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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

BRIEF FOR ARGUMENT
5 JANUARY 2023

Date: 3 January 2023

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Christopher Stanek (LSUC# 45127K)
Tel: 416-862-4369
Fax: 416-862-7661

E. Patrick Shea (LSUC# 39655K)
Tel: 416-369-7399
Fax: 416-862-7661

Lawyers for Buffalo and Fort Erie Public Bridge Authority

Index

CITATION: Durham Sports Barn Inc. Bankruptcy Proposal, 2020 ONSC 5938
COURT FILE NO.: 31-2601563
DATE: 20201002

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: In the Matter of the Notice of Intention to Make a Proposal of Durham's Sports Barn Inc. of the City of Oshawa in the Regional Municipality of Durham

BEFORE: C. Gilmore, J.

COUNSEL: *Philip Cho* and *Max Skrow*, for the company, Durham's Sports Barn Inc.

Todd Storms and *Zach Flemming-Giannotti*, for the Landlord, 1213423 Ontario Inc.

HEARD: September 11, 2020

ENDORSEMENT ON MOTION

OVERVIEW

[1] This is Durham's Sports Barn Inc.'s ("Durham" or "the Tenant") motion for various relief in relation to its Landlord, 1213423 Ontario Inc. ("121" or "the "Landlord").

[2] Specifically, Durham seeks an order:

a. That the distress sale between the Landlord and Mr. Larry Rogalski ("Mr. Rogalski") was not completed prior to the filing of the Notice of Intention to Make a Proposal by Durham and therefore that the transaction between the Landlord and Mr. Rogalski and the Bill of Sale dated January 2, 2020, is of no force or effect and the property shall be returned to Durham and the proceeds returned to Mr. Rogalski.

b. Setting aside the Notice of Termination and the Notice of Default dated January 9, 2020, delivered by the Landlord such that the lease agreement dated November 1, 2015, remains in full force and effect.

[3] There are three issues to be determined on this motion; (1) whether the distraint was lawful or should be set aside, (2) whether the lease termination that followed the Notice of Intention ("NOI") was lawful or should be set aside, and (3) whether Durham should be relieved of paying rent when it was prevented from lawfully operating due to emergency orders issued by the Province of Ontario.

d. Mr. Rogalski conceded that he received the appraisals in advance of negotiating a sale price.[3]

e. There is a concern about the validity of the second appraisal which was done without the appraiser viewing the chattels and relying solely on the information in the first appraisal.

f. Mr. Russo knew that the distraint sale would be insufficient to cover the rental arrears.[4]

[48] This Court has a concern that the distress sale did not comply with s. 53 of the *CTA* given that there is evidence that the best price possible was not obtained. This was because the second appraisal was done without inspection of the goods, the sale price was negotiated between friends and the purchaser had access to the appraisals before agreeing to a price. Finally, the sale has not been completed as the goods remain with Durham and Mr. Rogalski has paid for them but not insisted on delivery. In any event, the funds received from the sale came far short of the significant pre-NOI arrears.

[49] In the circumstances, the purchase funds should be returned to Mr. Rogalski and, if necessary, a proper sale of the goods can be conducted by the Trustee. In the interim, the goods will remain in Durham's possession so they can operate the business during the course of the proposal proceedings.

Post-NOI Rental Payments

[50] Durham has not paid rent since January 2020. The Landlord did not cash the prorated January cheque and the February rent cheque as described above. Given the Landlord's refusal to accept those cheques, Durham has not paid further rent.

[51] Durham now seeks further relief from the payment of rent from March to July 2020 on the grounds that it was prohibited from operating between March 19 to May 25, 2020, due to the pandemic lockdown ("the Shutdown"). It seeks to pay proportional rent for the period of May 26 to July 24, 2020, during its Phase II re-opening ("the Limited Operation Period" or the "LOP") which the Tenant calculates as 65% of Unit 2 and 5% of Unit 1.

[52] Durham argues that relief from rental payments during the Shutdown and partial relief during the LOP is consistent with the remedial provisions of the *BIA* as the lease was frustrated during the Shutdown and is a *force majeure.*

[53] The lease contains a *force majeure* clause which excludes the Landlord from its obligation to provide the Company with quiet enjoyment as a result of the Shutdown. As such, Durham argues that it should correspondingly be relieved of its obligation to pay rent.

---

[3] Rogalski Cross-examination at Q131.
[4] Russo Cross-examination, Q 137-140.

[54] Durham relies on *Hengyun* Inte*rnational Investment Commerce Inc. c. 9368-7614 Quebec Inc., 2020 QCCS 2251.* In that case, a gym tenant was relieved from paying rent for March, April, May and part of June 2020 due to the pandemic lockdowns. The Court held that the lockdown resulted in the Landlord being unable to provide the Tenant its right to peaceable enjoyment of the premises. Notwithstanding the *force majeure* term in the lease, which did not excuse the Tenant from the payment of rent in such circumstances, the Court relied on the concept of *superior force* in the Quebec Civil Code to find that the pandemic was unforeseeable.

[55] Similarly, the *force majeure* clause in the lease in the case at bar cannot be relied upon by Durham to avoid paying rent. However, Durham argues that where the *force majeure* interferes with its quiet enjoyment, the Landlord cannot insist on the payment of rent.

[56] Durham also relies on a case decided under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 *("CCAA"), Comark Holdings Inc., Re* (June 3, 2020), Doc. Toronto CV-20-00642013-00CL (Ont. S.C.J.) *("Comark")*, 2020 QCCS 2251. In that case, the debtor was relieved of its obligation to pay rent during any period in which it was not permitted to open its locations in the ordinary course of business.

[57] I do not agree with the Tenant that it should be relieved of any portion of the rent demanded by the Landlord post-NOI. I come to this conclusion based on the following;

a. The *force majeure* clause in the lease relieves the Landlord from providing quiet enjoyment (i.e. the performance of an obligation under the lease) but does not relieve the Tenant from the obligation to pay rent.

b. The obligation of the Landlord to provide quiet enjoyment is always subject to the payment of rent by the Tenant, as stated at paragraph 3.3 of the Lease. As Durham did not pay rent during the subject periods, the Landlord's obligation to provide quiet enjoyment correspondingly did not arise.

c. The Landlord was not advised of the Tenant's position concerning relief or abatement of any rent during the Shutdown or the LOP until August 2020 and, therefore, had no opportunity to assist the Tenant during those times to remedy or mitigate the situation.

d. The *Hengyun* case is not applicable. First, the language of the *force majeure* clause is quite different in the two leases and, second, the Court relied on the application of the doctrine of "superior force" in the Quebec Civil Code, a doctrine which does not exist in Ontario.

e. Government legislation enacted during the Shutdown and the LOP to ensure the survival of small businesses focused on preventing eviction by landlords but did not suspend the payment of rent.[5]

---

[5] *Protecting Small Business Act, 2020, SO 2020, c. 10,* s.81, 82 and 84.

f. I do not find that the *Comark* case applies. The initial Order was in place for a mere 10 days. On the comeback motion, a consensual rent deferral was negotiated. This case cannot stand for the proposition that a precedent for long term rental relief during the Shutdown and the LOP has been created.

[58] Given, all of the above, I find that Durham is obligated to pay all post-NOI rent as demanded by the Landlord.

Time to File Proposal

[59] This motion has been significantly delayed as a result of the COVID-19 crisis. Given that a determination of the issues on this motion was necessary for Durham to make a proposal to its creditors, I am satisfied that Durham should be given a further extension of its time to file a proposal under the NOI. To hold otherwise would effectively put Durham into bankruptcy without having had any meaningful opportunity to make a proposal.

[60] In making this order, I am aware that s. 50.4(9) of the *BIA* does not allow for extensions that exceed five months in the aggregate after the expiry of 30-day period following the filing of the NOI. Since the NOI was filed on January 3, 2020, it has now been over five months since that initial 30-day period expired. However, I am satisfied that an overly strict and technical compliance with these provisions would be contrary to the objectives of the *BIA*. As Morawetz CJ recently noted in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552, 79 C.B.R. (6th) 96 at para. 48, "in enacting the *BIA*, and in making amendments over the years, Parliament could never have envisioned the impact of a pandemic such as COVID-19." Strictly complying with the timelines in the *BIA* without any regard for the extraordinary circumstances of this case is neither reasonable nor desirable.

[61] I am satisfied that I have this power through the inherent jurisdiction of the Court. Inherent jurisdiction is exercisable in "any situation where the requirements of justice demand it" (*Gillespie v. Manitoba (Attorney General)*, 2000 MBCA 1 (Man. C.A.) at para. 92. Certainly the requirements of justice demand that Durham should not be precluded from making a proposal because of its inability to obtain a timely court hearing due to circumstances entirely beyond its control.

[62] Finally, I note that the Federal Government passed the *Time Limits and Other Periods Act (COVID-19),* S.C.2020, c.11, s.11 which came into effect July 27, 2020. This legislation provides for the ability to extend the time limits in section 50.4(9) and other sections of the *BIA.* However, to date, the responsible minister has not made any Orders under this *Act* extending any timelines.

ORDERS

[63] Given all of the above, I make the following orders:

a. The Notice of Termination dated January 9, 2020, delivered by the Landlord is hereby set aside such that the lease dated November 1, 2015, remains in full force and effect.

COURT OF APPEAL FOR ONTARIO

CITATION: Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., 2022 ONCA 585
DATE: 20220815
DOCKET: C69692

Doherty, Harvison Young and George JJ.A.

BETWEEN

Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI

Plaintiff (Appellant/Respondent to Cross-Appeal)

and

Oxford Properties Retail Holdings II Inc., CPPIB Upper Canada Mall Inc., Omers Realty Management Corporation, Montez Hillcrest Inc., Hillcrest Holdings Inc., Yorkdale Shopping Centre Holdings Inc., Square One Property Corporation, Scarborough Town Centre Holdings Inc., Oxford Properties Retail Holdings Inc. and Kingsway Garden Inc.

Defendants (Respondents/Cross-Appellants)

Jonathan C. Lisus and Carter Liebzeit, for the appellant/respondent

Deborah E. Palter and Alexander Soutter, for the respondents/cross-appellants

Heard: April 19, 2022

On appeal from the decision of Justice C. Gilmore of the Superior Court of Justice, released June 24, 2021, and reported at 2021 ONSC 4515 and 2021 ONSC 4998.

Doherty J.A.:

[39] Oxford and HBC agree that the motion judge correctly ordered relief from forfeiture under s. 20. They disagree as to the proper scope of that order. HBC submits the motion judge did not go far enough and should have abated or reduced the rent owing by 50 percent for some indefinite time while the economic effects of COVID-19 continued. Oxford maintains the motion judge went too far in the relief she granted. Counsel submits HBC was in a position to pay the amounts owing under the lease, including interest, forthwith and the motion judge should have ordered payment within 10 days.

[40] The different positions taken by HBC and Oxford reflect their different views as to the scope of the relief provided for in s. 20. HBC relies heavily on the broad language in the section, stressing the phrases "as the court thinks fit" and "the court considers just". That language clearly suggests a broad discretion.

[41] The discretion in s. 20 must, however, be exercised in the context of providing the remedy contemplated by s. 20. Section 20 provides for a specific and narrow remedy. The tenant may gain relief from forfeiture of the lease. Any terms granted as part of the order are granted to make the relief from forfeiture an effective remedy.

[42] Section 20 allows the court to intervene and prevent the forfeiture of the lease, even though the landlord is entitled to forfeiture under the terms of the lease. In my view, relief from forfeiture does not contemplate a recalibration of existing

rights and obligations under the lease on a go forward basis to reflect what the court sees as a fair arrangement in light of unforeseen developments. Nothing in s. 20 empowers the court to create what the court regards as a fair lease for the parties. Section 20(5) of the *CTA* specifically provides that when relief from forfeiture is granted the tenant holds the leased premises "according to the lease".

[43] Section 20 aims to preserve the relationship between the parties as reflected in the lease. The broad discretion in s. 20 allows the court to impose terms that will bring and keep the tenant in compliance with the existing lease: see *Clark Auto Body v. Integra Custom Collision Ltd.*, 2007 BCCA 24, at 30. To order that a tenant is not required to pay the agreed upon rent is not to grant relief from forfeiture of the lease, but is to grant relief from compliance with the terms of the lease. Nor does the abatement or reduction of the rent agreed upon in the lease preserve the lease. Instead, it alters a basic and fundamental term of the lease.

[44] HBC relies on s. 20(6) of the *CTA* to support its interpretation of the scope of the relief provided for in s. 20. Section 20(6) forecloses parties from contracting out of s. 20.

[45] I agree with counsel for Oxford's submission that s. 20(6) does not advance the appellant's argument. Oxford does not suggest the parties did, or could, contract out of s. 20(1) under the terms of their lease. Oxford submits that s. 20(1)

CREDIT AMENDING AND FORBEARANCE AGREEMENT

THIS AGREEMENT (this "Agreement") is made as of this 8th day of October, 2021.

B E T W E E N:

ROYAL BANK OF CANADA

(hereinafter referred to as the "**Lender**")

- and -

PEACE BRIDGE DUTY FREE INC.

(hereinafter referred to as the "**Borrower**")

RECITALS:

WHEREAS the Borrower is indebted to the Lender with respect to certain credit facilities (the "**Credit Facilities**") made available by the Lender to the Borrower, including, without limitation, those Credit Facilities made pursuant to and under the terms of the credit agreement dated July 20, 2018, as amended on July 5, 2021 (collectively, as same may have been amended, replaced, restated or supplemented from time to time, the "**Credit Agreement**");

AND WHEREAS to secure the Borrower's obligations to the Lender, including, without limitation, those arising under the Credit Agreement, the Borrower has provided security in favour of the Lender (collectively, the "**Security**"), including, without limitation, the general security agreement dated August 19, 2013 (the "**GSA**"), which GSA grants the Lender, amongst other things, a security interest in any and all of the Borrower's property, assets and undertakings;

AND WHEREAS certain of the Credit Facilities are repayable on demand, certain events of default have occurred pursuant to the Credit Agreement and the Lender has demanded repayment of the Indebtedness (as defined herein);

AND WHEREAS the Borrower has requested and the Lender has agreed to forbear from taking certain actions under the Credit Agreement and the Security in connection with the defaults of the Borrower existing to the date hereof and has agreed to continue to extend the Credit Facilities to the Borrower, all solely on the terms and conditions and subject to the limitations as specified in this Agreement, 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), strictly in accordance with the timelines set out in this Agreement;

NOW THEREFORE in consideration of the respective covenants of the parties hereto as herein contained, and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereby agree as follows:

a) no further advances will be permitted under the revolving line of credit or lease line, effective immediately upon the execution of this Agreement by the Borrower; and,

b) the total credit available to the Borrower under its Visa Facility is reduced from $300,000 to $50,000 upon execution of the agreement.

ARTICLE 6
OBLIGATIONS OF THE BORROWER DURING THE FORBEARANCE PERIOD

6.1 Financing Agreements

During the Forbearance Period, the Borrower shall strictly adhere to all the terms, conditions and covenants of this Agreement and all the other Financing Agreements, including, without limitation, terms requiring prompt payment of principal, interest, fees and other amounts when due, except to the extent that such terms, conditions and covenants are otherwise specifically amended by this Agreement.

6.2 Full Co-Operation

During the Forbearance Period, the Borrower shall cooperate fully with the Lender, its consultants and appraisers including, without limitation, by providing promptly all requested information, and by providing the Lender and its consultants and appraisers full access to the books, records, property, assets and agents of the Borrower wherever they may be situated and in whatever medium they may be recorded, at the request of and at times convenient to any such party, acting reasonably, which right of access shall include the right to inspect and appraise such property and assets.

6.3 Payment and Other Obligations

The Borrower hereby covenants and agrees with the Lender to reimburse the Lender for all expenses, including, without limitation, actual legal, appraisal and other professional expenses that the Lender has incurred or will incur arising out of its dealings with the Borrower (collectively, the "**Professional Expenses**"), including, without limitation, the actual fees and expenses of the Lender's solicitors, Aird & Berlis LLP, and that the Professional Expenses shall be for the account of the Borrower and shall be paid by the Borrower upon delivery to the Borrower of invoices evidencing the Professional Expenses, or payment will otherwise be made by the Lender for later repayment by the Borrower by no later than one day prior to the expiration or termination of the Forbearance Period. Nothing in this Agreement shall derogate from the Borrower's obligation to pay for all the Professional Expenses or shall constitute a cap on the Professional Expenses.

6.4 Operational Obligations

For the duration of the Forbearance Period, the Borrower hereby covenants and agrees with the Lender as follows:

(a) the Borrower shall close any and all of its accounts at other financial institutions, and use only its accounts with the Lender, unless otherwise agreed in writing by the Lender;

(b) by no later than November 15, 2021 the Borrower shall deliver to the Lender evidence that an arrangement satisfactory to the Lender, in its sole discretion, has been entered into between the Borrower and the Landlord in respect of the Lease and the defaults thereunder to ensure that the Landlord will not terminate the Lease before the end of its current term;

(c) the Borrower shall afford access and cooperation to an appraiser engaged by the Lender to permit it to attend and complete an appraisal of the Borrower's inventory on or before October 15, 2021;

(d) the Lender may speak directly with the Landlord regarding the status of the Lease and the resolution of any defaults thereunder;

(e) the Borrower shall maintain its corporate existence as a valid and subsisting entity and shall not merge, amalgamate or consolidate with any other corporation, except with the Lender's prior written consent;

(f) except as specifically provided for herein, the Borrower shall comply in all respects with all terms and provisions of the Financing Agreements and this Agreement and nothing herein derogates therefrom. For greater certainty, except as provided for in this Agreement, the Borrower shall continue to remit all payments when due under the Financing Agreements and shall operate all facilities within the terms and the limits prescribed therein, except as amended by this Agreement. For further greater certainty, and notwithstanding anything else in the Financing Agreements or this Agreement, the Borrower shall operate and maintain sufficient funds to cover any and all items attempting to clear its bank account with the Lender at all times;

(g) the Borrower shall comply with any and all cash management obligations and obligations to maintain insurance in accordance with the Financing Agreements;

(h) the Borrower shall be responsible for paying the fees and out of pocket expenses of the Lender and, if the Borrower fail to do so, the amount of such fees and expenses will be added to the Indebtedness;

(i) the Borrower shall not, without the prior written consent of the Lender, make any distribution or payment to any person, corporation or other entity who does not deal with the Borrower at arm's length (as such term is defined in the *Income Tax Act* (Canada)), except for:

  (i) payments of salary at levels not in excess of those now in effect; and

  (ii) payments to ordinary suppliers in respect of any supply arrangements arising in the ordinary course of the business of the Borrower that are commercially

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

AFFIDAVIT OF JIM PEARCE

I, **Jim Pearce**, of the Town of Fort Erie, in the Province of Ontario, **AFFIRM AND SAY THAT:**

1. I am the general manager as well as an officer holding the position of Secretary/Treasurer of Peace Bridge Duty Free Inc. ("**Duty Free**"). As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and belief, and, in all such cases, believe it to be true.

2. Capitalized terms not defined in the affidavit have the same meaning as in the Lease (as defined below).

3. Having reviewed the application record of the Royal Bank of Canada ("**RBC**"), and based on my involvement in this matter, it is my understanding that RBC is acting out of concern that our landlord will shortly take steps to terminate the lease. Duty Free is not in monetary default

70. Furthermore, terminating the Lease would also compromise Duty Free's ability to operate the duty free shop at the Hamilton Airport, which is otherwise in good standing with its landlord and the CBSA, because Duty Free ships inventory from its Leased Premises to the Hamilton location.

71. On December 8, 2021, the Duty Free retained Blaney McMurtry LLP ("**Blaney**") as local specialist counsel to assist in this matter. Blaney offered on December 10th to enter into negotiations with the Landlord. The Landlord replied that it was available for a meeting on Monday morning. A copy of the e-mail correspondence discussing a meeting is attached hereto and marked as **Exhibit "O"**.

72. I believe that, given more time, a commercial resolution can be reached with the Landlord reflecting a fair compromise to both parties. I believe our ability to make a proposal that will be found to be credible and reasonable by the Landlord will be enhanced by the passage of time as the business, which was once a very profitable business, returns to form over the next few months.

SWORN (OR AFFIRMED) remotely by way of video conference by Alexandra Teodorescu stated as being located in the City of Oshawa, Province of Ontario, on this 12th day of December, 2021, in accordance with O.Reg. 431/20, Administering the Oath or Declaration remotely.

A Commissioner for Taking Affidavits,
Alexandra Teodorescu

JIM PEARCE

Signature:

Email: jimp@dutyfree.ca

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	MONDAY, THE 17TH
	)	
JUSTICE PATTILLO	)	DAY OF JANUARY, 2022

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

AMENDED ORDER
(appointing Monitor)

THIS APPLICATION, made by Royal Bank of Canada ("**RBC**") for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing msi Spergel inc. ("**Spergel**") as a monitor (in such capacity, the "**Monitor**") without security, of Peace Bridge Duty Free Inc. (the "**Debtor**"), was heard this day via Zoom videoconference because of the Covid-19 pandemic.

ON READING the affidavit of Christopher Schulze sworn December 2, 2021 and the exhibits thereto, and the affidavit of Jim Pearce sworn December 12, 2021 (the "**Pearce Affidavit**") and the exhibits thereto, and on hearing the submissions of counsel for RBC, the Debtor, the Buffalo and Fort Erie Public Bridge Authority (the "**Authority**") and such other counsel as were present, no one appearing for any other stakeholder although duly served as

NO EXERCISE OF RIGHTS OR REMEDIES

9. **THIS COURT ORDERS** that all rights and remedies against the Debtor, the Monitor or affecting the Property are hereby stayed and suspended except with the written consent of the Monitor or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE MONITOR

10. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Monitor or leave of this Court.

CONTINUATION OF SERVICES

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Debtor, or as may be ordered by this Court.

Court File Number: CV-21-00673084-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Royal Bank of Canada
Plaintiff(s)

AND

Peace Bridge Duty Free Inc.
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
S. Mitra and J. Nemers for the Applicant, Royal Bank of Canada D. Ullmann and A. Teodorescu for the Respondent, Peace Bridge Duty Free Inc. L. Williams for the Court-appointed Monitor, msi Spergel inc. (a representative of which, M. Manchanda, was also in attendance) C. Stanek for the Buffalo and Fort Erie Public Bridge Authority		

☐ Order ☐ Direction for Registrar (No formal order need be taken out)

☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____

☐ Time Table approved (as follows):

re the sub. of the Monitor, its 1st Report"

Based on the agreement of the parties, the landlord the Buffalo and Fort Erie Public Bridge Authority taking no position, the RBC's motion is adjourned to March 23, 2022 at 12 noon (1 hr.). I am satisfied the draft order, amending the terms of the initial appointment of the Monitor should issue. The cash flow statements of the respondent at Ex N to Tim Pearce's affidavit sworn December 12, 2021 and at Confidential Appendix 1 of the Monitor's report shall be sealed until further order of the court. In my views as noted in Sierra

March 17/22
Date

P. Cattillo, J.
Judge's Signature

☑ Additional Pages 1

Court File Number: CV-21-00623084-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Club of Canada v. Canada (Ministry of Finance), [2002] 2 S.C.R. 533, protection of private commercial information is an interest of public importance and the information sought to be protected here should be sealed to protect the risk of exposure to adverse parties - I am further satisfied the benefits of such an order outweigh its negative effects. See: Sherman Estate v. Donovan, 2021 SCC 25.

Order signed by me.

Judges Initials

In the matter of the proposal of Cosgrove-Moore Bindery Services Limited of the City of Toronto, Province of Ontario

[Indexed as: Cosgrove-Moore Bindery Services Ltd. (Re)]

48 O.R. (3d) 540
[2000] O.J. No. 1661
Court File No. 31-372219

Ontario Superior Court of Justice
Ground J.
May 10, 2000

Bankruptcy -- Proposal -- Notice of intention to make proposal -- Payments for use of leased property -- Motion for immediate payment -- Court having jurisdiction to grant relief by motion -- Applicant for immediate payment not required to apply for lift of stay nor to proceed by action -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.1(4).

Cosgrove-Moore carried on a bindery business in premises leased from the landlord. Cosgrove-Moore rented equipment from Westcoast. On March 3, 2000, Cosgrove-Moore gave notice of an intention to make a proposal. The landlord moved for an order pursuant to s. 65.1(4) of the Bankruptcy and Insolvency Act ("BIA") for an immediate payment in respect of rentals and utility charges due after March 3, 2000. Westcoast made a similar motion in respect of lease payments due under the equipment lease.

Held, the motions should be granted.

Section 65.1 of the BIA is a self-contained code dealing with a situation where a party is obligated to provide goods or services or the use of leased property under a contract or lease on a continuing basis to a person who files a notice of

pursuant to the lease of the premises on which Cosgrove-Moore Bindery Services Limited ("C-M") carries on its business. The motion brought by Westcoast Capital Corporation ("Westcoast") is in respect of equipment lease payments due under a master equipment lease between Westcoast and C-M for substantial bindery equipment used in the business of C-M. Both motions seek orders, pursuant to s. 65.1(4) of the BIA, for the immediate payment of amounts due under the lease and the master equipment lease in respect of periods after March 3, 2000, the date of the notice of intention to make a proposal. The rentals and utility charges under the lease due March 1, 2000 remain unpa id and the utility charges due April 1, 2000 and May 1, 2000 remain unpaid. The payments due under the master equipment lease which commenced November 15, 1999 and are payable monthly on the 15th day of each month all remain unpaid.

[2] It is my view that s. 65.1 of the BIA is a self-contained code dealing with a situation where a party is obligated to provide goods or services or the use of leased property under a contract or lease on a continuing basis to a person who files a notice of intention or a proposal. I am satisfied that each of the landlord and Westcoast is such a party.

[3] I am also satisfied that the payments for the utilities required to be made under the lease are "payments for the use of leased property" and are in the same category as rents for the purposes of s. 65.1(4).

[4] The effect of s-ss. (1), (2) and (5) of s. 65.1 is that a party providing such goods and services or use of leased premises is prevented from exercising contractual rights which it may have to terminate or amend the contract or lease or to accelerate payment as a result of the notice or proposal.

[5] In an attempt to balance the interests of the debtor and the creditor which is required to continue to supply goods, services or the use of leased property, Parliament has provided that the creditor may require immediate payment for goods, services or the use of leased property "provided after the filing" of the notice or proposal. This provision is not dependent on the date that the payments would otherwise be due

no assistance in determining appropriate procedures where the BIA is silent.

[10] I have come to the conclusion that the purpose of s. 65.1 is to provide a commercial enterprise with the opportunity to continue operations while working toward a reorganization but at the same time to give creditors obligated to continue to supply goods, services or the use of leased property some protection that payments ordinarily due during the proposal period will not be wiped out or reduced to pro rata unsecured claims in the event of an ultimate bankruptcy.

[11] It seems to me to be inconsistent with such purpose to require the supplier of such goods and services or use of leased property to commence possibly lengthy and expensive litigation to collect the amounts for which the court has determined that immediate payment should be made.

[12] For the same reasons I do not believe that the stay provisions of the BIA should be interpreted to require an application to lift the stay with respect to payments to be made in respect of the post notice period which were due prior to the notice date.

[13] Accordingly, an order will issue, on the motion of the landlord, that C-M pay by certified cheque to the landlord within seven days of the date of the order:

(a) $58,968.67 for use of the premises from March 4 to March 31, 2000;

(b) $17,625.00 for hydro and $1,772.59 for gas provided for the use of the premises from March 4 to March 31, 2000;

(c) $18,412.52 for hydro and $3,220.11 for gas provided for use of the premises for April 2000;

(d) $34,567.84 for use of the premises from May 1 to 17, 2000; and

(e) $10,097.18 for hydro and $1,765.87 for gas from May 1 to

2022	Gross Sales	Base Rent	Rent Paid	Date Paid
Jan.	$266,000	$333,333.33	$53,200	2/16/2022
Feb.	$317,000	$333,333.33	$63,400	3/10/2022
Mar.	$575,000	$333,333.33	$115,000	4/11/2022
April	$802,000	$333,333.33	$160,400	5/19/2022
May	$840,000	$333,333.33	$168,000	6/21/2022
June	$942,000	$333,333.33	$188,400	7/8/2022
July	$1,332,000	$333,333.33	$266,400	8/11/2022
Aug.	$1,295,000	$333,333.33	$259,000	9/8/2022
Sept.	$1,185,000	$333,333.33	$237,000	10/4/2022
Oct.	$1,215,000	$333,333.33	$243,000	11/1/2022
Nov.	$980,000	$333,333.33	$196,000	12/1/2022

**** 4/20/2022 - Rec'd $18,545.66 (CERS - Jan. 16 thru Feb. 12, 2022)***

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKQB 39**

Date: **2022 02 08**
Docket: QBG 1694 of 2020
Judicial Centre: Regina

BETWEEN:

101297277 SASKATCHEWAN LTD. AND
INDUSTRIAL PROPERTIES REGINA LIMITED

PLAINTIFFS

- and -

COPPER SANDS LAND CORP. AND
MDI UTILITY CORP.

DEFENDANTS

CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released April 21, 2022. (A copy of the corrigendum is appended to this corrected judgment.)

Counsel:

Ryan A. Pederson	for the Receiver
Janine L. Lavoie-Harding and David J. Ukrainetz	for Old Kent Road Financial Inc.
Rick M. Van Beselaere, Q.C.	for 101297277 Saskatchewan Ltd.
Alexander K. Shalashniy	for Industrial Properties Regina Limited

JUDGMENT
FEBRUARY 8, 2022

SCHERMAN J.

the Receiver. The stay and suspension shall not apply in respect of any "**Eligible Financial Contract**" as defined in section 65.1 of the BIA.

NO INTERFERENCE WITH THE RECEIVER

10. No Person shall discontinue, fall to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, including, without limitation, insurance coverage, without written consent of the Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an Eligible Financial Contract with the Debtor from terminating such contract or exercising any rights of set-off, in accordance with its terms.

CONTINUATION OF SERVICES

11. (a) All Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including, without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

...

RECEIVER TO HOLD FUNDS

...

12C. The Receiver shall not as a result of exercising its powers under paragraph 12A, Paragraph 3(q) or this Order generally be liable to MDI Utility Corp. or OKR or any other Person, including but not limited to the residents of the Copper Sands Trailer Park, or for any other matters relating to the water treatment facility, the waste water treatment facility or anyone claiming through or under them or any of them for any matters related to the operation of the water utility or

[36] While OKR has taken title to the lands and facilities, it has not taken control of the facilities nor made any effort to provide the required services from the facilities. Rather what it did after taking title to the lands and facilities is lease the facilities back to MDI. To date it has not terminated the Tenancy at Will. There is no basis for OKR to take the position that the Servicing Agreement has somehow been terminated by reason of it having taken title. The lands and facilities have been leased back to MDI, no doubt with a view to avoiding the argument that OKR thus has an obligation to provide the contractual services.

[37] Clause 12A of the Servicing Agreement is, in my opinion, clear. Where the right to assume control of the facilities is exercised, Copper Sands is entitled to "assume control of the facilities in order to continue the provision of services to CSLC" and to "lease the facility from MDI for a sum equivalent to ten percent (10%) of the monthly service fees payable to MDI hereunder". Its sole payment obligation to MDI is to pay a sum equivalent to 10% of the otherwise monthly service fee until the acts of default are remedied. The term of the license and/or lease created is "until such time as the foregoing acts of default are remedied". The term of this licence or lease is of uncertain but limited duration and would certainly end upon the Receiver disclaiming the contract which is proposed to occur within approximately six months.

[38] By no reasonable interpretation of the Servicing Agreement does it call for payment of 10% of the monthly service fee in addition to the monthly service fee. Once control is assumed, the lease of the facilities for 10% of the otherwise monthly service fee is in place and in lieu of the monthly service fee previously payable to MDI when it was operating the facilities.

[39] Clause 10 of the Receivership Order provides "No Person" shall fail to honour, repudiate, cease to perform any right, contract, agreement, licence or permit in

favour of or held by the Debtor without the written consent of the Receiver or leave of the court.

[40] In my opinion, Clause 10 of the Receivership Order, this provision applies to the entirety of the Servicing Agreement, including the licence to assume control of the facilities. The Receiver is entitled to the benefit of the Servicing Agreement and the licence and/or lease embedded therein until it disclaims the contract.

[41] Clause 11(a) of the Receivership Order provides that "All Persons having oral or written agreements with the Debtor" for the supply of goods and services including utilities are restrained from terminating those supplies. Clause 11(b) goes on to provide that "no Person shall discontinue the supply of the Utility Services ... to be delivered to the Debtor, the Copper Sands Trailer Park and the residents thereof without the prior written consent of the Receiver or without Order of the Court". The reference to "no Person" in Clause 11(b) gives that clause a wider scope and impact than Clause 11(a) that applies only to persons having agreements with the Debtor (being Copper Sands).

[42] Until the Service Contract is disclaimed by the Receiver, the Receiver has, under the Servicing Agreement, the right to assume control of the facilities. For so long as it continues to have that right and exercises it, its monthly payment obligation is 10% of $15,800 or $1,580 per month. For the period December 1, 2020 to November 19, 2021 this translates into a sum of $18,380.66 owing.

[43] Having decided what the contractual rights and obligations are, *inter se* Copper Sands and MDI's, the issue then becomes, what rights and obligations arise as between OKR and the Receiver. As assignee of the debts owed by the Receiver to MDI,

COURT FILE NO.: 06-CL-6566
DATE: 20080326

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF an Application pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

RE: **CITIZENS BANK OF RHODE ISLAND**

Applicant

- and -

PARAMOUNT HOLDINGS CANADA COMPANY, PARAMOUNT HOLDINGS CANADA COMPANY II and IMAGE CRAFT INC.

Respondents

BEFORE: **Justice A. Hoy**

COUNSEL: **Harvey G. Chaiton and Maria Konyukhova**, for RSM Richter Inc.

Alan J. Butcher, for Transcorp Distribution Inc.

DATE HEARD: **March 19, 2008**

E N D O R S E M E N T

[1] The issue in this motion by RSM Richter Inc. in its capacity as the court appointed Interim Receiver and Receiver of the assets of Image Craft Inc. ("IC") and its Canadian affiliates, and cross-motion of Transcorp Distribution Inc. ("Transcorp"), is whether accounts receivable in the amount of $243,177.95 collected by the Receiver constitute property of IC or are subject to an implied or constructive trust in favour of Transcorp. It is conceded by Transcorp that there is not an express trust.

[2] If the accounts receivable are the property of IC, they will be paid to IC's first ranking secured creditor, Citizen's Bank of Rhode Island (the "Bank"), which has a security interest over the accounts receivable of IC. The Bank will suffer a substantial deficiency on its secured claim; no funds will be available for distribution to unsecured creditors.

designed to eliminate the indebtedness over a certain time. As also noted above, the payments were made out of IC's general funds; an arrangement whereby the amounts receivable were "passed through" to Transcorp was not put in place, and there was no requirement that a separate account be established and maintained until the credit imbalance was rectified. There was no evidence that the word "trust" was used in the parties' discussions regarding repayment. The payments are in my view consistent with a debtor-creditor relationship.

[28] Nor does the fact that Transcorp had, after many years as a debtor, become a creditor provide the requisite clear intention to create a trust.

[29] Throughout the arrangement, IC bore the risk of non-payment by national customers. The fact that IC accorded volume and early payment discounts in relation to the receivables is consistent with the accounts receivable constituting IC's property.

[30] As the requisite intention to create a trust is not present, there can be no implied trust.

[31] Counsel for Transcorp also argued that the Receiver is obligated to continue to pay down the outstanding balance owing to Transcorp, in priority, because the receiving order contains the customary provision restraining suppliers of services from terminating the supply of those services, provided that the normal prices or charges for services received after the date of the order are paid by the receiver in accordance with normal payment practices of the debtor. I understand Transcorp to argue that the normal payment practice of IC was that the accounts receivable were held in trust and paid to Transcorp pending rectification of the credit imbalance, that the Receiver did not do so and is therefore in breach of the receiving order and, by analogy to *GMAC Commercial Credit Corporation v. TCT Logistics Inc.*, [2005] O.J. No. 589 (C.A.), the fact that the accounts receivable were commingled with IC's general funds should not defeat Transcorp's trust claim. This argument is disposed of by my conclusion that there was no intention that the accounts receivable be held in trust and applied to repay the indebtedness.

[32] While IC can be seen as having been enriched by the receipt of the accounts receivable at issue, and Transcorp having suffered a corresponding deprivation because it did not receive the benefit of those accounts receivable, there is in my view juristic reason for the deprivation.

[33] Transcorp is an unsecured creditor of IC. The indebtedness arose out of a contractual business relationship. There was no dishonest or underhanded conduct on the part of IC.

[34] Moreover, as noted in *Confederation Life,* a juristic reason may arise out of a relationship between the person enriched and some other person and (para. 208), in the context of a constructive trust claim against the assets of an insolvent person who is allegedly a constructive trustee, it is important to be aware of the interests of the insolvent's other creditors as well as those of the constructive trust claimant. The security interest of the Bank is a further juristic reason for the deprivation.

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-022070-037

DATE: FEBRUARY 10, 2004

IN THE PRESENCE OF: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON

LES BOUTIQUES SAN FRANCISCO INCORPORÉES
and
LES AILES DE LA MODE INCORPORÉES
and
LES ÉDITIONS SAN FRANCISCO INCORPORÉE
Debtors
and
RICHTER & ASSOCIÉS INC.
Monitor
and
L'ORÉAL CANADA INC.
and
MAKE UP FOR EVER S.A.
Petitioners

JUDGMENT
ON MOTIONS TO LIFT THE STAY OF PROCEEDINGS OR, SUBSIDIARILY, TO ORDER THE DEPOSIT OF MONEYS IN TRUST

JG1793

[94] Finally, on this issue of the prejudice, it must be remembered that, in this case, there is no evidence of bad faith in the BSF Group's behaviour towards these two suppliers. Notwithstanding what is alleged in their motions, the Court is of the view that the circumstances surrounding the discussions and exchanges of cheques in December 2003 indicate that they were carried on in good faith, in the normal course of business of the BSF Group.

[95] To sum up, be it from the angles of the lack of serious and distinct prejudice to L'Oréal and Make Up For Ever, of the applicable precedents and their reasoning, or of the purpose and objectives of the *CCAA*, nothing warrants the Court to lift the stay of proceedings or to order the deposit of moneys in trust in the actual situation of these two suppliers.

3) THE CLAIM OF L'ORÉAL CONCERNING THE DISPLAY UNITS

[96] Turning now to the claim of L'Oréal concerning the display units it provided to the BSF Group in November 2003, this is what the evidence indicates.

[97] Even if the written contract presented by L'Oréal in that month was never signed by the BSF Group, the exchanges of e-mails[35] that were filed in the record nevertheless suggest that the parties had agreed as follows.

[98] L'Oréal accepted to provide to the BSF Group some display units that were to be used by the BSF Group to exhibit the products and facilitate their sales. The parties were to share equally in the cost of creating, constructing and installing these display units but at all times, L'Oréal was to remain the owner. For its share, it was agreed that a first amount of $28,000 would be paid by the BSF Group within 90 days of delivery and another amount of $28,000 would be spent by them as "coop-advertising" during 2003-2004.

[99] L'Oréal considers that this is covered by section 11.3 of the *CCAA* which indicates in part that:

> "**11.3** No order made under section 11 shall have the effect of
>
> (*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; [...]"
>
> (Emphasis added)

[100] The BSF Group replies that the agreement at issue is not per se a contract of lease but rather a *sui generis* agreement and that section 11.3 does not apply.

[101] Even though this agreement is not a traditional lease, it remains that it shares a lot of the characteristics that one would normally find in a contract of lease (article 1851

---

[35] Exhibit R-10 in support of the motion of L'Oréal.

C.C.Q.). More specifically, we definitely have here a person, L'Oréal, who provides another, the BSF Group, with the use and enjoyment of display units for a certain period, in exchange for payments that are detailed in the e-mails filed. The display units are also not to be kept by the BSF Group but returned to L'Oréal after their use.

[102] This is certainly closer to a traditional lease for use than, for instance, to some sort of financing agreement[36].

[103] With respect to these display units, it is the Court's opinion that we have a situation which is quite analogous to the use of leased property provided after the initial order is made. The BSF Group continues to this day to make use of those display units for the purpose of selling the products of L'Oréal. Similarly to the use of leased premises, these are still being enjoyed and benefited from by the BSF Group in order to help the sale of the products of L'Oréal. It is a continuing benefit that the BSF Group still wants to make use of and the Court fails to see why it should be treated differently than the other situations covered by section 11.3 of the *CCAA*.

[104] As a result, with respect to these conclusions of the motion of L'Oréal, the Court considers that if it is indeed the intent of the BSF Group to continue to use these display units, it should abide by the terms of the obligations it agreed to. These include the payment of an amount of $28,000 within 90 days of delivery of the display units and an allowance of $28,000 as "coop-advertising" for the period 2003-2004.

[105] Since there has been no indication or evidence suggesting that the BSF Group has yet defaulted on these obligations, the Court will simply issue in this respect a declaration confirming this conclusion.

[106] **FOR THESE REASONS, THE COURT:**

WITH RESPECT TO L'ORÉAL CANADA INC.:

[107] **DISMISSES** the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

[108] **DECLARES** that with respect to the display units provided by L'Oréal Canada Inc. to Les Ailes de la Mode pursuant to the terms of the e-mails filed as Exhibit R-10, Les Ailes de la Mode must comply with the obligations agreed upon between the parties, namely to:

- Pay an amount of $28,000 to L'Oréal Canada Inc. within 90 days following the delivery of the display units; and

- Provide for an allowance of $28,000 as «coop-advertising» for the period 2003-2004;

---

[36] See on that issue *Re Smith Brothers Contracting Ltd.* (1998), 53 B.C.L.R. (3d) 265 (S.C.); *Re Philip Services Corp.* (1999), 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]); *Re International Wallcoverings Ltd.* (1999), 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]).

Shea, Patrick

From: Stanek, Chris
Sent: January-07-22 1:52 PM
To: Leanne Williams; Shea, Patrick
Subject: RE: Peace Bridge [IMAN-CLIENT.FID148589]
Attachments: Summary of amounts due 1.31.22.xlsx

Leanne:

Please see attached a breakdown of the outstanding rent payable including arrears and interest under the Lease. The Tenant's current monthly obligations (base rent + CAM) are as contained in the attached Excel spreadsheet. As for monthly payments, since they re-opened, the Tenants have been unilaterally paying only 20% of reported sales. The rate of interest under the Lease is 24% per annum compounded monthly – which is a per diem rate of .0675%.

If you have any other questions, please let us know.

Christopher Stanek
Partner
T +1 416 862 4369
christopher.stanek@gowlingwlg.com

GOWLING WLG

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

gowlingwlg.com

From: Leanne Williams <LWilliams@tgf.ca>
Sent: Thursday, January 06, 2022 2:28 PM
To: Shea, Patrick <Patrick.Shea@ca.gowlingwlg.com>; Stanek, Chris <Christopher.Stanek@ca.gowlingwlg.com>
Subject: Peace Bridge [IMAN-CLIENT.FID148589]

Patrick/Chris,

Happy new year! I hope that you had a good holiday.

On behalf of the Monitor, we are requesting that you please provide a breakdown of the outstanding rent. We would like to confirm the amount of the arrears (together with any interest and penalties), the current obligations and what is being paid monthly by the tenants. If possible, could you please also provide the rate of interest that is accruing and a per diem rate. Thanks!!

Leanne

TGF Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Leanne M. Williams | | LWilliams@tgf.ca | Direct Line +1 416 304 0060 | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

Ron Rienas

From: Ron Rienas
Sent: Thursday, February 24, 2022 3:34 PM
To: Jim Pearce
Cc: Greg O'Hara; Stanek, Chris; Karen L. Costa
Subject: PBA - PBDF lease
Attachments: Balance due 2.28.22.xlsx; THRP-CRA Notice-Rent-Per23 Dec18.pdf; THRP-CRA Notice-Rent-Per24 Jan15.pdf

Jim,

As per your e-mails below, we acknowledge receipt of the HST payment for Q4 of 2021.

However, your rent payment comment *"...thus no additional payments are due at this time."* is incorrect. As you know, there are many additional rent payments due and as per the attached they amount to $6,789,845.04. PBDF has arbitrarily determined to pay rent on the basis of 20% of sales. This amount has never been agreed to by PBA and is in violation of the lease.

As PBDF did for some amounts of CERS, PBDF is now choosing to use all of the government's THRP funding for other non-rent expenses with no regard for the amount of rent owed to PBDF's landlord.

As per Article 16.03 of the lease please provide us by no later than March 4, 2022, a draft of PBDF's 2021 financial statements.

Thank you.

Ron

From: Jim Pearce <JimP@dutyfree.ca>
Sent: Tuesday, February 22, 2022 11:00 AM
To: Nancy C. Teal <nct@peacebridge.com>
Subject: PBA - THRP

Hi - attached are the CRA Notices for THRP for Period 23-Dec18th & Period 24-Jan15th (waiting on Period 22-Nov21st confirmation)

The rent previously paid exceeded the THRP subsidy thus no additional payments are due at this time.

Jim

From: Ron Rienas
Sent: Monday, April 11, 2022 5:33 PM
To: Greg O'Hara <gohara@dutyfree.ca>; Jim Pearce <JimP@dutyfree.ca>
Cc: Stanek, Chris <Christopher.Stanek@gowlingwlg.com>; Karen L. Costa <klc@peacebridge.com>; Shea, Patrick <Patrick.Shea@gowlingwlg.com>
Subject: RE: PBA - PBDF lease

Greg,

We acknowledge receipt of a partial rent payment on April 11, 2022. It has been applied to the amount of base rent owed. As you know, rent is due *"on the first day of each month"* as stipulated by Article 4.02 of the lease.

Attached is the statement showing the total amount of rent owing as of today.

As indicated previously, PBDF has arbitrarily decided to pay 20% of gross sales as rent with no concurrence from PBA. PBDF has also determined not to remit any of the THRP funds received from the federal government to the PBA to reduce the amount of rent owing,

Lastly, I was not requesting the final 2021 audited statements back on February 24, 2022. I was asking for draft financial statements, information we are entitled to ask for and which was previously provided.

Ron Rienas
General Manager
Buffalo & Fort Erie Public Bridge Authority

100 Queen Street, Fort Erie, ON L2A 3S6 | 1 Peace Bridge Plaza, Buffalo, NY 14213
rr@peacebridge.com T 905-994-3676| T 716-884-8636| F 905-871-9940 | F 716-884-2089 | C 905-651-2206

Ron Rienas

From: Ron Rienas
Sent: Wednesday, July 6, 2022 4:10 PM
To: Greg O'Hara
Cc: Jim Pearce; Karen L. Costa
Subject: PBA - PBDF lease
Attachments: Balance due 7.6.22.xlsx

Greg,

We acknowledge receipt of a partial rent payment on July 6, 2022. It has been applied to the amount of base rent owed. As you know, rent is due *"on the first day of each month"* as stipulated by Article 4.02 of the lease.

Attached is the statement showing the balance of rent owing as of July 1, 2022

As indicated previously, PBDF has arbitrarily decided to pay 20% of gross sales as rent with no concurrence from the PBA. PBDF has also determined not to remit any of the THRP funds received from the federal government to the PBA to reduce the amount of rent owing,

Also, we are required by the federal government to remit HST on the basis of the rent stipulated in the lease, not on what PBDF arbitrarily decides to pay. Accordingly, we have paid the full amount of the HST to the government as required by law. Please remit immediately the full amount of HST due for the first and second quarters of 2022 as PBDF has previously done.

Ron Rienas
General Manager
Buffalo & Fort Erie Public Bridge Authority

100 Queen Street, Fort Erie, ON L2A 3S6 | 1 Peace Bridge Plaza, Buffalo, NY 14213
rr@peacebridge.com T 905-994-3676| T 716-884-8636| F 905-871-9940 | F 716-884-2089 | C 905-651-2206

BUILDING LEASE

BETWEEN

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

- AND -

PEACE BRIDGE DUTY FREE INC.

ARTICLE I
BASIC LEASE TERMS

1.01 Basic Lease Terms

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

Address of Landlord:

(b) Tenant: Peace Bridge Duty Free Inc.

Address of Tenant:

(c) Leased Premises: The Building and the portion of the Lands as identified in Schedule "B".

(d) Term: 15 years.

(e) Commencement Date: November 1, 2016.

(f) Termination Date: October 31, 2031.

(g) Letter of Credit: $50,000.

(h) Extension Options: One option to extend the term for an additional period of five years.

ARTICLE II
DEFINITIONS AND INTERPRETATION

2.01 Definitions

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

(a) "**Additional Rent**" means all money or charges which the Tenant is required to pay under this Lease (except Base Rent, Percentage Rent and Sales Taxes) whether or not they are designated "Additional Rent" whether or not they are payable to the Landlord or to third parties.

(b) "**Additional Services**" means those services provided to the Tenant at its request, as additional services, which are not part of the services provided by the Landlord to the Tenant in accordance with the terms of this Lease and charged as Operating Costs including, but not limited to, maintenance, repair, janitorial or cleaning services. Additional Services also includes any services provided by the Landlord on behalf of the Tenant in respect of any obligations of the Tenant required under this Lease which the Tenant fails to observe and perform.

(c) "**Adverse Effect**" means any one or more of:

(i) impairment of the quality of the natural environment for any use that can be made of it;

(ii) injury or damage to property or to plant or animal life;

(iii) harm or material discomfort to any Person;

(iv) an adverse effect on the health of any Person;

(v) impairment of the safety of any Person;

(vi) rendering any property or plant or animal life unfit for human use;

(vii) loss of enjoyment of a normal use of property; and

(viii) interference with the normal conduct of business.

(d) "**Alterations**" has the meaning ascribed to that term in Section 12.02.

(e) "**Applicable Laws**" means any statutes, laws, by-laws, regulations, ordinances and requirements of governmental and other public authorities having jurisdiction over or in respect of the Leased Premises or the Property, or any portion thereof, and all amendments thereto at any time and from time to time, and including but not limited to the Environmental Laws.

(f) "**Architect**" means the architect, engineer or land surveyor named by the Landlord from time to time.

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

(h) "**Building**" means the building located on the Lands as shown on Schedule B as it exists from time to time.

(i) "**Building Systems**" means: (i) the equipment, facilities and all systems, services and installations from time to time installed in or servicing the Leased Premises (or any portion thereof) including, but not limited to: mechanical (including plumbing, sprinkler, drainage and sewage) and electrical systems and appurtenances thereto; utilities (including, without limitation, electricity, water, hydro and gas), lighting, sprinkler, life safety (including fire prevention, communications, security and surveillance); computer (including environmental, security and lighting control); and (ii) all machinery, appliances, equipment, apparatus, components, computer software and appurtenances forming part of or used for or in connection with any of such systems, services, installations and facilities including, but not limited to, boilers, motors, generators, fans, pumps, pipes, conduits, ducts, valves, wiring, meters and controls, and the structures and shafts housing and enclosing any of them.

(j) "**Business Day**" means any day other than a Saturday, Sunday or statutory holiday in the Province of Ontario.

(k) "**Business Taxes**" means every tax, duty and licence fee which is levied, rated, charged or assessed against or in respect of the business carried on in the Leased Premises or in respect of the use or occupancy of the Leased Premises by the Tenant whether the taxes, rates, duties, assessments or licence fees are rated, charged or assessed by any Government Authority during the Term.

(l) "**Claims**" means any threatened or actual claim, demand, action, cause of action, administrative order, requirement or proceeding, damage, loss, cost, fine, penalty, interest, liability and expense including, without limitation, reasonable engineering and legal fees and disbursements on a full indemnity basis.

(m) "**Commencement Date**" means the date set out in Section 1.01(e).

(n) "**Contaminants**" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an Adverse Effect and includes any waste, dangerous good, hazardous product, controlled substance or any other substance or thing regulated or reportable under any Environmental Laws.

(o) "**Environmental Approvals**" means all applicable permits, licences, authorizations, consents, directions and approvals required by Governmental Authorities pursuant to Environmental Laws in respect of the Leased Premises and the equipment, structures, substances and activities located or carried on therein or thereon by the Tenant.

(p) "**Environmental Laws**" means all existing and future federal, provincial and municipal laws, regulations, by-laws, ordinances, notices, orders, rules, protocols, policies, directions and guidelines and all present and future principles of common law and equity relating to the protection of the environment, including Contaminants, pollution and waste management.

(q) "**Environmental Site Assessment**" or "**ESA**" includes a visual and instructive inspection of property, buildings, structures, soils, bedrock and groundwater, including the installation of monitoring and measurement devices, for the purpose of determining the presence of Contaminants or compliance with Environmental Laws.

(r) "**Event of Default**" has the meaning ascribed to that term in Section 17.01.

(s) "**Extension Term**" has the meaning ascribed to that term in Section 3.06.

(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.

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

2.02 Net Lease

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

2.03 Extended Meanings

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

2.04 Entire Agreement

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

2.05 Governing Law

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

2.06 Time of the Essence

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

2.07 No Limitation

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

drafted this Lease or any portion thereof or by virtue of this Lease being drawn using the Landlord's form;

(b) any deletion of language or wording from this Lease prior to execution by the Landlord and the Tenant shall not be construed to have any particular meaning or to raise any presumption, construction or implication including, without limitation, any implication that by the deletion of certain language or wording, the Landlord and the Tenant intended to state the opposite of the deleted language or wording; and

(c) the selection or use of any bold, italicized, underlined or coloured print in this Lease shall not be construed to have any particular meaning or to raise any presumption, construction or implication.

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.

2.16 Conflict with Schedules

Any conflict or inconsistency between the provisions contained in the Schedules of this Lease and the provisions contained elsewhere in the Lease will be resolved in favour of the provisions contained elsewhere in the Lease.

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.

ARTICLE III
GRANT AND TERM

3.01 Demise

In consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the Tenant to be paid, observed and performed, the Landlord demises and leases to the Tenant and the Tenant rents from the Landlord the Leased Premises.

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

ARTICLE IV
RENT

4.01 Covenant to Pay

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

4.02 Base Rent

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

4.03 Percentage Rent

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

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

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

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

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

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

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

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

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

4.04 Accrual of Rent

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

4.05 Rent and Payments Generally

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

(a) be paid when due hereunder, without prior demand therefor and without any abatement, set-off, compensation or deduction whatsoever (except as otherwise specifically provided for in this Lease);

(b) be applied towards amounts then outstanding hereunder in such manner as the Landlord determines in its sole discretion;

(c) bear interest at a rate equal to twenty-four percent (24%) per annum, calculated and payable monthly from the date such Rent or other payments became due to and including the date of payment;

(d) an administrative charge of $150.00 will be charged in connection with any late payment or returned cheque to cover the Landlord's additional administration costs;

(e) in addition the Tenant shall pay all Sales Taxes. The amount of such Sales Taxes will be calculated by the Landlord in accordance with the applicable legislation and will be paid to the Landlord (or to the lawful taxing authority, as the Landlord may direct) on the due date of the amounts in respect of which such Sales Taxes are payable. All such payments shall be made prior to the date that the same shall become due and payable and any interest and any penalties assessed as a result of any default in or late payment of same shall be the sole responsibility of the Tenant. Notwithstanding any other provision of this Lease, the amount payable by the Tenant under this section shall be deemed not to be Rent but the Landlord shall have all of the same remedies for and rights of recovery of such amount as it has for the recovery of Rent under this Lease or otherwise; and

(f) if the Commencement Date is on a day other than the first day of a calendar month or if the Term ends on any day other than the last day of the month, Rent for the fractions of a month at the Commencement Date and at the end of the Term shall be calculated on a pro rata basis.

4.06 Letter of Credit

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

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

ARTICLE XIV
ASSIGNMENT, SUBLETTING, PARTING WITH POSSESSION AND CORPORATE CONTROL

14.01 Transfers

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

14.02 Landlord's Option to Terminate

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

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

18.04 Registration

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

18.05 Quiet Enjoyment

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

18.06 Landlord's Co-Operation and Access

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

18.07 Regulatory Changes

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

18.08 Unavoidable Delay

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

SCHEDULE "D"

TENANT'S PROPOSAL

Please see attached as labeled Schedule D

PBDF knows best how to address these ongoing challenges and prides itself on successfully mitigating these issues by being innovative in its business and by being able to grow sales per vehicle despite these challenges. Examples of how PBDF addresses each of these challenges are contained in the section below.

i) Currency Exchange Rate Issues

Recently, when the exchange rate dramatically swung in favor of American tourism, PBDF promoted Canada, Toronto and Niagara to US markets through aggressive radio, TV and online campaigns. PBDF used best exchange rate guarantees ("better than the bank") to give the American consumer the confidence that they would receive the maximum benefit for the US dollar at the Store.

In the past, when the Canadian dollar strengthened versus the US dollar, Canadians intensified their cross-border shopping and visits to US destinations. To take advantage of this trend, PBDF partnered with many US based organizations such as Grove City, Kissing Bridge, Darien Lake, Buffalo Bisons, Erie County Fair, Fantasy Island and Buffalo Niagara International Airport, etc. in cross promotions designed to make the Store a stop for Canadians on their way to these locations.

ii) Retail Competition

PBDF has implemented a very successful sales campaign targeted to Canadian shoppers called "start your cross-border shopping at PBDF". PBDF sourced both different and competitive products from the US, including non-traditional duty free products, adjusted prices to be competitive with the large US retailers, and added the PBDF level of customer service not found at many of the competitive retail stores.

iii) Vehicle Traffic Issues Including a Steady Decline in Volumes

Since a peak of 3.3 million in Peace Bridge passenger vehicles from Canada to the United States in 2000, there has been a steady decline in this amount. In 2015, traffic declined to 2.1 million. This represents a 38% decline in passenger vehicles utilizing the Peace Bridge since 2000.

PBDF is proud of the fact that despite the significant reduction in passenger vehicles, during the same time period, duty free sales related to to passenger vehicles declined by only 12%, from $21.0 million of sales in 2000 to $18.5 million of sales in 2015. This achievement by PBDF was a result of it's many efforts to increase sales per vehicle through many initiatives including promotions, pricing and enhanced customer service. PBDF was able to increase sales per vehicle from $50.33 in 2000 to $64.27 in 2015. **This represents an average sales increase of 28% per vehicle.**

PBDF is proud that despite this significant challenge, sales at the Store have consistently outperformed traffic volume levels as measured by sales per outbound vehicle.

iv) Customer Awareness and Traffic Perceptions and Delays

In addition to numerous awareness generating marketing programs discussed earlier in this section, PBDF was successful, due to the great cooperation with the Authority, in creating Duty Free Way. This successful initiative involved the implementation of overhead signage on the QEW which directed travelers onto a dedicated roadway leading into the Store.

In addition, PBDF launched an advertising campaign called Fastest Border Crossing Guarantee. If customers experienced a longer wait time at the Peace Bridge versus any other Regional bridge they received 10% off their purchase.

Proposed Minimum Base Rent, Percentage Rent, Proposed Section 4.03 and Form of Lease

PBDF is pleased to offer the following financial terms (all in Canadian dollars) to the Authority in accordance with the guidelines provided in the RFP (including Appendix G).

Minimum Base Rent:

PBDF proposes a Minimum Base Rent of $4,000,000.

Percentage Rent:

The Annual Percentage Rent proposed is based on the Tenant's Annual Gross Sales, as follows:

Annual Sales			Rent % Applicable to Range of Sales
$0	up to	$20,000,000	20
>$20,000,000	up to	$25,000,000	22
>$25,000,000			24

To facilitate monthly payments of the Percentage Rent pursuant to section 4.03 of the Lease, PBDF proposes that Percentage Rent payable in a given month will be calculated on the basis of the Applicable Percentage Rent Rate based on Aggregate Year-to-Date Gross Sales x Tenant's Gross Sales during the month for which Percentage Rent is being calculated.

At the end of each year, there will be a reconciliation to ensure that the Percentage Rent paid on a monthly basis equals the Percentage Rent payable on the basis of the Tenant's Annual Gross Sales.

The tenant's annual gross sales will include sales related to products from the Store, currency exchange revenue and sales of its sub tenants and any other elements defined in the lease.

For clarity, based on $25,000,000 in Tenant's Annual Gross Sales the Annual Percentage Rent would be $5,100,000.

Proposed Section 4.03 (Percentage Rent)

PBDF is pleased to provide a completed section 4.03 (Percentage Rent) in the Form of Lease on the basis of PBDF's financial proposal. Please note that PBDF proposes that the Percentage Rent will be the same for the initial term of the lease and the extension term of the lease. This is reflected in section 4.03 proposed below.

4.03 Percentage Rent

The Tenant covenants and agrees with the Landlord to pay Annual Percentage Rent, as follows:

- The Tenant will pay to the Landlord 20% of the Tenant's Annual Gross Sales that are $0 up to $20,000,000
- The Tenant will pay to the Landlord 22% of the Tenant's Annual Gross that are in excess of $20,000,000 but less than $25,000,000
- The Tenant will pay to the Landlord 24% of the Tenant's Annual Gross Sales that are equal to or greater than $25,000,00

To facilitate monthly payments of the Percentage Rent, the Tenant covenants and agrees with the

Landlord that if, during any month (including any broken calendar month) of the Term of the Lease or any Extension Term of the Lease, the Calculated Percentage Rent (which is based on the Tenant's Gross Sales during such monthly period) exceeds the monthly Base Rent for the same monthly period, the Tenant will within twenty-five (25) days following the conclusion of such monthly period, pay the resulting difference between the calculated Percentage Rent and the Base Rent together with all applicable taxes, to the Landlord as Percentage Rent.

The Calculated Percentage Rent is to be calculated as follows: Applicable Percentage Rent Rate x Tenant's Gross Sales during the month for which Percentage Rent is being calculated. The Applicable Percentage Rent Rate is based on the Tenant's Year-to-Date Annual Gross Sales.

At the end of each year, there will be a reconciliation based on the Tenant's audited Annual Gross Sales to ensure that the Tenant pays the higher of the Annual Percentage Rent or Minimum Base Rent.

Form of Lease:

PBDF confirms that it does not propose any changes to the Form of Lease.

CITATION: Shaun Developments Inc. v. Shamsipour, 2018 ONSC 440
COURT FILE NO.: CV-16-562924
DATE: 20180118

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SHAUN DEVELOPMENTS INC. Plaintiff/Defendants by Counterclaim	*Thomas M. Slahta*, for the Plaintiff/Defendants by Counterclaim
– and –	
ALI REZA SHAMSIPOUR, MOHSEN ZADEGAN AND MANSOUR SHAMSIPOUR Defendants/Plaintiffs by Counterclaim	*David Taub* and *Ellad Gersh*, for the Defendants/Plaintiffs by Counterclaim
	HEARD: October 13, 2017

CAVANAGH J.

REASONS FOR JUDGMENT

Introduction

[1] The plaintiff entered into three separate agreements of purchase and sale with one of each of the defendants in relation to three separate properties. The properties were to be purchased concurrently and redeveloped together. The transactions did not close.

[2] The plaintiff commenced the within action seeking specific performance of each agreement of purchase and sale. The defendants have defended the action, and they have counterclaimed for an order deleting the registration of cautions from title to the properties and for damages.

[3] The defendants submit that the agreements are null and void because the plaintiff failed to give notice of compliance of a condition, or notice of waiver of the condition, within the time prescribed by each agreement. The plaintiff submits that no notice was required to have been given, the condition has now been validly waived, and the agreements are binding and enforceable.

distillation that he had set out. The decision of Gans J. in *RBC v. Crew* was affirmed by the Court of Appeal: 2017 CarswellOnt 12188.

[47] In *Sattva*, Rothstein J. expressed that:

> a. 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.
>
> b. To do so, a decision-maker must read the contract 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.
>
> c. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.
>
> d. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. The evidence that can be relied upon under the rubric of "surrounding circumstances" should consist only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

See *Sattva* at paras. 47, 57, and 58.

[48] In *Sattva*, Rothstein J. wrote that the meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement. Rothstein J. quoted with approval, at para. 48, the following passage from the decision of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997)*, [1998] 1 All E.R. 98 (U.K.H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] The defendants submit that the word "verdict" as used in the agreements means the March 2016 OMB Approval and, therefore, the commencement of the one week period of time during which the OMB condition could have been declared to be fulfilled, or alternatively

CITATION: Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP
2022 ONSC 5922
COURT FILE NO.: CV-20-651807-00CL
DATE: 20221019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
PORTER AIRLINES INC. and PORTER AIRCRAFT LEASING CORP. Plaintiffs and Defendants by Counterclaim	*Orestes Pasparakis*, *Lynn O'Brien*, *James Renihan*, *Andrea Campbell*, *Stephen Taylor* and *Justine Smith*, for the Plaintiffs, Defendants by Counterclaim
– and –	
NIEUPORT AVIATION INFRASTRUCTURE PARTNERS GP Defendant and Plaintiff by Counterclaim	*Adam Hirsh*, *Shawn Irving*, *Sonja Pavic*, *Jesse Cohen*, *Marleigh Dick* and *Jayne Cooke*, for the Defendant, Plaintiff by Counterclaim
	HEARD: November 29, 30, December 1, 2, 3, 6, 8, 9, and 10, 2021 and February 8, 9, 10, and 11, and March 9, 10 and 11, 2022

CAVANAGH J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] Porter Airlines Inc. ("Porter") is a regional, short-haul, commercial air carrier based at Billy Bishop Toronto City Airport ("Billy Bishop").

[2] Porter Aviation Holdings Inc. ("PAHI") is Porter's parent. Porter Aircraft Leasing Corp. ("PALC") is also owned by PAHI and is an affiliate of Porter.

a. Slot Allocation Dispute.

b. Notice Dispute.

c. COVID-19 Dispute: (i) Effect of *Force Majeure* clause in Licence Agreement; and (ii) Nieuport's obligation to act reasonably under s. 6.22(b) of Licence Agreement.

d. Limited Recourse Guarantee Dispute.

e. Rate Dispute.

f. Security Deposit Dispute.

g. Advertising Agreement Dispute.

h. Damages.

[26] I address each issue in turn.

Issue #1 - Slot Allocation Dispute

[27] The first issue involves interpretation of the Licence Agreement to determine whether, under the Licence Agreement:

a. As Porter contends, Porter is entitled to (i) provide Nieuport with the "Carrier's Allocation" input for use in the calculation of monthly Terminal Fees under the Licence Agreement based on an allocation of "daily slots" by PortsToronto, meaning the total number of slots allocated to Porter that may vary from day to day during the allocation period expressed on a per day basis as a daily average, and (ii) pay monthly Terminal Fees under the Licence Agreement on this basis (subject to the five year slot commitment in the Asset Purchase Agreement); or

b. As Nieuport contends, Porter is required to (i) provide Nieuport with the "Carrier's Allocation" input based on the number of "daily slots" required to be allocated to Porter by PortsToronto pursuant to the CCOA, meaning slots that recur daily for every day of the allocation period and are reserved for Porter's use, and to (ii) pay monthly Terminal Fees based on this allocation whether or not Porter uses all of the slots allocated to it.

Principles of Contractual Interpretation

[28] The primary objective of contractual interpretation is to determine the objective intent of the parties at the time the contract was made.

[29] In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, at para. 47, Rothstein J., writing for the Court, held:

> ... 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" [citations omitted]. To do so, a decision-maker must read the contract 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. Consideration of surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that 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 context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

[30] In *Sattva*, Rothstein J., at paras. 57-58, addressed the role of surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered:

> While the surrounding circumstances will be considered in interpreting the terms of the contract, they must never be allowed to overwhelm the words of that agreement [citations omitted]. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract [citation omitted]. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [citation omitted].
>
> The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract [citation omitted], that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" [citation omitted]. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[31] In *Sattva*, at para. 58, Rothstein J. made it clear that the evidence of surrounding circumstances that can be relied upon in the interpretative process should consist only of objective evidence of the background facts at the time of execution of the contract.

[32] In *Shewchuck v. Blackmont Capital Inc.*, 2016 ONCA 912, at para. 41, Strathy J.A. cited *Sattva* and held that "the scope of the factual matrix is temporally limited to evidence of facts known to the contracting parties contemporaneously with the execution of the contract". Subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix.

[33] In *Shewchuck*, Strathy J.A. explained the dangers associated with reliance on subsequent conduct and, at para. 46, held that evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix. Strathy J.A., at para. 52, held that "[t]he inherent dangers of evidence of subsequent conduct mean that when it is admitted it must be used cautiously and its weight will vary from case to case".

The Licence Agreement

[34] The starting point of the analysis is the terms of the Licence Agreement.

[35] The Licence Agreement, in section 2.1, provides that "[p]rovided that Porter pays all Fees due under this Licence Agreement, and performs the covenants in accordance with the terms and conditions herein on its part contained", Nieuport, as Terminal Operator, shall (a) perform for Porter the Ground Services (as defined) in connection with Porter's air carrier business, and (b) grants to Porter the non-exclusive right and licence to operate an Air Carrier Business (as defined) at the Terminal, and in connection therewith, the right to conduct certain specified activities.

[36] In section 2.1, the services to be provided by Nieuport and the non-exclusive rights and licence to operate granted to Porter are called the "Privileges".

[37] The parts of the Licence Agreement that require interpretation are the sections that provide for the monthly Terminal Fees that Porter is required to pay in exchange for the Privileges granted under the Licence Agreement. I set out the specific sections of the Licence Agreement that require interpretation below.

Formula in Schedule B for calculating monthly Terminal Fees

[38] Schedule B of the Licence Agreement is entitled "Tariff of Fees and Charges". Under Schedule B, Porter agrees to pay to Nieuport in connection with its exercise and enforcement of the Privileges, Porter's other use of the Terminal Facilities (as defined) and in consideration for Nieuport making the Terminal Facilities available for Porter's use pursuant to the terms of the Licence Agreement, fees and charges assessed by Nieuport as set out in Schedule B.

[39] Schedule B, in paragraph 1, contains provisions under the heading "Fees per Slot" and the sub-headings (a) "Terminal Fee", (b) "Ground Handling Fee", and (c) "Monthly Fees".

COURT OF APPEAL FOR ONTARIO

CITATION: 10443204 Canada Inc. v. 2701835 Ontario Inc., 2022 ONCA 745
DATE: 20221101
DOCKET: C70044

Miller, Zarnett and Coroza JJ.A.

BETWEEN

10443204 Canada Inc.

Plaintiff (Respondent)

and

2701835 Ontario Inc. and Chirag Jagdishbhai Patel

Defendants (Appellants)

Simon Bieber and Robert Trenker, for the appellants

Melvin I. Rotman and Yovin Jaimangal, for the respondent

Heard: October 21, 2022

On appeal from the judgment of Justice Mohan Sharma of the Superior Court of Justice, dated August 9, 2021, with reasons reported at 2021 ONSC 5429.

Zarnett J.A.:

A. INTRODUCTION

[1] The appellants, Chirag Patel and his corporation 2701835 Ontario Inc., appeal the summary judgment that declared them liable for the balance of the price they agreed to pay the respondent for the purchase of a coin laundry business. The motion judge held that the appellants' defence, that they had been induced by the respondent's fraudulent misrepresentations about the revenues of the

(2) The Effect of Disclaimer Clauses

[21] A clause in a contract that purports to limit remedies arising from a misrepresentation does not immunize the maker of a fraudulent misrepresentation from the remedies available to the innocent party: *Fea Investments*, at paras. 49-54.

[22] In *Hasham v. Kingston* (1991), 4 O.R. (3d) 514 (Div. Ct.), the clause in issue excluded liability for all representations outside the terms of the contract. The Divisional Court found that the clause could not apply to a misrepresentation that was found to be fraudulent: at p. 524.

[23] The reasoning in *Hasham* was applied by this court in *Fea Investments* to conclude that a clause in a contract that limited remedies for misrepresentation did not apply to fraudulent misrepresentations: at paras. 52-54.

(3) Entire Agreement Clauses and Fraudulent Misrepresentations

[24] Entire agreement clauses are "generally intended to lift and distill the parties' bargain from the muck of negotiations": *Soboczynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241, at para. 43, leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 243. They are generally read to apply to what was said or done before the agreement was made, so as to exclude such dealings from affecting the interpretation of the agreement. They are essentially a codification of the parol evidence rule: *Soboczynski*, at paras. 45-47.

Soboczynski et al. v. Beauchamp et al.
[Indexed as: Soboczynski v. Beauchamp]

Ontario Reports

Court of Appeal for Ontario,

Hoy A.C.J.O., Epstein and Hourigan JJ.A.

April 23, 2015

125 O.R. (3d) 241 | 2015 ONCA 282

Case Summary

Sale of land — Agreement of purchase and sale — "Entire agreement" clause in agreement of purchase and sale not precluding purchaser's action in negligent misrepresentation against vendor for non-contractual representations made subsequent to agreement but before closing.

Torts — Negligent misrepresentation — Vendors completing seller property information statement ("SPIS") before closing of house sale in which they stated that property was not subject to flooding and undertook to inform purchasers of any important changes to information in SPIS — Vendors failing to disclose pre-closing flooding of basement — Purchasers' negligent misrepresentation claim failing in absence of evidence that they relied on vendors' representations.

The parties entered into an agreement of purchase and sale which contained an "entire agreement" clause. Before the transaction closed, the defendant vendors completed a seller property information statement ("SPIS") in which they stated that the property was not subject to flooding and undertook to inform the plaintiff purchasers of any important changes to the information contained in the SPIS. The defendants failed to inform the plaintiffs of a pre-closing basement flood. After the closing, the basement flooded again, and the plaintiffs found out about the earlier flood. They sued the defendants for damages for negligent misrepresentation. The trial judge found that the entire agreement clause in the agreement of purchase and sale acted as a bar to the action. The Divisional Court allowed the plaintiffs' appeal. The defendants appealed.

Held, the appeal should be allowed.

The action was not precluded by the entire agreement clause. The entire agreement clause operated retrospectively, not prospectively. Its application was restricted to limit representations, warranties, collateral agreements and conditions made prior to or during the negotiations leading up to the signing of the agreement of purchase and sale. When the defendants made representations in the SPIS, a document completed after the agreement of purchase and sale was signed, the entire agreement clause was spent.

(2) by concluding that the respondents had made out a claim for damages based on negligent misrepresentation; and

(3) in its trial costs award to the respondents.

V. *Analysis*

(i) *Did the Divisional Court err by finding that the entire agreement clause in the APS did not preclude a claim in tort based on an alleged negligent misrepresentation made in the SPIS?*

[38] The appellants submit that the entire agreement clause, which expressly stated that there are no representations affecting their agreement other than as expressed in the APS, precludes the respondents from advancing a claim in tort based on [page249] representations in the SPIS. The appellants point out that the respondents could have avoided the consequences of the entire agreement clause by incorporating the SPIS into the APS, but did not do so.

[39] It is well-settled that contract and tort duties may arise concurrently. In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, the Supreme Court wrote, at p. 26 S.C.R., "where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort". The court continued, at p. 27 S.C.R., "In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon."

[40] Accordingly, the key question is whether the entire agreement clause in the APS negatives the respondents' right to sue in tort based on misrepresentations made in the SPIS -- a document completed after the APS was entered into.

[41] In my view, the answer to the question is that, in the circumstances of this case, any consequences flowing from representations made in the SPIS were outside the reach of the entire agreement clause. The entire agreement clause in the APS operates retrospectively, not prospectively. In other words, the application of the clause is restricted to limit representations, warranties, collateral agreements and conditions made *prior to or during* the negotiations leading up to the signing of the APS. When the appellants made representations in the SPIS, a document completed *after* the APS had been signed by all parties, the entire agreement clause was spent.

[42] This conclusion is supported by the general purpose of entire agreement clauses, jurisprudence from this court, the plain meaning of the entire agreement clause at issue in this case, and the post-contractual conduct of the parties.

General purpose of entire agreement clauses

[43] An entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of the negotiations. In limiting the expression of the parties' intentions to the written form, the clause attempts to provide certainty and clarity.

[44] In *Inntrepreneur Pub Co. v. East Crown Ltd.*, [2000] 41 E.G. 209, [2000] Lloyd's Rep. 611 (U.K. Ch.), Lightman J. colourfully described the purpose of an entire agreement clause as

follows:

> The purpose of an entire agreement clause is to preclude a party to a written agreement threshing the undergrowth and finding *in the course of [page250] negotiations* some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty . . . For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere.

(Emphasis added)

[45] Legal commentators appear to be united in their view that entire agreement clauses are, generally speaking, retrospective in nature. According to Angela Swan, "An 'entire agreement' clause deals only with what was done or said *before* the agreement was made and seeks to exclude those statements and acts from muddying the interpretation of the agreement; it is a contractual invocation of the parol evidence rule": *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2012), at p. 600 (emphasis in original); see, also, John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p. 733.

[46] Justice P.M. Perell agrees. He says that "[t]he parol evidence rule then directs that the written contract may not be contradicted by evidence of the oral and written statements made by the parties *before* the signing of the contract. The entire agreement clause is essentially a codification of the parol evidence rule": "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998), 20 Advoc. Q. 287, at 290-91 (emphasis added).

[47] And according to Professor M.H. Ogilvie, entire agreement clauses are "patently not applicable . . . where the representation *postdates* the contract": "Entire Agreement Clauses: Neither Riddle Nor Enigma" (2009), 87 Can. Bar Rev. at 642 (emphasis added).

Jurisprudence from this court

[48] While there appears to be little jurisprudence on the effect of an entire agreement clause on representations made *after* the contract containing the clause is entered into, some assistance can be found in this court's decision in *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919 (C.A.), subsequent proceedings [2006] O.J. No. 1729, 19 B.L.R. (4th) 19 (C.A.).

[49] *Shelanu* involved a contractual dispute in which the question was whether an entire agreement clause in a written agreement rendered unenforceable a subsequent oral agreement between the parties. Justice Weiler, writing for the court, concluded it did not.

[50] *Shelanu* clarified certain points about entire agreement clauses. [page251]

[51] First, an entire agreement clause does not prevent the parties from amending the terms of their agreement. In other words, post-contract events can affect both the enforceability of the obligations in the agreement and add new obligations to those imposed by its terms.

[52] Second, and relatedly, entire agreement clauses do not apply prospectively unless the wording expressly so provides. In the words of Weiler J.A., at paras. 49-50 [(2003), 64 O.R.

Date: 19980702
Docket: 9603-0083-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MADAM JUSTICE PICARD

BETWEEN:

LAKELAND COLLEGE FACULTY
ASSOCIATION and WANJIKU KAAI

Appellants
(Applicants)

-and-

BOARD OF GOVERNORS OF LAKELAND COLLEGE

Respondent

APPEAL FROM THE HONOURABLE MR. JUSTICE LEFSRUD

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE PICARD
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL AND,
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE CONRAD

essentially these definitions that the chambers judge referred to when he concluded that the term consultation must be "afforded a substantial meaning" and "must amount to considerably more than a form of lip service."

[37] The words "consult" and "consultation" have received judicial consideration in a number of contexts, in legislation and in contracts. The following principles can be gleaned from them: consultation involves,

1. a fact-specific analysis to determine whether, under the circumstances, the measures taken do in fact constitute consultation: *Fletcher* v. *Minister of Town and Country Planning,* [1947] 2 All E.R. 496 at 500 (K.B.); *R. v. Sampson* (1995), 131 D.L.R. (4th) 192 at 218 (B.C. C.A.);

2. a duty upon the decision maker to fully inform the other side of its own position, as well as to fully inform itself of the position of the other: *R.* v. *Jack* (1995), 131 D.L.R. (4th) 165 at 188 (B.C. C.A.); *Trans Canada Pipelines Ltd* v. *Beardmore (Township of)* (1997), 106 O.A.C. 30 at 62 - 64 (Ont. Gen. Div.)

3. an opportunity for both sides to be heard and to state the factors they feel should guide the decision: *Rollo* v. *Minister of Town and Country Planning,* [1948] 1 All E.R. 13 at 17 (C.A.); *Johnson* v. *Glen* (1879), 26 Gr. 162 at 186 (Ont. Ch.).

[38] In summary, a consultation should involve a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information. This definition is as much founded in common sense as in dictionaries or learned judicial writings and would seem unlikely to cause discomfort to anyone charged with consulting before making an important decision, especially those responsible for administering an educational institution.

B. Purpose of the *Colleges Act*

[39] It is trite law to say that in construing part of a statue one must consider the purpose of the statute: *Driedger on the Construction of Statutes,* R. Sullivan ed., 3rd ed. (Toronto: Butterworths, 1994) at 44-45. The *Colleges Act* creates and provides the structure for important educational institutions in the Province of Alberta. Colleges are meant to be institutions of learning and are founded on a commitment and responsibility to "teach". While the *Act* does not define teaching, article 1.20 of the collective agreement does so in the following words; "the art, practice or profession of any individual who develops, instructs, causes to know the knowledge of, or guides the studies of another individual by precept, example or experience". [A.B. 320] A board of governors has the general power to govern a college. The administrative and support staff facilitate the teaching and learning but the principal players are the "student" and the "teacher".

RENT DEFERRAL AGREEMENT

THIS AGREEMENT made the 27th day of April, 2020:

BETWEEN:

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY
(the "**Landlord**")

AND

PEACE BRIDGE DUTY FREE INC.
(the "**Tenant**")

WHEREAS:

A. By a lease made July 28, 2016 between the Landlord and the Tenant, the Tenant leased from the Landlord certain premises (the "**Premises**") municipally known 1 Peace Bridge, Fort Erie, Ontario, for a term commencing November 1, 2016 and expiring October 31, 2031; and

B. Due to travel restrictions and economic hardships created across the world by the COVID-19 pandemic, the Tenant requests rent relief.

NOW THEREFORE THIS AGREEMENT WITNESSES in consideration of the covenants and agreements contained herein, and for other good and valuable consideration, the receipt of sufficiency whereof is hereby acknowledged, the parties agree as follows:

1. INTERPRETATION

1.1 **Expressions in Lease**: Unless expressly provided to the contrary in this Agreement, all terms defined in the Lease shall have the same meaning in this Agreement.

1.2 **Definitions and Interpretation**: The Lease is amended by adding the following definitions thereto:

"**Amortization Period**" means the one year period commencing on the Restart Date.

"**Suspension Date**" means April 1, 2020.

"**Deferred Rent**" means the Base Rent otherwise payable by the Tenant pursuant to the Lease during the Rent Deferral Period but for the terms of this Agreement.

"**Rent Deferral Period**" means the period commencing on the Rent Suspension Date to and including the earlier of:

i. July 31, 2020; or

ii. the last day of the month following the date that the Tenant has fully reopened the Duty Free Shop for business after the restrictions on non-essential travel between Canada and the United States are lifted (for greater clarity, a partial reopening to accommodate essential travel does not constitute a full reopening).

"**Required Conditions**" means:

i. the Tenant pays all Additional Rent throughout the Rent Deferral Period, including without limitation, all Operating Costs and Property Taxes;

ii. the Tenant does not seek benefit or protection of any statute for the benefit of bankrupt or insolvent debtors, including without limitation, a proposal, assignment or arrangement with its creditors or the repudiation or disclaimer of the Lease;

iii. there has not been a Transfer (as defined in section 14.01 of this Lease); and

iv. the Tenant strictly complies with all of the terms of the Lease and there is no Event of Default; and

v. the Tenant strictly complies with all of the terms of this Agreement (including without limitation, the representations and warranties herein).

"**Restart Date**" means the day immediately following the last day of the Rent Deferral Period.

2. RENT DEFERRAL

2.1 **Tenant's Representations and Warranties:** The Tenant represents and warrants to the Landlord the following:

(a) the Tenant temporarily closed its business at the Premises on or about March 21, 2020 and will fully re-open for business at the Premises as soon the restrictions on non-essential travel between Canada and the United States of America are lifted; and

(b) the Tenant has and will continue to use its best efforts to take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including without limitation, any income tax deferral or reduction, rent assistance, employee wage and benefit subsidies and the like, with a view to ensuring that the Tenant is and remains a financially viable business, and shall keep the Landlord apprised of the Tenant's efforts in this regard.

2.2 **Rent Suspension and Deferral:** Provided the Required Conditions are met both throughout the Rent Deferral Period and the Amortization Period, then notwithstanding anything in this Lease to the contrary, the Tenant's obligation to pay the Deferred Rent during the Rent Deferral Period shall be suspended and deferred and shall not be payable until the Restart Date. The Tenant shall, however, be bound by all the other terms and conditions of this Lease during the Rent Suspension Period. For the purpose of clarity, it is understood and agreed that if any of the Required Conditions are not met, the Tenant's right to suspend and defer payment of Deferred Rent during the Rent Suspension Period shall be immediately forfeited and withdrawn retroactive to the Rent Suspension Date and the Deferred Rent that would otherwise have been payable during the Rent Suspension Period to the date of such forfeiture shall be immediately due and payable together with interest thereon at the rate set forth in the Lease for non-payment of Rent, calculated from the date each such installment of Deferred Rent would otherwise have been payable pursuant to Lease but for this Agreement. Except as expressly

suspended and deferred in accordance with this section, the Tenant shall continue to pay all Rent in accordance with the Lease.

2.3 **Repayment of the Deferred Rent:** 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. The Tenant covenants and agrees that if at any time, any of the Required Conditions are not met, the Landlord's agreement to amortize the repayment of the Deferred Rent shall be deemed to have been immediately withdrawn and the Tenant shall immediately pay to the Landlord the then outstanding unamortized balance of the Deferred Rent together with interest thereon at the rate of 4% per annum.

3. ACKNOWLEDGEMENT

3.1 **Acknowledgement:** The Tenant confirms that, as of the date hereof, (a) the Landlord is not in default under any obligation of the Landlord under the Lease and (b) there are no disputes or claims outstanding by the Tenant against the Landlord in respect of any past billings, rental recoveries or other matters pertaining to the Lease.

4. NO AGREEMENT

4.1 This Agreement shall be deemed not to have been executed and delivered by the Landlord until:

i. this Agreement has been duly executed by all the other parties hereto and the Landlord has received at least one executed original hereof; and

ii. the Landlord has received payment of the sum of $3,000 plus the applicable HST thereon, being the estimated legal fees incurred by the Landlord in relation to the request for rent-relief and the preparation of this Agreement.

Until the aforesaid deliverables have been received by the Landlord, the Landlord may, at its sole option, by written notice to the Tenant, withdraw any agreement in respect of rent-relief and this Agreement shall be null and void and of no further force or effect.

5. AGREEMENT PART OF LEASE

5.1 **Agreement Part of Lease:** This Agreement shall be read in conjunction with the Lease and shall form a part thereof and all provisions of the Lease insofar as applicable and except as amended by this Agreement shall continue in full force and effect and shall be binding upon and shall enure to the benefit of the parties, their successors and permitted assigns.

5.2 **Further Assurances:** Each party shall at any time and from time to time, upon the request of the other party, execute and deliver such further documents and do such further acts and things as the other party may reasonably request to evidence, carry out and give full effect to the terms, conditions, intent and meaning of this Agreement.

5.3 **Counterparts:** This Agreement may be executed by the parties in separate counterparts each of which when so executed and delivered to all of the parties shall be deemed to be and shall be read as a single agreement among the parties.

[Signature Page Follows]

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement with effect on the date first set out on the first page of this Agreement.

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

Per: _____
Name: ■ Ron Rienas
Title: ■ General Manager

c/s

Per: _____
Name: ■
Title: ■

I/We have authority to bind the corporation

PEACE BRIDGE DUTY FREE INC.

Per: _____
Name: ■ G.G. O'HARA
Title: ■ PRESIDENT

c/s

Per: _____
Name: ■
Title: ■

I/We have authority to bind the corporation

RENT DEFERRAL AGREEMENT

THIS AGREEMENT made the 20th day of November, 2020.

BETWEEN:

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY
(the "**Landlord**")

AND

PEACE BRIDGE DUTY FREE INC.
(the "**Tenant**")

WHEREAS:

A. By a lease made July 28, 2016 between the Landlord and the Tenant, the Tenant leased from the Landlord certain premises (the "**Premises**") municipally known 1 Peace Bridge, Fort Erie, Ontario, for a term commencing November 1, 2016 and expiring October 31, 2031; and

B. Due to travel restrictions and economic hardships created across the world by the COVID-19 pandemic, the Tenant requests rent relief.

NOW THEREFORE THIS AGREEMENT WITNESSES in consideration of the covenants and agreements contained herein, and for other good and valuable consideration, the receipt of sufficiency whereof is hereby acknowledged, the parties agree as follows:

1. INTERPRETATION

1.1 **Expressions in Lease:** Unless expressly provided to the contrary in this Agreement, all terms defined in the Lease shall have the same meaning in this Agreement.

1.2 **Definitions and Interpretation:** The Lease is amended by adding the following definitions thereto:

"**Amortization Period**" means the two year period commencing on the Restart Date.

"**Suspension Date**" means April 1, 2020.

"**Deferred Rent**" means the Base Rent otherwise payable by the Tenant pursuant to the Lease during the Rent Deferral Period but for the terms of this Agreement.

"**Rent Deferral Period**" means the period commencing on the Rent Suspension Date to and including the earlier of:

i. March 31, 2021; or

ii. the last day of the month following the date that the Tenant has fully reopened the Duty Free Shop for business after the restrictions on non-essential travel between Canada and the United States are lifted (for greater clarity, a partial reopening to accommodate essential travel does not constitute a full reopening).

"**Required Conditions**" means:

i. the Tenant pays all Additional Rent throughout the Rent Deferral Period, including without limitation, all Operating Costs and Property Taxes;

ii. the Tenant does not seek benefit or protection of any statute for the benefit of bankrupt or insolvent debtors, including without limitation, a proposal, assignment or arrangement with its creditors or the repudiation or disclaimer of the Lease;

iii. there has not been a Transfer (as defined in section 14.01 of this Lease); and

iv. the Tenant strictly complies with all of the terms of the Lease and there is no Event of Default; and

v. the Tenant strictly complies with all of the terms of this Agreement (including without limitation, the representations and warranties herein).

"**Restart Date**" means the day immediately following the last day of the Rent Deferral Period.

2. RENT DEFERRAL

2.1 **Tenant's Representations and Warranties**: The Tenant represents and warrants to the Landlord the following:

(a) the Tenant temporarily closed its business at the Premises on or about March 21, 2020 and will fully re-open for business at the Premises as soon the restrictions on non-essential travel between Canada and the United States of America are lifted; and

(b) the Tenant has and will continue to use its best efforts to take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including without limitation, any income tax deferral or reduction, rent assistance, employee wage and benefit subsidies and the like, with a view to ensuring that the Tenant is and remains a financially viable business, and shall keep the Landlord apprised of the Tenant's efforts in this regard.

2.2 Rent Suspension and Deferral: Provided the Required Conditions are met both throughout the Rent Deferral Period and the Amortization Period, then notwithstanding anything in this Lease to the contrary, the Tenant's obligation to pay the Deferred Rent during the Rent Deferral Period shall be suspended and deferred and shall not be payable until the Restart Date. The Tenant shall, however, be bound by all the other terms and conditions of this Lease during the Rent Suspension Period. For the purpose of clarity, it is understood and agreed that if any of the Required Conditions are not met, the Tenant's right to suspend and defer payment of Deferred Rent during the Rent Suspension Period shall be immediately forfeited and withdrawn retroactive to the Rent Suspension Date and the Deferred Rent that would otherwise have been payable during the Rent Suspension Period to the date of such forfeiture shall be immediately due and payable together with interest thereon at the rate set forth in the Lease for non-payment of Rent, calculated from the date each such installment of Deferred Rent would otherwise have been payable pursuant to Lease but for this Agreement. Except as expressly

suspended and deferred in accordance with this section, the Tenant shall continue to pay all Rent in accordance with the Lease.

2.3 **Repayment of the Deferred Rent:** 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. The Tenant covenants and agrees that if at any time, any of the Required Conditions are not met, the Landlord's agreement to amortize the repayment of the Deferred Rent shall be deemed to have been immediately withdrawn and the Tenant shall immediately pay to the Landlord the then outstanding unamortized balance of the Deferred Rent together with interest thereon at the rate of 4% per annum.

3. ACKNOWLEDGEMENT

3.1 **Acknowledgement:** The Tenant confirms that, as of the date hereof, (a) the Landlord is not in default under any obligation of the Landlord under the Lease and (b) there are no disputes or claims outstanding by the Tenant against the Landlord in respect of any past billings, rental recoveries or other matters pertaining to the Lease.

4. NO AGREEMENT

4.1 This Agreement shall be deemed not to have been executed and delivered by the Landlord until:

i. this Agreement has been duly executed by all the other parties hereto and the Landlord has received at least one executed original hereof; and

Until the aforesaid deliverables have been received by the Landlord, the Landlord may, at its sole option, by written notice to the Tenant, withdraw any agreement in respect of rent-relief and this Agreement shall be null and void and of no further force or effect.

5. AGREEMENT PART OF LEASE

5.1 **Agreement Part of Lease:** This Agreement shall be read in conjunction with the Lease and shall form a part thereof and all provisions of the Lease insofar as applicable and except as amended by this Agreement shall continue in full force and effect and shall be binding upon and shall enure to the benefit of the parties, their successors and permitted assigns.

5.2 **Further Assurances:** Each party shall at any time and from time to time, upon the request of the other party, execute and deliver such further documents and do such further acts and things as the other party may reasonably request to evidence, carry out and give full effect to the terms, conditions, intent and meaning of this Agreement.

5.3 **Counterparts:** This Agreement may be executed by the parties in separate counterparts each of which when so executed and delivered to all of the parties shall be deemed to be and shall be read as a single agreement among the parties.

[Signature Page Follows]

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement with effect on the date first set out on the first page of this Agreement.

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

Per: _____
Name: ■
Title: ■

c/s

Per: _____
Name: ■
Title: ■

I/We have authority to bind the corporation

PEACE BRIDGE DUTY FREE INC.

Per: _____
Name: ■ GREGORY G. O'HARA
Title: ■ PRESIDENT

c/s

Per: _____
Name: ■
Title: ■

I/We have authority to bind the corporation

From: Ron Rienas
Sent: Friday, November 20, 2020 1:49 PM
To: Greg O'Hara <gohara@dutyfree.ca>
Cc: Jim Pearce <JimP@dutyfree.ca>
Subject: RE: Attached Image -Rent Deferral Agreement

Greg,

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 PBA 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.

I would note that the financial statements required in Article 16.03 b) to be provided for 2019 were not provided by the end of March 2020.

I would also note that we have not yet received the HST reimbursement as promised in our discussion earlier this week.

Ron Rienas
General Manager
Buffalo & Fort Erie Public Bridge Authority

100 Queen Street, Fort Erie, ON L2A 3S6 | 1 Peace Bridge Plaza, Buffalo, NY 14213
rr@peacebridge.com T 905-994-3676| T 716-884-8636| F 905-871-9940 | F 716-884-2089 | C 905-651-2206

From: Ron Rienas
Sent: Wednesday, December 2, 2020 5:27 PM
To: Greg O'Hara <gohara@dutyfree.ca>
Cc: Jim Pearce <JimP@dutyfree.ca>
Subject: RE: Peace Bridge - Rent Deferral Agreement

Greg,

Please provide the PBA with the following by no later than Monday December 7, 2020

- A copy of PBDF's 2020/21 winter control contract with Stevensville Lawn Service
- A certificate from a recognized and reputable HVAC contractor certifying that the HVAC system is in good working order.

You have not responded to my notice letter of November 27, 2020 requiring the PBDF to clean the washrooms as required by the lease. If you do not advise me by Monday December 7 that PBDF will be fulfilling this obligation the PBA will continue to provide this service at PBDF's expense. On a related issue there have been some mechanical issues with the washroom plumbing that the PBA plumbing tradesman and maintenance supervisor have had to be involved with. PBDF will be required to pay for their time.

Please be advised that the PBA has not executed the latest Rent Deferral Agreement. We are awaiting additional financial information and given other lease conformity issues we are not comfortable that the outstanding rent obligations will be met.

Ron Rienas
General Manager
Buffalo & Fort Erie Public Bridge Authority

100 Queen Street, Fort Erie, ON L2A 3S6 | 1 Peace Bridge Plaza, Buffalo, NY 14213
rr@peacebridge.com T 905-994-3676| T 716-884-8636| F 905-871-9940 | F 716-884-2089 | C 905-651-2206

From: Ron Rienas
Sent: Wednesday, December 9, 2020 4:17 PM
To: Jim Pearce <JimP@dutyfree.ca>
Subject: PBA Information request

Jim,

We do not believe that PBDF is being at all forthcoming in providing requested information and is delaying and obfuscating at every opportunity. As I have indicated previously, the PBA needed to have a degree of comfort before extending the rent deferral to March 31, 2021.

I want to make it clear that the PBA 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 PBA 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.

Please see my comments in red below to your e-mail of yesterday

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

AFFIDAVIT OF RON RIENAS
(Sworn 26 November 2022)

I, RON RIENAS, of the City of Port Colborne, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am the General Manager of the Buffalo and Fort Erie Public Bridge Authority (the "**Authority**") and, as such, have personal knowledge of the matters herein deposed save and except where I rely on information and belief, in which cases I identify the source of that information and verily believe it to be true.

2. I am swearing this Affidavit in response to the Affidavit of Jim Pearce affirmed 13 November 2022 (the "**Pearce 13 Nov 22 Affidavit**"). I wish to note that the Authority does not believe that PBDF's purported Cross-Motion is properly brought in this Application and I do not want the fact that I am addressing statements or arguments made by Mr. Pearce in his Affidavit taken as the Authority agreeing that PBDF's purported Cross-Motion is properly brought in this Application. I am assuming that the Pearce 13 Nov 22 Affidavit is also delivered in response to the Authority's Motion returnable on 9 December 2022

14. In paragraph 103 of his Affidavit, Mr. Pearce asserts that the Authority's insistence that PBDF pay the $333,333 base rent required by the Lease after 14 December 2021 is "inconsistent with the normal payment practices at the time of the Appointment Order". This is disingenuous. Mr. Pearce is aware that the Authority specifically rejected the request by PBDF to pay percentage only rent and consistently objected to PBDF paying percentage only rent.

C. Authority Acted in Good Faith and Consulted with PBDF

15. In paragraphs 17-21, 27 and 32 of his Affidavit, Mr. Pearce: (a) implies that the Authority did not consult with PBDF concerning the impact of the COVID-related restrictions as required by Article 18.07 of the Lease; (b) asserts that the Authority has not acted reasonable as required by Art 2.15 of the Lease; and (c) implies that the Authority has not complied with some duty of good faith and honest performance. This is not accurate.

16. The Authority has always dealt in good faith, and been honest, with PBDF. The Authority has fulfilled its obligation to consult with PBDF.

17. Aside from engagements surrounding the First Rent Deferral in April of 2020 and the (aborted) Second Rent Deferral in November of 2020, there have been other engagements between PBDF and the Authority concerning the impact of COVID and the (further) accommodations that the Authority might be willing to make to address the impact that COVID was having (and had) on PBDF.

18. While I do not propose to detail all of the various dealings between PBDF and the Authority, I will provide a high level overview of some of the engagements that took place as contemplated by Article 18.07 of the Lease. The results of these dealings are summarized in Mr. Wolf's letter of 14 January 2022.

19. There were exchanges of written communications between PBDF and the Authority in December of 2020. At that time, the Authority offered to assist PBDF to obtain Federal government assistance and, to that end, to arrange a meeting with the Member of Parliament for Niagara Centre. PBDF did not respond to that offer.

20. As noted in paragraph 32 of the Pearce 13 Nov 22 Affidavit, I and Karen Costa met with Mr. Pearce and the President and Managing Partner of PBDF Greg O'Hara on 13 May 2021 to discuss the

situation relating to the closure by PBDF of the duty free on the Canadian side of the Peace Bridge. At that meeting, PBDF presented for the third time the same proposal to address the rent owing and payable by PBDF. The Authority was clear that this proposal was not acceptable the first two times it had been presented and remained unacceptable. At the meeting on 13 May 2021, PBDF made it clear that: (a) the shareholders of PBDF were not prepared to provide financial support to PBDF; and (b) PBDF would not apply for the Business Credit Availability Program.

21. In August of 2021, there was a without prejudice proposal presented to the Authority by PBDF and a meeting among the parties' lawyers. That proposal included PBDF paying percentage only rent. I am advised by Chris Stanek of Gowling and verily believe that in a telephone call on or about 27 September 2021, he told PBDF's lawyer—then Ben Mills of Colin Bedard LLP—that a proposal by PBDF that it pay only percentage rent was not acceptable to the Authority. On or about 30 September 2022, PBDF, through its lawyers, indicated that it would be in a positon to provide the Authority with an offer to address the rent arrears by 15 October 2021. On 15 October 2021, Mr. O'Hara made another without prejudice proposal to the Authority. On 26 October 2021, the Authority responded to PBDF's proposal and provided a counter-proposal.

22. In a 24 December 2021 e-mail, Mr. Wolf wrote:

Further to our last call we have acquired more information from our client, participated in a several hours long meeting to consider options, and plan to finish our review of material over the holidays.

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

We think this negotiation process may be facilitated by a mediator….

The sooner we start the booking process the earlier date we could achieve. Ideally, we could find a cancellation the first or second week of January before the return date of the hearing.

23. On 30 December 2022, Mr. Stanek responded

We note that your e-mail offering a mediation was not accompanied by a proposal designed to deal with your client's default. Based upon the proposals exchanged to date, our respective clients' positions are too far apart for a mediation to be effective.

All of the proposals made by your client to date provided that your client will only pay a small portion of the arrears each month out of future revenue over a significant period of time. That is not acceptable to our client. Your client is a party to a binding Lease that our client is entitled to rely upon. Your client is in default and owes substantial arrears. Any proposal must include a provision for the repayment of the arrears and go-forward rent supported by a detailed business plan and personal guarantees from individual(s) with financial means and/or third-party security. Once we have seen such a proposal with this supporting information, we are prepared to re-visit whether there is room for settlement and whether a mediator may be able to assist with any negotiations.

24. PBDF has never engaged with the Authority to negotiate a mutually acceptable reduction in the minimum rent payable under the Lease. After the Authority refused to agree to PBDF paying only percentage rent, PBDF ignored the requirements of the Lease and began to unilaterally pay percentage only rent, which PBDF unilaterally determined would be 20% of sales. PBDF, first relying on the Provincial eviction moratorium and then the Appointment Order, has continued to pay percentage only rent over the Authority's objection. As noted in my Affidavit sworn on 7 September 2022, the Authority advised the Monitor on 7 January 2022 that PBDF was not paying the required minimum rent and has repeatedly advised PBDF that it did not accept the payment of percentage only rent.

D. Authority met with FDFA

25. There is no dispute that when Frontier Duty Free Association ("**FDFA**") first reached out to the Authority and asked for a meeting, the Authority declined. This was because they did not represent PBDF. However, on 10 March 2022, the Authority responded to further request(s) for a meeting confirmed that it would meet with FDFA on 25 March 2022.

26. In paragraph 86 of his Affidavit, Mr. Pearce implies that the Authority excluded PBDF from the meeting on 25 March 2022 and refused to discuss the specifics of the Lease with PBDF. That is not accurate.

27. In the letter to FDFA on 10 March 2022 in which it agreed to meet with FDFA, the Authority wrote "[y]ou will appreciate that we will not be able to discuss with you the specifics of the situation involving [PBDF] or the offers that have been made to them unless you obtain written consent from them for us to speak to you about those matters." In that letter, the Authority also asked FDFA for an outline of what they proposed to discuss at the meeting on 25 March 2022. For some reason, that letter does not appear to have been attached as an Exhibit to the Pearce 13 Nov 22 Affidavit.

28. PBDF did not provide consent for the Authority to discuss with FDFA its specific situation and the outline that FDFA provided to the Authority—which I assume was shared with PBDF—did not include any discussion of PBDF's specific situation or the Lease. My e-mail of 21 March 2022 that is attached as Exhibit T to and referred in paragraph 86 of the Pearce 13 Nov 22 Affidavit was more of a question than a statement—I was confirming whether PBDF would be attending the meeting and whether there was intended to be a discussion of the Lease. In my view, the entire purpose of meeting with FDFA was to address PBDF's specific situation and the Lease because the information that FDFA presented to the Authority's Board on 25 March 2022 was not unknown to the Authority.

29. The Authority considered the points made by FDFA in its communications with the Authority and it did not (and does not) change the Authority's views as to what it is prepared to agree to in terms of a rent abatement and conditions for the repayment of the remaining rent owing by PBDF.

E. Authority has Offered PBDF a Generous Rent Abatement

30. In paragraph 18 of his Affidavit, Mr. Pearce asserts that the Authority is appearing to take the position that minimum rent is payable by PBDF from 31 July 2020 onward. As noted in the letter at Tab 10 of the Brief of Exhibits, the Authority has confirmed that it is willing to give PBDF a 50% rent abatement for the period that PBDF (voluntarily) closed the duty free as a result of the COVID-related restrictions imposed on cross-border travel subject to their being an acceptable agreement to pay the remaining rent owing.

31. In paragraph 19 of his Affidavit, Mr. Pearce argues that the Authority is asserting that the "Border Restrictions" had no impact on the Lease beyond 31 July 2020. That is untrue. The Authority acknowledged in the First Rent Deferral and continues to acknowledge that the "Border Restrictions" have impacted PBDF's business—although the Authority does dispute that PBDF was required to stop operating the duty free—and has offered to give PBDF a generous rent abatement and to negotiate terms for the repayment of the remaining rent over time.

32. The barrier to the parties reaching an agreement is that PBDF wants a 75% rent abatement and does not want to agree to a plan to repay the remaining rent arrears on terms that are acceptable to the Authority.

F. Factors Considered by the Authority

33. In paragraph 27 of his Affidavit, Mr. Pearce asserts that it was and continues to be his expectation that the Authority would take into consideration the fact that border restrictions impacted the ability of PBDF and to generate sales. The Authority has taken those factors into account in determining that it is prepared to provide PBDF with a 50% rent abatement, subject to a plan acceptable to the Authority being put in place to repay the remaining arrears. The Authority also considered, among other factors: (a) that PBDF voluntarily closed the duty free while other operators did not; (b) the financial interest of PBDF's shareholders and the need to fairly apportion the financial impact of COVID between the Authority and PBDF; (c) the arrangements made with other duty free operators; (d) Mr. Wolf's argument in his letter of 14 January 2022; and (e) the information provided by FDFA.

G. PBDF was not Forced to Close the Duty Free

34. In paragraphs 27, 46, 106 and 107 of his Affidavit, Mr. Pearce implies that PBDF was prevented by the Government from continuing to operate the duty free, ordered to close the duty free and forced to close that duty free. Mr. Pearce knows that is not accurate. It was PBDF's decision to close the duty free at the Peace Bridge due to the reduced traffic caused by the Government border restrictions. I note that other duty frees remained open. For example, the duty free on the US side of the Peace Bridge and duty frees at other international bridges, including the Blue Water Bridge in Sarnia, Ontario and the Ambassador Bridge in Windsor, Ontario remained open.

H. Authority Cannot Subsidize PBDF or its Shareholders

35. In paragraph 105 of his Affidavit, Mr. Pearce asserts that the Authority has USD$77MM in unrestricted cash on hand. This is correct. However, the Authority also has significant long-term debt. The Authority's cash reserves are intended for the care and maintenance of the Peace Bridge, which is a significant asset that requires extensive capital expenditures. Those reserves cannot be used to subsidize PBDF and its shareholders.

36. I note that: (a) while indicating how much in rent PBDF has paid to the Authority—see paragraph 5 of the Pearce 13 Nov 22 Affidavit—Mr. Pearce does not disclose how much in profit PBDF realized since 1986; and (b) while asserting that it is impossible for PBDF to pay rent as required by the Lease—see paragraph 32 of the Pearce 13 Nov 22 Affidavit—Mr. Pearce does not provide any

K. Authority has Considered Facts Raised by Mr. Pearce

41. In paragraphs 116 to 121 of his Affidavit, Mr. Pearce argues, essentially, why the Authority ought to provide PBDF with the concessions it is demanding from the Authority. The Authority is aware of and has considered all of the matters raised by Mr. Pearce in these paragraphs and they do not change the Authority's position that it wants to have the right to exercise its remedies based on the failure of PBDF to pay base rent from 14 December 2021 as required by the Lease and the Appointment Order.

L. Articles 18.07 and 18.08 of the Lease

42. In paragraphs 17, 20, and 32 of his Affidavit, Mr. Pearce refers to Article 18.07 of the Lease and implies that this provision requires that the Authority agree to amend the Lease as requested by PBDF. This is not accurate.

43. Article 18.07 does not require that the Authority accede to PBDF's demand with respect to amendments to the Lease based on a material adverse effect caused by the introduction of or a change to an Applicable Law. It requires that the Authority consult with the Tenant to discuss the impact to the Lease of any such introduction of or change to an Applicable Law. The Authority has done this. The issue is that PBDF wants amendments to the Lease to which the Authority is not prepared to agree.

44. I note that the Lease defines "Unavoidable Delay" as:

> *…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.*

45. And Article 18.08 of the Lease says:

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

John C. Wolf
Partner
D: 416-593-2994 E: jwolf@blaney.com

January 14th, 2022

Via Email

Gowling WLG
100 King St West
Suite # 1600
Toronto, ON, M5X 1G5

Attention: Christopher Stanek and Patrick Shea

Dear Chris and Patrick,

RE: **Buffalo & Fort Erie Public Bridge Authority ("Landlord") lease to Peace Bridge Duty Free Inc. as amended ("Lease") of certain premises ("Duty Free Store "or "store")**

And Re: **Royal Bank Of Canada ("RBC") Receivership Application**
Initially returnable December 14th, 2021 ("Receivership")

Further to your last email, we wanted to respond to you with areas of mutual client agreement, and proposals on those areas still requiring refinement.

Underlying this letter are what I understand to be the material interests/positions of the parties as follows:

1. Authority has no business objective of terminating the Lease in favour of another tenant.

2. All things being equal Authority is prepared for Duty Free to remain the tenant throughout the Lease term.

3. Authority supported Duty Free after May 2020 when it was unable to pay rent because of governmental closures and in that regard an initial rent deferral agreement was concluded, and a second agreement was executed by Duty Free (but not by the Authority) that sought to address the periods through March 31st, 2021, it being anticipated non-essential traffic would resume before then.

4. In December 2020, the Authority supported Duty Free's attempts to secure federal support.

5. In April 2021, the parties began to disagree. The Authority wanted Duty Free to open for business and Duty Free wanted to await a time when non-essential traffic was permitted again, or at least expected in the short term.

6. Despite this philosophical disagreement, the status quo was permitted to continue without further written agreement- probably because of the provincial eviction moratorium which the Authority acknowledged the existence of in various communications.

7. Once Duty Free opened in early Fall 2021, the Authority sought payment of full minimum monthly basic rent notwithstanding that sales having regard to reduced traffic were inevitably going to be insufficient to generate that sum.

8. In August 2021, DutyFree made a proposal which was not acceptable to Authority. Counter proposals were exchanged.

9. During 2021, Duty Free paid monthly 20% of actual gross sales which was accepted by the Authority (20% being the basis uon which minimum basic rent is calculated in the Lease). Duty Free gross sales since opening are approximately 35% of pre-closure sales.

10. Bad weather and government musing about future Covid implications have had an immediate negative impact on gross sales.

From the exchanges to date, it appears that prior to Omicrom when it was anticipated that the pandemic was moving behind the parties and a gradual return to normal bridge traffic could be reasonably contemplated, the parties indicated in without prejudice proposals a general agreement as follows:

1. Security deposit $50,000 to be replenished (completed).

2. HST would be paid by Duty Free on the Authority's imputed 2021 Rent (resulting in an overpayment of HST) (completed).

3. Food tenant to be sought at full market rent and approved by Authority (underway).

4. Lease amendment to be retroactive to November 1st, 2021.

5. Existing Lease terms apply after January 1st, 2026.

6. 2023: minimum base rent calculated as the greater of rent payable on $3 million, or 20% of sales.

7. 2024: minimum base rent calculated as the greater of rent payable on $3.5 million, or 20% of sales.

8. 2025: minimum base rent calculated as the greater of rent payable on $4 million, or 20% of sales.

Obviously given the developments of the past two months, particulars of these terms will require tweaking to reflect on the ground facts, and the delay in any proforma estimates of the time for business to improve sufficiently to be able to honour these commitments..

The parties were not able to reach any agreement in principal on:

1. Basic rent for the period October 24th - December 2021.

2. Basic rent for the period 2022.

3. How to address rent arrears (partial forgiveness and the balance abated over a future term).

4. Treatment of the 2021 HST over paymenent.

5. Duty Free's Lease term extension proposal.

6. How to address further governmental interference with bridge crossing; and/or reduction in traffic.

Since the exchange of offers, Omicron has introduced a further and large degree of uncertainty into bridge traffic and therefore what will be achieved vis a vis Duty Free sales in 2022.

Ontario is currently in shutdown.

The Federal government (with a stake in the Authority) has specifically requested that Canadians not travel internationally.

It is unknown whether non-essential travel border will be restricted.

As of today, it is expected that unvaccinated persons will be barred entry into Canada and therefore cannot be customers on the return to the USA.

Evidence on the effectiveness of vaccines on new variants is extremely disappointing. Ontario, despite two years of opportunity to plan, appears to have no excess medical capacity generally; and as at now actual capacity is materially impacted by medical worker infection and absenteeism.

The American governmemt is warning its citizens not to travel to Ontario by reason of published Omicron infection rates.

The status quo is to put it mildly, fluid and full of uncertainty and this unfortunate reality should be accounted for in any lease amending agreement.

Over the holidays, we have made many investigations in furtherance of a fair and commercially reasonable framework for a lease amending agreement that takes into account industry norms and practices in dealing with this unprecedented event.

Our investigations have revealed a number of interesting and relevant facts such as:

1. No other Canadian frontier duty free location has been threatened with eviction or other lease enforcement by its landlord as has Duty Free.

2. We are advised that the Treasury Board stated that all federal landlords were to participate in CECRA. We are attempting to obtain a copy of that decree. The Authority did not receive CECRA. Had the Authority received CECRA, 75% of eligible rent would have been forgiven from March 2020 to September 2020. During this period, gross rent of about $2.7 million accrued.

3. The clear intent of the Treasury Board/Federal Government was that CECRA type rent relief should be afforded to frontier duty free stores and many tenants received the benefit of CECRA, or otherwise received CECRA kind relief.

4. Other similarly situated frontier duty free parties have negotiated rent forgiveness, rent reduction and rent deferment agreements where arrears are payable over the term of the lease, and which appear to incorporate CECRA like terms of 75% foregiven during the CECRA period or most of it, and a material rent reduction in respect of the period therafter and going forward.

5. A public example of this is the Sault St. Marie Bridge Authority which agreed:

   <u>for the Canadian operator to:</u>

   (a) Reduce minimum rent for 2020/2021 and 2021/2022 by 35%;

   (b) In addition to waive 75% of rent from April – June 2020 (**<u>at the express request of the Federal Ministry of Transportation</u>**);

   <u>for the American operator to:</u>

   (c) Extend the term of the lease by 15 years;

   (d) Reduce percentage rent from 18% to 16% (the same rate as the Canadian operator);

   (e) Reduce rent retroactively by 35% from March 2020 until border re-opening;

(f) Payment of reduced rent during closure to be deferred and payable amortized without interest over the balance of the term of the extended lease.

Attached are the Sault St. Marie Bridge Authority's minutes evidencing the foregoing.

The approach of the Sault St. Marie Bridge Authority is instructive in terms of examples of reasonable accommodations to duty free operators having regard to site specific facts, including CECRA type relief.

What the parties can take from this is:

1. No duty free leases are in jeopardy except according to the Authority, the Peace Bridge Duty Free;

2. Federal rent relief programs have recently been extended until at least May 2022. In the past, the *Commercial Tenancies Act* stay of enforcement of leases has been extended to a period six months thereafter which means at least November 2022. There is no reason to expect anything different this time.

3. Duty Free may be eligle for the next rent releif program.

4. Rent relief needs to take into account future partial closures/loss of bridge traffic if and when such events occur.

5. Rent relief in favour of Duty Free during CECRA or any other period of government shutdown should be significant such as 75% (like under CECRA).

6. Rent relief in favour of Duty Free during any period of restricted operation should be material such as 35% (used by the Sault St. Marie Bridge Authority).

7. Remaining arrears of rent should be abated over the remaining balance of any term of the Lease without interest.

Our client is keen to resolve all issues related to the Lease, and to be able to focus on its business.

We look forward to a face to face zoom mediation to further hone this proposal into a written agreement capable of execution. Please reply with a mediator from the list previously provided acceptable to you.

Yours very truly,

Blaney McMurtry LLP

John C. Wolf

John C. Wolf
JCW/gf
Encl.

cc: David Ullmann and Alexandra Teodorescu

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

AFFIDAVIT OF JIM PEARCE

I, **Jim Pearce**, of the Town of Fort Erie, in the Province of Ontario, **AFFIRM AND SAY THAT:**

1. I am the general manager as well as an officer holding the position of Secretary/Treasurer of Peace Bridge Duty Free Inc. ("**Duty Free**"). As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and belief, and, in all such cases, believe it to be true.

2. I have reviewed my affidavit sworn December 12th, 2021, and I affirm it to be true.

3. Capitalized terms not defined in this affidavit have the same meaning as in the notice of cross-motion and in the Lease ("Lease" is as defined in the notice of cross-motion and my affidavit sworn December 12th, 2021).

61. I note that paragraph 27 of Ron Rienas' September 7th, 2022 affidavit states that from July 31st, 2020 onward, the Authority was aware of and operating within the context of the eviction moratorium. As such, the Authority was aware it would be unlawful to terminate the Lease when it elected to wrongfully threaten eviction for non-payment of rent, both on September 8th, 2021 and November 21st, 2021, as noted below.

62. Despite the Authority's knowledge of the eviction moratorium making it unlawful to terminate the Lease, the acknowledgment by the Authority's lawyer of the eviction moratorium (September 17th, 2021 letter at Exhibit "E" of my December 12th, 2021 affidavit), the Authority's counsel advised RBC's lawyer that the Authority intended to exercise its remedies under the default provisions of the Lease (ie. terminate the Lease anyway) during the non-enforcement period, without regard to the eviction moratorium.

> Attached hereto and marked as **Exhibit "G"** is a copy of Chris Stanek's November 21st, 2021 email that is also referred to in paragraph 65 of my December 12th, 2021 affidavit

63. The Authority's actions directly led to this receivership application and in due course RBC demanding increased security from Duty Free. As a result of the receivership application, Duty Free has granted RBC additional security in the form of $850,000 collateral cash, and has also duly maintained the thresholds set out in the Appointment Order as amended (defined below).

64. In response to paragraph 38 of Ron Rienas' affidavit alleging Duty Free has not provided financial information in accordance with Article V of the Lease, Article V of the Lease requires Duty Free to furnish two things to the Authority: monthly statements of Gross Sales by the tenth day of each month (subsection 5.01), which Duty Free has done; and annual statements within 45 days (subsection 5.02) – Duty Free has delivered its 2021 audited financial statements to the

Authority. Article V of the Lease does not impose any additional contractual obligation on Duty Free to furnish or deliver any other financial information to the Authority.

65. While Duty Free may have provided additional financial information to the Authority in the past as a courtesy, Duty Free is not prepared to extend that courtesy in the context of the current proceedings that were initiated because of the Authority's wrongful conduct and the Authority's threats of Lease termination.

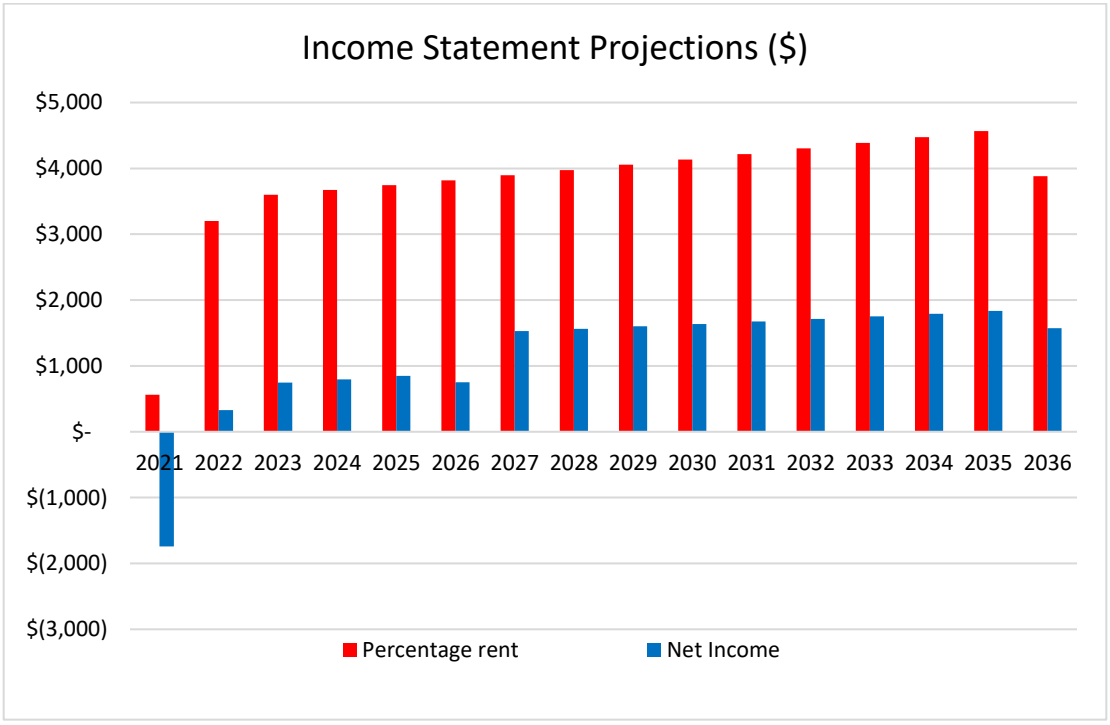
Duty Free has paid Normal Rent in accordance with the status quo since the Appointment Order and is in compliance with the Appointment Order

66. At the time of Justice Pattillo's December 14th, 2021 Order (as amended by Justice Penny's March 23rd, 2022 Order) appointing the monitor ("**Appointment Order**"), Duty Free had paid to the Authority as basic rent the greater of 20% of its Gross Sales (as provided for by section 4.03 of the Lease) and any emergency rent assistance received from the government (CERS and the Tourism and Hospitality Recovery Program). The greater of 20% of the Tenant's Gross Sales and any government rent support, along with Additional Rent (together Normal Rent as defined above), has been the "normal rent" paid by Duty Free since the onset of the Covid-19 pandemic and was the basic rent accepted by the authority as at the date of the Appointment Order.

67. I am advised by Duty Free's counsel, David Ullmann of Blaney McMurtry LLP, that the Authority's counsel was present at the hearing before Justice Pattillo when the initial order was made, but took no position, and the Authority's counsel also received the draft Appointment Order before it was submitted to the Court or signed and did not object to it or request any additional provisions in the order.

Attached hereto and marked as **Exhibit "H"** is an email exchange dated December 14th, 2021 with counsel and Justice Pattillo regarding the Appointment Order

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


Income Statement Projections ($)
$5,000
$4,000
$3,000
$2,000
$1,000
$-
$(1,000)
$(2,000)
$(3,000)
2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036
Percentage rent
Net Income

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

Gail Fairhart

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

Follow Up Flag: Follow up
Flag Status: Completed

Leanne,

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

Have a nice weekend.

Regards,

David

David T. Ullmann
Partner
dullmann@blaney.com
416-596-4289 | 416-594-2437

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

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

Best,

Jim

Cashflow Report

(000's)

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

Notes:

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

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

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

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

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

Inventory Report

(000's)

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

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

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

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

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

Gail Fairhart

From: John C. Wolf
Sent: June 9, 2022 10:55 AM
To: Leanne Williams; :mmanchanda@spergel.ca
Cc: David T. Ullmann
Subject: FW: Peace Bridge Duty Free Inc (PBDF) and Peace Bridge Authority (PBA)- status report to Monitor made June 9th 2022
Attachments: PBA_Board_May_2022.docx

Follow Up Flag: Follow up
Flag Status: Completed

Greetings Leanne & Mukal,

Further to our recent telephone call we:

1. Confirm the information in our earlier report (reproduced below) remains accurate, except for highlighted areas where we provide updates below.
2. The Federal budget did not address the duty free industry or this tenancy.
3. Covid supports through out the economy were terminated in or about May 2022.
4. Sales at the PBDF have risen to more or less 50% of pre-pandemic sales, continuing a favorable trend of recovery.
5. Tour bus sales have unfortunately decreased from about 10% to close to nil because of border restriction issues .
6. Government restrictions including:
    a. ArriveCan obligations for Canadian citizens which program has proven very difficult for persons who are not computer savvy, and an inconvenience to all;
    b. Prohibition on unvaccinated tourists crossing into Canada at land borders(which excludes about 40% plus of travelers from the USA from being able to enter Canada;
    c. Omicrom uncertainty;
    d. Conflicting advisories by various levels of governments in both countries,

    have all contributed to a reduction in the growth of sales.

7. Inflation , especially gas but also general inflation, is a real deterrent to cross border discretionary travel as ordinary families wealth disposal income is destroyed .
8. FDFA lobbying efforts continue visa vis federal and provincial governments culminating in a :Hill Day" series of meetings in Ottawa with MPs on June 6th- 7th to highlight duty free industry issues and needs. Specifically, the MPs were requested by the FDFA to support a $20 million industry rescue package.
9. PBDF was in attendance and spoke with CBSA (Canada Border Services Agency) who advised that no new licences would be available until into 2023 meaning that PBA's threats to terminate the licence may be over-reaching. .
10. MP Battaway(associated with the Transportation Ministry) suggested a three way meeting with the PBA, PBDF(& FDFA) and the government; and floated the idea of the government guaranteeing a long term low interest loan. The PMO had a representative in attendance and supported the initiative. This is the first real "crack" vis a vis a verbal commitment to do a specific thing- even if that things is presently unstructured, and we are facilitating a proposed structured process which we hope will result in exchanges of proposals between stakeholders with concessions to set a framework for a resolution ; and once achieved, also a facilitated meeting of stake holders to attempt to reach a consensus
11. As you may recall FDFA has requested and been invited to provide presentations to the PBA. FDFA provided statistical information not in the public sphere about the industry's performance. These stats emphasized the PBDF is in the top half of duty free shop performers. FDFA reiterated its suggestion of offering to jointly lobby MPs with the PBA. Attached are the presentations/notes for the May 27th attendance at the PBA Board meetings. The meeting with MP Battaway(

who as noted above is associated with the MOT and appointed the actual PBA directors and knows the GM) is the first step in this regard.

12. FDFA indicates that it expects within about 3 months of Hill Day that the industry will know if the Federal government will also assist the industry too and in what manner.
13. The PBA has clearly taken a wait and see approach to arrears and rent, while reserving its contractual and statutory rights of lease termination- which as previously noted the tenant is of the view is subject to a contractual obligation to modify rent in the event of business interruption.

Blaney is of the view that the court attendance should be deferred for 3- 4 months(with a right to return it earlier at any parties initiative) to allowPBDF/MOT & FDFA initiatives to play out; and for the trend in respect of sales to be better informed by actual results. This preserves the stay which is fundamental to a resolution of tenancy issues

Blaney is also of the view that the silence from the PBA is an implicit recognition of its contentment with the staus quo.

We would be pleased to speak with you in more detail about these matter, or to provide any further information that may assist you.

Regards,

Blaney McMurtry LLP 2 Queen Street East | Suite 1500 Toronto, Ontario M5C 3G5

John C. Wolf

jwolf@blaney.com
T 416-593-2994 | F 416-596-2044
W Blaney.com

From: John C. Wolf
Sent: March 10, 2022 4:02 PM
To: 'Leanne Williams' <LWilliams@tgf.ca>; Mukul Manchanda (mmanchanda@spergel.ca) <mmanchanda@spergel.ca>
Cc: David T. Ullmann <DUllmann@blaney.com>
Subject: FW: Peace Bridge Duty Free Inc (PBDF) and Peace Bridge Authority (PBA)- status report March 10th, 2022

Greetings Leanne & Mukal,

Further to our recent telephone call we attach for your information and records:

1. Three letters from the FDFA to the PBA and two replies(see footnote below)
2. Email from Treasury Board to FDFA re federal landlords and CECRA(the initial rent relief program waiving 75% of rent)

We also confirm our information as follows:

- Gowling has not communicated with me since my letter in mid January 2022
- Gowlings has not threatened the tenant with lease enforcement since that letter
- PBDF advises:
    - that no monies have been paid to any shareholder of the PBDF since the pandemic began
    - Greg O'Hara has deferred receipt of any employment income from the PBDF since the pandemic began
    - 100% of all rent related government assistance received has been paid to the PBA
    - In addition, those sums have been topped up so that 20% of gross sales have been paid to PBA
    - All forbearance commitments to RBC have been honoured
    - Sales are about 35% of pre -covid sales
    - Sales are less than that as compared to assumptions underlying minimum rent of 20% of gross sales when the lease was negotiated
    - 2022 and 2023 rent will need to be at 20% of percentage gross sales

- FDFA advises:
    - It has had several meetings and discussions with various elected and senior ministerial employees and the Ministry of Transportation has assigned a staffer to brief the minister
    - Treasury Board has been similarly engaged
    - The PMO has also been similarly engaged and a staffer has been assigned to investigate. In addition, the PMO has directed the senior staffer responsible for Cdn-USA border issues to meet with the FDFA and to communicate with the government of the State of New York
    - It has contacted the Premier's office and a staffer is being assigned to co-ordinate with the FDFA
    - It has met with at least 10 individual MP's who are associated with the MOT or local to the region or otherwise connected to frontier issues
    - Its goal is to influence the New York and Cdn government/PMO/MOT to direct the PBA board of directors to conclude a lease amending agreement (LAA) with the PBDF that is capable of being honoured
    - Its meetings with elected politicians and senior bureaucrats have been well received and there is considerable sympathy for the PBDF
    - Specifically, both PBA and FDFA are asking the government to allocate funds to the PBA in respect of PBDF rent
    - The FDFA is asking for a broad relief package for FDFA members and a specific payment in addition to PBDF for rent support
    - It hopes that it's lobbying will result in direction to the PBA board (5 Cdn and 5 USA) appointed directors to negotiate a lease amending agreement
    - Once the Federal budget is finalized and announced (and the PBA knows what funds if any it will receive) a mediation should take place to fix a LAA

- The FDFA/PBDF "Value Proposition " has three components:
    - In the event of lease termination 100% of rent arrears will be forfeited- PBDF has conceptually offered to pay some fixed amount of arrears over the balance of the term of the lease, although this tied to gross revenue and future rent obligations

- Any termination and RFP for a replacement operator will likely take a minimum of 6 months- meaning a loss of rent at 20% of gross sales and probably longer
- The duty-free amenity to travellers will be interrupted
- Alternate arrangements will be needed to process trucker's immigration needs and toilet needs
- Employment for all PBDF employees will be lost
- Any prudent replacement tenant will not agree to the same lease terms as the business can not be profitable with a fixed minimum rent for the foreseeable future; and most new leases provide for free rent periods and tenant allowances- the PBDF is not seeking any rent-free period/allowance and will likely pay greater rent than any replacement tenant
- PBDF a 30-year business will not be destroyed by the federal government who ordered the travel ban which destroyed business opportunities, created a rent relief program inadequate to pay rent; and therefore, is the architect of the business failure

- The Commercial Tenancy Act currently has an eviction moratorium in place through April- which may be extended
- The Lease obligated the PBA to communicate with the PBDF if business is interrupted. PBDF is of the view that the PBA has not fulfilled its contractual obligations in this regard
- The PBA's options are quite limited- either negotiate a LAA or attempt to obtain judicial authorization to terminate the lease when all stays expire

Please contact Blaney should you wish additional information.

Regards,

John

P.S. since we spoke we received a 3rd PBA letter attached

Blaney McMurtry LLP 2 Queen Street East | Suite 1500 Toronto, Ontario M5C 3G5

John C. Wolf

jwolf@blaney.com
T 416-593-2994 | F 416-596-2044
W Blaney.com

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

AFFIDAVIT OF JIM PEARCE

I, **Jim Pearce**, of the Town of Fort Erie, in the Province of Ontario, **AFFIRM AND SAY THAT:**

1. I am the general manager as well as an officer holding the position of Secretary/Treasurer of Peace Bridge Duty Free Inc. ("**Duty Free**"). As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and belief, and, in all such cases, believe it to be true.

2. I have reviewed my affidavit sworn December 12th, 2021, and I affirm it to be true.

3. Capitalized terms not defined in this affidavit have the same meaning as in the notice of cross-motion and in the Lease ("Lease" is as defined in the notice of cross-motion and my affidavit sworn December 12th, 2021).

Authority, made by way of alleging a default of the Lease, Duty Free adjusted its accounting practices to calculate is monthly Gross Sales on the last day of each month on a rush basis, so it could accelerate payment of its installments of Normal Rent to the Authority on the first day of each month.

57. Duty Free's Normal Rent payments have increased as Gross Sales have increased from close to 0% to about 50% of pre-Covid sales by summer 2022, and are currently 60% to 65% of pre-Covid-19 sales.

The Authority's bad faith conduct intended to unnecessarily cause receivership proceeding

58. I am advised by Barbara Barrett, Executive Director of the Frontier Duty Free Association ("**FDFA**"), that of the previously 33, now 32, land border duty free shops in Canada, Duty Free was the only one whose landlord demanded immediate payment of full contract rent and threatened eviction for non-payment of rent during the non-enforcement period under Part IV of the *Commercial Tenancies Act*, that ran to April 22nd, 2022, commonly referred to as the eviction moratorium.

59. As noted in paragraph 26 of my December 12th, 2021 affidavit, the Authority issued two default notices under the Lease on September 8th, 2021, threatening termination of the Lease. These notices of default were promptly and duly reported by Duty Free to its bank, RBC.

60. As a result of the Authority's default notices, on September 23rd, 2021, RBC made demand and sent a Notice of Intention to Enforce Security as noted in paragraph 61 of my December 12th, 2021 affidavit.

CITATION: KL Solar Projects LP v. Independent Electricity System Operator, 2019 ONSC 6501
COURT FILE NO.: CV-19-622166-00CL
DATE: 20191115

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

RE: KL SOLAR PROJECTS LP, HIGHLANDS SOLAR PROJECTS LP, MADAWASKA SOLAR PROJECTS LP, MCNAB SOLAR PROJECTS LP, PB SOLAR PROJECTS LP, RAMARA SOLAR PROJECTS LP, SUDBURY COMMUNITY SOLAR PROJECTS LP and SUBSTAINABLE OTTAWA PROJECTS LP

Applicants

AND:

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

Respondent

BEFORE: HAINEY J.

COUNSEL: *Marie Henein, Alex Smith,* and *David Postel* for the Applicants

Alan Mark and *Melanie Ouanounou* for the Respondent

HEARD: October 7 and 8, 2019

ENDORSEMENT

BACKGROUND

[1] The applicants in this application ("KL Application"), like the applicants in the related application, Grasshopper Solar Corporation v. Independent Electricity System Operator 2019 ONSC 6397 ("Grasshopper Application") are in the process of constructing solar power projects pursuant to contracts with the respondent ("FIT Contracts"). They seek declaratory relief with respect to the respondent's assertion of a right to terminate their FIT Contracts.

[2] I heard this application and the Grasshopper Application together. Both applications raise the following issue:

Clean Hands

[30] I do not agree with the IESO's submission that Mr. Kendon gave evidence with the intention of misleading the court. I am satisfied that his evidence was truthful, albeit at times somewhat confusing.

[31] This would not be a basis for denying the applicants the equitable remedy of estoppel by convention if it were otherwise available to them.

Entire Agreement and Waiver Clauses

[32] Section 1.9 of the FIT Contracts provides as follows:

> **1.9 Entire Agreement**
>
> (a) This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter of this Agreement. There are no warranties, conditions or representations (including any that may be implied by statute) and there are no agreements in connection with the subject matter of this Agreement, except as specifically set forth or referred to in this Agreement. No reliance is placed on any warranty, representation, opinion, advice or assertion of fact made by a Party to this Agreement, or its Representatives, to the other Party to this Agreement, or its Representatives, except to the extent that the same has been reduced to writing and included as a term of this Agreement.
>
> (b) Where this Agreement explicitly incorporates by reference any definitions set out in the FIT Rules, such reference shall be to the FIT Rules in effect on the Contract Date.

[33] Courts routinely give effect to entire agreement clauses, such as Section 1.9, to exclude reliance on historical representations or conduct which existed at the time of the formation of the contract but was not included as an express term of the contract. This is true even in the context of standard form contracts drafted by one party.

[34] I am of the view that the following words of the Court of Appeal for Ontario in *Soboczynski v. Beauchamp* 2015 ONCA 282 at para. 59, apply to the entire agreement clause in this case:

> 59. The entire agreement clause in this case is saying, "These are the terms of our agreement and nothing that was said beforehand is relevant. You have no basis for relying on anything other than the terms of the agreement. The agreement stands on its own".

[35] Based upon the Court of Appeal's decision in this case, the Bulletin and the IESO's past practice cannot amend the terms of the FIT Contracts.

[36] Section 1.10 of the FIT Contracts provides as follows:

> **1.10 Waiver Amendment**
>
> Except as expressly provided in this Agreement, no waiver of any provision of this Agreement shall be binding unless executed in writing by the Party to be bound thereby and in the case of a waiver issued by the Sponsor, such waiver shall not be binding on the Sponsor unless it has been executed by an individual identified in such waiver as "Contract Management". No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver or operate as a waiver of, or estoppel with respect to, any subsequent failure to comply, unless otherwise expressly provided. Except as expressly provided in this Agreement, no amendment of any provision of this Agreement shall be binding unless executed in writing by both Parties to this Agreement, and no such amendment shall be binding on the Sponsor unless it has been executed by an individual identified in such amendment as "Contract Management".

[37] In my view, this clause in the FIT Contracts prevents the applicants from relying upon estoppel by convention arising solely from previous waivers of provisions in the FIT Contracts by the IESO.

CONCLUSION

[38] For the reasons outlined above this application for an order that the IESO is estopped from terminating the FIT Contracts for failure to achieve commercial operation by the MCOD is dismissed. Since the MCOD has already passed my order will not take effect for thirty days from the date of this endorsement so that the applicants may seek appellate review before the FIT Contracts are terminated.

COSTS

[39] If the parities cannot settle costs they may schedule a 9:30 a.m. attendance with me.

[40] I thank counsel for their helpful submissions.

HAINEY J.

Date: November 15, 2019

CITATION: Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP
2022 ONSC 5922
COURT FILE NO.: CV-20-651807-00CL
DATE: 20221019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
PORTER AIRLINES INC. and PORTER AIRCRAFT LEASING CORP. Plaintiffs and Defendants by Counterclaim	*Orestes Pasparakis*, *Lynn O'Brien*, *James Renihan*, *Andrea Campbell*, *Stephen Taylor* and *Justine Smith*, for the Plaintiffs, Defendants by Counterclaim
– and –	
NIEUPORT AVIATION INFRASTRUCTURE PARTNERS GP Defendant and Plaintiff by Counterclaim	*Adam Hirsh*, *Shawn Irving*, *Sonja Pavic*, *Jesse Cohen*, *Marleigh Dick* and *Jayne Cooke*, for the Defendant, Plaintiff by Counterclaim
	HEARD: November 29, 30, December 1, 2, 3, 6, 8, 9, and 10, 2021 and February 8, 9, 10, and 11, and March 9, 10 and 11, 2022

CAVANAGH J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] Porter Airlines Inc. ("Porter") is a regional, short-haul, commercial air carrier based at Billy Bishop Toronto City Airport ("Billy Bishop").

[2] Porter Aviation Holdings Inc. ("PAHI") is Porter's parent. Porter Aircraft Leasing Corp. ("PALC") is also owned by PAHI and is an affiliate of Porter.

could easily have been included. Language limiting the effective period for the reduced period of notice to eleven months was included in the January 2019 Agreement. The fact that the 9 month period of notice would only apply to notices sent after the negotiations were to have concluded conflicts with the interpretation of the March 2019 Agreement that Nieuport advances.

[368] I am unable to conclude, as Nieuport asks, that for me to accept the interpretation of the March 2019 Agreement that Porter advances would lead to a commercially unreasonable outcome. Nieuport may have been willing to give this concession to Porter as part of the terms agreed upon for the negotiations. It is not obvious that the reduced 9 month notice period, which would only become effective at the end of the negotiations, would not be effective unless the negotiations were successful.

[369] When I read the March 2019 Agreement as a whole and give the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances, I conclude that March 2019 Agreement means, as it reads, that Nieuport and Porter agree that any additional relinquishment of Porter's slots at Billy Bishop (which means reduction in daily slots in Porter's Carrier's Allocation) can be made on 9 months' notice, without any limitation in time. By making the March 2019 Agreement, the parties amended the notice period in the Licence Agreement.

Issue #3 – The COVID-19 Dispute

[370] Porter advances two legal theories that, it submits, entitle it to relief in relation to the consequences of the COVID-19 pandemic.

[371] First, Porter submits that the pandemic engages the *force majeure* clause in the Licence Agreement which operates to relieve it from (i) the obligation to pay Terminal Fees; and (ii) the obligation to provide notice of its intention to reduce the slots in its Carrier Allocation.

[372] Second, Porter submits that the Licence Agreement requires Nieuport to act reasonably in the exercise of its contractual rights and that it was unreasonable for Nieuport to demand payment of Terminal Fees or increase the Terminal Fees during the pandemic. Porter submits, in the alternative, that it was unreasonable for Nieuport to demand payment of the Terminal Fees in full, given the significant constraints on Porter's ability to operate.

[373] I address each of the bases upon which Porter relies for relief, in turn.

Issue #3A - The Force Majeure Dispute

Factual background to COVID-19

[374] I first summarize the evidence with respect to the effect of COVOD-19 on the airline industry in Canada and at Billy Bishop.

(a) Early impact of COVID-19

[375] In early March 2020, Porter began to feel the impact of COVID-19 when new bookings for travel ceased, and passengers cancelled travel *en masse*.

[475] I address Porter's submissions with respect to the interpretation to be given to section 6.22(b) of the Licence Agreement in the context of the Licence Agreement was a whole.

[476] The Licence Agreement provides in section 4.1 that Porter covenants and agrees to pay all fees as they fall due in accordance with the Tariff of Fees and Charges.

[477] Section 4.2 of the Licence Agreement provides:

> All payments by the Carrier to Terminal Operator of whatsoever nature required or contemplated by this Licence Agreement and the Ground Handling Agreement shall be paid by the Carrier to Terminal Operator in lawful currency of Canada, without prior demand therefor, by wire of funds to Terminal Operator's accounts provided to the Carrier, and shall be subject to interest and collection fees, as set out in this Licence Agreement and the Ground Handling Agreement, all without prejudice to any other right or remedy of Terminal Operator.

[478] Schedule B of the Licence Agreement, in section 1(c), provides that the Terminal Fee shall be paid by Porter to Nieuport monthly, in advance, by wire of funds to Nieuport's accounts.

[479] The rates under the Licence Agreement are identical to the rates that Porter proposed in the draft Licence Agreement and the CIM which were presented to prospective purchasers of the Terminal when PALC and PAHI engaged in the process of selling the Terminal in 2015. The rates provided for in the Licence Agreement for Terminal Fees (including annual escalations and CPI indexing) were negotiated and agreed upon. These rates were agreed upon for the life of the Licence Agreement. The Licence Agreement provides that Porter has the right to terminate it for convenience at any time on 12 months' notice.

[480] Upon execution of the Licence Agreement, Porter had a contractual obligation to pay Terminal Fees. Nieuport's obligation under s. 6.22(b) to act reasonably in the exercise of its rights pursuant to the Licence Agreement does not qualify or limit its entitlement to receive contractually agreed upon Terminal Fees. By requiring Porter to comply with its contractual obligation to pay fees, which must be paid without prior demand, Nieuport cannot be said to be acting unreasonably in the exercise of its rights and obligations under the Licence Agreement.

[481] In the Licence Agreement, "Tariff of Fees and Charges" means "Terminal Operator's tariff of fees and charges for services provided to Air Carriers by Terminal Operator, as amended by Terminal Operator from time to time and notified by Terminal Operator to Air Carriers". A copy of the Tariff of Fees and Charges is attached as Schedule B to the Licence Agreement. The Licence Agreement plainly provides that Nieuport, but not Porter, may amend the Tariff of Fees and Charges. It was open to the parties to negotiate a price adjustment clause in the Licence Agreement which would allow Porter to revisit the Terminal Fees under the Licence Agreement if circumstances changed. They did not do so.

[482] Porter's interpretation of s. 6.22(b) as requiring Nieuport to reduce or eliminate Terminal Fees if, at any time during the term of the Licence Agreement it would be objectively reasonable for a different fee structure to apply, would mean that throughout the term of the Licence Agreement the Court could be asked at any time, and from time to time, to determine whether Terminal Fees are "reasonable" and, if not, set reasonable Terminal Fees for Porter to pay. This is precisely what Porter asks me to do.

[483] The amount of Terminal Fees to be paid was negotiated and provided for in the Licence Agreement. In my view, section 6.22(b) does not operate to allow Porter to ask the Court to re-write the Licence Agreement to substitute its determination of reasonable Terminal Fees for those that the parties negotiated. There are no benchmarks in the Licence Agreement setting out the standards for a judge to apply to determine a "reasonable" Terminal Fee at any given time. In the absence of a price adjustment clause in the Licence Agreement that allows Porter to revisit the Terminal Fees, Nieuport cannot be said to be acting unreasonably in the exercise of its rights and obligations under the Licence Agreement by refusing to relieve Porter from its obligation to pay Terminal Fees.

[484] The Licence Agreement provides that the Base Fee of $900 per day per daily slot allocated to Carrier shall increase automatically on January 1st of each year commencing in 2018 through and including 2022. Nieuport was not required to take any action to exercise its negotiated right to receive increased Terminal Fees. They increased automatically. Nieuport cannot be said to be acting unreasonably in the exercise of its rights and obligations under the Licence Agreement by holding Porter to its bargain.

[485] Porter submits that Nieuport breached its obligation under s. 6.22(b) to act reasonably by demanding that Porter pay Terminal Fees during its suspension of service and by increasing Terminal Fees during the pandemic. I disagree. Nieuport was contractually entitled to receive payment of Terminal Fees from Porter, and to receive payment of Terminal Fees that increased automatically, without demand. Porter breached the Licence Agreement by not paying the Terminal Fees it owed. I do not agree that Nieuport acted unreasonably by sending letters demanding that Porter comply with its obligations under the Licence Agreement, or by taking legal action to enforce its right to receive Terminal Fees under the Licence Agreement. Such acts are not acts taken by Nieuport in the exercise of its rights and obligations under the Licence Agreement.

[486] Considerable evidence was tendered at the trial from fact witnesses and expert witnesses called by the parties in relation to the health and safety risks associated with operating the Terminal during the pandemic. This evidence was tendered by Porter to show that Nieuport, by demanding payment of Terminal Fees and thereby pushing Porter to operate in spite of the public health crisis, breached its contractual obligation under s. 6.22(b) of the Licence Agreement to act reasonably in the exercise of its rights and obligations pursuant to the Licence Agreement. Porter relies on the evidence tendered by its health and safety expert to show that it was unreasonable for Nieuport to charge Terminal Fees during the period of time when, Porter submits, operating from Billy Bishop was not safe because of the risk of serious health complications arising from COVID-19 infection.

SUPREME COURT OF CANADA

CITATION: Bhasin *v.* Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494 **DATE:** 20141113
DOCKET: 35380

BETWEEN:

Harish Bhasin, carrying on business as Bhasin & Associates
Appellant
and
Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited)
Respondents

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 112) Cromwell J. (McLachlin C.J. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)

BHASIN *v.* HRYNEW, 2014 SCC 71, [2014] 3 S.C.R. 494

Harish Bhasin, carrying on business as Bhasin & Associates *Appellant*

v.

Larry Hrynew and
Heritage Education Funds Inc.

obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

[70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[71] Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

[72] In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

[73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in

Contractual Performance: Recent Developments", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

[74] There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

[75] Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

SUPREME COURT OF CANADA

CITATION: Wastech Services Ltd. *v.* Greater Vancouver Sewerage and Drainage District, 2021 SCC 7

APPEAL HEARD: December 6, 2019
JUDGMENT RENDERED: February 5, 2021
DOCKET: 38601

BETWEEN:

Wastech Services Ltd.
Appellant

and

Greater Vancouver Sewerage and Drainage District
Respondent

- and -

Attorney General of British Columbia and Canadian Chamber of Commerce
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 114)	Kasirer J. (Wagner C.J. and Abella, Moldaver, Karakatsanis and Martin JJ. concurring)
JOINT CONCURRING REASONS: (paras. 115 to 141)	Brown and Rowe JJ. (Côté J. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

contracting party should have appropriate regard to the legitimate contractual interests of their contracting partners. But in claiming compensation for its lost opportunity based on a supposedly dishonest or unreasonable exercise of the discretion to reallocate waste under the contract, the appellant misrepresents the organizing principle and overstates one of the specific duties of good faith derived therefrom.

[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).

[5] Carefully considered, the appellant's case does not rest on allegations that it fell prey to lies or deception. There is no claim that the respondent exercised its discretion capriciously or arbitrarily. The appellant does not point to, under the guise of allegedly unreasonable conduct, any identifiable wrong committed by the

respondent beyond seeking its own best interest within the bounds set for the exercise of discretion by the agreement. The duty of good faith at issue here constrains the permissible exercise of discretionary powers in contract but, in so doing, it does not displace the detailed, negotiated bargain as the primary source of justice between the parties.

[6] Importantly, the good faith duty at issue does not require the respondent to subordinate its interests to those of the appellant, nor does it require that a benefit be conferred on the appellant that was not contemplated under the contract or one which stands beyond the purposes for which the discretion was agreed. Here, the appellant decries conduct that is self-interested, to be sure, and that, it says, made it impossible to achieve the fundamental benefit for which it had bargained. But in seeking damages for this loss, the appellant does not allege that the respondent committed any actionable wrong in exercising the discretion provided for under the contract. While it is true the arbitrator characterized the long-term contract here as a relational one, he found that the situation giving rise to this dispute, however unlikely it may have appeared to the parties, was a risk that the parties had specifically considered in drafting their detailed agreement. In that context, whatever trust and cooperation that the parties might owe one another arising out of the long-term relational character of the contract cannot resolve this case in favour of the appellant by requiring the respondent to act as a fiduciary.

[7] When the contours of good faith performance in this context are properly identified, it is plain that the respondent did not exercise its power to reallocate waste

McCamus (2020), at p. 937; J. M. Paterson, "Good Faith Duties in Contract Performance" (2014), 14 *O.U.C.L.J.* 283, at pp. 284, 299 and 302; A. Gray, "Development of Good Faith in Canada, Australia and Great Britain" (2015), 57 *Can. Bus. L.J.* 84, at p. 113; S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 503).

[68] I think it best to note at the outset that I do not refer to reasonableness in an administrative law sense. Rather, I agree with Professor McCamus' view that reasonableness for this good faith duty is understood by reference to purpose: ". . . where discretionary powers are conferred by agreement, it is implicitly understood that the powers are to be exercised reasonably. The concept of reasonableness in this context implies a duty to exercise the discretion honestly and in light of the purposes for which it was conferred" ((2020), at p. 937).

[69] Thus, beyond the requirement of honest performance, to determine whether a party failed in its duty to exercise discretionary power in good faith, one must ask the following question: was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion? If so, the party has not exercised the contractual power in good faith.

[70] The touchstone for measuring whether a party has exercised a discretionary power in good faith is the purpose for which the discretion was created. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in

place. Perforce, the exercise of power consonant with purpose may be thought of as undertaken fairly and in good faith on the parties' own terms. As such, barring issues such as unconscionability not raised in this appeal, that exercise is best understood, as a general matter, to be insulated from judicial review as a matter of fairness.

[71] But where the exercise stands outside of the compass set by contractual purpose, the exercise is unreasonable in light of the agreement for which the parties bargained and, as such, it may be thought of as unfair and contrary to the requirements of good faith. Scholars commenting on trends in common law jurisdictions have observed that "courts have repeatedly held that discretionary contractual powers should not be exercised for an 'improper' or 'extraneous' purpose" (J. M. Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009), 35 *Mon. L. R.* 45, at p. 54). As Professor Collins has written, "[t]he good faith standard . . . enables a court to control discretionary decisions that are perceived to be based on improper purposes, that is where the power is used for a purpose not originally expected by the subject of the power" (H. Collins, "Discretionary Powers in Contracts", in D. Campbell, H. Collins and J. Wightman, eds., *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003), 219, at p. 223). It is this principle that constrains contractual discretion and, accordingly, fixes the proper limits for judicial review of the exercise of the power. Importantly, it is not what a court sees as fair according to its view of what is the proper exercise of the discretion. Instead, drawing on the purpose set by the parties, the measure of fairness is what is reasonable according to the parties' own bargain. Where the exercise of the discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose for

which the agreement the parties themselves crafted provides discretion — it is thus contrary to the requirements of good faith. Courts can then intervene, for example, where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties.

[72] Sometimes, the text of the discretionary clause itself will make the parties' contractual purpose clear. In other circumstances, purpose can only be understood by reading the clause in the context of the contract as a whole. Writing extra-judicially, Lord Sales has recently explained that where the clause that confers a discretionary power is "entirely general", a court will have to construe the ambit of the power itself (P. Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 *L.Q.R.* 384, at p. 393). In those cases, he notes at p. 393: "It is necessary instead to form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power."

[73] I hasten to say that the role of the courts is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective. The common law recognizes that "[c]ompetition between businesses regularly involves each business taking steps to promote itself at the expense of the other. . . . Far from prohibiting such conduct, the common law seeks to encourage and protect it" (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31, citing *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, at para. 142). As

a general matter, good faith should not be used as a pretext for scrutinizing motive (*Bhasin*, at para. 70).

[74] Not only does this deferential approach ensure "some elbow-room" for the "aggressive pursuit of self-interest" (C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at para. 30.120; see also *A.I. Enterprises*, at para. 31), but it also prevents good faith from veering into "a form of *ad hoc* judicial moralism or 'palm tree' justice" (*Bhasin*, at para. 70). In this context, then, courts must only ensure parties have not exercised their discretion in ways unconnected to the purposes for which the contract grants that power.

[75] To this end, it is helpful to keep in mind that, generally speaking, a range of outcomes flows from the choices that may be considered a reasonable exercise of discretion when considered in light of the purposes identified by the contract. Some of these choices may properly be thought of as connected to the purposes of the discretion. Others will be demonstrably unconnected to the contemplated purposes. Wherever a party is granted discretion, there may be differing yet legitimate ways in which that party can exercise its power that is itself part of the bargain. In a contractual context, these choices are ascertained principally by reference to the contract, interpreted as a whole — the first source of justice between the parties. Good faith does not eliminate the discretion-exercising party's power of choice. Rather, it simply limits the range of legitimate ways in which a discretionary power may be exercised in light of the relevant purposes (S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369, at pp. 385-86). Where discretion is exercised

Switzer, 2003 ABCA 187, 330 A.R. 40, at para. 33; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 530).

[81] Wastech submits that the arbitrator's conclusions as to the nature of the impact on Wastech of Metro's exercise of discretion amount to a finding of "nullification" or "evisceration". In particular, Wastech points to the arbitrator's findings that Metro's exercise of discretion made it "impossible" for Wastech to achieve the Target OR, and that having the opportunity to achieve the Target OR in every year of the Contract was "the fundamental benefit for which Wastech bargained" (Award, at para. 94). Metro answers that the arbitrator made no finding of "substantial nullification" or "evisceration", nor was such a finding open to him on the facts (R.F., at paras. 73 and 75; Transcript, at p. 93).

[82] Respectfully stated, I am of the view that requiring "substantial nullification" — that is to say, the evisceration by one party of the better part of the benefit of the contract of the other — is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith.

[83] The fact that a party's exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract should not be regarded as dispositive, in itself, as to whether the discretion was exercised in good faith (Burton, at pp. 384-85). As authors A. Swan, J. Adamski, and A. Y. Na explain, the mere fact that a party is deprived of substantially the whole benefit of a contract is not sufficient, absent proof of the discretion-exercising party's fault or default, to make

out a claim for breach of the contract (see *Canadian Contract Law* (4th ed. 2018), at §7.73). In other words, absent some infringement of the non-exercising party's rights, there is no actionable wrong for the law to correct.

[84] For these reasons, I conclude that the "substantial nullification" or "evisceration" of the benefit of a contract is not a necessary prerequisite to finding that a party breached the duty to exercise contractual discretionary powers in good faith. However, the fact that an exercise of discretion substantially nullifies or eviscerates the benefit of the contract could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.

[85] The parties also submit that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In support, Wastech and Metro both point to the organizing principle recognized in *Bhasin* — which states that parties generally must perform their contractual duties "honestly and reasonably and not capriciously or arbitrarily" (*Bhasin*, at para. 63) — and to a line of decided cases, which they say confirm the existence of such constraints on the exercise of contractual discretionary powers.

[86] I agree with the parties that the jurisprudence supports a conclusion that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In *Greenberg*, at p. 763, the Court of Appeal for Ontario noted that the discretionary provision in question had to be "exercised in a reasonable way, not arbitrarily or capriciously". Similarly, the Supreme Court of the United Kingdom

affirmed the existence of these constraints in English law in *British Telecommunications plc v. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All E.R. 907, at para. 37: ". . . it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously . . . . This will normally mean that it must be exercised consistently with its contractual purpose".

[87] Although capriciousness and arbitrariness have sometimes been referred to independently of improper purpose, I agree with the Supreme Court in *Telefónica* that a capricious or arbitrary exercise of a discretionary power is an example of such a power being exercised contrary to that standard. When seeking to demonstrate that discretion was exercised capriciously or arbitrarily, one necessarily considers contractual purposes by showing that discretion was exercised in a manner unconnected to the underlying contractual purposes for which the power was conferred.

[88] In sum, then, the duty to exercise discretion in good faith will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted. This will notably be the case where the exercise of discretion is capricious or arbitrary in light of those purposes because that exercise has fallen outside the range of behaviour contemplated by the parties. The fact that the exercise substantially nullifies or eviscerates the fundamental contractual benefit may be relevant but is not a necessary pre-requisite to establishing a breach.

(b) *Source of the Duty*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

AFFIDAVIT OF JIM PEARCE

I, **Jim Pearce**, of the Town of Fort Erie, in the Province of Ontario, **AFFIRM AND SAY THAT:**

1. I am the general manager as well as an officer holding the position of Secretary/Treasurer of Peace Bridge Duty Free Inc. ("**Duty Free**"). As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and belief, and, in all such cases, believe it to be true.

2. I have reviewed my affidavit sworn December 12th, 2021, and I affirm it to be true.

3. Capitalized terms not defined in this affidavit have the same meaning as in the notice of cross-motion and in the Lease ("Lease" is as defined in the notice of cross-motion and my affidavit sworn December 12th, 2021).

Authority is sorted out, a new operator is found, a new lease negotiated, and the new operator gets the business up and running again, along with all the growing pains involved starting a new business in a highly regulated environment.

119. Licensing may be a further obstacle. In June 2022, I was advised by Charles Melchers, Director Regulatory Trade Programs for Canada Border Services Agency, that it would not be issuing new licenses for duty free stores at least well into 2023.

120. It is extremely unlikely any replacement tenant would agree to pay gross rent as a percentage of occupancy costs of 20% like Duty Free has and will continue to do. According to FDFA, Duty Free by the Lease pays the highest Base Rent of any Canadian land border duty free store and the highest percentage of gross sales.

121. In addition, as a result of Duty Free's secured bank creditor RBC, the Authority likely would not recover any of the alleged Base Rent arrears in the context of a receivership or other insolvency, as all sums would be required by RBC.

122. I continue to believe that in conjunction with a judicial ordered mediation, and given some more months for Gross Sales to continue to improve, that a commercial resolution can be reached with the Authority reflecting a fair compromise to both parties; and the best value for the Authority will be achieved by preserving the Lease (which now provides for higher than market Base

GOWLING WLG

26 July 2022

Sent by E-Mail (*dullmann@blaney.com*)

E. Patrick Shea, LSM, CS Prof Corp
Direct 416-369-7399
patrick.shea@gowlingwlg.com

David T. Ullmann
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5

Sent by E-Mail (*lwilliams@tgf.ca)*

Leanne M. Williams
Thornton Grout Finnigan LLP
Suite 3200, 100 Wellington Street West
P. O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Dear Mr. Ullmann and Ms. Williams:

Re: Peace Bridge Duty Free Inc. ("PBDF")—Non-payment of Rent

Our client has advised that PBDF not paying rent as required by the lease between the parties and has made no proposal as to how it plans to pay the outstanding rent owing to our client. As at 6 July 2022, PBDF owes almost $8 million in rent.

There is no arrangement in place as between our clients that permit PBDF to pay rent otherwise than as required by the applicable lease. Our client has offered to forgive 50% of the outstanding rent that accrued during the COVID-related shut-down, provided that: (a) there is a plan in place that acceptable to our client for the payment of the other 50%; and (b) the post-COVID shut-down rent is paid in full as required by the applicable lease. PBDF has not proposed a plan to pay the rent that is owing and has apparently arbitrarily determined that it will pay on-going rent in an amount equal to only 20% of its monthly gross sales notwithstanding the terms of the applicable lease.

Paragraph 11 of the Order dated 14 December 2021 prohibits the termination of agreements, including the lease between PBDF and out client, so long as rent subsequent to 14 December 2021 is paid in accordance with the applicable lease or as may be agree by our client. It is our client's intention to terminate the lease based on the failure of PBDF to pay rent subsequent to 14 December 2021 as required by the lease.

We are asking that the Monitor provide its position as to whether, in light of the failure of PBDF to pay rent as required by the applicable lease and paragraph 11 of the 14 December 2021 Order,

GOWLING WLG

consent of the Monitor or leave of the Court is required for our client to terminate the lease. If the Monitor believes that consent or leave is required, we ask that the Monitor please consent to the termination of the lease. If the Monitor requires that our client obtain an Order permitting it to terminate the lease, we ask that the Monitor co-operate is scheduling an expedited hearing of our client's Motion. The ongoing failure of PBDF to pay rent is causing serious harm to our client, which has been extremely patient in waiting for PBDF to propose a plan to deal with the outstanding rent.

Sincerely,

GOWLING WLG (CANADA) LLP

E. Patrick Shea, MStJ, LSM, CS
EPS:jm
cc. Sanjeev Mitra, Aird & Berlis LLP (*smitra@airdberlis.com*)

52504549\1

GOWLING WLG

2 August 2022

E. Patrick Shea, LSM, CS Prof Corp
Direct 416-369-7399
patrick.shea@gowlingwlg.com

Sent by E-Mail (*dullmann@blaney.com*)

David T. Ullmann
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario M5C 3G5

Dear Mr. Ullmann:

Re: Peace Bridge Duty Free Inc. ("PBDF")—Proposal to Pay Outstanding Rent and Payment of Going-forward Rent

Our client has yet to see a detailed proposal with respect to the payment of the rent arrears that accumulated during the period PBDF chose to be closed during the COVID pandemic.

We wish to ensure that PBDF is aware that our client's offer to provide an abatement equal to 50% of the unpaid rent that accumulated during PBDF's COVID-related shutdown remains on the table, conditional on there being an arrangement in place acceptable to our client 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.

Should your client wish 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. We wish to make it clear that our client is not interested in mediation or other ADR unless there is first a complete and workable proposal on the table from PBDF and is not required to justify that business decision to PBDF.

In terms of on-going rent, we wish to by clear that there is no arrangement in place to permit PBDF to pay rent other than as provided for by the applicable lease and our client has not agreed to PBDF paying any amount (or at any time) other than what is provide for in the applicable lease. Rent owing for the period subsequent to the mandatory COVID-related shutdown must be paid in full within 10 business days of this letter and all future rent must be paid, in full, on the first day of the month as required by the applicable lease.

GOWLING WLG

Finally, we require that PBDF provide evidence that it has paid over to our client any government rent subsidies or other rent-related benefits that it received during the COVID pandemic.

Sincerely,

GOWLING WLG (CANADA) LLP

E. Patrick Shea, LSM, CS
EPS:jm
cc. Client (*rr@peacebridge.com)*

CITATION: Target Canada Co. (Re), 2016 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Linda Galessiere and *Gus Camelino* for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *Daniel Hamson* for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark and Melaney Wagner for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

[35] Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

[36] The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

[37] With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

[38] Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

[73] The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

[74] The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

[75] The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

[76] Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

[77] However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

[78] Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

[79] This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

[80] Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation,* 2015 ONSC 4004, 27 C.B.R. (6th) 134 at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having

any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be

ROYAL BANK OF CANADA
Applicant

-and-

PEACE BRIDGE DUTY FREE INC.
Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

BRIEF FOR ARGUMENT

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Christopher Stanek (LSUC# 45127K)
Tel: 416-862-4369
Fax: 416-862-7661

E. Patrick Shea (LSUC# 39655K)
Tel: 416-369-7399
Fax: 416-862-7661

Lawyers for Buffalo and Fort Erie Public Bridge Authority