the Landlord's alleged failure to act in good faith), indicated in its Costs Outline to be $653,704.09 (including disbursements of $38,242.38, and all applicable taxes) with fees calculated at 80% of the actual amounts. The Tenant's partial indemnity costs were indicated to be $422,570.13 (with fees calculated at 50% of actual amounts and including the same disbursements and all applicable taxes). The amounts claimed by the Tenant were later

corrected and adjusted downward (partial indemnity at $409,387.33 and substantial indemnity at $640,521.29) to avoid double counting of one of the disbursements for expert fees.[1]

[29] At the time of the Lift Stay Motion, the Tenant delivered a Bill of Costs indicating all-inclusive partial indemnity costs (calculated at 60% of actual costs) totalling $29,342.03 and substantial indemnity costs (calculated at 90% of actual costs) in the amount of $43,243.40, which was the amount it sought for that motion in its cost submissions. However, the Tenant's Costs Outline delivered after the Cross-Motion included all-inclusive total amounts for the Lift Stay Motion of $84,831.92 on a partial indemnity basis and $135,939.45 on a substantial indemnity basis. Although this appears from the description to include some (unspecified) fees for the Cross-Motion that had been backed out of the original Bill of Costs delivered for the Lift Stay Motion, no detailed explanation was provided for this discrepancy.

[30] In addition to the offers that were exchanged between the parties and in evidence for the court's consideration on the Cross-Motion, the Tenant submitted two further without prejudice offers for the court's consideration in the context of the decision on costs which reflect additional compromises that the Tenant was prepared to make as the Cross-Motion hearing date approached and as its financial circumstances improved. However, these were not strictly speaking Rule 49 offers so they do not carry with them the consequences of r. 49.10.

[31] In its cost submissions, the Tenant also requested an order directing the Landlord to reimburse it for additional expenses that it claims the Landlord's actions caused it to incur, because the Tenant blames the Landlord for the Receivership Application. These total more than $285,000 in aggregate for the legal and professional costs of the Monitor (itself and its counsel) and for RBC's counsel. These claimed expenses introduce some more complicated issues into the costs analysis which do not need to be resolved since the Tenant is not being awarded any costs.

Costs Analysis

[32] The Court has discretion to award costs incidental to a proceeding pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Rule 57.01(1) enumerates a list of factors to be taken into consideration in exercising that discretion. Some of the relevant factors in this case include the amount at issue (in excess of $10 million), the importance of the issues to the parties (significant to both sides given the amount at issue and the remaining term of the Lease and renewal options), the complexity and novelty of the issues (given the uniqueness of s. 18.07 of the Lease and the unprecedented COVID-19 pandemic and Border Restrictions that triggered it), and certain complexities previously mentioned arising out of evidence tendered by the Tenant.

---

[1] The Landlord complains that it requested, but was denied, access to the dockets to support the costs claimed by the Tenant. The Landlord also complains about disproportionate time spent by the Tenant's counsel on certain examinations. Since the Tenant is not being awarded its costs of the Cross-Motion these complaints do not need to be addressed.

[33] As noted by the Tenant in its cost submissions, modern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* (1999), 181 DLR (4th) 614 (Ont. C.A.), at para. 22.

[34] In terms of entitlement to costs, both parties' submissions were made on the basis that the successful party would be awarded its costs.

[35] The following is ordered regarding the entitlement to costs on the two motions:

a. As the successful party, the Landlord is entitled to its costs of the Cross-Motion. Based on the court's previous endorsements, the Landlord was entitled to include in the costs sought its costs of July 25–26 procedural motion and of the mediation which the court directed be "in the cause" of this Cross-Motion. Nothing in the issues raised on the Cross-Motion or the cost submissions received give me cause to reconsider those earlier directions.

b. The Landlord was not the successful party on the Lift Stay Motion and does not claim to be. It claims no costs for the Lift Stay Motion. However, the Landlord contends that the Tenant was also not successful on that motion and that neither party should be awarded costs of that motion. In my view, the Tenant was successful in resisting that motion and is entitled to some costs, but limited just to that motion.

[36] The Scale of Costs: The Tenant correctly observes that costs are typically awarded on a partial indemnity scale unless there is an offer to settle under r. 49.10 or a party engages in reprehensible or egregious conduct worthy of sanction by the court in the form of elevated costs on a substantial indemnity basis. *Davies v. Clarington (Municipality) et al*., 2009 ONCA 722, 100 O.R. (3d) 66, at paras. 28–31. Neither of these circumstances arise in this case.

a. The Landlord itself acknowledges that the offers exchanged by the parties involved attempts to reach a "global" resolution that included non-monetary defaults and included provisions beyond the payment of the deferred rent/arrears and the ramp-up of the Base Rent. The Tenant likewise does not suggest that its offers, even the last two, triggered the cost consequences of r. 49.10. The offers were part of the good faith negotiations that s. 18.07 of the Lease obliged the parties to engage in.

b. While the Tenant's positions and the relief sought on the Cross-Motion tended to complicate the issues and resulted in additional evidence that was not considered by the court to be relevant to the ultimate determination of the issues, this does not rise to the level of conduct that is worthy of a sanction by the court of elevated costs.

[37] However, the Landlord claims to have a contractual entitlement to substantial indemnity costs under s. 17.03 of the Lease.

[38] The following is ordered regarding the scale of costs on the two motions:

a. The Landlord has a *prima facie* contractual right under s. 17.03 of the Lease to substantial indemnity costs of the Cross-Motion, which was clearly a proceeding

involving: (a) the recovery of rent. I see no reason to interfere with that contractual right, particularly given that it will not result in an award that the court considers to be unreasonable or disproportionate. As detailed below, the amounts the Landlord claims on a substantial indemnity basis are very reasonable and proportionate (in fact significantly less both in quantum and in percentage) in comparison with the amounts that the Tenant was seeking if it won. The Landlord's claimed substantial indemnity costs for the Cross-Motion are less than the Tenant's claimed partial indemnity costs for the Cross-Motion.

b. The Tenant did try to settle the Lift Stay Motion, on terms that were not significantly different from what happened, namely that an interim arrangement was put in place so that the Cross-Motion could be adjudicated in a timely manner to avoid the court having to deal with concerns about the overlap of certain issues on the two motions, particularly on the question of whether the Tenant was in breach of the Lease during the Closure Period. However, there was technically no r. 49 offer. Partial indemnity is the appropriate scale of costs for the Tenant to be awarded for the Lift Stay Motion.

[39] Quantum of Costs: The Tenant submits that costs awards, at the end of the day, should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties": see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (C.A.), at para. 24. This is now embodied in rr. 57.01(1)(0.a) and (0.b). See also *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2021 ONSC 753, cited by the Landlord.

[40] The following is ordered regarding the quantum of costs on the two motions:

a. On the Cross-Motion, the amounts at issue were significant and the issues were important, particularly given the alleged failure to act in good faith and the complexities those allegations introduced into the evidence and ensuing objections (described in more detail above). Also as noted above, the amount of substantial indemnity costs claimed by the Landlord is reasonable and proportionate in light of these complexities and having regard to the principle of proportionality and the Tenant's objectively reasonable expectation that the Landlord would be incurring costs as it was. That fact that the Landlord's claimed substantial indemnity costs are less than the Tenant's claimed partial indemnity costs is telling. The Landlord has also applied a lower percentage to calculate its substantial indemnity costs than the Tenant did (75% as opposed to 90%) and did not insist on the full indemnity costs that it might have asked for arising out of the last minute adjournment. The Landlord is awarded its substantial indemnity costs of the Cross-Motion in the claimed amount of $269,178.68 for fees (based on 75% of its full indemnity fees) inclusive of applicable taxes, plus $20,160.54 for disbursements (inclusive of applicable taxes), for a total of $289,339.22.

b. The Tenant's Costs Outline for the Lift Stay Motion (that was stated explicitly not to include any of its costs for the Cross-Motion that were being incurred in and around the same time) sets out the appropriate amount for it to be awarded. The Tenant's claimed partial indemnity costs of the Lift Stay Motion in the all-inclusive amount of

> $29,342.03, although higher than the partial indemnity amount indicated by the Landlord for that motion, are not disproportionate or unreasonable. This amount of costs is awarded to the Tenant and shall be set off against the costs awarded to the Landlord on this Cross-Motion.

[41] This means that the Tenant shall pay to the Landlord net costs of the Cross-Motion and Lift Stay Motion in the total all-inclusive amount of $259,997.19. In accordance with r. 57.03, but subject to the stay that is currently in place pending the return of the Receivership Application and any other relevant considerations which may be raised with the court at a future attendance (if applicable), the Tenant shall pay these costs to the Landlord forthwith (within 30 days of this endorsement).

KIMMEL J.

Date: January 17, 2024

TAB 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

JUSTICE KIMMEL	)	FRIDAY , THE 15th DAY
	)	
	)	OF DECEMBER, 2023

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

ORDER

THIS CROSS-MOTION, made by the Moving Party, Peace Bridge Duty Free Inc. ("**PBDF**"), was heard November 1st, 2nd, and 3rd, 2023 at the courthouse located at 330 University Ave, Toronto, ON, M5G 1R7, the decision being reserved until this day.

ON READING the motion record of PBDF dated December 13, 2021, the Cross-Motion Record of PBDF dated November 13, 2022, the Responding Motion Record of PBDF dated December 2, 2022, the Supplementary Motion Record of PBDF January 2, 2023, the Supplementary Motion Record of PBDF February 13, 2023, the Supplementary Motion Record of PBDF dated September 26, 2023, the Factum of PBDF dated October 16, 2023, and Reply Factum

of PBDF dated October 27, 2023, and Compendium of PBDF dated October 31, 2023, and Brief of Offers of PBDF dated November 2, 2023, and the Costs Submissions of PBDF dated November 24, 2023, and upon reading the Factum of the Buffalo and Fort Erie Public Bridge Authority (the "**Authority**") dated October 23, 2023, the Authority's Brief of Excerpts from Transcripts dated October 23, 2023, Affidavits of Ron Rienas dated September 7, 2022, November 26, 2022 and March 1, 2023, Transcript of Mills dated August 17, 2023, Transcript of Jim Pearce dated August 31, 2023, Transcript of Ephraim Stulberg dated September 29, 2023, Transcript of Lisa Hutcheson dated September 29, 2023, and Affidavit of Amanda Singh dated October 23, 2023, and Brief of Documents of the Authority for Argument dated October 30, 2023, filed,

AND ON HEARING the submissions of counsel for PBDF and the Authority,

1. **THIS COURT ORDERS** that the PBDF's motion is dismissed**.**

2. **THIS COURT ORDERS** that pending the return of the Receivership Application, PBDF shall continue to pay the agreed upon without prejudice rent for the Ramp Up Period, subject to further orders of the Court, which amounts should now align with what the parties have agreed to and have been following during the Ramp Up Period.

_____

Justice Kimmel

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

ROYAL BANK OF CANADA	and	**PEACE BRIDGE DUTY FREE INC.**
Applicant		Respondent (Moving Party)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ORDER

BLANEY McMURTRY LLP
Lawyers
2 Queen Street East, Suite 1500
Toronto, ON, M5C 3G5

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John C. Wolf (LSO #30165B)
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Email: bjones@blaney.com

Lawyers for the Respondent/Moving Party
Peace Bridge Duty Free Inc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

JUSTICE KIMMEL	)	WEDNESDAY, THE 17th DAY
	)	
	)	OF JANUARY 2024

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

ORDER
(Re: Costs)

THIS CROSS-MOTION, made by the Moving Party, Peace Bridge Duty Free Inc. ("**PBDF**"), was heard November 1st, 2nd, and 3rd, 2023, and the motion being dismissed on December 15th, 2023, with the decision with respect to costs being reserved until this day.

ON READING PBDF's Costs Submissions Brief dated November 24, 2023, and Reply Costs Submissions dated December 1, 2023, and the Costs Submissions of the Buffalo and Fort Erie Public Bridge Authority (the "**Authority**") dated November 24, 2023, and Reply Costs Submissions of the Landlord dated December 1, 2023, filed,

1. **THIS COURT ORDERS** that PBDF pay the Authority net costs of the Cross-Motion and Lift Stay Motion in the total all inclusive amount of $259,997.19, within thirty (30) days.

2. **THIS COURT ORDERS** the paragraph 1 of this order is subject to the stay in these proceedings that is currently in place pending the return of the Receivership Application and any other relevant considerations which may be raised with the court at a future attendance (if applicable).

_____

Justice Kimmel

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

ROYAL BANK OF CANADA	and	**PEACE BRIDGE DUTY FREE INC.**
Applicant		Respondent (Moving Party)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ORDER
(Re: Costs)

BLANEY McMURTRY LLP
Lawyers
2 Queen Street East, Suite 1500
Toronto, ON, M5C 3G5

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John C. Wolf (LSO #30165B)
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Email: bjones@blaney.com

Lawyers for the Respondent/Moving Party
Peace Bridge Duty Free Inc.

TAB 4

From:	Brendan Jones
To:	Shea, Patrick
Cc:	David T. Ullmann; John C. Wolf; Ariyana Botejue
Subject:	RE: Royal Bank of Canada v Peace Bridge Duty Free
Date:	Tuesday, January 23, 2024 3:35:19 PM
Attachments:	2024-01-23 - Draft Order dismissal of motion.docx 2024-01-23 - Draft Costs Order.docx image001.png image002.png image003.png image004.png image005.png image006.png image007.png image008.png

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Good afternoon,

It came to our attention that a formal order has not been taken out. Please find attached draft orders relating to the hearing of the cross-motion and the costs decision of Justice Kimmel.

Please advise whether you have any proposed revisions. If not, kindly confirm whether you approve the form of each order as to form and content.

Regards,

Brendan Jones
Partner

bjones@blaney.com
416-593-2997 | 416-594-3593

From: Shea, Patrick
To: Brendan Jones
Cc: David T. Ullmann; John C. Wolf; Ariyana Botejue
Subject: RE: Royal Bank of Canada v Peace Bridge Duty Free
Date: Tuesday, January 23, 2024 3:50:23 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png

Thank you.
The costs order is fine.

The second paragraph of the dismissal order should be removed…the rent payable is the rent required by the Lease. The Cross-Motion was dismissed and any statement re the rent payable was, in our view, obiter.

E. Patrick Shea, KC, LSM, CS (he/him)
Partner
T +1 416 369 7399
patrick.shea@gowlingwlg.com

Gowling WLG (Canada) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5
Canada

gowlingwlg.com

From: Brendan Jones
To: Shea, Patrick
Cc: David T. Ullmann; John C. Wolf; Ariyana Botejue
Subject: RE: Royal Bank of Canada v Peace Bridge Duty Free
Date: Tuesday, January 23, 2024 4:23:20 PM
Attachments: 2024-01-23 - Draft Costs Order v2.docx
image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png

We note that the draft cost order that we sent did not included the direction from Her Honour with respect to the impact of the stay of proceedings on the obligation to pay the costs ordered at paragraph 41 of the endorsement.

I've attached an updated version of the cost order.

Brendan Jones
Partner

bjones@blaney.com
416-593-2997 | 416-594-3593

From: Shea, Patrick
To: Brendan Jones
Cc: David T. Ullmann; John C. Wolf; Ariyana Botejue
Subject: RE: Royal Bank of Canada v Peace Bridge Duty Free
Date: Tuesday, January 23, 2024 4:42:20 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png

We do not accept this change to the costs order….If you wish to include the language from the last sentence of paragraph 41, you must be accurate. The language in that sentence modifies when the costs are payable, not the entire concept of costs…only the obligation to pay the costs in 30 days is subject to the stay and any other relevant consideration which may be raised with the court at a future attendance.

E. Patrick Shea, KC, LSM, CS (he/him)
Partner
T +1 416 369 7399
patrick.shea@gowlingwlg.com

Gowling WLG (Canada) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5
Canada

gowlingwlg.com

From: Brendan Jones
To: Shea, Patrick
Cc: David T. Ullmann; John C. Wolf; Ariyana Botejue
Subject: RE: Royal Bank of Canada v Peace Bridge Duty Free
Date: Wednesday, February 7, 2024 12:08:45 PM
Attachments: 2024-02-07 - Consent to extend time to perfect appeal (2).pdf
image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png

Good afternoon Patrick,

As you know we are unable to perfect the appeal until the order from the motion is settled. I've attached a draft consent to extend the time to perfect the appeal for 30 days.

Could you kindly confirm whether we may sign the consent on your behalf.

If there are any issues, please let us know.

Regards,

Brendan

Brendan Jones
Partner

bjones@blaney.com
416-593-2997 | 416-594-3593

From: Shea, Patrick
To: Brendan Jones
Cc: David T. Ullmann; John C. Wolf; Ariyana Botejue
Subject: RE: Royal Bank of Canada v Peace Bridge Duty Free
Date: Wednesday, February 7, 2024 12:16:46 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png

Thank you, but we will not be consenting. There was plenty of time for you to take out Orders, but you delayed. Now you have an appointment scheduled for 9 February 2024 to settle the Orders so this is not necessary.

E. Patrick Shea, KC, LSM, CS (he/him)
Partner
T +1 416 369 7399
patrick.shea@gowlingwlg.com

Gowling WLG (Canada) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5
Canada

gowlingwlg.com

TAB 5

IE CA 3 Holdings Ltd. v. NYDIG ABL LLC, 2024 BCCA 38 (CanLII)

Date: 2024-01-30
File number: CA49297
Citation: IE CA 3 Holdings Ltd. v. NYDIG ABL LLC, 2024 BCCA 38 (CanLII), <https://canlii.ca/t/k2lg0>, retrieved on 2024-02-08

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *IE CA 3 Holdings Ltd. v. NYDIG ABL LLC,* 2024 BCCA 38

Date: 20240130
Docket: CA49297

Between:

IE CA 3 Holdings Ltd., IE CA 4 Holdings Ltd., and Iris Energy Ltd.

Appellants/
Respondents on Cross Appeal
(Respondents)

And

NYDIG ABL LLC

Respondent/
Appellant on Cross Appeal
(Petitioner)

And

PricewaterhouseCoopers Inc. in its capacity as receiver and manager over IE CA 3 Holdings Ltd. and IE CA 4 Holdings Ltd.

Respondent
(Receiver)

Before: The Honourable Mr. Justice Hunter
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 10, 2023 (*NYDIG ABL LLC v. IE CA 3 Holdings Ltd.*, 2023 BCSC 1383, Vancouver Docket S230488).

Oral Reasons for Judgment

Counsel for the Appellants/Respondents on Cross Appeal:	K.E. Siddall C.L. Formosa
Counsel for the Respondent/Appellant on Cross Appeal:	C. Burr C.I. Hildebrand
Place and Date of Hearing:	Vancouver, British Columbia January 30, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2024

Summary:

The respondent applies for an extension of time to file a notice of cross-appeal and a cross-appeal factum. Held: Extension granted. There was a dispute about the scope of the order that was not resolved until after the time for filing a notice of cross-appeal. Finality plays a lesser role in considering extensions to file cross-appeals than it does extensions to bring an appeal. The appellant will not be unduly prejudiced by the delay in filing the cross-appeal. The interests of justice favour all matters in dispute arising from the trial judgment being resolved in one hearing.

[1] **HUNTER J.A.**: The respondent, NYDIG ABL LLC ("NYDIG"), applies for an extension of time to file a notice of cross-appeal and a cross-appeal factum.

[2] The appeal arises from a judgment in which a chambers judge held that certain transactions carried out by the appellants are, as against NYDIG, void as fraudulent conveyances under the *Fraudulent Conveyances Act*, R.S.B.C. 1996, c. 163, but did not give certain alternative declaratory relief sought by NYDIG.

[3] The underlying action concerns a claim by NYDIG against the appellants IE CA 3 Holdings Ltd. ("IE CA 3") and IE CA 4 Holdings Ltd. ("IE CA 4", and together with IE CA 3, the "Debtors"). IE CA 3 owes NYDIG in excess of US $36 million and IE CA 4, in excess of US $77 million. The Debtors used the borrowed funds to purchase approximately 37,800 pieces of specialized computer equipment (the "Equipment") that generates "hashpower" that is used to mine for Bitcoin, a type of cryptocurrency.

[4] A receiver has been appointed over the Debtors. The Receiver is in the process of, among other things, realizing on the Equipment, which was pledged to NYDIG as collateral under the financing agreement. A dispute arose between NYDIG on one side, and the Debtors and their parent company, Iris Energy Limited ("IEL") on the other, concerning whether NYDIG's collateral under the financing agreements also includes the proceeds derived from the sale of Bitcoin that was mined using the hashpower generated by the Equipment.

[5] NYDIG brought an application seeking a declaration to the effect that the financing agreements granted NYDIG a security interest in all Bitcoin mined using the Equipment and the proceeds derived from the sale of it, or alternatively one or more of the following declarations:

> a) that the transactions carried out by the Respondents pursuant to the Hashpower Agreements are, as against NYDIG, void as fraudulent conveyances, and should be reversed;

> b) that the Respondents have conducted their affairs in a manner that is oppressive to NYDIG, thereby entitling NYDIG to a remedy under s. 227 of the *British Columbia Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]; and
>
> c) that IEL and its subsidiaries should be treated, as against NYDIG, as a single debtor entity, pursuant to the doctrine of substantive consolidation.

[6] In reasons indexed at 2023 BCSC 1383 ("Reasons"), the chambers judge dismissed the primary application concerning NYDIG's claim for security interest in the Bitcoin but granted the declaration that the transactions carried out by the appellants were, as against NYDIG, fraudulent transactions. It is the treatment of the other alternative declarations that has led to this application.

[7] With respect to this relief, the Reasons provided as follows, under the heading "Other Relief Sought":

> [151] In view of that conclusion, it is unnecessary to consider the appropriateness of the relief sought under s. 227 of the *BCA*, which takes the form of a similar declaration.
>
> [152] With respect to NYDIG's request for a declaration that IEL and the Debtors be treated as a single consolidated entity, such relief has previously been said to be available, "[i]n a liquidation or reorganization of a corporate group": *Nortel Networks Corporation (Re)*, 2015 ONSC 2987, leave to appeal refused, 2016 ONCA 332, at para. 213. As counsel for NYDIG candidly acknowledged during the hearing, the doctrine has never been applied in Canada to bring about the substantive consolidation of a solvent company like IEL with its insolvent affiliates. Given that NYDIG has been successful in obtaining other declaratory relief, this is not a case in which it is necessary to consider expanding the ambit of the doctrine in the manner urged. A second reason for refusing that relief is that it more closely resembles the parent guarantee that NYDIG abandoned at the bargaining table.

[8] The appellants filed their notice of appeal on August 21, 2023 and their factum on November 15, 2023. NYDIG filed its respondents' factum on December 15, 2023. The appellants filed their reply factum on December 22, 2023. The appeal books were filed on January 12, 2024. The appeal is ready for hearing and has been scheduled to be heard for one day on March 12, 2024.

[9] While the factums were being exchanged, draft orders were exchanged between the parties. A disagreement arose as to the terms of the order.

[10] In NYDIG's interpretation of the Reasons, the chambers judge had declined to dismiss or refuse its requests for a declaration that it is entitled to a remedy under s. 227 of the *BCA* (the "Oppression Remedy") and for a declaration that IEL and its subsidiaries be treated as a single debtor entity, pursuant to the doctrine of substantive consolidation (the "Substantive Consolidation Remedy").

[11] In the appellants' interpretation of the Reasons, the chambers judge had refused NYDIG's request for the Oppression Remedy and the Substantive Consolidation Remedy.

[12] In a memorandum issued to the parties on December 13, 2023, the chambers judge advised the parties that he had refused NYDIG's application for the Oppression Remedy and the

Substantive Consolidation Remedy. The formal order, entered January 17, 2024, reflects that determination.

[13] On December 19, 2023, counsel for NYDIG advised counsel to the other parties that NYDIG intended to bring the present application for an extension of time to file a notice of cross-appeal regarding the Oppression Remedy and Substantive Consolidation Remedy.

[14] On January 16, 2024, NYDIG filed its application for an extension of time to file a notice of cross-appeal and cross-appeal factum.

Legal Framework

[15] Section 32 of the *Court of Appeal Act,* S.B.C. 2021, c. 6 provides:

> (1) A justice may dispense with a requirement of the rules.
>
> (2) A justice may extend or shorten a time limit, provided in this Act or the rules, for doing an act, including the time limit for commencing an appeal or application for leave to appeal.
>
> (3) Subsection (2) applies to an extension of a time limit even if the time limit for doing an act expires before
>
> (a) a person applies for the extension, or
>
> (b) the justice orders the extension.

[16] The criteria applicable to whether to grant an extension of time were set out in *Davies v. C.I.B.C.* (1987), 1987 CanLII 2608 (BC CA), 15 B.C.L.R. (2d) 256 at 259–260 (C.A.) and can be summarized as follows:

1) Was there a *bona fide* intention to appeal?
2) When were the respondents informed of the intention?
3) Would the respondents be unduly prejudiced by an extension of time?
4) Is there merit in the appeal?
5) Is it in the interests of justice that an extension be granted?

[17] While these considerations also apply to an extension of time to bring a cross-appeal, the weighting of the criteria may be adjusted to account for the reality that a late-filed cross-appeal does not disturb the finality of litigation in the same way that a late-filed appeal does: *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club,* 2019 BCCA 439 (Chambers) at paras. 45–46 [*Douglas Lake*].

[18] Justice Lambert explained this distinction in *Newson v. Newson* (1980), 1980 CanLII 388 (BC CA), 18 B.C.L.R. 203 (C.A.) in these terms:

> [15] In my opinion the factors that should influence the court or a judge in deciding whether to exercise the discretion to extend the time for filing a notice of appeal are not applicable with the same force or in the same way in deciding whether the court or a judge should exercise the discretion to extend the time for filing a factum embodying a notice of cross-appeal.
>
> [16] The concept of finality of litigation underlies the strict view that is taken by this court in considering whether to exercise its discretion to extend the time for filing a notice

> of appeal. Once a dispute has been submitted to litigation, and has been decided, and the time for appeal has expired, then the parties should be able to pursue their affairs on the basis that the dispute has been finally put to rest, for better or worse. They may make irrevocable decisions based on that assumption. They ought to be able to do so.
>
> [17] But where a notice of appeal has been filed, it is clear that the litigation is not over. The parties must manage their affairs with a regard for the continuance of the dispute and the possibility of more than one result. Since the dispute is going to continue, it remains an important consideration that all the issues that were involved in the dispute at trial and that continue to vex the parties should be considered and decided in the appeal.

[19] The most significant factors in assessing an application to extend the time to file a cross-appeal are whether the appellant would be unduly prejudiced by permitting the cross-appeal to be filed and whether, having regard to the nature of the appeal, the issues to be canvassed in the appeal, and the time available for the appellant to respond to the issues raised in the cross-appeal, it is in the interests of justice that all matters in dispute arising from the trial judgment be resolved in one hearing: *Douglas Lake* at para. 46.

[20] If the proposed cross-appeal has no merit, the application to extend the time to file should be dismissed: *The Law Society of British Columbia v. Cole*, 2022 BCCA 55 (Chambers) at para. 29 [*Cole*]. However, unless the lack of merit is obvious, the merits question should be left to the division hearing the appeal: *Douglas Lake* at para. 46.

[21] Whether the extension would be in the interests of justice is the “overriding question” that “embraces the first four questions”: *Davies* at 260–261.

Analysis

[22] The parties have been diligent in filing their factums and appeal materials so that the appeal can be heard on a timely basis. The reason for the need for an extension of time is that there was a dispute concerning the interpretation of the order made by the chambers judge. NYDIG interpreted the reasons for judgment as not addressing their alternative relief sought, focussing on the statement in the reasons that “it is unnecessary to consider the appropriateness of the relief sought under s. 227 of the *BCA*”, and “this is not a case in which it is necessary to consider expanding the ambit of the [substantive consolidation] doctrine”. The appellants rely on the statement that “[a] second reason for refusing that relief…” for the conclusion that the judge had refused the order sought (although I note that this statement applies only to the substantive consolidation claim).

[23] The dispute was not resolved until December 13, 2023 when the judge issued his memorandum clarifying that he had refused both alternative declarations sought. The respondent has proceeded promptly to bring this application forward. The question is whether it is in the interests of justice to permit the cross-appeal to be filed, given the impending appeal date.

[24] The appellants have taken the position that while it should have been apparent that the alternative relief had been refused, if there was any real doubt NYDIG ought to have filed a protective cross-appeal until the matter could be clarified, thereby avoiding the risk of being unable to challenge the judge’s conclusion if their interpretation was rejected. At a minimum, they should

have advised the appellants of their provisional intention of filing a cross-appeal if the judge confirmed that he had dismissed both applications for alternative declaratory relief.

[25] The failure of NYDIG to notify the other parties of its intention to bring a cross-appeal within the applicable timeframe for bringing the cross-appeal is not fatal to its application: *Cole* at para. 15. I do agree that it would have been prudent to either file a protective cross-appeal or at a minimum, advise the appellants of their intention to do so if necessary. If the issue was whether the time should be extended to file a notice of appeal, the approach taken by NYDIG would have counted against extending the time. In the normal course, once the time for filing a notice of appeal has expired, a successful party is entitled to conclude that the dispute has ended, and govern itself accordingly. The onus on a party seeking to appeal a judgment out of time can be a heavy one.

[26] However, the significance of unwisely relying on an interpretation of the judgment to allow relevant time limits to expire has somewhat different implications for a cross-appeal. Once the appellants filed their notice of appeal, it was obvious to all that the dispute had not ended and was heading for a different forum. Finality no longer plays a role in assessing the appropriateness of permitting a cross-appeal to proceed. There may be circumstances where the cross-appeal so changes the nature of the appeal proceedings that the failure to comply with the requisite time limits creates some real prejudice, but it is difficult to see what difference it would have made to the appellants in this case to know that NYDIG wished to preserve its rights to assert the declaratory relief they did not obtain at trial.

[27] In my view, the reason for the delay in filing has been satisfactorily explained by the respondents. The Head of Structured Financing for NYDIG has filed an affidavit swearing that had it been clear to NYDIG, based on the Reasons, that the chambers judge dismissed the Oppression Relief and/or the Substantive Consolidation Relief, NYDIG would have filed a notice of cross-appeal in accordance with the prescribed timelines. The appellants have taken issue with this evidence on the basis that it does not disclose which individual from NYDIG made the determination as to the meaning of the reasons for judgment, but I am satisfied that Mr. Smyth's affidavit provides an adequate basis for a conclusion that NYDIG would have filed a cross-appeal within the required time limits had it understood that its alternative relief had been refused rather than simply not addressed.

[28] The most significant consideration in my view is whether the appellants will be unduly prejudiced by permitting the cross-appeal to proceed. To be relevant, the prejudice must arise from the delay in filing, not the fact that the appellants would now be required to meet an additional argument on appeal: *Aslanimehr v. Hashemi*, 2019 BCCA 421 (Chambers) at para. 44. The appellants have taken the position that they will suffer prejudice, primarily because of the short time before the appeal is scheduled to be heard in March.

[29] The issue the respondent wishes to raise was squarely before the chambers judge, so responding to it will not require the appellants to address a new point not previously considered. Amended appeal books will not be required. Both parties are represented by experienced counsel,

and I am satisfied that the prejudice to the appellants from the delay is not so great that the application should be refused.

[30] NYDIG has stated that if the extension is granted, it will deliver its cross-appeal factum today in order to preserve the appeal date.

Disposition

[31] In these circumstances, I am satisfied that it is in the interests of justice that the extension be granted on the following terms:

i. The time for filing and delivering a notice of cross-appeal and cross-appeal factum is extended to January 30, 2024;

ii. The time for the appellants to file and deliver their factum on cross-appeal is extended to February 20, 2024; and

iii. The appellants are entitled to their costs of this application in any event of the appeal.

"The Honourable Mr. Justice Hunter"

TAB 6

Blaney McMurtry LLP | Lawyers
2 Queen Street East | Suite 1500
Toronto, Ontario M5C 3G5
T 416-593-1221
W Blaney.com

David T. Ullmann
Partner
D: 416-596-4289 E: DUllmann@blaney.com

January 24th, 2024

Via Email patrick.shea@gowlingwlg.com and Christopher.Stanek@gowlingwlg.com

Patrick Shea and Christopher Stanek
Gowling WLG (Canada) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON, M5X 1G5

Dear Counsel:

Re: Lease between Buffalo and Fort Erie Public Bridge Authority ("Landlord") and Peace Bridge Duty Free Inc. ("Tenant") dated July 20th, 2016 ("Lease")

And Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

As you know, we have been speaking with Mr. Mitra about possible scenarios to propose to the landlord with the consent of RBC.

We believe we are getting closer and wanted to deliver the attached offer to settle to your client. It remains conditional upon RBC agreeing to free-up $500,000 now. We expect that upon a conditional agreement between the landlord and tenant, that the bank will come on board.

By way of offer overview, the tenant has attempted to mirror the landlord's last offer to settle and to agree to as many of the landlord's terms as possible. In particular:

- The tenant will pay arrears in the sum as requested, with $2.5 million paid up front and the balance within 6 months.
- The tenant will pay the costs submitted in the landlord's bill of costs - not the amount awarded by the court - which accretes about $100,000 to the landlord.
- The landlord shall be entitled to retain any overpayment of rent through the lease year 2023 totalling approximately $259,000.
- The tenant has reluctantly agreed to no longer seek an extension of lease term or further option to extend.
- The tenant agrees to address signage at the premises, food services, and removing temporary hoarding as requested.

- The tenant accepts the ramp up period.
- The tenant agrees that subsection 18.07 does not give rise to an entitlement to rent concessions.
- The landlord shall remit any Tenant HST overpayment on receipt.
- The tenant and landlord will exchange releases of all claims to date, including known and unknown claims and also including claims for contribution and indemnity.

The tenant has spent considerable time modelling its obligations and ability to pay and it is confident that it can perform the proposal vis a vis the landlord. This represents a “stretch” in that it is entirely dependent upon a $500,000 release of security by RBC and also does include a material cash infusion by the shareholders.

We recognize you are well able to assess the benefits to the landlord, and we ask your indulgence while we recount the tenant’s view of the benefits to the landlord:

- The landlord recovers over $2.8 million arrears unavailable in any insolvency.
- The landlord recovers its substantial indemnity legal fees of approximately $350,000 unavailable in any insolvency.
- The shareholders are injecting fresh capital into the tenant to make the arrears payment.
- The Appeal will be withdrawn - and landlord costs and delay avoided.
- The landlord avoids the inherent uncertainty of an Appeal – regardless of what percentage of risk the landlord assesses - there is always risk in any litigation.
- The landlord will avoid delay and costs associated with a BIA Proposal or bankruptcy.
- The landlord will avoid vacancy through an RFP process, and the costs of that process.
- The landlord is very likely materially better off financially with the amended lease as proposed then what it could achieve in the open market.
- The landlord is not required to fund any leasehold improvements, free basic rent or fixturing periods typical to a replacement tenancy.
- The landlord will no longer consume senior executive and BOD administrative time.
- The landlord will have the satisfaction of winning the litigation and recovering over $3 million of monies otherwise forfeited and avoiding downtime, costs and uncertainty of outcome.

The proposal is subject to your review and comments in respect of how it is worded, and we would be pleased to work with you to capture these business terms.

Please call me to discuss, or arrange a time to meet. In this regard, we recall Stephen Morrison owes the parties one day of mediation time.

Yours very truly,
BLANEY MCMURTRY LLP

David T. Ullmann
DTU/gf

cc: John C. Wolf and Brendan Jones

Proposed Settlement Terms with PBDF and PBA
dated January 24th, 2024

- **Ramp-up of Base Rent.** Art 4.03 will be amended to provide for the following Base Rent:

  Lease Year ending 31 Oct 2022—Base Rent of $2MM or 20% of sales, whichever is greater.

  Lease Year ending 31 Oct 2023—Base Rent of $2.5MM or 20% of sales, whichever is greater.

  Lease Year ending 31 Oct 2024 —Base Rent of $3MM or 20% of sales, whichever is greater.

  Lease Year ending 31 Oct 2025—Base Rent of $3.5MM or 20% of sales, whichever is greater.

  From and after the Lease Year ending October 31st, 2026, Base Rent will be payable in accordance with the Lease.

  Notwithstanding the foregoing, any over-payment of rent by PBDF up to October 31st, 2023 in the sum of $259,000 will be retained by the Authority and will not be applied to rent payable for any subsequent year.

- **Accrued Rent.** Accrued rent for the period to 31 October 2021 is $5.703 MM (without interest). The Authority shall waive any interest and accept $2.852 MM, in full and final satisfaction of the amount owing which shall be paid as follows: $2.5 million (of which $500,000 is to be released by RBC and requires its consent which is pending) within 30 days of signing the amendment to the Lease, and $352,000 6 months later.

- **Food Services.** PBDF will use its commercially reasonable efforts to source a new food service provider or providers within 90 days of the signing the amendment to the Lease. As agreed, rent due to the Authority will be the actual rent paid by the sub-tenant.

- **Refurbishment.** Capital improvements will only be made in YR11 and YR16 of the Lease. No capital improvement in YR6 will be made or required.

- **Interior.** Within no more than 90 days of signing the amendment to the Lease, PBDF will restore the interior of the premises by removing the wall constructed to block the food service areas. The repairs will be conducted in a manner and to a standard acceptable provided for in the Lease.

- **Exterior/Signage.** Within 90 days of the signing the amendment to the Lease, PBDF will repair and/or replace the billboards and exterior signage to be substantially as depicted in the Tenant Proposal.

- **Professional Fees.** Within 90 days of the signing the amendment to the Lease, and upon receipt of an invoice, PBDF will pay the Authority's professional fees in the amount submitted by PBA's cost brief namely $310,000 plus HST.

- **Subsection 18.07 of the Lease.** The Tenant agrees that subsection 18.07 does not give rise to an entitlement to rent concessions.

- **HST**. PBA will remit to PBDF any Tenant overpayment of HST upon receipt.

- **Releases.** The parties will exchange comprehensive releases of all claims (including for contribution and indemnity) of any kind (known or unknown) against the other in respect of any matters arising to the date of executing the amendment of lease agreement in a form to be agreed to between the parties acting reasonably.

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

ROYAL BANK OF CANADA and **PEACE BRIDGE DUTY FREE INC.**

Applicant Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AIDE MEMOIRE BRIEF OF
PEACE BRIDGE DUTY FREE INC.
(Case Conference returnable February 9, 2024)

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, ON, M5C 3G5

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John Wolf (LSO #30165B)
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Email: bjones@blaney.com

Lawyers for the Respondent