

**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

FACTUM OF BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

(Motion returnable 9 December 2022)

Date: 28 November 2022

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TO: THE SERVICE LIST

FACTUM
(Motion Returnable 9 December 2022)

PART I—THE MOTIONS

1. This is a Motion by Buffalo and Fort Erie Public Bridge Authority (the “**Authority**”) for an Order:
 - (a) declaring that the Authority is no longer bound by the restriction imposed by para 11 of the Order dated 14 December 2021 as amended (the “**Appointment Order**”) for the reason that Peace Bridge Duty Free Inc. (“**PBDF**”) has not, since 14 December 2021, paid rent as required by the Building Lease between the Authority and PBDF dated 28 July 2016 (the “**Lease**”); or, in the alternative,
 - (b) lifting the stay imposed by para 9 so that the Authority may exercise its remedies under the Lease, including terminating the Lease and evicting PBDF; or, in the further alternative,
 - (c) requiring that PBDF pay, within 10 business days, all rent payable in accordance with the Lease since 14 December 2021 and account for all subsidies received by PBDF since 14 December 2021, without prejudice to the Authority’s rights in connection with rent owing by PBDF for the period prior to 14 December 2021.
2. In an effort to delay the hearing of the Authority’s Motion, PBDF is purported to bring what it has styled as a Cross-Motion seeking substantive relief against the Authority, including damages against the Authority. That Cross-Motion is not properly brought in this Application.
3. Royal Bank of Canada (“**RBC**”) has indicated that, if the Authority is successful, it intends to seek to appoint a receiver over the assets and property of PBDF. The Authority does not oppose the appointment of a receiver provided that its right to exercise its remedies under the Lease is not stayed or restricted or any such stay or restriction is conditional on the minimum rent owing to the

Authority since 14 December 2022 Authority either being paid or secured in priority to RBC and the receiver.

PART II—FACTS, LAW AND ARGUMENT

I accept that the impact of COVID-19 and the restrictions on retail businesses that followed can be taken into account when setting the terms of relief for forfeiture. For example, the problems associated with COVID-19 may dictate a term allowing the tenant some additional time to bring itself into compliance with the lease. I do not, however, accept that the economic impact of COVID-19 can be taken as a basis for fundamentally altering the remedy from one of relief from forfeiture to one imposing new terms in the lease. [Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., 2022 ONCA 585 (CanLII), para 52]

A. Background Facts

4. The Authority is the owner and operator of the Peace Bridge in Fort Erie, Ontario. Pursuant to the Lease, the Authority leased certain premises to PBDF for the purpose of permitting it to operate a duty free store at the Peace Bridge. **[Affidavit of Ron Rienas sworn 7 September 2022 ("Rienas 7 Sept 22 Affidavit"), paras 4 and 6]**
5. PBDF defaulted under the Lease. Those defaults included, but were not limited to payment defaults.
6. Royal Bank of Canada ("**RBC**") is a secured creditor of PBDF. The assertion by the Authority that PBDF had defaulted under the Lease resulted in an additional default under the applicable agreement(s) between PBDF and RBC—as at 2 July 2021 PBDF was already in default of its financial covenants. **[Affidavit of Jim Pearce sworn 12 December 2021 ("Pearce 12 Dec 21 Affidavit"), para 60]** On 8 September 2021, RBC issued default notices and brought this application seeking to have a receiver appointed over PBDF's assets and property, including the Lease. **[Pearce 12 Dec 21 Affidavit, paras 61-64, and Rienas 7 Sept 22 Affidavit, paras 16 and 17]**
7. In December of 2021, PBDF proposed the adjournment of RBC's Application so that it could try to

reach a commercial resolution with the Authority:

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. **[Pearce 12 Dec 21 Affidavit, para 72]**

8. The Authority did not object to providing PBDF with a reasonable period of time to make a proposal to the Authority to remedy the defaults under the Lease.
9. On 14 December 2021, the Court made the Appointment Order appointing msi Spergel inc. (the “**Monitor**”) as “monitor” of PBDF to protect RBC’s interests as a secured creditor pending the return of this Application. **[Rienas 7 Sept 22 Affidavit, para 17 and Appointment Order dated 14 December 2022]**
10. The Appointment Order includes the “standard” provisions that: (a) prevent creditors from exercising remedies; and (b) restrict the exercise of contractual remedies provided PBDF paid for goods and services provided after 14 December 2021. **[Appointment Order, paras 9 and 11]**
11. The Lease requires that PBDF pay minimum annual rent of \$4,000,000 per annum—\$333,333 per month. **[Lease, Art 4.02, Rienas 7 Sept 22 Affidavit, para 9, and Pearce 12 Dec 21 Affidavit, para 18]**
12. PBDF has not paid rent in accordance with the Lease since 14 December 2021. PBDF has, instead, been unilaterally paying an amount equal to 20% of its reported sales to the Authority. **[Rienas 7 Sept 22 Affidavit, paras 10 and 19]**
13. On 30 December 2021, in response to a request that the Authority agree to mediation, the Authority advised PBDF:

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. **[Pearce 26 Nov 22 Affidavit, paras 22 and 23]**

14. On 7 January 2022, the Monitor was advised that PBDF was unilaterally paying rent equal to 20% of sales and that this was not in accordance with the Lease. **[Rienas 7 Sept 22 Affidavit, para 20]**
15. The Authority notified PBDF multiple times both prior and subsequent to 14 December 2021 that it was not accepting percentage only rent. The Authority at least twice expressly rejected requests by PBDF that the Lease be amended to provide for percentage only rent. **[Rienas 7 Sept 22 Affidavit, para 32 and Rienas 26 Nov 22 Affidavit, paras 20 and 21]**
16. The Authority, relying on Art 2.17 of the Lease, did not take immediate steps to exercise its rights under the Lease based on the fact that PBDF was “short-paying” rent to provide PBDF with time to develop a proposal to address the impacts of COVID and because there was a Provincial moratorium on the eviction of commercial tenants, that might have impacted the Authority¹ even if the Authority was not restricted by the Appointment Order.
17. The Provincial moratorium was lifted in April of 2022. **[Rienas 7 Sept 22 Affidavit, paras 33 and 34]** At that point, PBDF had still not provided the Authority with a proposal to address the impact of COVID that satisfied the requirements set by the Authority four (4) months earlier in December of 2021.

¹ *Commercial Tenancies Act*, RSO 1990, c L.7, Part IV. Under Part IV, Judges are, assuming the Part is applicable, prohibited from ordering a writ of possession that is effective during the applicable non-enforcement period if the basis for ordering the writ is an arrears of rent. As well, the amendments prohibit landlords from exercising a right of re-entry and from seizing any goods or chattels as a distress for arrears of rent during the applicable non-enforcement period: see *Al-Waleed Salon Inc. v. Amiri*, [2022 ONSC 5607](#) (CanLII) and *Green Solutions Industries International Inc. v Clarke Holdings (London) Inc.*, [2022 ONSC 1505](#) (CanLII)

18. On 26 July 2022, the Authority advised the Monitor and PBDF that it would be seeking to exercise its remedies under the Lease based on the failure of PBDF to pay minimum rent after 14 December 2021. **[Rienas 7 Sept 22 Affidavit, para 35 and Brief of Exhibits Tab 9]** PBDF continued to pay percentage only rent.
19. On 2 August 2022, the Authority again advised PBDF as to what it considered acceptable in terms of the resolution. **[Rienas 7 Sept 22 Affidavit, para 37 and Brief of Exhibits Tab 10]** PBDF did provide a substantive response.
20. PBDF does not assert that there was an amendment to the Lease that permits it to pay percentage only rent, but asserts various reasons why it believes the Authority ought to be required to accept less than the minimum rent required by the Lease. PBDF relies, for example, on: (a) the fact that it was unilaterally, and in breach of the Lease, paying percentage only rent to the Authority as at 14 December 2021; and (b) the Appointment Order requires that it pay the normal rent after 14 December 2021 in accordance with normal payment practices of the PBDF as permitting it to pay only 20% of its sales to the Authority.
21. PBDF appears to operate another duty free at the Hamilton International Airport. **[Pearce 12 Dec 21 Affidavit, paras 14, 50 and 70]** There is, however, no evidence from PBDF concerning: (a) whether it closed that duty free; or (b) what, if any, accommodation(s) or lease amendment(s) it has agreed to with the landlord(s) of that duty free.
22. PBDF asserts that it paid about \$13,600,000 in rent to the Authority between 1 November 2016 and the onset of COVID in March of 2020. **[Pearce 13 Nov 22 Affidavit, para 5]** That means that is reasonable to assume that PBDF's gross sales over that period were likely in excess of \$68,000,000 from the Peace Bridge duty free alone. While being critical of the Authority for not agreeing to provide it with more financial support, PBDF has not provided any information whatsoever as to much its shareholders took from the company pre-COVID or indicate why they cannot (or will not) provide financial support to PBDF.

B. Lease Provides for Minimum Rent of \$333,333

23. This is not a case involving a calculation of additional rent or an exercise of discretion in terms of the allocation of costs on the part of the Authority, or a situation where the landlord agreed to provide accommodations to its tenant². There is no dispute that PBDF is obliged by the Lease to pay minimum monthly rent of \$333,333 on the first day of each month. Article 4.02 of the Lease says:

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.

24. PBDF acknowledges that the minimum rent is \$4,000,000 per annum. **[Pearce 12 Dec 21 Affidavit, para 18]** PBDF filed documents with the Federal government confirming that the monthly rent payable to the Authority is \$333,333. **[Pearce 12 Dec 21 Affidavit, Exhibit E]**
25. The basis upon which PBDF itself determined what rent it would offer to pay to the Authority—the rent provided for in the Lease is what PBDF offered in order to secure the Lease as part of the competitive process undertaken by the Authority **[See Rienas 7 Sept 22 Affidavit, para 9, Pearce 12 Dec 21 Affidavit, para 15 and PBDF Response to RFP attached to Lease, Brief of Exhibits, Tab 1, p 119]**—is not relevant. The Lease, by its express terms, allocates the risk that the duty free will not perform financially to PBDF and its shareholders. This is typical of most, if not all, leases.
26. There is also no factual dispute that: (a) PBDF has not paid \$333,333 per month; and (b) PBDF has not paid what rent it has paid on the 1st of the month, since 14 December 2021.

² While perhaps pre-supposing PBDF's argument, the facts of this case bear to resemblance to those that were before the Court in *100 Bloor Street West Corp. v. Barry's BootCamp*, [2022 ONSC 5054](#) (CanLII).

27. The only issues on this Motion concerning rent relate to quantum and are whether: (a) the Authority agreed that PBDF could pay percentage only; or (b) the Appointment Order permits PBDF to unilaterally pay percentage only rent.

C. No Agreement to Amend the Lease re Percentage Only Rent

28. Article 2.17 of the Lease says:

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.

29. There is no factual dispute that: (a) there is no signed amendment to the Lease that provides for PBDF to pay percentage only rent—neither the First Rent Deferral nor the (unsigned) Second Rent Deferral provide for percentage only rent; or (b) PBDF has unilaterally determined that it would pay to the Authority only 20% of its monthly sales as opposed to the \$333,333 required by the Lease. There is also no dispute that the Authority repeatedly advised PBDF that it was not agreeing that PBDF could pay rent equal to only 20% of its sales. **[See Rienas 7 Sept 22 Affidavit, paras 29 and 32]**

D. No Right to Withhold Rent

30. To the extent that PBDF is arguing that it is entitled to some sort of rent abatement based on a damages claim, the law is clear that the existence of a right to an abatement does not permit a tenant to withhold—or short-pay—rent. **[See *Cooper v. The Laundry Lounge, Inc.*, 2019 ONSC 3216 (CanLII) aff'd, 2020 ONCA 166 (CanLII) and *G5 Events Inc. v. 2748355 Canada Inc.*, 2022 ONSC 5389 (CanLII)]**

31. Articles 4.01 and 4.05 of the Lease say:

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.....

4.05 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); (emphasis added)*

E. Lifting the Stay(s) Imposed by the Appointment Order

- 32. The Authority has both a contractual and a statutory right to terminate the Lease based on PBDF’s failure to pay rent. [**Commercial Tenancies Act**, R.S.O. 1990, c. L.7 (“CTA”), s. 18(1). See also [**Hudson’s Bay Company ULC Compagnie de la Baie D’Hudson SRI v. Oxford Properties Retail Holdings II Inc.**, [2022 ONCA 585](#) (CanLII), para 32]
- 33. Those rights are restricted by para 11 and potentially para 9 of the Appointment Order.

i. Para 11 of the Appointment Order

- 34. The Authority is not taking issue with the failure of PBDF to pay rent prior to 14 December 2021 and accepts that the rent owing as at that date represents an unsecured debt owing by PBDF that may not be recoverable. The sole issue on this Motion is the failure of PBDF to pay the minimum rent required by the Lease from and after 14 December 2021³.
- 35. Paragraph 11 of the Appointment Order is the provision that is intended to deal with suppliers such

³ Aside from the minimum rent, the PBDF is also arguably obliged to begin to repay to the Authority deferred rent based on the terms of the First Rent Deferral, but the Authority is not relying on the failure of PBDF to make the payments required by the First Rent Deferral to support this Motion.

as the Authority. It says:

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.

36. Paragraph 11 serves the same effective purpose as s. 65.1 of the BIA—it preserves the value of PBDF’s business—the duty free—by preventing suppliers from terminating their agreements based on the failure of PBDF to pay for goods, services or leased property supplied prior to 14 December 2021, **provided that payment is made going forward**. [See BIA, s. 65.1] In this case, the provision operates primarily for the benefit of RBC by preserving the “going concern” value of PBDF.
37. The inability of the Authority to exercise remedies under the Lease is premised on the *status quo* being maintained *vis-a-vis* the amount owing to the Authority and the Authority is entitled to be paid rent in accordance with the Lease from and after 14 December 2021 so that new debt will not accrue. [See *Cosgrove-Moore Bindery Services Ltd (Re)*, [2000 CanLII 22377](#) (ON SC), *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, [2010 BCCA 469](#) (CanLII) and *Quest University Canada (Re)*, [2020 BCSC 921](#) (CanLII)] In the context of the stay that arises under the BIA, the Courts have been clear that the failure of a (reorganizing) tenant to pay rent justifies the termination of a lease⁴. *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, [2010 BCCA 469](#) (CanLII) and *Durham Sports Barn Inc. (Re)*, [2020 ONSC 5938](#) (CanLII)
38. This Motion should not be necessary. In *Cosgrove-Moore Bindery Services Ltd (Re)*, the Court commented that a landlord such as the Authority should not be required to pursue lengthy and costly litigation to recover rent owing for a period where its right to enforce its remedies for non-payment of rent is suspended. [[2000 CanLII 22377](#) (ON SC), para 11] The Authority has, however, been forced to bring this Motion by the position taken by PBDF.

⁴ This is not a case where PBDF is paying rent as required and the Authority is seeking an Order that para 11 does not apply.

39. In order to successfully oppose the Authority's request for confirmation that para 11 is no longer applicable, PBDF will have to establish that: (a) the Lease has been amended to permit PBDF to pay percentage only rent; or (b) the Authority is under some other legal obligation to accept the payment of percentage only rent in satisfaction of PBDF's obligation under the Lease to pay rent. There is no evidence upon which the Court could reasonably conclude that this is the case.
40. There is no agreement that PBDF can pay percentage only rent. The only signed agreement that PBDF points to is the First Rent Deferral. That agreement provides for the deferral of rent for a fixed period that has long-since expired. The (unsigned) Second Rent Deferral, assuming that it is enforceable, also only provides for a rent deferral for a period that has long-since expired. Both the First Rent Deferral and the Second Rent Deferral contemplated that by now PBDF would be repaying back the deferred rent. **[Rienas 7 Sept 22 Affidavit, paras 7, 8 and 28]**

a. Para 11 does not Validate Defaults

41. PBDF appears to assert that because it had unilaterally begun, over the objection of the Authority, "short-paying" rent prior to 14 December 2021, para 11 of the Appointment Order allowed it to continue to "short-pay" rent. That argument is not tenable.
42. The terminology used in para 11 of the Appointment Order is "template" and is used in orders appointing receivers and interim receivers, and initial orders under the *Companies' Creditors Arrangement Act*.
43. The intention of para 11 is to balance the interests of RBC, and those of the Authority and PBDF's other suppliers by preserving the *status quo*—so long as no further amounts become owing, PBDF's suppliers are required to supply goods and services so that PBDF's business can be operated and value preserved for the benefit of RBC. Preserving the *status quo* does not involve validating PBDF's pre-appointment breach of its supply agreements such that further (unrecoverable) amounts will become owing to suppliers such as the Authority while RBC gets the benefit of the goods or services provided. The *quid pro quo* for RBC getting the benefit of the on-going supply of goods and services to PBDF despite the pre-14 December 2021 defaults by PBDF is that the suppliers will get paid. It is noteworthy that, notwithstanding that a large portion of its debt is likely *de facto* unsecured, it

appears that RBC has continued to be paid since 14 December 2021.

44. It simply cannot be the case that the phrase “***provided in each case 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***” are intended to permit a receiver or a debtor over whose assets a receiver has been appointed to continue to not pay or “short” pay trade creditors on the basis that prior to the appointment it had, with out the creditors’ agreement, not been paying to short paying the creditors. The provision differentiates between the amount to be paid and the means of payment. The provision refers to the “normal price or charges”—which refers to the contract price—being paid “in accordance with the normal payment practice or such other practices as may be agreed”—which refers to the means of payment as opposed to the amount to be paid.
45. If PBDF’s interpretation of para 11 is correct, then a supplier who was not being paid, or was being short-paid, by the debtor as at the date a receiver was appointed would be forced to continue to supply goods or services for the ultimate benefit of the secured creditor(s) without being paid or without being paid in full—the supplier would be subsidizing the secured creditor(s) recovery. That cannot have been what Justice Penny intended when he made the Appointment Order.

b. Other Justification for Percentage Only Rent

46. There appear to be various grounds upon which PBDF asserts that the Authority is legally obliged to accept percentage only rent. None of these grounds have any merit and most have been considered by the Court in the context of other (failed) attempts by tenants to avoid paying rent based on the financial impact of COVID.

Obligation to Consult

47. PBDF appears to assert that the Authority was obliged by Art 18.07 of the Lease to amend the Lease to provide for percentage only or reduced rent.

48. Article 18.07 says

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.

49. Article 18.07 does not oblige the Authority to agree to amend the Lease or cede to PBDF's demands, but to consult with PBDF. Any suggestion by Mr. Pearce's assertion that the Authority did not consult with PBDF is simply untrue. The evidence is clear that the Authority engaged in significant consultations with PBDF. [See Rienas 26 Nov 22 Affidavit, paras 15 to 28] PBDF has acknowledge those consultations in writing. [14 Jan 22 letter, Pearce 13 Nov 22 Affidavit Exhibit A]
50. The issue that has led to this Motion is that PBDF and its shareholders, using the Appointment Order as leverage, want the Authority to agree to: (a) a 75% rent abatement with no fixed terms for the repayment of the remaining rent arrears; and (b) to amend the lease to allow PBDF to pay percentage only rent for the foreseeable future—to re-allocate the risk that the duty free will not perform from PBDF and its shareholders to the Authority. Rather than balancing the impact of COVID on PBDF (and the Authority), PBDF and its shareholders want the Authority to absorb the bulk of the financial impact so that PBDF's shareholders do not have to provide financial support to PBDF.

Covenant to Act Reasonably

51. PBDF relies on Art 2.15 of the Lease [Pearce 13 Nov 22 Affidavit, para 21], which says

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.

52. In *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP* [2022 ONSC 5922 (CanLII)],

the Court dealt with an argument by Porter Airlines that a contractual obligation to act reasonably that was comparable to Art 2.15 obliged a counterparty to an agreement with Porter to reduce fees based on the impacts of COVID on Porter's business. The relevant agreement included a provision that was comparable to Art 2.15.

53. Leaving aside whether Art 2.15 is even applicable to a request by PBDF to amend the Lease⁵, there is no basis upon which the Court could reasonably find that the Authority has behaved in a commercially unreasonable manner. The Court would have to find that it is commercially unreasonable for the Authority to: (a) refuse to amend the Lease to re-assign the risk that PBDF will not perform financially from PBDF and its shareholders to the Authority; (b) expect that PBDF's shareholders—who have realized significant profits over the years that PBDF has operated the duty free—to financially support PBDF during difficult financial times; (c) offer PBDF a 50% rent abatement instead of the 75% abatement PBDF is demanding; (d) insist on a fixed plan for the repayment of the remaining deferred rent that is supported by a business plan; (e) request, in the circumstances, security or personal guarantees; and (f) refuse to mediate without PBDF having put forward a proposal supported by financial information.
54. What the Authority has offered to PBDF is commercially reasonable and the Authority has acted in a commercially reasonable manner by identifying clearly to PBDF what it is expecting and providing PBDF and its shareholders with ample time to develop a proposal. Refusing to amend the Lease to assume the risk that the duty free will not perform financially and requiring that PBDF's shareholder provide financial support to PBDF are commercially reasonable. What is not commercially reasonable is expecting the Authority to use its cash reserves to subsidize PBDF and its shareholders. It is worth noting that while PBDF asserts that it was (and is) unable to pay the minimum rent required by the Lease or comply with its obligations under the First Rent Deferral, it was able to provide RBC with additional cash collateral of \$850,000. **[See Order dated 23 March 2022, para 1(b)]**

⁵ The provision applies to the exercise of discretion, consents or approvals under the Lease.

Common Law Duty of Good Faith and Fair Dealing

55. PBDF implies that the Authority has not complied with its common law duty of good faith and fair dealing.
56. There is no basis upon which the Court could reasonable find that the Authority has acted contrary to community standards of honesty, reasonableness or fairness in its dealings with PBDF. [See **Arton Holdings Ltd. v. Gateway Realty Ltd.**, [1991 CanLII 2707](#) (NS SC) aff'd, [1992 NSCA 70](#) (CanLII)]
57. As noted in *Bahsin v. Hrynew* [\[2014 SCC 71\]](#) (CanLII):

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith....

[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 place 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. . . . 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. . . . 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....

*[73]....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.... (citations omitted) [Bhasin v. Hrynew, [2014 SCC 71](#) (CanLII), paras 65, 70 and 73. See also *C.M. Callow Inc. v. Zollinger*, [2020 SCC 45](#) (CanLII)]*

58. Most recently, in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* [\[2021 SCC 7\]](#) (CanLII)], the Supreme Court found:

[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...

[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....

[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...that exercise is best understood, as a general matter, to be insulated from judicial review as a matter of fairness....

*[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" As a general matter, good faith should not be used as a pretext for scrutinizing motive. (citations omitted) **[Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7 (CanLII), paras 4, 6, 70 and 73]***

59. In determining what it is prepared to agree in terms of providing financial assistance to PBDF, the Authority has demonstrated appropriate regard for PBDF's legitimate interests as a tenant and made reasonable—generous in fact—proposal(s) to PBDF. The fact that PBDF and its shareholders want more from the Authority so that PBDF's shareholders do not have to provide financial support does not give rise to breach by the Authority of any obligation to act in good faith or deal fairly with PBDF. As noted by the Supreme Court in *Wastech Services*, the Authority is not obliged to subordinate its own interest as a landlord to those of PBDF and accede to the demands of PBDF and its shareholder(s). **[Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District 2021 SCC 7 (CanLII), para 6]**
60. The Authority has never misled PBDF in its dealings with respect to the impact of COVID. In particular, the Authority has always been clear that it was not agreeing that PBDF could pay percentage only rent and repeatedly advised PBDF, in writing, of this fact. The Authority has done

nothing that would even suggest that it was accepting or acceding to PBDF's unilateral payment of percentage only rent.

61. The Authority cannot be faulted for not “negotiating with itself” or harassing PBDF to make a proposal. After repeatedly rejecting the same proposal by PBDF, on 30 December 2021, the Authority provided PBDF with the specific (reasonable) parameters for a proposal to address the impact of COVID. **[See Rienas 26 Nov 22 Affidavit, para 23]** The onus was then on PBDF to come back to the Authority with a proposal that fit within the parameters set by the Authority. There is no dispute that PBDF did not provide such a proposal and instead insisted that the Authority agree to mediation—mediation that PBDF insisted (and continued to insist) take place in a vacuum.
62. The Authority cannot be faulted for, relying on Art 2.17 of the Lease in providing voluntary accommodations to PBDF. The fact of the matter is that had the Authority acted immediately, PBDF would now be asserting that in doing so the Authority breached its duty of good faith and fair dealing by not giving PBDF and its shareholders a fair opportunity to present a proposal to the Authority.
63. Finally, the duty of good faith and fair dealing goes both ways. PBDF owed a duty to deal with the Authority in good faith and fairly. **[See 1117304 Ontario Inc. (Harvey's Restaurant) v. Cara Operations Limited, 2008 CanLII 56704 (ON SC)]** PBDF has clearly not acted in good faith or fairly with the Authority since at least 14 December 2021 and has taken advantage of the Authority's willingness to provide PBDF and its shareholders with an opportunity to develop a proposal to deal with the financial impact of COVID.
64. PBDF's strategy in terms of dealing with the Authority is clear from the e-mails from its lawyers to the Monitor and its lawyers:

Blaney is of the view that the court attendance should be deferred for 3-4 months (with the right to return it earlier ay any parties (sic) initiative to allows (sic) PBDF/MOT and FDFA initiatives to play out....This preserves the stay which is fundamental to a resolution of the tenancy issue. [9 Jun 2022 E-mail, Pearce Affidavit, Exhibit K]

The [Authority's] options are quite limited—either negotiate a [lease amending agreement] or attempt to obtain judicial authorization to terminate the lease when all stays expire. [10 Mar 2022 E-mail, Pearce Affidavit, Exhibit K]

65. It is clear that PBDF is using the stays included in the Appointment Order as leverage and a negotiating tool and improperly taking advantage of the Appointment Order.

Force Majeure/Art 18.8

66. PBDF implies that Art 18.8 of the Lease permits PBDF to unilaterally determine that it will base rent on a basis different than that provided for in the Lease and/or obliges the Authority to grant it a rent abatement.

67. Article 18.08 of the Lease says:

18.08 Unavoidable Delay

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

68. 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.

69. Comparable provisions in agreements and whether they were triggered by COVID are issues that have been considered. The reported cases do not support an argument by PBDF that it was somehow excused from paying the minimum rent required by the Lease.

70. There is no evidence that PBDF was legally required to close the duty free. The decision to close

the duty free was voluntary. **[See Rienas 26 Nov Affidavit, para 34]** In *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP* [\[2022 ONSC 5922 \(CanLII\)\]](#), the Court found that the fact that a company voluntarily ceased to carry on business during COVID for its own financial reasons does not trigger the force majeure clause in the applicable agreement.

71. Even if it was triggered, Art 18.08 of the Lease is not applicable to excuse PBDF from paying rent in accordance with the Lease. **[Braebury Development Corporation v. Gap (Canada) Inc., [2021 ONSC 6210 \(CanLII\)](#) and Windsor-Essex Catholic District School Board v. 231846 Ontario Limited, [2021 ONSC 3040 \(CanLII\)](#)]**

Accommodations are not Amendments

72. There is no dispute that, as an accommodation to PBDF, the Authority did not aggressively pursue its default remedies. However, any accommodation given by the Authority to PBDF was given in reliance on Art 2.17 of the Lease **[Rienas 7 Sept 22 Affidavit, para 29]** and the Authority repeatedly advised PBDF that it was not agreeing the PBDF could pay percentage only rent. **[Rienas 7 Sept 22 Affidavit, para 32, and Brief of Exhibit, Tab 8]**
73. As of at least June of 2022—immediately after the Provincial moratorium on the eviction of commercial tenants came to an end—PBDF was aware that the Authority was preserving its rights to seek to terminate the Lease and evict PBDF. **[E-mail of 9 June 2022, Pearce Affidavit, Exhibit K]**
74. On 26 July 2022 and 2 August 2022, the Authority specifically advised PBDF (and the Monitor) that it was taking issue with PBDF's failure to pay minimum rent as required by the Lease and the Appointment Order. **[Rienas 7 Sept 22 Affidavit, para 35 and 37, and Brief of Exhibits Tabs 9 and 10]**
75. Four (4) months have passed since the Authority advised PBDF that it was going to seek authority to enforce its remedies under the Lease based on the failure of PBDF to pay minimum rent. PBDF is still not paying the minimum rent, even though its monthly sales are in excess of \$1,300,000. **[Rienas 7 Sept 22 Affidavit, para 37 and Brief of Exhibit Tab 4]**

76. The Authority cannot be criticized for (voluntarily) giving PBDF time to make a proposal. Had the Authority taken aggressive steps to bring this Motion, it would have been criticized by RBC, the Monitor and PBDF for not providing PBDF and its shareholders with a reasonable time to develop a proposal to address the impact of COVID. Now, having given PBDF and its shareholders ample opportunity to develop a proposal - to no avail - the Authority is being criticized by at least PBDF for, essentially, not acting aggressively to exercise its rights based on the failure of PBDF to pay minimum rent as required by the Lease. The very purpose of Art 2.17 of the Lease is to provide the Authority with the ability to give PBDF "room" without prejudicing its rights under the Lease.

ii. Para 9 of the Appointment Order

77. Paragraph 9 of the Appointment Order says:

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.

78. Properly interpreted, the stay imposed by para 9 of the Appointment Order applies to the enforcement of creditor remedies as opposed to contractual remedies, which is addressed by para 11 of the Order.
79. Assuming, however, that para 9 is interpreted so imposing an additional restriction on the exercise by the Authority of its remedies under the Lease, there are proper grounds for the stay imposed by para 9 to be lifted.
80. There is no statutory test for lifting a stay imposed by para 9 of the Appointment Order. In comparable circumstances, the Courts have considered the totality of the circumstances and the relative prejudice. [See ***Industrial Alliance Insurance and Financial Services Inc. v Wedgemount Power Limited Partnership***, [2018 BCSC 723 \(CanLII\)](#)] The Courts have also referred to s. 69.4 of the BIA. Under s. 69.4, the Bankruptcy Court is required to consider: (a) whether the party seeking relief will suffer material (objective) prejudice by the continued operation of the stay; or (b) there are

other equitable grounds for granting the requested relief. [*Alberta Energy Regulator v Lexin Resources Ltd.*, [2019 ABQB 23](#) (CanLII), *Saskatchewan Immigrant Investor Fund Inc. v Windermere Properties Ltd.*, [2019 SKQB 153](#) (CanLII) and BIA, s. 69.4]

81. Assuming that para 9 is applicable, to obtain an order lifting the stay imposed by that paragraph, the Authority must establish that: (a) it will be treated differently or some way unfairly; or (b) will suffer worse harm than other creditors if the stay is not lifted to permit the exercise of its remedies under the Lease. *Alberta Energy Regulator v Lexin Resources Ltd.*, 2019 ABQB 23 and *Saskatchewan Immigrant Investor Fund Inc. v Windermere Properties Ltd.*, 2019 SKQB 153 (CanLII)
82. Assuming that the minimum rent required by the Lease is payable, there is clear prejudice to the Authority based on the fact that PBDF continues to pay percentage only rent. The Authority has no security. As at 14 December 2021, the Authority was owed in excess of \$7,000,000. That debt is very likely unrecoverable. [See *Pearce 13 Nov 22 Affidavit*, para 102] Since 14 December 2021, a further over \$1,200,000 in rent has become owing as a result of the failure of PBDF to pay the minimum rent required by the Lease. [See *Brief of Exhibits*, Tab 4 and (current) *Rent Ledger to be provided*⁶] This further debt is also very likely unrecoverable. Each month that goes by the amount of (unrecoverable) debt owing to the Authority increases.
83. While PBDF may argue that the Authority has significant financial reserves, those reserves are not for the purpose of providing financial support to the Authority's tenants or the shareholders of PBDF. The Authority's cash reserves are for the purpose of maintaining the Peace Bridge. Moreover, while it has significant cash reserves, the Authority also has significant debt. [*Rienas 26 Nov 22 Affidavit*, para 35]
84. In terms of the impact on other parties, RBC's interests may very well be impacted should the Lease be terminated. However, the lease very likely has no economic value to RBC. In order to "force" the assignment of the Lease to the purchaser, RBC would be required to "cure" the monetary defaults under the Lease. Moreover, for almost a year, RBC has financially benefited from PBDF not paying

⁶ There is no dispute as to the amount PBDF is paying to the Authority.

the minimum rent required by the Lease. RBC has not had to advance further money to PBDF to allow it to pay rent to the Authority⁷. While RBC cannot be faulted for taking advantage of the situation, it cannot, in the circumstances, come before the Court to object to the relief being sought by the Authority on the basis that it will be prejudiced if the Lease is terminated.

85. In this case, the equities also favour lifting the stay. The Appointment Order stayed the Authority from exercising its remedies under the Lease to preserve the *status quo* and based on the specific condition that PBDF would pay rent as required by the Lease so that no further amounts became owing to the Authority. PBDF did not do that. Instead, PBDF and its shareholders relied on the Appointment Order, the Provincial moratorium on the eviction of commercial tenants and the voluntary indulgences granted to it by the Authority to unilaterally and over the object of the Authority pay reduced rent so that PBDF's shareholders would not have to provide financial support to PBDF.

F. Rights under the *Commercial Tenancies Act*

86. In response to any steps by the Authority to terminate the lease and retake possession, PBDF can: (a) bring an application requesting relief from forfeiture [**CTA, s. 20(1)**]; and/or (b) pay into court the arrears of rent and costs. [**CTA, s 20(4)**]
87. A tenant seeking relief from forfeiture must convince the court that it would be inequitable in the circumstances to permit the landlord to exercise its rights under the lease, terminate the lease and take possession of the property. Relief from forfeiture is granted sparingly. [***Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, [2022 ONCA 585](#) (CanLII), para 35]**
88. In determining whether to exercise its discretion to grant relief from forfeiture, the court must consider several factors: (a) the conduct of the tenant and whether it was willful; (b) the gravity of the breach; and (c) the disparity between the value of the property forfeited and the damage caused by the breach. [**See *Durham Sports Barn Inc. (Re)*, [2020 ONSC 5938](#) (CanLII), para 39 and *G5 Events***

⁷ The Authority believes that RBC has been at least kept current since 14 December 2022.

***Inc. v. 2748355 Canada Inc.*, [2022 ONSC 5389](#) (CanLII), para 79]**

89. In *Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, the Court of Appeal considered the extent to which the remedy of relief from forfeiture, and in particular s. 20 of the CTA, can be used to allocate the economic pain arising out of the pandemic between commercial tenants and their landlords. The Court of Appeal found that: (a) relief from forfeiture does not contemplate a recalibration of existing rights and obligations under a lease on a go forward basis to reflect what the Court sees as a fair arrangement in light of unforeseen developments such as the COVID pandemic; (b) nothing in s. 20 of the CTA empowers the court to create what the court regards as a fair lease for the parties; and (c) 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". **[*Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, [2022 ONCA 585](#) (CanLII), para 42]**
90. Subsection 20(1) of the CTA does not contemplate rent reductions or abatements as terms of an order granting relief from forfeiture. 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. 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. **[*Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, [2022 ONCA 585](#) (CanLII), paras 43 and 45]** Moreover, PBDF's deliberate refusal to pay rent effectively precludes any relief from forfeiture. **[*1383421 Ontario Inc. v. Ole Miss Place Inc.*, [2003 CanLII 57436](#) (ON CA) and *Ross v. T. Eaton Co.*, [1992 CanLII 7470](#) (ON CA). See also *G5 Events Inc. v. 2748355 Canada Inc.*, [2022 ONSC 5389](#) (CanLII)]**

G. PBDF Cross-Motion is Improper

91. On 6 October 2022, Justice Kimmell was advised that PBDF disputed the proper interpretation of the Lease and the Authority's calculation of the rent payable. Her Honour directed that PBDF could bring a Cross-Motion seeking a declaration regarding the rent owing under the Lease. **[6 Oct 22 Endorsement, para 3]**

92. PBDF ultimately served its Cross-Motion over a month later, on 13 November 2022. Based on the Pearce 13 Nov 22 Affidavit, which was filed in support of the Cross-Motion, it is clear that PBDF is not really taking issue with the interpretation of the Lease or the Authority's calculation of the minimum rent payable by PBDF under the Lease, but is trying to delay the Authority from exercising its remedies while the amount of the unpaid rent continues to grow. Based on the Cross-Motion, PBDF sought to have the Authority's Motion re-scheduled based on the issues that it raised on the "Cross-Motion". **[See PBDF Aide Memoire dated 25 November 2022]**
93. PBDF's Cross-Motion seeks substantive relief, including damages, against the Authority in an Application where the Authority is not an Applicant or a Respondent and in which no relief is being sought against the Authority—the Application seeks only the appointment of a receiver of PBDF.
94. The Authority was required to bring this Motion because the Appointment Order impacts the Authority's ability to exercise its remedies under the Lease. The fact that the Authority has been stayed in the context of an Application brought by RBC cannot be the basis for PBDF to bring a Motion seeking a substantive remedy against the Authority.
95. If it believes that it has a cause of action against the Authority or there is a legitimate issue with respect to the right of the Authority to exercise its remedies, PBDF's remedies lie outside of this Application and under the CTA.

H. Request by RBC

96. RBC wants to have a "full blown" receiver appointed over PBDF's assets and property so that it can enforce its security and try to recover what is owing to it by PBDF.
97. The Authority does not object to RBC exercising its rights as a secured creditor, so long as it is clear that the appointment of that receiver does not prevent the Authority from exercising its remedies under the Lease unless: (a) the minimum rent owing from 14 December 2021 is paid; or (b) the Authority is provided first-priority security to secure the rent owing from 14 December 2021. It goes without saying that if RBC appoints a receiver and the receiver wishes to occupy the duty free, that receiver will be required to pay to the Authority the rent required by the Lease.

98. There is no dispute that PBDF's assets are not sufficient to satisfy the secured debt owing to RBC.
[Pearce 13 Nov 22 Affidavit, para 212]

I. Summary

99. There is no dispute that the Lease provides for the payment of minimum rent of \$333,333 per month and that PBDF has not been paying this minimum rent. There is no basis for a finding that the Authority is obliged to accept less than the minimum rent required by the Lease.
100. The (unrecoverable) debt owing by PBDF is increasing monthly—by over \$1,200,000 since 14 December 2021—while PBDF's shareholders “wait in the wings” and provide no financial support, despite that PBDF is clearly generating sufficient sales to pay rent as required by the Lease.
101. For its part, RBC is, quite understandably, content to sit by while PBDF short-pays rent to the Authority so long as: (a) PBDF services its secured debt; and (b) RBC will not bear the burden of PBDF short-paying rent.

PART III—ORDER REQUESTED

102. The Authority respectfully requests:

(a) Order:

- (i) declaring that the Authority is no longer bound by the restriction imposed by the restriction in para 11 of the Appointment Order; or, in the alternative,
- (ii) lifting the stay imposed by para 9 of the Appointment Order; or, in the further alternative,

- (iii) requiring that PBDF pay, within 10 business days, all rent payable in accordance with the Lease since 14 December 2021 and account for all subsidies received by PBDF since 14 December 2021, without prejudice to the Authority's rights in connection with rent owing by PBDF for the period prior to 14 December 2021;
- (b) an Order dismissing PBDF's Cross-Motion;
- (c) if an Order is made appointing a receiver over the duty free, that the Order: (i) not restrict the Authority's remedies as against PBDF unless the Authority: (i) is paid the minimum rent owing from 14 December 2022 onwards; or (ii) is provided with a charge ranking in priority to RBC to secure the minimum rent owing from 14 December 2022 onwards; and
- (d) costs from PBDF on a complete indemnity basis to be paid in priority to RBC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November 2022.

E. Patrick Shea

E. Patrick Shea
GOWLING WLG (CANADA) LLP
Lawyers for Buffalo and Fort Erie Public Bridge Authority

SCHEDULE A

Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., 2022 ONCA 585 (CanLII)

Al-Waleed Salon Inc. v. Amiri, 2022 ONSC 5607 (CanLII)

Green Solutions Industries International Inc. v Clarke Holdings (London) Inc., 2022 ONSC 1505 (CanLII)

Cooper v. The Laundry Lounge, Inc., 2019 ONSC 3216 (CanLII) aff'd, 2020 ONCA 166 (CanLII)

100 Bloor Street West Corp. v. Barry's BootCamp, 2022 ONSC 5054 (CanLII)

G5 Events Inc. v. 2748355 Canada Inc., 2022 ONSC 5389 (CanLII)

Cosgrove-Moore Bindery Services Ltd (Re), 2000 CanLII 22377 (ON SC)

Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd., 2010 BCCA 469 (CanLII)

Quest University Canada (Re), 2020 BCSC 921 (CanLII)]

Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd., 2010 BCCA 469 (CanLII)

Durham Sports Barn Inc. (Re), 2020 ONSC 5938 (CanLII)

Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP, 2022 ONSC 5922 (CanLII)

Arton Holdings Ltd. v. Gateway Realty Ltd., 1991 CanLII 2707 (NS SC) aff'd 1992 NSCA 70 (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)

1117304 Ontario Inc. (Harvey's Restaurant) v. Cara Operations Limited, 2008 CanLII 56704 (ON SC)

Braebury Development Corporation v. Gap (Canada) Inc., 2021 ONSC 6210 (CanLII)

Windsor-Essex Catholic District School Board v. 231846 Ontario Limited, 2021 ONSC 3040 (CanLII)]

Industrial Alliance Insurance and Financial Services Inc. v Wedgemount Power Limited Partnership, 2018 BCSC 723 (CanLII)

Alberta Energy Regulator v Lexin Resources Ltd., 2019 ABQB 23 (CanLII)

Saskatchewan Immigrant Investor Fund Inc. v Windermere Properties Ltd., 2019 SKQB 153 (CanLII)

1383421 Ontario Inc. v. Ole Miss Place Inc., 2003 CanLII 57436 (ON CA)

Ross v. T. Eaton Co., 1992 CanLII 7470 (ON CA)

SCHEDULE B

Bankruptcy and Insolvency Act, RSC 1985, c B-3

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

- (a) the insolvent person is insolvent; or
- (b) a notice of intention or a proposal has been filed in respect of the insolvent person.

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

- “(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed.”

...

- (4) Nothing in subsections (1) to (3) shall be construed
 - (a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed;
 - (b) as requiring the further advance of money or credit; or
 - (c) [Repealed]

...

(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

...

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate

in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

...

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

...

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

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.

...

38 (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the person who is assignee, liquidator or trustee for the period of the person's occupation.

(2) Despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the person who is assignee, liquidator or trustee may at any time within three months thereafter for the purposes of the trust estate and before the person has given notice of intention to surrender possession or disclaim, by notice in writing elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by the lease or agreement, and the person may, upon payment to the landlord of all arrears of rent, assign the lease with rights of renewal, if any, to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who on application of the assignee, liquidator or trustee, is approved by a judge of the Superior Court of Justice as a person fit and proper to be put in possession of the leased premises.

...

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.

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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