Court of Appeal File No.: COA-23-CV-1355
Court File No. CV-21-00673084-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent
(Appellant)

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 PEACE BRIDGE DUTY FREE INC.

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FACTUM

PART 1 - STATEMENT

1. This is an appeal from the Order of the Honourable Madam Justice Kimmel ("**Motion Judge**"), dated December 15, 2023 ("**Order**"), dismissing Peace Bridge Duty Free Inc.'s ("**Appellant**") Cross-Motion seeking a determination that subsection 18.07 of the Lease (defined below) was engaged due to Covid-19 and associated Border Restrictions (defined below) determining whether any Base Rent was due and payable under the Lease, and if so a determination of the amount owing during the period of the tenancy affected by the Border Restrictions.

2. The issues for determination in this appeal are whether the Motion Judge erred by:

(a) failing to give effect to her own conclusion that the Base Rent abatement was warranted;

(b) failing to properly apply the law of contract interpretation;

(c) failing to properly consider the factual matrix; and

(d) failing to properly apply the duty of good faith in performance of the Lease;

3. The Appellant submits that the Motion Judge failed to properly interpret the Lease and failed to determine the amount of Base Rent payable under the Lease in light of the acknowledgment by both parties that at least a partial abatement of Base Rent was appropriate in the circumstances. The Appellant asks that the Order be set aside and an Order granted as set out in the Notice of Appeal.

PART II – OVERVIEW

4. The key issue on this appeal is that the Motion Judge and the Respondent both agree with the Appellant that subsection 18.07 of the Lease was engaged by changes in applicable law (as defined in the lease, hereinafter "**Applicable Law**"), and that the appropriate application of that provision in these circumstances requires a significant Base Rent abatement. However, no rent has actually been abated by the Respondent and the Motion Judge did not grant a remedy consistent with her finding that an adjustment to Base Rent was warranted.

5. The Appellant, whose duty-free shop business was devastated by the COVID-19 pandemic the "**pandemic**"), and associated travel restrictions, many of which were enacted by the Respondent's stakeholders, saw its revenues reduced to nothing overnight through no fault of its

own. It was forced to close for 18 months, and had no revenues to pay it's $4 million annual Base Rent under the Lease. It also had to endure "aggressive", "hardball" tactics from its quasi-government landlord, the Respondent, including unreasonable demands for payments of large sums that the Respondent knew could not be made, unlawful threats of lease termination, and intentionally causing a receivership proceeding, among other issues.

6. The Appellant had foresight to include section 18.07 in the Lease as a "safety valve" to protect itself from the changes in government regulation. However, the Respondent took the opportunity created by laws enacted by its stakeholders to advance its own self interest at the expense of the Appellant.

7. The Motion Judge recognized some but not all of these issues and agreed with the Appellant that an abatement of Base Rent was appropriate, but disagreed with the Appellant on the quantum. Ultimately, the Motion Judge declined to grant a remedy, and as a result there is an injustice that the Appellant is asking this Court to remedy.

PART III - FACTS

Parties

8. The Appellant has operated a duty-free shop from 1 Peace Bridge Plaza, Fort Erie, Ontario ("**Leased Premises**")[1] as a tenant of the Respondent since 1986.[2] Prior to the pandemic, the duty-free store was typically open 24 hours a day and 365 days a year. The business employed

[1] Appellant's Exhibit Book [**AEB**] Tab 1, Affidavit of Jim Pearce dated December 12, 2021 ("**Pearce December 2021 Affidavit**") at para. 5.
[2] *Ibid*.

approximately 90 staff that all live locally.[3] Appellant owed no monies to the Authority and during its time in business has been a faithful and dependable tenant.

9. The Respondent is an international entity created by the State of New York and the Government of Canada. It is governed by a 10-member Board of Directors consisting of five members from New York State and five members from Canada appointed by the Governor-in-Council as recommended by the Minister of Transport.[4]

10. The Canadian and New York State governments are equal stakeholders in the Respondent, and are also responsible for many of the Applicable Laws, including U.S.-Canada emergency border restriction legislation and related regulations that impacted the Peace Bridge border crossing ("**Border Restrictions**")[5], that caused material adverse effects to the Appellant's business. The assets of the Authority will eventually revert to the Canadian and New York governments.[6]

The Lease

11. The most recent lease was signed following a request for proposal ("**RFP**") process and dated July 28th, 2016 ("**Lease**"). It is for a fifteen (15) year term commencing November 1st, 2016 and ending October 31st, 2031, with an option to extend for an additional five (5) years through 2036.[7]

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[3] *Ibid* at para. 11.
[4] *Ibid* at para. 7.
[5] See Schedule 1 of this Factum.
[6] **AEB**, Tab 2, Affidavit of Jim Pearce dated November 13, 2022 Affidavit ("**Pearce November 2022 Affidavit**") at para. 15.
[7] **AEB**, Tab 3, Exhibit "A" to Pearce December 2021 Affidavit, 2016 Lease.

12. In the RFP process, the Respondent provided applicants with historical traffic data and annual duty-free sales volumes during the past five (5) years that were $20,000,000 - $25,000,000, upon which to base their bids.[8]

13. In the RFP, the Appellant offered to pay Base Rent, Percentage Rent and Additional Rent based on having the exclusive right, through the existing regulatory framework, to sell duty-free products to eligible travellers on the Canadian side of the Peace Bridge border crossing. The amount payable for Base Rent and Percentage Rent can generally be described as 20% of sales with a floor of $4,000,000. The Appellant's proposed Rent was largely based on traffic volumes provided by the Authority noted above.[9]

Subsection 18.07 of the Lease

14. The RFP contemplated a 30-day period to negotiate the final Lease terms. Subsection 18.07 was added during these negotiations as a "safety valve"[10] to address the Appellant's vulnerability to unanticipated changes in laws.

15. Pursuant to subsection 18.07 of the Lease the Respondent agreed:

> **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 Premiers, the **Respondent agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease**. [emphasis added]

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[8] **AEB**, Tab 4, Affidavit of Ben Mills sworn January 1st, 2023 ("**Mills Affidavit**") at Exhibit "B", Historical Traffic Information.
[9] **AEB**, Tab 1, Pearce December 2021 Affidavit, paras. 17-19; Exhibit "A"; **AEB**, Tab 3, Exhibit "A" to Pearce December 2021 Affidavit, 2016 Lease.
[10] Appeal Book and Compendium [**ABC**] at Tab 3, Decision of Justice Kimmel dated December 15, 2023 ("**Reasons**") at para. 48.

16. The Respondent, in addition to its duties of good faith and honest performance, has a contractual obligation pursuant to subsection 2.15 of the Lease to act reasonably in exercising any discretion in respect of how the Applicable Laws impact the Lease.

Factual matrix regarding 18.07 of the Lease

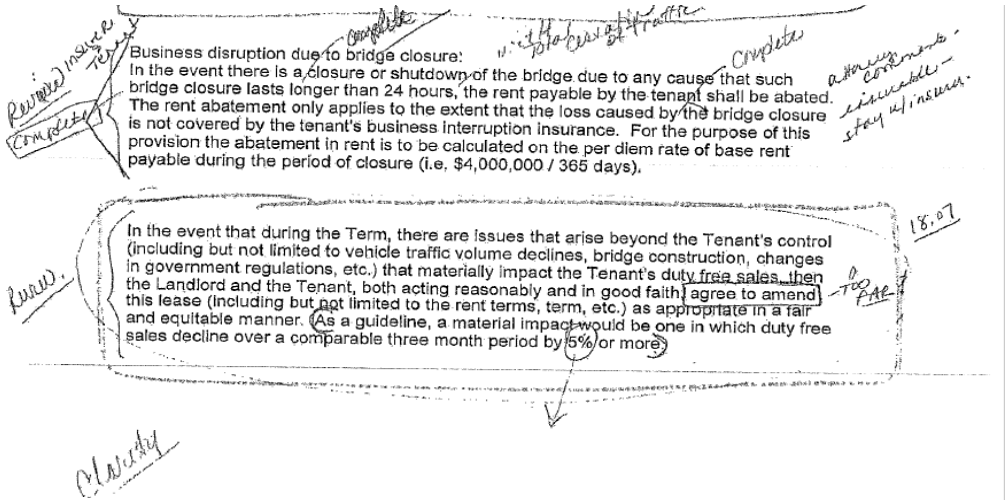
17. The Appellant was concerned about events beyond its control impacting sales and its ability to generate sufficient sales to pay rent. In particular, the Appellant's concerns, made known in the lease negotiations, were: (1) changes impacting the sale of tobacco; (2) changes impacting the sale of alcohol; (3) changes impacting volume of traffic over the Peace Bridge; and (4) construction on or impacting the bridge which would impact the volume of traffic flow.[11]

18. The Respondent accepted the concerns about changes in regulations as reasonable and added, subsection 18.07 to the form of lease on or around July 13th, 2016. By way of comparison, the Appellant also sought to include rent abatements for contribution and general declines in annual vehicle traffic volume. The Respondent was not receptive to providing relief for those issues in the Lease.[12]

19. On July 18th, 2016, Jim Pearce and Karen Costa, the Respondent's Chief Financial Officer, met to discuss outstanding issues regarding the draft Lease. One of the issues addressed at that meeting was the Appellant's concern that if something occurred during the term of the Lease that was beyond the Appellant's control and that materially impacted sales, the Appellant would need an abatement of Rent, and potentially other terms of the Lease to be addressed as well, otherwise

[11] **AEB**, Tab 5, Supplementary Affidavit of Jim Pearce dated February 13, 2023 ("**Pearce February 2023 Affidavit**"), at para. 6.
[12] **AEB**, Tab 6, Mills Affidavit, paras 9-10; **AEB**, Tab 7, Transcript of cross-examination of Ben Mills dated August 17, 2023 ("**Mills Transcript**") p.32-33, q. 90-98; **AEB**, Tab 8, Exhibit 1 to Mills Transcript.

there would be no way that the Appellant would be able to pay minimum Base Rent.[13] Mr. Pearce provided a handout at the meeting, with respect to the Appellant's concern that Ms. Costa marked up in part:[14]


Business disruption due to bridge closure:
In the event there is a closure or shutdown of the bridge due to any cause that such bridge closure lasts longer than 24 hours, the rent payable by the tenant shall be abated. The rent abatement only applies to the extent that the loss caused by the bridge closure is not covered by the tenant's business interruption insurance. For the purpose of this provision the abatement in rent is to be calculated on the per diem rate of base rent payable during the period of closure (i.e. $4,000,000 / 365 days).

In the event that during the Term, there are issues that arise 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 amend this lease (including but not limited to the rent terms, term, etc.) as appropriate in a fair and equitable manner. (As a guideline, a material impact would be one in which duty free sales decline over a comparable three month period by 5% or more)

20. During the meeting, Ms. Costa conveyed to Mr. Pearce that while the Respondent understood the concerns raised by the Tenant, it did not want the language of the Lease to expressly provide for a formulaic rent abatement because it was concerned that such an express contractual right might prejudice the ability to successfully make a business interruption claim. The Respondent did not object to the need for a rent abatement to address regulatory changes in the appropriate circumstances.[15] The parties left the details of how the Lease would be adjusted to be determined as circumstances required based on the impact to the Lease of future unknown events.

21. Ms. Costa emailed Mr. Pearce the next day confirming that changes in government regulations were events that could materially impact the Appellant's business. She expressly

[13] **AEB**, Tab 5, Pearce February 2023 Affidavit, at para. 7.
[14] **AEB**, Tab 9, Respondent's Disclosure Brief ("**LDB**") at p.448; **AEB**, Tab 10, Transcript of Examination of Karen Costa dated May 30th, 2023 ("**Costa Transcript"**), q. 134, 159.
[15] **AEB**, Tab 5, Pearce February 2023 Affidavit, at para. 8.

acknowledged on behalf of the Respondent that subsection 18.07 of the Lease, which was added in an earlier draft, was intended by the Respondent to address the Appellant's need for a rent abatement in appropriate circumstances as discussed during the July 18th, 2016 meeting.[16] Ms. Costa wrote:

> Lease discussion in the event of a catastrophic event - we reviewed the examples listed as catastrophic. **We agree that changes in governmental regulations could materially impact the business and have added section 18.07 to the lease.** All other events listed were are (sic) routine events at a border crossing. [emphasis added][17]

22. Ms. Costa confirmed 18.07 was the answer to Mr. Pearce's July 18th, 2016 request.[18]

23. Given the lengthy landlord-tenant relationship, and their generally good relationship, the Appellant had no concerns about taking Ms. Costa (on behalf of the Respondent) at her word.[19]

Impact of the Pandemic and Changes in Applicable Laws on the Appellant's Business

24. Virtually all Canadian duty-free stores closed due to the pandemic Border Restrictions.[20] The land border closed March 21st, 2020 for all non-essential travel. The Appellant's retail store closed the same day, and partially reopened on September 19th, 2021 (the "**Closure Period**").[21] Within days of the border closure, the Appellant invoked subsection 18.07 of the Lease.[22] The Appellant stopped making payments to shareholders at the onset of the pandemic.[23]

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[16] *Ibid* at para.10.
[17] **AEB**, Tab 11 at Exhibit "C", Email from Costa dated July 19, 2016.
[18] **AEB**, Tab 10, Costa Transcript, p. 47, q. 185.
[19] **AEB**, Tab 5, Pearce February 2023 Affidavit, at para 9.
[20] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para 90; **AEB**, Tab 12, Pearce November 2022 Affidavit, at Exhibit "X", Letter from Tony Baldinelli to Deputy Prime Minister Crystia Freedland dated April 1st, 2022.
[21] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para. 11.
[22] **AEB**, Tab 5, Pearce February 2023 Affidavit, at para. 19; **AEB**, Tab 13, Pearce February 2023 Affidavit at Exhibit "F".
[23] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para.50.

25. Canada reopened its land border to fully vaccinated Americans on August 9th, 2021, and the United States re-opened its border to fully vaccinated Canadian travellers on November 8th, 2021.[24] Even then, significant impediments to travel and Border Restrictions continued. The final Border Restriction, which was the requirement for travellers into the United States to be fully vaccinated, was lifted effective May 11th, 2023.[25]

26. During the border closure, traffic crossing the Peace Bridge was reduced to almost nothing, particularly private vehicles and tour busses that are the Appellant's primary customers.[26] The essential workers who were crossing the Canadian side of the border were daily crossers and did not have any duty-free allowance.[27]

The Appellant's Rental Payments

27. The Appellant applied for every government program in respect of commercial rent assistance available to it for the benefit of the Respondent, and paid all sums received to the Respondent as rent.[28] However, the rental assistance programs available to the Appellant as a percentage of full contract rent was a small fraction of that available to other commercial businesses.[29]

28. Throughout the pandemic the Appellant paid all Additional Rent to the Respondent, in the sum of approximately $10,800 per month, including during the Closure Period.[30] Since reopening its retail store, the Appellant has in good faith paid the Respondent Additional Rent and the greater

[24] **AEB**, Tab 1, Pearce December 2021 Affidavit, at para. 12.
[25] **AEB**, Tab 14, Transcript of cross-examination of Ron Rienas dated August 23, 2023 ("**Rienas Transcrip**t"), p.102, q. 320.
[26] **AEB**, Tab 2, Pearce November 2022 Affidavit, para. 45.
[27] Pearce Reply Affidavit December 2022, Tenant's RMR, Tab 1, para. 30.
[28] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para. 43.
[29] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para. 37.
[30] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para. 52.

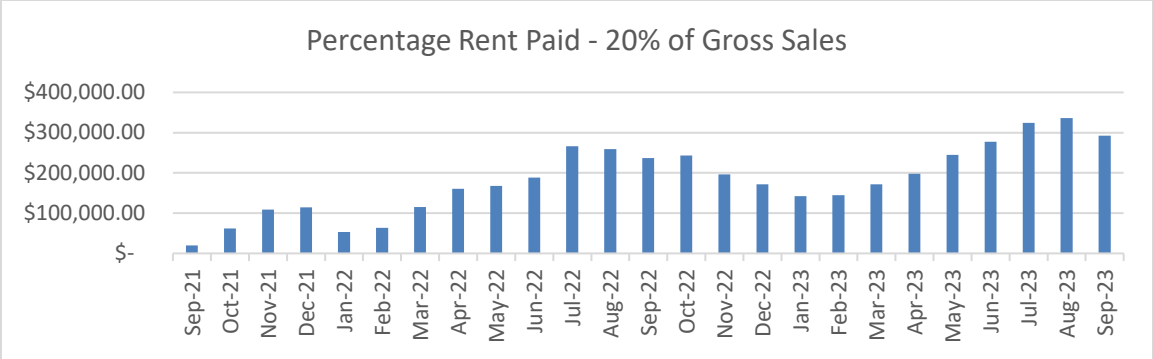
of all pandemic related rent assistance it was eligible for and received or 20% of its monthly Gross Sales ("**Normal Rent**"). In addition, at the demand of the Respondent, in or about July 2022, the Appellant paid HST on 100% of Base Rent, $43,000 per month from April 2020, resulting in an HST overpayment.[31]

29. Even by adjusting the Appellant's rental payments to Normal Rent, it sustained a pre-tax net loss of $1,120,627 from 2020 to the end of 2022, while paying the Respondent $3,428,640 in Base Rent during that period.[32] In contrast, the Appellant would have pre-tax losses totalling $10.2 million in the absence of an adjustment to minimum Base Rent.[33]

30. The Respondent for its part also had a decline in income. However, its revenues have continued to exceed its expenses each year during the pandemic, largely because its main income, tolls from commercial trucks, was relatively unimpacted by the pandemic after the initial wave.[34]

31. As anticipated, as the Border Restrictions were eased and travel slowly increased, the Appellant sales increased allowing it to pay more Base Rent as shown below (excluding the top up to reach $333,333.33 per month since May 2023).

[31] **AEB**, Tab 2, Pearce November 2022 Affidavit, at para. 54.
[32] **AEB**, Tab 15, Affidavit of Ephraim Stulberg dated September 26, 2023, August 16, 2023 Report ("**MDD Report**") at Schedule 1a., p. 2 of 15 and Schedule 4, p. 7 of 15.
[33] **AEB**, Tab 15, MDD Report, p. 10 of 17, para. 41.
[34] **AEB**, Tab 15, MDD report, p. 10 of 17, para. 44.



Both sides acknowledged that a rent abatement is reasonable and necessary but have not reached agreement on quantum of the abatement

32. Until a May 2023 consent Court Order that adjusted Base Rent, the Appellant paid Normal Rent. For the 18 months the store was closed, the Adverse Effect on the Tenant's business was 100%. There were no sales, and therefore, the amount of rent paid in respect of this period was full Additional Rent and government subsidies, but no Percentage Rent (20% of zero sales is zero).

33. The Respondent acknowledged the pandemic materially impacted the business and a significant rent abatement was reasonable and appropriate, not only for past rent, but future rent moving forward.[35] The Respondent also acknowledged the magnitude of the adverse impact on the Appellant's business must influence the appropriate level of relief in response to changes in Applicable Laws.[36]

34. The Respondent did not actually grant any rent abatement. The parties exchanged proposals in the fall of 2021. The immediate payment of substantial back rent demanded by the Respondent was problematic. The offers contained minimum Base Rent step ups beginning at $2.5 million in the 2022 Lease year up to $4 million.[37]As the impact of the pandemic continued and the parties

[35] **AEB**, Tab 14, Rienas Transcript, p. 129, q. 419., p.191, q.609, p.194, q.623
[36] **AEB**, Tab 16, Transcript of examination of Tim Clutterbuck dated May 30, 2023 ("**Clutterbuck Transcript**"), p.95, q. 238; p.104-105, q. 275.
[37] **AEB,** Tab 17, Exhibit 1.3 to the cross-examination of Jim Pearce dated March 31, 2023

understanding of the impact to the business improved, the parties subsequently identified that the 2021 Lease year beginning November 1st, 2021 would have minimum Base Rent of $2 million in subsequent proposals[38] with step-ups to return to full Base Rent[39] as follows:

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

35. For the period of November 1st, 2021 to October 31st, 2022 the Appellant paid Percentage Rent in the amount of $1,977,217 (there was also an upward sales adjustment of $2,119), plus a further government subsidy payment of $16,412 for that period,[40] which is essentially $2 million. In the Lease year ending October 31st, 2023, the Tenant was on pace to overpay the minimum Base Rent of $2.5 million.

Respondent's capricious and arbitrary treatment of the Appellant leading to Court intervention

36. The Respondent's actions towards the Appellant in this dispute have been unreasonable, capricious and designed to cause the Appellant's business to fail. The reasons for this have not been made clear, but there is a clear problematic pattern of such actions.

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[38] **AEB,** Tab 18, Transcript of Ephraim Stulberg dated September 29th, 2023, Exhibit 3.
[39] *Note*: Full Rent is deemed to be the amount of Base Rent that would be due under the Lease with no adjustment or consideration of section 18.07. It would be the Base Rent payable in the absence of the pandemic.
[40] **AEB,** Tab 19, Pearce November 2022 Affidavit, Exhibit D; **AEB,** Tab 5, Pearce February 2023 Affidavit, para. 25; **AEB,** Tab 20, Pearce February 2023 Affidavit, Exhibit I.

37. Despite the pandemic and border closures, the Respondent initially demanded full rent.[41] It then demanded the Appellant sign a rent deferral ("**First Rent Deferral**"), without entertaining any negotiation of the terms, under threat of formal Lease enforcement.[42]

38. Pursuant to paragraph 2.1(a) of the First Rent Deferral, the Lease was amended to allow the Respondent to remain closed until the restrictions on non-essential travel between Canada and the United States were lifted.[43]

39. The Respondent then insisted that the Appellant accept a second rent deferral ("**Second Rent Deferral**") (that also approved the store would remain closed) in November 2020, only to purport to back out of that agreement itself.[44]

40. The Respondent's General Manager acted on his own personal initiative[45] after the board approved the Second Rent Deferral to steer the board away from a reasonable resolution, opting instead to attempt to use the Appellant's vulnerability to changes in Applicable Laws to make demands for payment (for example $1 million within 10 days during the period the Second Rent Deferral[46]) it knew could not be performed along with asking for guarantees it was not entitled to in order to access shareholder assets.[47]

41. When that attempt to terminate the tenancy failed, the Respondent sent a notice of monetary default to the Appellant on September 8th, 2021, demanding payment of $5,931,389.00 within 9

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[41] **AEB**, Tab 5, Pearce February 2023 Affidavit, paras. 15-18.
[42] **AEB**, Tab 1, Pearce December 2021 Affidavit, para. 24; **AEB**, Tab 21, Pearce December 2021 Affidavit, at Exhibit "B"; **AEB**, Tab 5, Pearce February 2023 Affidavit; **AEB**, Tab 22, Transcript of cross-examination of Jim Pearce held August 31, 2023 ("**Pearce Transcript**"), Exhibit 1.2.
[43] *Ibid*, **AEB**, Tab 22.
[44] **AEB**, Tab 23, Pearce Transcript, Exhibit 1.2.
[45] **AEB**, Tab 14, Rienas Transcript at p. 78, q.241.
[46] **AEB**, Tab 32, Rienas Transcript, Exhibit 7.
[47] **AEB**, Tab 14, Rienas Transcript at p. 86, q. 265; **AEB**, Tab 1, Pearce December 2021 Affidavit, para. 16.

days under threat of Lease termination. The notice was sent notwithstanding the Respondent's knowledge of the Ontario eviction moratorium expressly prohibiting such action.[48]

42. A notice of alleged non-monetary defaults was delivered the same day demanding an additional $1.2 million dollars, plus $10,000 of legal expenses within 14 days (for a total of $7.1 million) between the two notices while the border remained closed for Canadian's travelling to the U.S., which is the direction the Appellant services). The purported defaults related to replenishing a letter of credit (that the Appellant restored); not continuously operating; and closing for 10 consecutive days without Respondent consent, despite the Respondent consenting to the store remaining closed in the Lease amendment set out in the First (and Second) Rent Deferral, which amendment remained in force.[49]

43. The Respondent's counsel then advised Royal Bank of Canada's ("**RBC**") lawyer that the Respondent intended to exercise its remedies under the default provisions of the Lease (i.e., terminate the Lease anyway) during the non-enforcement period,[50] making it the only land border duty-free store landlord to tell a tenant's creditor/bank it intended to terminate its lease during the Ontario eviction moratorium. This caused RBC to initiate receivership proceedings because of what the Respondent stated was pending Lease enforcement during the pandemic (which would have been unlawful).[51]

44. The Respondent pursued its strategy to oust the Appellant, despite negative financial implications for itself in an apparent attempt to punish the Appellant even if it meant the

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[48] Under Part IV of the *Commercial Tenancies Act Commercial Tenancies Act,* RSO 1990, c L.7, that was in place through April 2022.
[49] **AEB**, Tab 1, Pearce December 2021 Affidavit, at para. 39.
[50] **AEB**, Tab 2, Pearce November 2022 Affidavit, para. 62.
[51] **AEB**, Tab 2, Pearce November 2022 Affidavit, para. 93.

Respondent hurt itself in the process. Specifically, based on rental rates and costs that would be incurred by the Respondent, its net economic return ("**NER**") by replacing the current Appellant through an RFP process would be between $11,460,667 - $25,858,019, compared to a $32,951,353 NER if the Tenant remained. The Respondent stands to receive between $7,093,333 - $21,460,686 (21.5% to 65.13%) more with the Appellant than by replacing it.[52]

Respondent acted reasonably toward U.S. duty-free store tenant

45. The treatment provided by the Respondent to its American duty-free tenant, Duty Free Americas ("**DFA")** provides a stark comparison. There is no provision in the lease with DFA similar to subsection 18.07. Rather, the Respondent simply did what was reasonable with its other tenant.[53] Similar to the Appellant, DFA did not resume paying Base Rent after its deferral period expired. Instead, it paid percentage rent only (16% of sales) in default of its lease obligations. As of December 2022, it had not paid back any of the deferred rent.[54]

46. Notwithstanding DFA's defaults, the Respondent sent no default notices, made no demands for payment, did not threaten enforcement, did not demand personal guarantees or seek access to shareholder assets.[55]

47. The Respondent received rent roughly in the same amount from the Appellant as was paid by DFA from April 2020 to December 2020. DFA paid $269,587,[56] while the Appellant paid

[52] **AEB**, Tab 24, Affidavit of Lisa Hutcheson dated September 26, 2023 ("**Hutcheson Affidavit**"), J.C. Williams Group report ("**JWC Report**"), Exhibit "A" at p. 29.
[53] Rienas Transcript, Exhibit 3.
[54] **AEB**, Tab 14, Rienas Transcript, p.109-110, q. 347-352; **AEB**, Tab 25, Rienas Transcript, Exhibit 3.
[55] **AEB**, Tab 14, Rienas Transcript, p.110-111, q. 353-356.
[56] **AEB**, Tab 26, Costa Transcript Exhibit 2, April 27th, 2021 email and attachment p.13.

$234,330[57] in respect of that period (including Additional Rent and CERS), plus it paid $43,000 per month for HST, which is a further $387,000.00 attributable to that period.[58]

48. The Respondent did not disclose, until ordered by the court, that DFA's lease is structured such that base rent is calculated as 50% of base rent plus additional rent paid in the preceding year,[59] which likely resulted in significantly lower base rent after 2020.[60] Yet the Authority gave DFA an additional 20% rent abatement on its already reduced rent, and two additional five-year extension options.[61] To further accommodate DFA, and in contrast to the demands the Appellant immediately pay rent arrears, DFA arrears are repayable over 5 years under its agreement.

49. The Respondent tried to justify DFA's preferential treatment because it remained open, whereas the Appellant was closed.[62] This is an irrelevant distinction since it ignores the First (and Second) Deferral amendments to the Lease that allow the store to be closed until the border reopened for non-essential travel, the actual payments the Appellant was making, and it ignores the difference between how the pandemic was being handled in Canada and the United States.[63]

The Motion Judge's Findings

50. At subparagraph [159] 1. of the Reasons, the Motion Judge concludes, that the Border Restrictions did result in adverse effects on the Appellant's business, both during the Closure

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[57] **AEB**, Tab 27, Pearce November 2022 Affidavit, Exhibit D, THRP-CERS Summary; **AEB**, Tab 28, Pearce February 2023 Affidavit, Exhibit I ($43,442+$59,333+$58,053+$73,502)
[58] **AEB**, Tab 2, Pearce November 2022 Affidavit, para 54. *Note*: The Authority refused requests for disclosure of rental amounts paid by DFA beyond December 2020, so no further information is available.
[59] **AEB**, Tab 25, Rienas Transcript, Exhibit 3, First Amendment to DFA Lease and response to undertaking No. 4.
[60] *Note*: The Authority refused to disclose this information beyond 2020.
[61] **AEB**, Tab 29, Rienas Transcript, Exhibit 1, and response to undertaking No. 3.
[62] **AEB**, Tab 14, Rienas Transcript, p.110, q. 356.
[63] **AEB**, Tab 30, Rienas Transcript, Exhibit 4.

Period and during the Ramp Up Period, that warranted some adjustment to the Base Rent payable by the Appellant.

51. At paragraph [63] the Motion Judge found that the parties essentially agree that:

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

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

52. At paragraph [65] the Motion Judge found that the parties agree that subsection 18.07 of the Lease:

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

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

53. The Respondent and Appellant made offers but there has been no abatement of Base Rent as a result of the adverse effects of the Border Restrictions (other than a 4-month rent deferral from April to July 2020).

54. Despite finding that subsection 18.07 of the Lease required an adjustment to Base Rent and the fact that there has been no adjustment to Base Rent, at subgraph [159] 4. B., the Motion Judge found that subsection 18.07 of the Lease was implemented over the course of the three years of consultations and negotiations; it is not rendered meaningless just because the parties have not been able to reach an agreement.

55. The obvious difficulty with the Motion Judge's conclusion is that if subsection 18.07 of the Lease is a substantive right/obligation; and the implementation of subsection 18.07 of the Lease warranted some adjustment of Base Rent; and no adjustment of Base Rent has occurred, then then it follows that there has not been a complete implementation of subsection 18.07 of the Lease.

PART IV - ISSUES AND ARGUMENT

56. The issues to be addressed in this appeal are:

(a) Whether the Motion Judge failed to give effect to (i) her finding that subsection 18.07 of the Lease gives rise to a substantive right/obligation to make adjustment to Base Rent; and (ii) her conclusion that a Base Rent adjustment was warranted, by not ordering a remedy.

(b) Whether the Motion Judge failed to correctly apply the law of contract interpretation?

(c) Whether the Motion Judge erred in law by failing to consider, as part of the factual matrix, discussions around the time subsection 18.07 of the Lease was added to the Respondent's draft form of Lease, including representations by the Respondent about how that provision was to be applied?

(d) Whether the Motion Judge erred by finding the Respondent did not breach its duty of honest performance by knowingly threatening to take actions to terminate the Lease when it knew such action would be unlawful?

Standard of Review

57. In considering the errors raised by the Appellant, the Court must review the Motion Judge's determinations using the following standards: questions of law are reviewable on a correctness standard, questions of fact are reviewable on a standard of palpable and overriding error, and questions of mixed fact and law are reviewable on a spectrum. With extricable legal errors, the standard of review is correctness. However, with respect to the application of the correct legal principles to the evidence, the standard is palpable and overriding error.[64]

58. A palpable error is one that is "not reasonably supported on the evidence" and it is overriding when it impacts on the trial judge's determination.[65]

Failing to provide a remedy in respect to of acknowledged substantive right to Base Rent abatement

59. The Motion Judge identified the first issue in the cross-motion to be determined by the Court as:

> *What was the impact to the Lease of the Border Restrictions and resulting adverse effects on the Tenant's business, and does that affect the Base Rent payable by the Tenant as a result?*[66]

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[64] *Falsetto v Falsetto*, 2023 ONCA 469 at para 53, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 26-37.
[65] *Ibid* at para 54.
[66] **ABC**, Tab 3, Reasons at para. [66]1.

to which she concluded that:

> *The Border Restrictions did result in adverse effects on the Tenant's business, both during the Closure Period and during the Ramp Up Period, that warranted some adjustment to the Base Rent payable by the Tenant.*[67]

but then failed to give effect to the Base Rent adjustment that she concluded was warranted, thus leaving the Appellant with no remedy.

60. This leads to an injustice because despite having the foresight to include subsection 18.07 to protect it from changes in Applicable Laws enacted by the Respondent's stakeholders (and others); and despite the acknowledge that subsection 18.07 of the Lease is intended to provide a Base Rent abatement in these exact circumstances; and despite a determination by the Court that there is an impact to the Lease that requires a Base Rent abatement; the Appellant will likely be faced with further demands for payment of full Base Rent and associated threats of Lease termination from the Respondent.

61. Subsection 18.07 of the Lease does not say that failing agreement on the impact to the Lease, the Base Rent provisions under Article IV of the Lease continue to apply.[68] If the Authority intended that result, it could have included that language in the Lease it drafted. It did not. As a result, the parties are left with uncertainty about the Base Rent payable during the Closure Period.

62. Since the Motion Judge concluded subsection 18.07 of the Lease gives rise to a substantive right that provides for an adjustment to the Base Rent payable by the Appellant in the circumstances of this case taking into consideration the extent of the Adverse Effect on the

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[67] **ABC**, Tab 3, Reasons at para. [159]1.
[68] *Molson Canada 2005 v. Miller Brewing Company*, 2013 ONSC 2758, para. 115.

Appellant's business,[69] the Court should interpret that clause in a manner that gives it meaning[70] by striving to determine the Base Rent abatement, rather than rendering the clause ineffective.

63. By denying the Appellant a remedy, the result is essentially that the Respondent's stakeholders, who implemented many of the Border Restrictions removing the Appellant's ability to generate revenue to pay rent, are, through the Respondent,[71] effectively expropriating the Appellant's property and leasehold interest, including $6 million in renovation upgrades, without compensation, which must be viewed contrary to public policy.

Error regarding subsection 18.07 being subordinate to other clauses

64. After the Motion Judge found that the Border Restrictions and resulting adverse effect on the Appellant's business were appropriate circumstances for an abatement of Base Rent pursuant to subsection 18.07 of the Lease, the Motion Judge made an error of law by relying on clauses that are subordinate to subsection 18.07, to reject the Appellant's position that there must be a Base Rent abatement when its sales were reduced to virtually nothing for 18 months.[72]

65. The Motion Judge erred at paragraphs 72 and 76 of her Reasons when she found that the entire agreement clause (s.2.04), the no abatement clause (s.4.05(a)), and the unavoidable delay clause (s.18.08) effectively override subsection 18.07 of the Lease. The Respondent specifically acknowledged it had an obligation to provide reasonable rent relief in the circumstances and a "significant rent abatement was appropriate" under 18.07 of the Lease.[73] Further, subsection 18.07 of the Lease expressly says its application will result in an "impact" to the Lease. By referring to

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[69] **ABC**, Tab 3, Reasons at para. 65b.
[70] *Weyerhaeuser Company Limited v Ontario (Attorney General)* 2017 ONCA 1007 at para. 65.
[71] The Respondent's assets eventually revert to its stakeholders.
[72] **ABC**, Tab 3, Reasons at para 72 and 76.
[73] **ABC**, Tab 3, Reasons at para. 80-81.

an "impact" to the Lease, this clause clearly contemplates its application can temporarily override other clauses in the Lease when it is engaged. The failure to recognize that subsection 18.07 of the Lease is intended override the other provisions is also inconsistent with its accepted characterization as a "safety valve".[74]

66. The acknowledgement/finding that subsection 18.07 of the Lease can give rise to a Base Rent abatement in appropriate circumstances necessarily means that subsection 18.07 of the Lease overrides the no abatement clause (s.4.05(a)), and the unavoidable delay clause (s.18.08) in appropriate circumstances. Accordingly, the Motion Judge erred at paragraphs 72 and 76 of her Reasons when she found the opposite and relied on those incorrect findings to reject the Appellant's interpretation that Base Rent must be abated during the Covid-19 closure period. This leads to a commercially unreasonable result and is contrary to the parties' acknowledged intention.

67. Had the Motion Judge properly interpreted subsection 18.07 of the Lease as overriding, the outcome of the Cross-Motion may have been different because she could have given effect to the intention of a rent abatement.

Motion Judge's Conclusions Regarding Re-Writing or Amending the Lease

68. The Motion Judge declined to grant a remedy because she concluded there was an absence of "established benchmarks" to determine the amount of Base Rent to be paid during the unprecedented Border Restrictions resulting from the pandemic. The Motion Judge concluded she would have to "re-write" or "amend" the Lease to give effect to subsection 18.07 of the Lease.[75]

[74] **ABC**, Tab 3, Reasons at para. 48.
[75] **ABC**, Tab 3, Reasons at para. 149 and [159] 4.b.

69. However, since the parties agreed, and the Motion Judge concluded, that subsection 18.07 of the Lease would be applied in appropriate circumstances to reduce Base Rent payable,[76] there is no need to "re-write" or "amend" the Lease to give effect to the acknowledged need for an abatement of Base Rent. It is simply a matter of applying subsection 18.07 of the Lease.

70. The Motion Judge made a fundamental error in contract interpretation law by concluding that the Court could not give effect to a Base Rent abatement without re-writing or amending the Lease.

Motion Judge's Conclusions Regarding Established Benchmarks

71. The Court must strive to give effect to all of the provisions agreed to by the parties.[77]

72. The Motion Judge's conclusions regarding established benchmarks failed to correctly identify the difference between an ascertainable standard and the evidence used to ascertain the standard.

73. The objective ascertainable criteria to determine the "impact to the lease" resulting from the change in Applicable Laws that Adversely Effected the Appellant's business can be informed by looking to the Lease and the factual matrix. Then to give effect to the clause, the Court can consider evidence available when the clause is triggered to calculate (based on the criteria) the impact to the Lease (in this case the amount of the Base Rent abatement).

74. Because of the inherent uncertainty of "unanticipated" changes in Applicable Laws, the parties left certain details for adjustment as circumstances required during the lifetime of the

[76] **ABC**, Tab 3, Reasons at para. 63.b., 65.b.and 159. 1.
[77] *Molson Canada 2005 v. Miller Brewing Company*, 2013 ONSC 2758, at para 115.

contract as a matter of practical necessity. For example, no one could have known about Covid-19 or the Border Restrictions in 2016, and there is no predetermined percentage or dollar amount reduction to apply depending on the particular change in Applicable Laws. The impact to the Lease must be assessed based on the evidence when the clause is triggered. This does not render subsection 18.07 of the Lease ineffective.

75. In *Winsco Manufacturing Ltd. v. Raymond Distributing Co*., the court stated in the context of pricing in an exclusive supply agreement, "The parties did not intend further negotiations as to terms before it was to come into effect, but rather that it was to become a complete obligation *eo instanti*, leaving certain details, as a matter of practical necessity, for adjustment as circumstances required during the lifetime of the contract".[78]

76. Applying this to the Lease, the parties did not intend for further negotiations regarding subsection 18.07 of the Lease at the time of Lease formation. However, in the event of an "unanticipated" event that triggers the clause, it does contemplate the possibility of future discussions in the context of determining the "impact" of changes in "Applicable Laws" to the Lease. Determining the "impact" to the Lease is "a detail", that was left "as a matter of practical necessary, for adjustment as circumstances required during the lifetime of the contract."

Factual matrix

77. The factual matrix surrounding the formation of the Lease can inform the identification of the objective criteria to ascertain the impact to the Lease when subsection 18.07 is trigger. The Court may consider whether there was any understanding regarding how the impact to the Lease

[78] *Winsco Manufacturing Ltd. v. Raymond Distributing Co*., 1957 CanLII 112, para. 34.

would be considered that existed at the time of execution of the Lease that would inform the interpretation of subsection 18.07 of the Lease and how the Lease would be impacted when it is engaged.[79]

78. The factual matrix at the time of contract formation in this case includes the July 18th and 19th, 2016 meeting, including handouts and a confirming email relating to the interpretation of subsection 18.07 of the Lease, in which the impact to the Appellant's sales are directly tied to the parties reasonably and in good faith changing the rent terms, term, etc. as appropriate in a fair and equitable manner.[80] The Motion Judge recognizes at paragraph 63 that the impact on the Applicant's sales is the key consideration for the impact to its business is sales, and that would dictate the need to adjust the Lease, including reducing Base Rent.

79. In this case, the impact to the Lease resulting from the introduction or change in Applicable Laws that cause a material adverse effect on the business operations of the Appellant at the leased premises is ascertainable and it should be tied to the impact on sales. It can be determined with reference to the evidence that exists (reduction in sales) once the clause is triggered that will inform the appropriate calculation of (in this case) a Base Rent abatement.

80. At paragraph 144 of the Reasons, the Motion Judge appears to confuse the use of the factual matrix at the time of contract formation with the evidentiary basis that will be used to determine the impact to the Lease.

81. The former would include the pre-contractual discussions about the interpretation of subsection 18.07, and the later would include the loss of sales during the Closure Period (the impact

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[79] *Molson Canada 2005 v. Miller Brewing Company*, 2013 ONSC 2758, at para 116-117.

[80] **AEB**, Tab 9, Respondent's Disclosure Brief p.448; **AEB**, Tab 10, Costa Transcript, q. 134, 159; **AEB**, Tab 11, Pearce February 2023 Affidavit, Exhibit "C".

was total). It may also include factors such as the Appellant's relative degree of responsibility (nil), that the Respondents stakeholders were responsible for the Border Restrictions, government rent relief given to other tenancies, the ability to pay, etc.

The Impact to the Lease is Ascertainable

82. An analogy can be drawn to cases of market rate lease renewals. In those cases, the Court will find in favour of the validity of renewal clause if reasonably possible to conclude that there is an ascertainable standard.

83. To be ascertainable and valid, a clause does not require much detail. For example, clauses to determine rental rates applicable to lease extension options that include words such as "then market rate", or "then current rate"[81] are enough to engage a binding agreement between the parties and the rental rate can be determined by application court. The clause does not have to specify how market rates are to be determined. The clause does not require and typically does not include a standard or definitive metric to set rent. The parties present evidence relevant to current market conditions such as recent lease deals to try to persuade the Court or arbitrator of that their position on "market rate" is correct, or at least more correct that the other side.

84. In this case, the Court is not being asked to ascertain market rent. It is being asked to ascertain the fair and equitable adjustment to Base Rent having regard to the impact on the Appellant's duty-free sales resulting from the change in Applicable Laws that Adversely Effected the business operations of the Appellant.

[81] *Mapleview-Veterans Drive Investments Inc.* v. *Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93 at para. 31.

85. This impact is no less ascertainable than "market rent" might be. The Court can consider extrinsic information that is available when the clause is triggered. For example, in this case, the Court may consider the impact on the Appellant's sales, how other leases in similar circumstances were dealt with, criteria in government programs to support commercial tenants, etc.

Reliance on outdated technical rule of construction

86. The Motion Judge relied on a pre-*Sattva* technical rule of construction to diminish the evidence of pre-contractual representations between the parties on July 18th and 19th, 2016 regarding how subsection 18.07 of the Lease would be interpreted as part of the factual matrix.

87. At the time of the July 18th, 2016 meeting and follow-up email, subsection 18.07 of the Lease was not being negotiated. It is already in the draft form of Lease. The July 19th, 2016 email is a covering email enclosing the final version of the Lease. The evidence from the meeting includes a handout from a discussion that is referred to in the email. Essentially, Ms. Costa says in her email that what Mr. Pearce was asking for (as it relates to changes in government regulations) is already in the Lease at subsection 18.07. In other words, it informs the parties' intentions based on objective information that was known to both parties that this is how 18.07 is going to be applied.[82]

88. The Supreme Court of Canada notes the technical rule of construction relied upon by the Motion Judge "sits uneasily" next to the approach from *Sattva* that directs courts to consider the

[82] **AEB**, Tab 9, Respondent's Disclosure Brief, p.448; **AEB**, Tab 10, Costa Transcript, q. 134, 159; **AEB**, Tab 11, Pearce February 2023 Affidavit, Exhibit "C".

surrounding circumstances in interpreting a contract, and there is the difficulty in drawing a principled distinction between circumstances surrounding contract formation and negotiations.[83]

The Law of Equity Requires a Remedy

89. It is a well-known maxim of equity that equity will not suffer a wrong to be without a remedy. In other words, for every recognized substantive right, the courts of equity must give effect to an entitlement of a corresponding remedy. Courts have held that no wrong should be allowed to go unredressed if it is capable of being remedied by courts of justice. The principle refers to rights which are suitable for judicial enforcement, but were not enforced at common law due to some technical defect.[84]

90. The law of equity further recognizes that "equity looks on that as done which ought to be done". This principle can be invoked by persons who have a right for a thing that should be done.[85]

91. The Courts may impose the law of equity in circumstances where: (i) the contract, properly interpreted, imposes an obligation on a contracting party to do something that it has not done; (ii) the contract is one that can be specifically enforced; and (iii) the maxim is invoked not by a stranger, but by a party who would be entitled to specifically enforce the contract.[86]

92. In this case, the elements of maxim are satisfied: (1) the Respondent conceded, and the Motion Judge found that subsection 18.07 of the Lease gives rise to a substantive right/obligation to make adjustments to the Rent payable by the Tenant in the circumstances of this case, taking

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[83] *Corner Brook (City) v. Bailey*, 2021 SCC 29 (CanLII), at para 56
[84] *Rebizant v. Greenwood*, 2000 MBQB 204, aff'ed (2001), 2001 CarswellMan 556 (Man. C.A.) at para 62; Snell's Equity, 29th ed. by P. V. Baker and P. St. J. Langan (London: Sweet & Maxwell, 1990) at 28.
[85] *Thomson v. Merchants Bank of Canada* (1919), 58 S.C.R. 287 at para 33.
[86] *Grant Forest Products Inc., Re*, 2010 ONCA 355 at para 16 [*Re Grant*]

into consideration the extent of the Adverse Effect on the Tenant's business;[87] (2) the obligation is within an enforceable Lease and it is acknowledged the clause is triggered in the circumstances; and (3) the Appellant is seeking to invoke the maxim as a party entitled to enforce the Lease.

93. Despite the unanimous acknowledgement that a significant Base Rent abatement is appropriate in applying subsection 18.07 of the Lease, not a single cent has actually been abated.

94. It is commercially unreasonable and unjust to say that if the parties cannot agree on the quantum of the abatement, the outcome is no abatement, resulting in full Base Rent owing. Such an interpretation provides no reason for the Respondent to ever agree to any change to the rent, or to attach unwelcome conditions to any offer to abate Base Rent.

Duty of Honest Performance

95. The Supreme Court of Canada has recognized that there is a general organizing principle in contract wherein the parties "generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily."[88] This organizing principle recognizes various duties on contracting parties such as the duty of honest performance which requires that "[P]arties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[89]

96. In *CM Callow Inc v. Zollinger* the Supreme Court held that the duty to act honestly in the performance of a contract precludes active deception, and that the respondent breached its duty by knowingly misleading Callow.[90] The respondent in that case acted dishonestly toward Callow by

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[87] **ABC**, Tab 3, Reasons at para. 65.
[88] *Bhasin v Hrynew,* 2014 SCC 71 [*Bhasin*].
[89] *Bhasin*, at para 73.
[90] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para 5 [*Callow*]

representing that a winter maintenance contract was not in danger even though a decision to terminate the contract had already been made thereby deceiving Callow and breaching its duty of honest performance.[91]

97. In *2505243 Ontario Limited (ByPeterandPaul.com) v. Princes Gates Hotel Limited Partnership,*[92] a landlord entered into discussions with a potential replacement tenant during Covid-19 and did not disclose those discussions to the existing tenant that it knew intended to stay. Justice Gilmore found that the landlord in that case breached the duty of good faith in contract by way of misleading by inaction.[93] Justice Gilmore found that the landlord in that case, much like the Respondent in this case, was under the impression that because the tenant was in arrears of rent, it could choose any course of action without repercussion and without consultation with the tenant. That is a flawed course of action which does not account for the duty of good faith to the tenant.[94] The Ontario Court of Appeal upheld Justice Gilmore's decision.

98. The principles of good faith apply to the present case. The Motion Judge found that despite telling the Appellant to sign the Second Rent Deferral Agreement so it could be approved at a November 20th, 2020 board meeting and then actually receiving the approval to sign it at that meeting, the Respondent misled the Appellant about the approval and proceeded to try to extract something more from the Appellant.[95] Despite a clear finding that the Respondent acted dishonestly to try to obtain an advantage from the Appellant, the Motion Judge failed to conclude there was a breach of the duty to perform the agreement honestly.

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[91] *Callow*, at para 42.
[92] 2021 ONSC 4649.
[93] *2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc. et al.*, 2021 ONSC 4649, at para 369, affirmed at 2022 ONCA 859.
[94] *Ibid* at para 373.
[95] **ABC**, Tab 3, Reasons at para. 112.

99. Instead, the Motion Judge reasoned that the Respondent allowed the Appellant to operate under the terms of the Second Deferral Agreement, which completely fails to acknowledge the Respondent demanding payment of $1 million within 10 days over the Christmas holiday, along with demanding payment of all outstanding amounts and payment of full rent from January 1st, 2021 onward that were entirely inconsistent with the Second Deferral Agreement[96] and unreasonable since it knew the Appellant would be unable to perform.

100. The Respondent also knew there was an eviction moratorium in place pursuant to Part IV of the *Commercial Tenancies Act*, the Lease was amended to suspend operation of subsection 9.02 of the Lease (the requirement to operate) until the border reopen for non-essential travel,[97] and that the Appellant intended to continue to operate the duty-free store when the border reopened. Despite this, the Respondent engaged in discussions with the second place RFP bidder to take over the Leased Premises and concealed that fact from the Appellant. The Respondent altered its board meeting minutes to conceal the fact that it was engaging with a replacement tenant so it would not appear "pre-determinative".[98] These are the same minutes that the Respondent approved a demand for $1 million payable by the end of the month, contrary to its approval of the Second Deferral Agreement.[99]

101. The Motion Judge made a palpable and overriding error by accepting that the Respondent was not approaching the matter of an alternative tenant from a comparative perspective, but was looking at "damage control" if the tenancy could not be preserved.[100] The only reason the tenancy

[96] **AEB**, Tab 31, Rienas Transcript, Exhibit 10.
[97] **AEB**, Tab 34, Affidavit of Ron Rienas dated September 7, 2022, ("**Rienas September Affidavit**"), Exhibit 2.
[98] **AEB**, Tab 31, Rienas Transcript, Exhibit 10, p.2.
[99] **AEB**, Tab 33, Rienas Transcript, Exhibit 5.
[100] **ABC**, Tab 3, Reasons paras. 100-101.

would not be able to preserved is that the Respondent was demanding full payment of Rent and personal guarantees from the Appellant.

102. It cannot be good faith to deliver a formal notice of non-monetary default and demand the Appellant reopen its duty-free store under threat of Lease termination on September 8th, 2021, when the Lease had been amended to remove the obligation to operate.[101]

103. It also cannot be good faith to demand payment of the full amount of the Base Rent in a formal notice of monetary default from counsel under threat of (unlawful) Lease termination when the Respondent knew that the proper application of subsection 18.07 of the Lease required a significant Base Rent abatement and to act on the notice of monetary default would be unlawful by reason of Part IV of the *Commercial Tenancies Act.* Similarly, it cannot be good faith to intentionally cause RBC to initiate receivership proceedings by representing the Respondent would be enforcing the Lease imminently at a time when it was unlawful to do so.

104. The Motion Judge also made palpable and overriding error in weighing the impact of Covid-19 and the Border Restrictions on the parties. At paragraph 96 of the Reasons, the Motion Judge related the possibility that the Respondent might have to face raising tolls in a future budget cycle as somehow comparable to the total destruction of Appellant's business and "important context" to justify the Respondent's aggressive and hardball approach with the Appellant. The evidence is that the Respondent's revenues exceeded its expenses every year,[102] whereas the Appellant was unable to generate any sales and losing millions of dollars through no fault of its own.

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[101] **AEB**, Tab 35, **Rienas September Affidavit**, Exhibit 3, notice of default
[102] **AEB**, Tab 15, MDD report, p. 10 of 17, para. 44.

105. The Motion Judge found that the Respondent's stakeholders were responsible for many of the changes in Applicable Laws, including the Border Restrictions.[103] The Motion Judge also found that the Respondent's representatives were playing "hardball" with the Appellant at times.[104]

106. Despite the obvious problem of the Respondent's stakeholders causing the Border Restrictions, and then the quasi-government Respondent leveraging the devasting impact they had on the Appellant to try to extract concessions in the form of personal guarantees from shareholders that it was not entitled to under the Lease and threatening to end the Appellant's long standing business if it did not capitulate, the Motion Judge did not identify problem with the Respondent pursuing its self-interest at the expense of the Appellant.[105]

PART V - ORDER REQUESTED

107. The Appellant requests that Order be set aside, and an Order granted as set out in the Notice of Appeal.

ALL OF WHICH ARE HEREBY SUBMITTED THIS 26th DAY OF JANUARY BY:

David T. Ullmann/Brendan Jones

[103] **ABC**, Tab 3, Reasons at para. 38.
[104] **ABC**, Tab 3, Reasons at para. 97.
[105] AEB, Tab 31, Rienas Transcript, Exhibit 10.

Certificate of Lawyer

1. An order under subrule 61.09 (2) (original record and exhibits) has been obtained.

2. It is estimated that 1 hour will be required for the lawyer's oral argument, not including reply.

3. The factum complies with subrule (3) or, if applicable, with an order referred to in that subrule.

4. The number of words contained in Parts I to V are 7815 words.

5. I am satisfied as to the authenticity of every authority listed in Schedule A.

David T. Ullmann

Schedule 1 – Border Restrictions

1. A non-exclusive summary of the Border Restrictions is as follows:

a) March 17th, 2020: Ontario declares state of emergency under the Emergency Management and Civil Protection Act;

b) March 21st, 2020: Agreement to close U.S.-Canada border to non-essential travel border for 30 days;

c) April 15th, 2020: Enhanced Federal border measures and quarantine plan and 14-day quarantine requirement;

d) April 22nd, 2020: Extension of restriction on non-essential travel between Canada- US border until May 21st, 2020;

e) May 22nd, 2020: Canada-U.S. border closure to all but essential workers extended to June 21st, 2020;

f) May 27th, 2020: Ontario government extends all emergency orders in force under s.7.0.2 (4) of the Emergency Management and Civil Protection Act until June 9th, 2020;

g) June 16th, 2020: U.S.-Canada border closure to all but essential workers extended until July 21st, 2020 for non-essential travel;

h) June 24th, 2020: Ontario government extends all emergency orders in force under s.7.0.2 (4) of the Emergency Management and Civil Protection Act until July 15th, 2020;

i) July 2020: ArriveCAN app was introduced for all border crossing into Canada;

j) July 9th, 2020: Ontario government extends all emergency orders in force under s.7.0.2 (4) of the Emergency Management and Civil Protection Act until July 22nd, 2020;

k) July 26th, 2020: U.S.-Canada border closure for non-essential travel extended until August 20th, 2020;

l) August 14th, 2020: U.S.-Canada border closure for non-essential travel extended until September 21st, 2020;

m) August 14th, 2020: Ontario extends emergency orders in force under s.7.0.2 (4) of the Emergency Management and Civil Protection Act until September 22nd, 2022;

n) September 18th, 2020: U.S.-Canada border closure for non-essential travel extended until October 21st, 2020;

o) October 19th, 2020: U.S.-Canada border closure to non-essential travel extended to November 21st, 2020;

p) November 2nd, 2020: Program launched to allow international travellers to Canada to leave quarantine provided they test negative upon arrival and retest 6 to 7 days after.

q) February 2021: Land travellers entering Canada required to provide negative COVID test result from the US within 3 days/positive result within 14 & 90 days prior to arrival.

r) April 21st, 2021: US-Canada border closure to non-essential travel extended until May 21st, 2021;

s) June 21st, 2021: Temporary travel restrictions to Canada for all U.S. travellers extended, unless their travel is for non-discretionary reasons.

t) August 9th, 2021: Canada permitted entry for fully vaccinated U.S. travellers. PCR test required. U.S. border remains closed;

u) September 7th, 2021 - Fully vaccinated foreign nationals eligible to enter Canada for non-essential reasons;

v) October 30th, 2021: Travellers in Canada were required to be fully vaccinated in order to board planes, trains and non-essential passenger vessels. Negative molecular tests within 72 were accepted as alternatives until November 29th, 2021;

w) November 30th, 2021: All travellers to Canada must be fully vaccinated and have a negative COVID-19 molecular test results within 72 hours;

x) November 8th, 2021: U.S. lifted restrictions at its land borders to permit travel for fully vaccinated travellers and a negative PCR tests within 72 hours;

y) December 2nd, 2021: Canadian announced that Canadians travelling abroad for less than 72 hours will not have to show negative PCR COVID-19 test when re- entering Canada;

z) December 21st, 2021: Reinstated the requirement for a pre-arrival negative PCR test for all travellers arriving in Canada from a trip of any duration;

aa) January 15th, 2022: Announced groups who were exempt from entry requirements will only be allowed to enter Canada if they are fully vaccinated, unvaccinated, or partially vaccinated foreign national truck drivers, coming from the U.S. by land, will not be allowed entry;

bb) January 22nd, 2022: U.S. allowed non-U.S. individuals traveling via land ports or entry at US-Canada borders to be fully vaccinated and to show proof of vaccination for essential and non-

essential reasons;

cc) February 28th, 2022: Fully vaccinated travellers arriving from any country to Canada would be randomly selected for arrival testing and accepting either a negative rapid antigen or PCR test from travellers as well as ArriveCAN;

dd) April 1st, 2022: Fully vaccinated travellers no longer required to provide a pre-entry COVID-19 test result to enter Canada by air, land or water, but ArriveCAN required;

ee) April 25th, 2022: Border measures eased - rapid testing no longer required, but ArriveCAN and double vaccination still required;

ff) October 1st, 2022: Canadian Covid-19 border measures ended including all requirements including vaccination and mandatory use of ArriveCAN.

Schedule A - Authorities

1. *Falsetto v Falsetto*, 2023 ONCA 469 at para 53,
2. *Housen v Nikolaisen*, 2002 SCC 33 at paras 26-37
3. *Molson Canada 2005 v. Miller Brewing Company*, 2013 ONSC 2758, para. 115.
4. *Weyerhaeuser Company Limited v Ontario (Attorney General)* 2017 ONCA 1007 at para. 65.
5. *Winsco Manufacturing Ltd. v. Raymond Distributing Co.*, 1957 CanLII 112,
6. *Corner Brook (City) v. Bailey*, 2021 SCC 29 (CanLII), at para 56
7. *Rebizant v. Greenwood*, 2000 MBQB 204, aff'ed (2001), 2001 CarswellMan 556 (Man. C.A.) at para 62
8. Snell's Equity, 29th ed. by P. V. Baker and P. St. J. Langan (London: Sweet & Maxwell, 1990) at 28.
9. *Thomson v. Merchants Bank of Canada* (1919), 58 S.C.R. 287 at para 33.
10. *Grant Forest Products Inc., Re*, 2010 ONCA 355 at para 16
11. *Bhasin v Hrynew,* 2014 SCC 71
12. *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45
13. *2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc. et al.*, 2021 ONSC 4649, at para 369, affirmed at 2022 ONCA 859.

Schedule B – Statutory Provisions

Commercial Tenancies Act, R.S.O. 1990, c. L.7, Part IV

Non-enforcement period

79 In this Part,

"non-enforcement period" means,

(a) in respect of a tenancy referred to in subsection 80 (1), the period that begins on the day subsection 1 (1) of Schedule 5 to the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020* comes into force and ends on the prescribed date, and

(b) in respect of a tenancy referred to in subsection 80 (2), the period prescribed for the purposes of this clause. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 79 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

Application

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. 2020, c. 36, Sched. 5, s. 1 (1).

Application, prescribed tenancies

(2) This Part applies to a tenancy that satisfies the prescribed criteria. However, sections 83 and 85 apply, with prescribed modifications, in respect of those tenancies only if so provided by the regulations. 2020, c. 36, Sched. 5, s. 1 (1).

Conflict

(3) This Part applies despite any other Part of this Act or any provision in an agreement or any common law rule. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 80 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

Eviction orders for rent arrears not effective during the non-enforcement period

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. 2020, c. 36, Sched. 5, s. 1 (1).

Same

(2) Subsection (1) applies in respect of an action or application that was commenced before, on or after the day the applicable non-enforcement period begins. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 81 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

No re-entry during the non-enforcement period

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. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 82 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

Restore possession and compensate for re-entry

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. 2020, c. 36, Sched. 5, s. 1 (1).

Tenancy deemed reinstated

(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. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 83 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

No distress during the non-enforcement period

84 No landlord shall, during the applicable non-enforcement period, seize any goods or chattels as a distress for arrears of rent in respect of a tenancy referred to in subsection 80 (1) or (2). 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 84 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

Return goods seized before the non-enforcement period

85 If, during the period that begins on October 31, 2020 and ends immediately before the day subsection 1 (1) of Schedule 5 to the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020* comes into force, a landlord seized any goods or chattels as a distress for arrears of rent, the landlord shall, as soon as reasonably possible, return to the tenant all of the seized goods and chattels that are unsold as of the day subsection 1 (1) of Schedule 5 to the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020* comes into force. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 85 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

Liability for re-entry and seizure of goods

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. 2020, c. 36, Sched. 5, s. 1 (1).

Same

(2) For greater certainty, subsection (1) applies in addition to any other remedy available by law to the person aggrieved. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 86 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

Regulations

87 The Lieutenant Governor in Council may make regulations,

(a) prescribing any matter referred to in this Part as prescribed;

(b) prescribing transitional rules that apply in respect of the non-enforcement period that is applicable in respect of a tenancy referred to in subsection 80 (2), including providing that sections 83 and 85 apply in respect of those tenancies and prescribing modifications to those sections and section 86. 2020, c. 36, Sched. 5, s. 1 (1).

Note: On December 8, 2022, section 87 of the Act is repealed. (See: 2020, c. 36, Sched. 5, s. 1 (2))

88-130 REPEALED: 1997, c. 24, s. 213 (4).

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

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

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

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