

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BETWEEN:

**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

**FACTUM OF BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY**

**(Motion returnable 1-3 November 2023)**

Date: 23 October 2023

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**TO: THE SERVICE LIST**

## FACTUM

### PART I—THE MOTION

1. This is a Motion by Peace Bridge Duty Free Inc. (“**PBDF**”) seeking an order amending the Lease dated 28 July 2016 (the “**Lease**”) between it and the Buffalo and Fort Erie Public Bridge Authority (“**PBA**”) to:

- (a) provide that the Base Rent p under the Lease is to “ramp-up” as set out in para 41 of PBDF’s Factum dated 16 October 2023 (the “**PBDF Factum**”); and
- (b) temporarily suspend the obligation to pay Base Rent for the period April 2020 to October 2021 or, in the alternative, specify what Base Rent PBDF is required to pay for that period and the terms for payment of that Base Rent by PBDF,

based on the allegation that PBA has breached its obligations under Art 18.07 of the Lease .

2. PBA was required by Art 18.07 of the Lease to consult and discuss with PBDF the impact on the Lease of changes in Applicable Laws made to address the COVID pandemic. PBA complied with this obligation and, based on the only financial information provided by PBDF, made reasonable proposals to address the Rent payable by PBDF under the Lease. PBDF refused to accept PBA’s proposals and insisted on lease concessions that were not reasonable. Having refused PBA’s reasonable offer, PBDF is not entitled to any relief on this Motion.

### PART II—FACTS, LAW AND ARGUMENT

#### I. Nature of the Motion

3. This Motion is strictly about the interpretation of Art 18.07 of the Lease and whether PBA complied with its obligations under Art 18.07 to consult with PBDF to discuss the impact the government’s

legislative response to the COVID pandemic (the “**Border Restrictions**”) had on PBDF’s business at the Peace Bridge.

## **II. Evolution of the Relief Sought by PBDF**

4. In the Motion, PBDF asked the Court to determine: (a) whether, as a result of the application of Art 18.07, Base Rent was payable by PBDF; and, if so (b) that amount of the Base Rent PBDF was required to pay for: (i) April to September 2020; (ii) October 2020 to 8 November 2021; (iii) 9 November 2021 to 30 September 2020; and (iv) 1 October 2022 to 11 May 2023<sup>1</sup>. **[Notice of Cross Motion dated 13 November 2022]**

5. In its Factum, PBDF requests that the Court order, based on the application of Art 18.07, that: (a) PBDF is not required to pay Base Rent for the period April 2020 to October 2021<sup>2</sup>; and (b) the Base Rent payable by PBDF “ramp back up” to \$4MM by the 2025/26 lease year. **[PBDF Factum para 96]**

## **III. Summary of PBA’s Position on the Motion**

6. PBA does not dispute that: (a) the Border Restrictions constituted an unanticipated change in an Applicable Law.; (b) the Border Restrictions caused a material Adverse Effect on PBDF’s business operations at the Peace Bridge insofar as they interfered with the normal conduct of business by PBDF; (c) PBA was obliged under Art 18.07 to consult with PBA to discuss the impact of the Border Restrictions; and (d) in making any decision with respect to a request by PBDF for lease concessions based on the Border Restrictions PBA was required to be reasonable and act in good faith.

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<sup>1</sup> This is the date the US border opened to unvaccinated travellers.

<sup>2</sup> PBDF confirmed there is a typographical error in para 96 of the PBDF Factum.

7. PBA's position is:
- (a) there is no reasonable interpretation of Art 18.07 that: (i) requires PBA to waive or suspend the payment of Base Rent; or (ii) automatically amends the Lease to remove or suspend the requirement to pay Base Rent;
  - (b) PBA consulted with PBDF to discuss the impact of the Border Restrictions on PBDF's business at the Peace Bridge and acted reasonably in offering lease concessions to prevent PBDF's business from being "wiped out"; and
  - (c) having failed to accept PBA's reasonable offers of lease concessions, PBDF is obliged to comply with its obligations under the Lease and pay Rent in accordance with the Lease.

#### IV. Facts

8. Many of the facts are not in dispute, although there are some disputes concerning what happened during the negotiation of the Lease and the relevance of certain factual assertions by PBDF to the interpretation of the Art 18.07:
- (a) PBA is the owner of the Peace Bridge, an international bridge that crosses the Canada-US border between Fort Erie, Ontario and Buffalo, New York.
  - (b) PBDF is a closely held company with four shareholders, each of which is represented on the company's Board. **[Pearce Transcript QQ44-45]** PBDF has operated the duty free store on the Canadian side of the Peace Bridge since 1986.
  - (c) In 2016, PBA issued an RFP requesting proposals to operate the duty free on the Canadian side of the Peace Bridge. The RFP required that those submitting bids agreed to pay Base Rent of at least \$2.5MM plus Percentage Rent. PBDF responded to the RFP and offered to

pay Base Rent of \$4MM plus Percentage Rent. PBA selected PBDF as the successful bidder.

- (d) Art 18.07 was not included in the draft lease attached to the RFP, but was added to the Lease by PBA at the request of PBDF. There were no changes to the wording of Art 18.07 from the time it was added to the Lease by PBA and the time the Lease was signed.
- (e) When the Canada-US border was closed to non-essential traffic in March of 2020, PBDF closed the duty free. PBDF did not discuss closing the duty free with PBA.
- (f) When PBA refused to agree to defer payment of Rent for April of 2020, PBDF triggered Art 18.07.
- (g) On 27 April, 2020, PBDF and PBA entered into a rent deferral agreement (the “**First Deferral**”) [Pearce Ex 1.2.28] pursuant to which PBA agreed to defer Rent until the earlier of (i) 31 July 2020; and, in general terms, (ii) the full re-opening of the duty free.
- (h) After the First Deferral expired and Rent became payable/due, PBA produced a second rent deferral agreement (the “**Second Deferral**”) [Pearce Ex 1.3.38] that contemplated the further deferral of Rent. PBDF signed the Second Rent Deferral, but PBA did not. Notwithstanding that it was not signed by PBA, PBDF operated as if Rent had been deferred as contemplated by the Second Rent Deferral and PBA did not object.
- (i) PBDF did not comply with the First or the Second Deferral in terms of repaying to PBA the deferred rent.
- (j) In 2021, PBDF provided financial projections to PBA and made proposals to PBA to address:
  - (i) Rent payable under the Lease going forward; and (ii) repayment of the deferred rent by PBDF. [PBDF Projections/Proposals, Pearce Ex 1.3.46, .48 and .53] PBA rejected PBDF’s proposals.

- (k) On 8 September 2021, PBA issued notices of default, but did not terminate the lease. **[Notices of Default, Pearce Ex 1.3.54]** Those notices resulted in a default by PBDF under its creditor facilities with Royal Bank of Canada (“RBC”). PBDF and RBC entered into a forbearance agreement that contemplated that PBDF would reach a resolution with PBA to preserve the Lease by 15 November 2021. **[Forbearance Agreement, Pearce Ex 1.3.55]**
- (l) PBDF reopened the Canadian duty free in September 2021. Taking into account what was paid by PBDF to PBA, PBDF owes \$5.7MM in deferred rent for the period April 2020 to September 2021.
- (m) In the Fall of 2021, after PBDF reopened duty free, PBDF and PBA attempted to negotiate: (i) the ramp-up of Base Rent to \$4MM; and (ii) the amount of the deferred rent that PBDF would repay and the terms for payment. Those negotiations were not successful in reaching a global resolution, although the parties did agree on the ramp-up of Base Rent that PBDF is asking the Court to impose on PBA. **[Proposals, Pearce Ex 1.3.57, .58 and .60]**
- (n) The failure of PBDF to reach a resolution with PBA by 15 November 2021 triggered a default under the forbearance with RBC. **[RBC Notice of Default, Pearce Ex 1.3.56]** RBC brought this Application seeking to appoint a receiver. In response, PBDF requested from the Court further time to reach a commercial resolution with PBA and, on 14 December 2021, an order was made staying PBA from exercising its remedies to permit PBA the opportunity negotiate a commercial arrangement with PBDF. **[Appointment Order dated 14 Dec 2021]**
- (o) Rather than seek a commercial resolution, PBDF brought this Cross-Motion seeking an order imposing a resolution on PBA based on Art 18.07.

## V. Preliminary Points

### A. PBA is not a “Government Authority”

9. The assertion that PBA is a “Government Authority” as defined by the Lease or a “quasi government” entity [PBDF Factum paras 13-15, 65 and 71] is absurd. The Lease defined “Government Authority” as a federal, provincial or municipal agency, board, tribunal, ministry, department, inspector, official, employee, servant or agent and has no ‘jurisdiction’. [Lease Art 2.01] PBA is a statutory public benefit corporation incorporated in New York State and recognized in Canada pursuant to the *Act respecting the Buffalo and Fort Erie Public Bridge Company*, SC 1934, c. 63. PBA has no authority to make binding decisions, orders or declarations and was also impacted by Border Restrictions.

### B. No Concept of “Normal Rent” in the Lease

10. There is no such thing as “Normal Rent” under the Lease. There is “Rent”, “Base Rent”, “Percentage Rent” and “Additional Rent”. [Lease Art 2.01 and Art IV] What is referred to as “Normal Rent” in the PBDF Factum is the rent that PBDF unilaterally decided to pay PBA—Percentage Rent. [Factum para 35]

### C. No Verbal Agreement

11. The *Statute of Frauds* precludes oral agreements to amend or vary a lease. [Statute of Frauds, RSO 1990, c S.19 ss. 1(2), 2 and 3, and *C.I.D. v. Garnier Holdings*, [2021 ONSC 196](#) (CanLII) paras 50-53] The Lease requires any amendment(s) to the Lease be in writing. [Lease Art 2.17.] Mr. Pearce confirmed that only signed amendment to the Lease was the First Deferral. [Pearce Transcript Q176].

## VI. Interpretation of the Lease—General Principles

12. There is no dispute that the principles applicable to the interpretation of Art 18.07 set out in *Sattva Capital Corp. v. Creston Moly Corp.* [2014 SCC 53 (CanLII)] as summarized in *8254125 Canada Inc. v. Celernus Investment Partners Inc.* [2019 ONSC 3144 (CanLII) paras 8 and 9].
13. The Parol Evidence Rule precludes the Court from considering the *ex post facto* evidence of Pearce or Mills concerning their intentions in connection with the negotiations surrounding Art 18.07 or what benefit they believed PBDF might derive from Art 18.07. [*Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) (CanLII) para 59]
14. Evidence of the “factual matrix” is admissible to interpret the Lease. However, the “factual matrix” consists only of objective evidence of the background facts at the time of the execution of the Lease—knowledge that was or reasonably ought to have been within the knowledge of both PBDF and PBA at or before the date of the Lease. [*Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) (CanLII) para 58. See also *8254125 Canada Inc. v. Celernus Investment Partners Inc.*, [2019 ONSC 3144](#) (CanLII) paras 8 and 9 and *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, [2017 ONCA 1007](#) (CanLII) para 68]
15. The factual matrix cannot overwhelm the plain meaning of the words use by the parties in Art 18.07. [*Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) (CanLII) para 57]

## VII. Art 18.07 Means what it Says—Consult and Discuss

16. PBA is not arguing that Art 18.07 has no meaning or that it had no obligations under Art 18.07. [PBDF **Factum paras 80-82**] PBA’s position is that Art 18.07 required PBA to “consult and discuss” with PBDF and act reasonably in considering lease concessions to address the impact of the Border

Restrictions on PBDF's business at the Peace Bridge.

17. PBDF's arguments that: (a) Art 18.07 includes an obligation on the part of PBA to amend the Lease to suspend the obligation to pay Base Rent **[PBDF Factum Issues 2, 3 and 4]**; and (b) Art 18.07 had the automatic effect of suspending the obligation to pay Base Rent **[PBDF Factum para 8]** ignore the plain wording of Art 18.07.
18. The wording of Art 18.07 is clear and unambiguous: in the event there is an unanticipated change of any Applicable Laws and that change has a material Adverse Effect on PBDF's business operations at the Peace Bridge, PBA is obliged to consult with PBDF to discuss the impact to the Lease of that change in Application Laws. **[Lease Art 18.07]**
19. PBA does not dispute that Art 18.07 required it to engage in discussions with PBDF to determine if a mutually agreeable amendment(s) to PBDF's obligation to pay Rent was possible to preserve the tenancy in circumstances where changes in the Applicable Laws resulted in a material Adverse Effect on PBDF's business at the Peace Bridge—that Art 18.07 is a “safety valve” of sorts that **could** result in adjustments to the rent payable by PBDF. **[PBDF Factum para 5]** This does not, however, equate to an obligation on the part of PBA to agree to specific rent-related concessions such as the suspension of the obligation to pay Base Rent. **[See *Atos v Sapient*, [2016 ONSC 6852](#) (CanLII) para 395]**
20. While the Court will not generally enforce “agreements to agree” **[See *EdperBrascan Corp. v. 117373 Canada Ltd.*, [2000 CanLII 22694](#) (ON SC) aff'd, [2002 CanLII 17624](#) (ON CA)]**, it **may** enforce a covenant to negotiate contained within an agreement **[See *Narwhal International Limited v. Teda International Realty Inc.*, [2021 ONCA 659](#) (CanLII), *Concord Pacific Acquisitions Inc. v Oei*, [2019 BCSC 1190](#) (CanLII) and *Empress Towers Ltd. v. Bank of Nova Scotia*, [1990 CanLII](#)**

[2207 \(BC CA\)](#)].

21. A duty or obligation to negotiate—or in this case discuss—does not impose an obligation to arrive at an agreement. A duty requiring parties to come to an agreement has never been recognized by the law. [***Correct Building Corporation v. Lehman***, [2022 ONSC 527 \(CanLII\)](#) para 170]
22. The Court will not intervene to impose a specific result on parties who agree to negotiate—or in this case discuss—unless the parties have agreed to objective criteria that can be applied by the Court to determine the appropriate result. [See ***Empress Towers Ltd. v. Bank of Nova Scotia***, [1990 CanLII 2207 \(BC CA\)](#), ***Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)***, [2016 ONCA 93 \(CanLII\)](#) and ***1284225 Ontario Limited v. Don Valley Business Park Corporation***, [2023 ONSC 5595 \(CanLII\)](#)] In the absence of objective criteria, the most the Court can do is determine whether a party has complied with its obligation to negotiate—or in this case discuss.
23. The argument that Art 18.07 must contemplate a mandatory or automatic amendment to the obligation to pay Base Rent because it does not say that “absent an agreement, the Lease continues to apply” [**PBDF Factum para 79**] has no merit. There was no need for Art 18.07 to say that absent an agreement the terms of the Lease continued to apply. Art 18.07 must be read in conjunction with the other provisions of the Lease, including: (a) Art 2.04, which is an “entire agreement” clause; (b) Art 2.17, which requires that any amendment(s) to the Lease be in writing; (c) Art 4.5(a) which require that Rent be paid without any abatement, set-off or deduction; and (d) Art 18.08, which contemplates that Unavoidable Delay does not excuse the payment of Rent.
24. PBDF’s reliance on *Molson Canada 2005 v. Miller Brewing Company* [**PBDF Factum paras 79 and 86**] is misplaced. *Molson Canada 2005* involved a request for an interlocutory injunction. The Court

considered only whether there was serious issue to be tried concerning whether the agreement in issue obliged Miller to negotiate in good faith. The Court found that the “strong argument” was that there was no enforceable obligation to negotiate, but Molson had satisfied the requirement of demonstrating a serious issue to be tried. [*Molson Canada 2005 v. Miller Brewing Company*, [2013 ONSC 2758 \(CanLII\)](#) para 114]

25. PBDF concedes that the Lease itself does not provide any objective criteria the parties contemplated would be applied to determine how Rent was to be adjusted in the event changes in the Applicable Laws had a material Adverse Impact on PBDF’s business at the Peace Bridge. [**PBDF Factum para 81**]
26. The expert evidence filed by PBDF is clear: there is no standard or definitive metric that can be applied to determine what a reasonable level of rent would be for the period that was affected by COVID. [**Stulberg Report para 55**]

#### **VIII. Consideration of the Factual Matrix**

27. Contrary to the argument made in the PBDF Factum [**PBDF Factum para 81**], the factual matrix does not establish, or even suggest, any objective criteria that can be applied by the Court to determine what, if any, adjustment to Base Rent ought to be applied based on Art 18.07. Art 18.07 was intended by the parties to be nothing more than covenant to negotiate—discuss—to determine if the parties can agree on a adjustment to the Lease based on the impact of a change in the Applicable Laws.
28. There is no dispute that PBDF’s business at the Peace Bridge is dependent on, among other things, the flow of traffic over the Canada-US border. It is understandable that PBDF would have concerns with respect to the impact that unanticipated changes in Applicable Laws might have on that flow of

traffic. That does not, however, result in Art 18.07 having to be interpreted as providing PBDF with the right to temporarily suspend the payment of Base Rent or obliging PBDF to agree to amend the Lease to temporarily remove the obligation to pay Base Rent.

29. What PBDF requested of PBA was that, in the event of a catastrophic issue beyond PBDF's control that materially impacted PBDF's sales at the Peace Bridge, PBA and PBDF acting reasonably and in good faith would discuss the Lease. **[Pearce Notes for 18 Jul 16 Meeting, Mills 3 Jan 23 Aff Ex E and Pearce Transcript QQ407-410]** When he was cross-examined Mr. Pearce confirmed his understanding that Art 18.07 contemplates only that there would be discussions. **[Pearce Transcript QQ410, 419-420 and 440]**
30. Whatever it was that PBDF based its offer to pay Base Rent of \$4MM upon **[PBDF Factum para 18]**<sup>3</sup> it is not part of the factual matrix. There is no evidence that PBA was aware that PBDF considered its offer of \$4MM to be conditional on minimum level of traffic over the Peace Bridge. PBDF's offer to pay \$4MM in Base Rent was not conditional and, in its response to the RFP, PBDF acknowledged that traffic over the Peace Bridge and its own sales had been declining. **[Lease, Pearce Ex 1.1.1, Sched D and Pearce Transcript QQ504-513]**
31. PBDF also relied on discussions that took place on 18 July 2016 between Mr. Pearce and Ms Costa. **[PBDF Factum paras 24-25]** Those discussions are not part of the factual matrix and is excluded by Art 2.04. **[See *Manorgate Estates Inc. v. Kirkor Architects and Planners*, [2017 ONSC 7154](#) (CanLII) paras 37 and 38 aff'd, 2018 ONCA 617 (CanLII)]**

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<sup>3</sup> The argument that PBDF relied on PBA to provide it with information with respect to its own sales from the purposes of preparing its response to the RFP **[PBDF Factum para 17]** is absurd.

32. To the extent that the Court is prepared to consider the parties' negotiations on 18 July 2016:
- (a) At the meeting on 18 July 2016, Mr. Pearce requested in writing only that PBA enter into a "side letter" agreeing to discuss the Lease:
- ...in the event that during the Term, and should it be necessary, that issues arise (something catastrophic) beyond the Tenant's control (including but not limited to vehicle traffic volume declines, bridge construction, changes in government regulations, etc.) that materially impact the Tenant's duty free sales, then the Landlord and the Tenant, both acting reasonably and in good faith, agree to discuss the lease (including but not limited to the rent terms, term, etc.).* **[Pearce Notes, Mills 3 Jan 23 Aff, Ex E]**
- (b) At the meeting on 18 July 2016, Mr. Pearce requested in writing that PBA agree to a mandatory abatement only in circumstances where the Peace Bridge was completely closed. **[Pearce Notes, Mills 3 Jan 23 Aff Ex E]**
- (c) Mr. Pearce could not recall PBDF ever putting to PBA language suggested by its consultant that would have required that PBA agree to amend the Lease in the event of a material impact on the profitability of the duty free. **[Menchella 4 Jul 16 E-mail, Pearce Ex 1.2.9 and Pearce QQ314-329]**
33. PBDF relies on an e-mail from Ms Costa on 19 July 2016. **[PBDF Factum para 26-28]** That e-mail is not part of the factual matrix and reliance on it is excluded by Art 2.04. Moreover, Ms Costa's e-mail, assuming it is to be considered, cannot be read as confirming that Art 18.07 "was intended by [PBA] to address [PBDF's] need for a rent abatement." **[PBDF Factum para 26]**. What Ms Costa wrote is that PBA agreed that changes in government regulations could materially impact PBDF's business and PBA added Art 18.07—the obligations to consult and discuss—to the Lease. **[Costa 19 Jul 16 E-mail, Pearce Ex 1.2.11]**
34. The personal views of Mr. Pearce and Mr. Mills as to what they believed was the purpose of Art

18.07 **[PBDF Factum para 29]** are not part of the factual matrix.

35. Mr. Pearce's assertions with respect to the calculations that PBDF did internally to determine it would offer Base Rent of \$4MM **[Pearce 2 Dec 22 Aff para 19 and Pearce Transcript QQ260-274]** is not part of the factual matrix. How PBDF determined it would offer Base Rent of \$4MM is not something that was known by both PBDF and PBA. PBDF's response to the RFP says only: "PBDF proposes a Minimum Base Rent of \$4,000,000" and there was nothing in response to the RFP to indicate that PBDF intended the \$4MM to be adjusted in any way whatsoever. **[Lease, Pearce Ex 1.1.1]** There is no evidence that during in the course of discussing Art 18.07 PBDF, even referred to a formula for adjusting Base Rent based on the application of Art 18.07.
36. It was not necessary for PBA to lead (inadmissible) direct evidence: (a) as to "how Art 18.07 arose"; (b) to contradict the (inadmissible) assertions made by Messrs Pearce and Mill concerning Art 18.07; or (c) with respect to the engagements on 18 and 19 July 2016. **[PDBD Factum para 30]** However: (a) Ms Costa was firm that, from her perspective, Art 18.07 contemplates only discussion where there was a change in the applicable laws that impacts PBDF's business; **[Costa Transcript QQ62-73 and 201-206 and 211]** (b) Ms Costa's evidence that she declined multiple times PBDF's request to include a provision in the Lease that provided for a mandatory abatement of rent; **[Costa Transcript QQ77-81 and 154-155]** (c) Ms Costa denied that Mr. Pearce raised with her on 19 June 2016 the concept that in the event of a "catastrophic event," a rent abatement would be granted that was proportionate to what PBDF could pay having regard to its gross sales; **[Costa Transcript QQ475, 485 and 489-491]** and (d) Ms. Costa was adamant that she never told Pearce that there was going to be a rent abatement provided to PBDF. **[Costa Transcript QQ467]**
37. The opinion of Dennis Tobin, a lawyer at Blaney McMurtry LLP, as to what Art 18.07 means as

relayed by Pearce is his 2 December 2022 Affidavit [**Pearce 2 Dec 22 Aff paras 21 and 22, and PBDF Factum para 71-2**] is not admissible. Mr. Tobin has no personal knowledge—he was not involved in drafting the Lease—and his opinion as a lawyer retained by PBDF in these proceedings as to what Art 18.07 means is not admissible to interpret Art 18.07.

**IX. PBA complied with Art 18.07**

38. The evidence establishes that throughout 2020 and 2021 PBA consulted and discussed—negotiated in fact—with PBDF concerning the impact the Border Restrictions had on its business at the Peace Bridge.

39. When he was examined, Tim Clutterbuck confirmed that PBA’s Board of Directors took into account the information available, considered the impact of the Border Restrictions on PBDF’s business and offered lease concessions that the Board considered reasonable. [**Clutterbuck Transcript QQ231-233, 238-239 and 241**]

40. Mr. Rienas’s evidence was that PBA considered all of the relevant information in determining what lease concessions to propose, including: (a) the financial interests of PBDF and its shareholders; (b) the need to fairly apportion the impact of COVID between PBA and PBDF; and (c) the information provided to PBA by PBDF. [**Rienas 26 Nov 22 Aff paras 33 and 41**]

**X. PBA made Proposals that were Reasonable**

41. Whether PBDF is entitled to relief—whether PBA complied with its obligations under Art 18.07—comes down to an assessment as to whether PBA’s proposals to PBDF in the Fall of 2021 were reasonable.

42. In determining what lease concessions to propose (or accept) to assist PBDF to address the impact

of the Border Restrictions, PBA was required to act reasonably and in good faith. PBA was not, however, prohibited from pursuing its own economic self-interests or forego an advantage flowing from the Lease such as Base Rent. [See Lease Art 2.15 and *Bhasin v. Hrynew*, [2014 SCC 71 \(CanLII\)](#), paras 65, 70 and 73. See also *C.M. Callow Inc. v. Zollinger*, [2020 SCC 45 \(CanLII\)](#)] And, in exercising its discretion under Art 18.07, PBA was not required to: (a) subordinate its own commercial and financial interests to those of PBDF and its shareholders; or (b) confer a benefit on PBDF and its shareholders that was not contemplated by the Lease by providing financial support to PBDF. [*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021 SCC 7 \(CanLII\)](#) paras 4, 6, 70 and 73, and *FCP (BOPC) Ltd. v Suzy Shier (Canada) Ltd.*, [2023 ONSC 3228 \(CanLII\)](#)] Nor was PBA required to show that it would be financial prejudiced if it did not accept a proposal made by PBDF. [*NJS Midtown Portfolio Inc. v. CMLS Financial Ltd.*, [2020 ONSC 3973 \(CanLII\)](#)]

43. There are two Rent-related issues raised by PBDF: (a) the Base Rent payable from 1 November 2021; and (b) the repayment of the rent that accrued between April of 2020 and October of 2021. PBA acted reasonably and in good faith in making proposals to PBDF to address each of these matters. Having refused to accept the concessions offered by PBA, PBDF is not entitled to any relief on this Motion—PBA complied with its obligation under Art 18.07 and, as a consequence, no remedy available to PBDF for breach of the Lease.

**A. Base Rent from 1 November 2021**

44. There can be no dispute that PBA acted reasonably under Art 18.07 in terms of proposing to increase the Base Rent back to \$4MM over time. PBA agreed to what PBDF proposed—the ramp up of Base Rent to \$4MM. [See PBDF Factum para 41]

45. PBDF initially proposed that PBA should agree to permanently amend the Lease to eliminate Base Rent. **[PBDF 21 Aug 21 Proposal Pearce Ex 1.3.53 and Pearce Transcript QQ1008 and 1009]** However by 15 October 2021, PBDF had finally abandoned the concept of eliminating Base Rent and agreed on the gradual increase of Base Rent back to \$4MM. **[PBDF 15 Oct 21 Proposal, Pearce Ex 1.3.57]** PBDF agreed that this ramp-up was reasonable. **[PBDF 15 Nov 21 Proposals, Pearce Ex 1.3.60]<sup>4</sup>**
46. PBDF retained Ephraim Stulberg of Matson Driscoll & Damico Ltd. to provide an opinion as to what Rent would be reasonable for PBDF to pay. Mr. Stulberg provided an opinion that Rent that guaranteed PBDF and its shareholders a fixed level of profitability would be reasonable. **[See Report dated 16 August 2023 (the “Stulberg Report”) paras 12 and 13 and Stulbert Transcript QQ129-131]** There is no reference in the Lease to PBDF being guaranteed a fixed level of profitability. **[Stulberg Transcript Q92]** Mr. Stulberg was not told that PBDF expected any fixed level of profitability. **[Stulbert Transcript Q132]**
47. Mr. Stulberg was not provided with any of the proposals made, or the financial projections provided, by PBDF. **[See, for ex, Stulberg Transcript QQ44, 51, 140, 226-227, 229-231, 235]** As a result, Mr. Stulberg was not aware that PBDF had projected that it would pay rent at a level that would not result in a fixed level of profitability and had, in fact, agreed to a gradual increase of Base Rent as proposed by PBA.
48. When he was examined, Mr. Stulberg testified that: (a) there was “room to maneuver” around the

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<sup>4</sup> After this litigation was commenced, PBDF and PBA exchanged other “without prejudice” offers. PBDF (improperly) disclosed one of these offers to Mr. Stulberg: Stulberg Ex 3. The other offers were put to Mr. Stulberg when he was examined. This exchange of offers confirmed PBDF’s acceptance of the ramp-up of Base Rent: Stulberg Ex B and E. The relevance of these offers on this Motion is unclear.

assumption he made with respect to profitability; **[Stulberg Transcript Q133]** and (b) what rent is commercially reasonable would generally be determined based on the result of negotiations between the parties. **[Stulberg Transcript Q52]** Mr. Stulberg also confirmed that the projections prepared by PBDF projected its level of profitability increasing over time as opposed to the steady level of profitability he had assumed. **[Stulberg Transcript QQ202-214]**

49. PBDF does not dispute Mr. Stulberg's qualifications to provide expert evidence. However, leaving aside the fact that PBDF did not provide Mr. Stulberg with all of the relevant information, the Stulberg Report is not particularly helpful. It is premised on the issue before the Court being the amount of the Base Rent the Court should direct is payable by PBDF as opposed to the meaning of Art 18.07. **[Stulberg Report para 5 and Stulberg Transcript QQ31-33, 39 and 125]**

#### **B. Repayment of Deferred Rent**

50. Based on the financial projections provided by PBDF, PBA acted reasonably in proposing under Art 18.07 that PBDF repay 50% of the deferred rent immediately.
51. Notwithstanding that PBDF agreed in the First Deferral to repay the deferred rent with interest; and PBDF initially proposed to not repay any of the deferred rent. **[See 21 Aug 21 Proposals, Pearce Ex 1.3.53]** By 15 October 2021, however, PBDF had abandoned the proposal to pay no deferred rent and the issues became: (a) how much of the deferred rent PBDF would have to repay; and (b) the terms for the repayment. PBDF was prepared to repay \$2MM of the deferred rent, but wanted PBDF to accept payment of the \$2MM over the term of the Lease without interest or security. **[PBDF 15 Oct 21 Proposal, Pearce Ex. 1.3.57 and PBDF 16 Nov 21 Proposal, Pearce Ex 1.3.60]** PBA, for its part, proposed that 50% of the deferred rent (without interest) be repaid immediately **[PBA 26 Oct 21 Proposal, Pearce Ex 1.1.58]** but later agreed to treat the 50% as a loan if PBDF paid interest

and provided a guarantee of security. **[Exhibits to Rienas 22 Nov 22 Aff Tab 10. See also Rienas 26 Nov 22 Aff para 23]**

52. Based on the information available, PBA's proposal that PBDF repay 50% of the deferred rent--\$5.7MM—immediately was reasonable.<sup>5</sup>
53. PBDF provided PBA with nearly identical financial projections in March and August of 2021. **[PBDF Projections/Proposals, Pearce Ex 1.3.48 and .53]** These were the only financial projections provided to PBA by PBDF. PBDF refused to provide PBA with additional financial information or projections after this litigation was commenced.
54. The projections provided by PBDF in 2021 were more conservative than the projections provided in 2016 in response to the RFP.
55. The projections from March of 2021 indicated:
  - (a) Assuming PBDF paid Base Rent beginning in 2021 and repaid 100% of the deferred rent, PBDF was not financially viable and would not generate a profit for its shareholder until 2023 as asserted by PBDF<sup>6</sup>.
  - (b) Assuming PBDF paid only Percentage Rent and repaid \$0 in deferred rent: (i) PBDF would require no cash injections and would be profitable beginning in 2021; and (ii) would have generated \$12.5MM in profits by 2031 and \$21.7MM in profits by 2036, assuming the option to extend the Lease Term was exercised. **[PBDF 15 Mar 21 Projections, Pearce Ex**

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<sup>5</sup> In the offers exchanged by PBDF and PBA after this litigation was commenced, PBDF agreed to pay 50% of the deferred rent (without interest) immediately; Stulbeg Ex B. The relevance of this offer on this Motion is unclear. PBA also proposed to retain any HST refund it received, but this was a "neutral" factor insofar as the projections provided by PBDF did not indicate that it was anticipating receiving back any HST.

<sup>6</sup> The projection showed \$3MM in deferred rent, but the letter confirmed that the deferred was about \$5MM.

### 1.3.48]<sup>7</sup>

56. Mr. Pearce implies that PBA did not consider PBDF's ability to pay Rent or the "economic realities". **[Pearce 2 Dec 22 Aff paras 15, 16 and 18]** This is not supported by the evidence. Nor is Mr. Pearce's assertion that what PBA proposed in the Fall of 2021 would result in the destruction of PBDF's business at the Peace Bridge. **[Pearce 2 Dec 22 Aff para 25]**
57. Based on PBDF's 2021 projections, and assuming PBDF ramped-up the Base Rent as agreed, to pay 50% of the Base Rent—\$2.8MM—PBDF would have required a cash injection of about \$2.8MM, but: (a) PBDF would have been able to repay that cash injection by 2026, at the latest; and (b) would have still generated significant profits for its shareholders by 2031. Stulberg opined that it would not be unreasonable for shareholders who stand to realize what PBDF was projecting would be its profits over the course of a lease to contribute the \$2.8MM that was required to pay PBA. **[Stulberg Transcript Q222]**
58. In considering the reasonableness of PBA's proposal, it is relevant that PBDF's shareholders: (a) contributed only \$21K in capital to PBDF **[Stulberg Transcript QQ240-241]**; (b) have made no shareholder loans to PBDF; (c) took \$12.4MM in dividends from PBDF between 2012 and 2020, \$600K in the first quarter of 2020. **[Pearce Transcript QQ192-203]**
59. The argument by PBDF that it would be commercially unreasonable to say that PBDF must pay "full rent" because the Rent Deferrals were premised on the fact that the duty free was closed **[PBDF Factum para 86]** ignores that: (a) in the Rent Deferrals contemplated the deferral as opposed to an abatement of rent—that PBDF was responsible for "full rent" while the duty free was closed; and (b)

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<sup>7</sup> These projections are referenced because they are the most detailed of the two. The August projections do not show a running cash balance, but are otherwise identical.

PBA did not propose that PBDF pay the “full rent”, but that PBDF pay 50% of the deferred rent; and  
(c) PBDF itself proposed that it pay \$2MM in deferred rent.

60. PBDF did not prepare any projections to determine what PBDF’s shareholders would have had to contribute in order for PBDF to accept PBA’s proposal that PBDF repay 50% of the deferred rent.  
**[Pearce Transcript QQ1333-1342]<sup>8</sup>**

61. Mr. Pearce’s evidence was that he did not approach the shareholders to contribute money to PBDF and he refused an undertaking to inquire of Greg O’Hara as to whether he had approached the other shareholders to contribute money. **[Pearce Transcript QQ1295-1298]**

62. There was no evidence from PBDF that they made any efforts whatsoever to borrow money to fund the immediate payment of 50% of the deferred rent.

63. PBDF’s proposal that PBA accept only \$2MM of the deferred rent and agree to provide a long-term, interest free and unsecured loan for the \$2MM was patently unreasonable based on PBDF’s financial projections, which showed that the company could have paid \$2MM to PBA by 2025. **[25 Mar 21 Projections, Pearce Ex 1.3.48]** Mr. Pearce’s evidence when cross-examined was that there was no analysis underlying the \$2MM offered by PBDF—it was just a “gross number”. **[Pearce Transcript QQ1370-1378]**

#### **XI. PBA Acted in Good Faith**

64. There is no merit to any suggestion that PBA acted improperly or in bad faith, or had ulterior motives.  
**[PBDF Factum, paras 7 and 44-52]** PBA was honest and forthright with PBDF throughout 2020

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<sup>8</sup> Any assertion by Mr. Pearce that PBDF did not know what was owed is not credible. In his letter of 25 March 2021 Mr. O’Hara indicated that the amount owed to PBA was, at that point, projected to exceed \$5MM: 21 Mar 21 Letter, Pearce Ex 1.3.48.

and 2021.

65. PBDF's assertions concerning the negotiation of the Rent Deferrals **[PBDF Factum paras 45 and 47]** are not accurate. PBA considered PBDF's comments on the draft documents. **[See Pearce Ex 1.2.21-24]**

66. The duty to act in good faith did not require PBA to refrain from: (a) exercising its remedies under the Lease in the face of breaches by PBDF—there is no possible argument, for example, that PBDF breached Arts 4.01 and 4.05 by not paying rent, and Art 9.02 by closing the duty free; **[See 1218807 Alberta Ltd v Muslim Association of Canada Ltd, [2023 ABKB 300](#) (CanLII)]** or (b) responding to inquiries from RBC in circumstances where PBDF specifically authorized RBC to communicate directly with PBA.

67. There is no merit to any suggestion that PBA breached the Provincial moratorium on the eviction of commercial tenants by issuing notices of default. Assuming it applied, s. 82 of the *Commercial Tenancies Act*, RSO 1990, c L.7 (the "CTA"), which is no longer in force, prohibited re-entry by a landlord, not the delivery of notices of termination. **[CTA, s. 82]**

68. As to the assertion that PBA made demands for payment that it knew PBDF could not afford **[PBDF Factum para 7]**: (a) there was no obligation on PBA to refrain from making demand for (partial) payment of amounts owing by PBDF; and, to the extent it is relevant (b) the evidence suggests that PBA had reasonable grounds to believe PBDF had the financial means to pay PBA. **[See Pearce Transcript QQ778-844]**

## **XII. No Insistence on Shareholder Guarantees.**

69. The assertion by PBDF that PBA insisted of guarantees from PBDF's shareholders **[Pearce 2 Dec**

**22 Aff paras 7, 9 and 17, and PBDF Factum para 48]** is misleading. The proposal made by PBA in the Fall 2021 does not contemplate personal guarantees or security. **[PBA 26 Oct 21 Proposal, Pearce Ex 1.3.58]** On 2 August 2022, PBA, through counsel, indicated that PBA was prepared to accept the payment of 50% of the deferred rent over 24 months if PBDF provided either a third-party guarantee or security. **[Exhibits to Rienas 22 Nov 22 Aff Tab 10. See also Rienas 26 Nov 22 Aff para 23.]**

70. There is nothing unreasonable about a third-party extending a \$2.8MM loan requesting security or a guarantee.

### **XIII. PBA Finances are not Relevant**

71. PBA owes contractual, not fiduciary, obligations to PBDF. PBA is required to comply with its obligations under the Lease and is not obliged to the financial and commercial interests of PBDF and its shareholders ahead of its own. **[See *Bhasin v. Hrynew*, [2014 SCC 71 \(CanLII\)](#), para 65]**
72. If PBDF's shareholders will not provide financial support to PBDF based on financial projections prepared by Mr. Pearce that show that they will realize a large financial return on any investment they make, why does it fall to PBA to provide financial support to PBDF to allow its shareholders to realize even greater returns?

### **XIV. Treatment of US Duty Free**

73. The treatment of the operator of the US duty free **[PBDF Factum paras 53-57]** is not relevant to the issue of compliance with Art 18.07. PBA was not required by Art 18.07 to provide PBDF with the identical treatment that was provided to its other tenants based on their specific circumstances—Art 18.07 is not a “most favoured nation” clause.

74. There are justifiable reasons for the operator of the US duty free—DFA—to be treated differently than PBDF, not the least of which is that DFA chose to keep the US duty free open during COVID and suffer the consequential financial impact while PBDF elected to close the Canadian duty free. **[See, for ex, Rienas Transcript Q88]**

75. The assertion that, as of December 2022, DFA had not paid back any deferred rent may be technically accurate **[PBDF Factum para 53]** but is misleading. The evidence is that: (a) DFA agreed to repay 80% of its deferred rent with interest; and (b) DFA has been repaying the deferred rent in accordance with that agreement. **[Rienas 26 Nov 22 Aff para 40]**

#### **XV. Consequences of Termination on PBA/Evidence of JC Williams Group**

76. PBDF argues, in reliance on the opinion evidence of JC Williams Group (“**JCWG**”) **[See Retails Expert Report dated 16 August 2023 (the “JCWG Report”)]** that there may be negative consequences to PBA if the Lease is terminated. **[PBDF Factum para 52]** That is not relevant to the interpretation of Art 18.07. Moreover, the JCWG Report is not admissible as “expert” evidence.

77. The threshold requirements for the admissibility of expert evidence are: (a) relevance; (b) necessity in assisting the trier of fact; (c) absence of an exclusionary rule; and (d) the need for the expert to be properly qualified. **[See *Bruff-Murphy v. Gunawardena*, [2017 ONCA 502](#) (CanLII), paras 35 and 36]**

78. The JCWG Report is not relevant insofar as it does not relate in any way to the interpretation of Art 18.07. JCWG was asked to answer questions the answers to which were intended to establish that PBA might be better off negotiating an amendment to the Lease than issuing a new RFP—that PBA should negotiate with PBDF. **[JCWG Report section 6 and Hutcheson Transcript QQ269-272]**

79. There are also issues with the qualifications of the person from JCWG who authored the JCWG Report, Lisa Hutcheson. Ms. Hutcheson has no ‘specialized knowledge’ concerning leases for duty free concessions—in fact she has no experience or knowledge in the duty free sector generally—and has not undertaken any studies of the duty free sector **[Hutcheson Transcript QQ29-34]** As a result of her own lack of specialized knowledge, Ms. Hutcheson relied on: (a) unverified information from Mr. Pearce **[JCWG Report section 6.2 and Hutcheson Transcript QQ60-79]**; and (b) comparables that she acknowledged were not appropriate. **[JCWG Report section 6.3]** PBDF refused to produce Mr. Pearce to be examined to test the information he provided to Ms Hutcheson, notwithstanding being ordered to do so. **[6 Sept 2023 Endorsement para 8(d)]<sup>9</sup>**

**XVI. PBA did not Allow PBDF the Duty Free to Remain Closed**

80. The assertions in that under the Rent Deferrals PBA allowed the duty free to be closed until the Canada-US border re-opened **[PBDF Factum paras 46, 50, 57 and 86]** is not accurate. The Rent Deferrals recognized that PBDF closed the duty free and provided PBDF for a time-limited deferral of Rent. The First Deferral, for example, required that PBDF begin to pay Rent on the earlier of: (a) July 31, 2020; and (b) the opening of the duty free after the restrictions on non-essential travel were lifted. **[First Deferral, Pearce Ex 1.2.28]**

**XVII. HST**

81. PBA was required to collect and remit HST based on the Rent payable under the Lease. PBDF filed documents with the Canada Revenue Agency indicating that it was paying Base Rent. **[CRA Documents, Pearce Ex 1.3.61]**

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<sup>9</sup> PBDF offered to produce Mr. Pearce to be examined on 19 October 2023, knowing that PBA’s Factum was due on 23 October 2023.

### **XVIII. Relief Requested by PBDF**

82. There is no merit to PBDF's argument that it falls to the Court under Art 18.07 to settle what percentage of the deferred rent PBDF is required to repay and on what terms. **[PBDF Factum paras 83-85]** This is not a case where the provisions of the lease in issue provides an objective standard or baseline based on which the Court can determine the amount to be paid by a tenant. **[See *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, [2016 ONCA 93 \(CanLII\)](#)]** It is trite law that the parties make their own contract and the Court will not make a contract for them out of terms which are absent, indefinite or illusory. **[*Winsco Manufacturing Ltd. v. Raymond Distributing Co. Ltd.*, [1957 CanLII 112 \(ON SC\)](#)]** In this case, Art 18.07 does not invite the Court to make an agreement for PBDF and PBA to adjust Base Rent. The issues before the Court are whether PBA: (a) consulted and discussed with PBDF as required by Art 18.07; and (b) acted in good faith and made reasonable proposals to adjust Base Rent.
83. Provided PBA complied with its obligations under Art 18.07, PBDF is not entitled to any relief on this Motion. Assuming that it cannot pay the rent that it owes, PBDF is, of course, free to: (a) attempt to negotiate an amendment to the Lease with PBA to preserve the tenancy; or (b) seek relief from forfeiture under the CTA.

### **PART III—ORDER REQUESTED**

84. PBA requests that PBDF's Motion be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of October 2023.

**E. Patrick Shea, KC**

**E. Patrick Shea, KC**

**GOWLING WLG (CANADA) LLP**

Lawyers for Buffalo and Fort Erie Public Bridge Authority

**SCHEDULE A  
(Authorities)**

*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII)

*8254125 Canada Inc. v. Celernus Investment Partners Inc.*, 2019 ONSC 3144 (CanLII)

*EdperBrascan Corp. v. 117373 Canada Ltd.*, 2000 CanLII 22694 (ON SC) aff'd, 2002 CanLII 17624 (ON CA)

*Narwhal International Limited v. Teda International Realty Inc.*, 2021 ONCA 659 (CanLII)

*Concord Pacific Acquisitions Inc. v Oei*, 2019 BCSC 1190 (CanLII)

*Empress Towers Ltd. v. Bank of Nova Scotia*, 1990 CanLII 2207 (BC CA)

*Correct Building Corporation v. Lehman*, 2022 ONSC 527 (CanLII)

*Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93 (CanLII)

*1284225 Ontario Limited v. Don Valley Business Park Corporation*, 2023 ONSC 5595 (CanLII)

*Molson Canada 2005 v. Miller Brewing Company*, [2013 ONSC 2758 (CanLII)

*Manorgate Estates Inc. v. Kirkor Architects and Planners*, 2017 ONSC 7154 (CanLII) aff'd, 2018 ONCA 617 (CanLII)

*Bhasin v. Hrynew*, 2014 SCC 71 (CanLII)

*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 (CanLII)

*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (CanLII)

*FCP (BOPC) Ltd. v Suzy Shier (Canada) Ltd.*, 2023 ONSC 3228 (CanLII)

*NJS Midtown Portfolio Inc. v. CMLS Financial Ltd.*, 2020 ONSC 3973 (CanLII)

*1218807 Alberta Ltd v Muslim Association of Canada Ltd*, 2023 ABKB 300 (CanLII)

*Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (CanLII)

*Winsco Manufacturing Ltd. v. Raymond Distributing Co. Ltd.*, 1957 CanLII 112 (ON SC)

**SCHEDULE B  
(Legislation)**

***Commercial Tenancies Act, RSO 1990, c L.7***

18 (1) Every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, shall be deemed to include an agreement that if the rent reserved, or any part thereof, remains unpaid for fifteen days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it is lawful for the landlord at any time thereafter to re-enter into and upon the demised premises or any part thereof in the name of the whole and to have again, repossess and enjoy the same as of the landlord's former estate.

...

19 (2) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, other than a proviso in respect of the payment of rent, is not enforceable by action, entry, or otherwise, unless the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

20 (1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or application in the Superior Court of Justice brought by the lessee, apply to the court for relief, and the court may grant such relief as, having regard to the proceeding and conduct of the parties under section 19 and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just.

...

(4) Where the proceeding is brought to enforce a right of re-entry or forfeiture for non-payment of rent and the lessee, at any time before judgment, pays into court all the rent in arrear and the costs of the proceeding, the proceeding is forever stayed.

...

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

- 1. The landlord is or was eligible to receive assistance under the Canada Emergency Commercial Rent Assistance for small businesses program.*
- 2. The landlord is receiving or has received assistance under the Canada Emergency Commercial Rent Assistance for small businesses program.*

3. The landlord would be eligible to receive assistance under the Canada Emergency Commercial Rent Assistance for small businesses program if the landlord entered into a rent reduction agreement with the tenant containing a moratorium on eviction.

4. The landlord would have been eligible to receive assistance under the Canada Emergency Commercial Rent Assistance for small businesses program as described in paragraph 1 or 3 if applications under that program were being accepted. This paragraph applies only if applications to the Canada Emergency Commercial Rent Assistance for small businesses program are no longer being accepted or if assistance is no longer available under the program.

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

...

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

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

(a) restore possession of the premises to the tenant unless the tenant declines to accept possession; or

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

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

...

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

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

### **Statute of Frauds, RSO 1990, c S.19**

1 (2) All leases and terms of years of any messuages, lands, tenements or hereditaments are void unless made by deed.

2 Subject to section 9 of the *Conveyancing and Law of Property Act*, no lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or the party's agent thereunto lawfully authorized by writing or by act or operation of law.

3 Sections 1 and 2 do not apply to a lease, or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which, reserved to the landlord during such term, amounts to at least two-thirds of the full improved value of the thing demised.

**SCHEDULE C  
(Lease Excerpts)**

**2.01 Definitions**

...

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

...

- (vii) loss of enjoyment of a normal use of property; and
- (viii) interference with the normal conduct of business.

...

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

...

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

...

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

...

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

...

(zz) "Unavoidable Delay" means any delay by a party in the performance of its obligations under this Lease caused in whole or in part by any acts of God, strikes, lockouts or other industrial disturbances, acts of public enemies, sabotage, war, blockades, insurrections, riots, epidemics, washouts, nuclear and radiation activity or fallout, arrests, civil disturbances, explosions, unavailability of materials, breakage of or accident to machinery, any legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means, any act, omission or event, whether of the kind herein enumerated or otherwise, not within the control of such party, and which, by the exercise of control of such party, could not have been prevented. Insolvency or lack of funds on the part of such party shall not constitute an unavoidable delay.

**2.04 Entire Agreement**

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

## **2.15 Reasonableness**

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

## **2.17 Amendment and Waiver**

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

## **4.01 Covenant to Pay**

The Tenant will pay Rent as provided in this Lease, together with all applicable Sales Taxes, duly and punctually by way of electronic funds transfer ("EFT") from the Tenant's bank account.....

## **4.02 Base Rent**

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

## **4.05 Rent and Payments Generally**

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

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

## **9.02 Conduct and Operation of Business**

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

- (a) operate its business 24 hours a day, seven days a week, 365 days a year with due diligence and efficiency and maintain an adequate staff to properly serve all customers;...

### **18.07 Regulatory Changes**

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

### **18.08 Unavoidable Delay**

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



**ROYAL BANK OF CANADA**  
Applicant

-and-

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

**PEACE BRIDGE DUTY FREE INC.**  
Respondent

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF**  
**BUFFALO & FORT ERIE PUBLIC BRIDGE AUTHORITY**

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