

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

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

**FRESH AS AMENDED FACTUM OF PEACE BRIDGE DUTY FREE INC.
(Motion Returnable January 5th, 2023)**

Date: December 23, 2022	<p>BLANEY MCMURTRY LLP Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5</p> <p>David T. Ullmann (LSO #42357I) Tel: (416) 596-4289 Email: dullmann@blaney.com</p> <p>John Wolf (LSO #30165B) Email: jwolf@blaney.com</p> <p>Brendan Jones (LSO #56821F) Email: bjones@blaney.com</p> <p>Lawyers for the Respondent</p>
--------------------------------	---

**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

INDEX

SECTION	TITLE	PAGE
Part I	<u>Overview</u>	1
Part II	<u>Facts</u>	4
	<u>The Tenancy</u>	4
	<u>Impact of Pandemic on the Business</u>	4
	<u>The Lease</u>	6
	<u>Rent Deferral Agreements</u>	11
	<u>Landlord Delivers Notices of Default</u>	12
	<u>Payment of Percentage Rent Since Re-Opening</u>	14
	<u>Judicial History of the Dispute</u>	16
Part III	<u>Issues and Argument</u>	19
	<u>Issue #1: Compliance with the Order</u>	20
	<u>Issue #2: Did the tenant fail to pay rent as required by the lease?</u>	24
	<u>Issue #3: Lift Stay</u>	27
	<u>Landlord did not act with Urgency</u>	30
	<u>Why should the Existing Process end only to Start Another with the Same with the Same Goal?</u>	30
Part IV	<u>Order Requested</u>	32
Schedule 1	<u>Border Restrictions</u>	33
Schedule A	<u>Authorities</u>	36
Schedule B	<u>Statutory Provisions Relied Upon</u>	37

**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

FACTUM

PART I – OVERVIEW¹

1. Duty Free (also referred to as the “Tenant” hereafter) has operated a duty-free shop at the Leased Premises since 1986². It paid approximately \$84 million in base rent to the Authority (also referred to as the “Landlord” hereafter) during that time up to March 2020. Since the current Lease came into force on November 1st, 2016, until the onset of Covid-19, Duty Free paid the Authority approximately \$13.6 million in Base Rent. The owners, recently invested about \$6 million to refurbish the Premises.

¹ This factum is written in response to the Landlord’s motion returnable on January 5, 2023 and does not represent the Tenant’s position on the Cross Motion.

² All terms not otherwise defined have the meanings set out in the Affidavits of Jim Pearce Dated November 13 and December 2, 2022

2. Prior to the Covid-19 emergency shutdown, Duty Free owed no monies to the Authority and during its time in business has been a faithful and dependable tenant.
3. For the last 16 months, including four months prior and the 12 months of this process Duty Free has been paying Additional Rent plus the greater of (a) monthly basic rent in the sum of 20% of the Tenant's actual Gross Sales and (b) any government rental assistance received ("**Normal Rent**"). The status quo which existed before the process commenced has been continued throughout this process.
4. The actual dollar amount of rent being paid resulting from the arrangement between the parties has naturally increased over time as sales have now recovered to 60 to 65% of pre-closure Gross Sales. The Landlord is receiving materially more rent now than when this process began.³
5. The Normal Rent paid by Duty Free has been accepted and deposited by the Authority throughout.
6. There is no basis to lift the stay at this point. The balance of convenience favours the continuation of the stay and the lack of material prejudice to the Landlord bolsters it.
7. The overwhelming evidence is that Duty Free has not breached the Appointment Order. The Landlord effectively concedes this point and is estopped by waiting 10 months before objecting to this in any way.
8. The Landlord's suggestion that any rent is owing will be shown to be false upon a proper review of the Lease and its terms, and on a full review of the record. If no rent is owing, then there

³ Affidavit of Jim Pearce, sworn November 13, 2022 ("**November 2022 Affidavit**"), para. 57, Cross-Motion Record of Peace Bridge Duty Free Inc. ("**Duty Free**") dated November 13, 2022 ("**CMR**"), Tab 2.

is certainly no prejudice to the Landlord from the continuation of the stay. In fact, the prejudice arising from the passage of time may ultimately be shown to have prejudiced the Tenant, who has rights against the Landlord given its aggressive and potentially illegal behaviour in this matter.

9. The prejudice, if any, to the Landlord has become negligible, with the Landlord now receiving almost 5 times the rent it received when this process began, while the consequences of lifting the stay against the Tenant are extreme – the certain destruction of its business, the loss of all invested capital, the loss of jobs, and an interruption in a border amenity.

10. It is submitted that rather than lift the stay, the correct path for the court to choose is either to order the parties to mediation, which the Landlord has steadfastly refused to attend, or set a reasonable timetable to litigate the issues set out in the Landlord's motion and Tenant's Cross Motion on a full record. Pending that motion, the current court process ensures that the status quo continues, the assets of the Tenant are safe and ensures that the Tenant is monitored by the court.

11. To lift the stay without determining all of the issues in the Cross Motion, will only require the parties to transfer their dispute to a different court and to restart this process, using different Courts and judges.

12. In the interim, the business continues to be Monitored by a court officer, which protects the Landlord and other creditor interests and would not be the case were the parties to be subject to a relief from forfeiture application process, which does not ordinarily involve court oversight during the litigation.

PART II - FACTS

The Tenancy

13. Duty Free is an Ontario corporation with a registered office address located at 1 Peace Bridge Plaza, Fort Erie, Ontario (the “**Leased Premises**”).⁴

14. By lease dated July 28, 2016, Duty Free leased the Leased Premises from the Authority for a fifteen (15) year term commencing on November 1, 2016 and ending on October 31, 2031, subject to Duty Free’s option to extend for an additional period of five (5) years through 2036 (the “**Lease**”).⁵

15. The Landlord 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.⁶

16. Duty Free completed major renovations to the Leased Premises between April 2018 and May 2019 at a cost of over \$6 million.⁷

Impact of Pandemic on the Business

17. As the name suggests, Duty Free operates a land border duty free shop with 26,000 square feet of retail space from the Leased Premises.

⁴ Affidavit of Jim Pearce, sworn December 12, 2021 (“**December 2021 Affidavit**”), para. 5, Motion Record of Duty Free dated December 13, 2021, (“**MR**”), Tab 2.

⁵ December 2021 Affidavit, *supra*, para. 6, MR, Tab 2.

⁶ December 2021 Affidavit, *supra*, para. 7, MR, Tab 2.

⁷ December 2021 Affidavit, *supra*, paras. 15-16, MR, Tab 2.

18. Duty Free holds a non-transferrable license to operate the retail store from the Canada Border Services Agency (“**CBSA**”) and an authorization by the Liquor Control Board of Ontario to buy and sell alcohol products.⁸

19. Prior to the Pandemic, the duty-free store was typically open 24 hours a day and 365 days a year. The business previously employed approximately 90 staff, including cashiers, product specialists/buyers, customer service, sales staff, supervisors, marketing professionals, and support staff in replenishment, customs paperwork, inventory and cash control. All staff live locally and all functions are performed at the store location.⁹

20. The pandemic, and particularly the border closures between Canada and the United States, greatly impacted Duty Free’s business. The land border was closed between March 2020 and August 2021 for all non-essential travel. The retail store entirely closed on or about March 21, 2020 and was only partially reopened on September 19, 2021. Canada only reopened its land border to fully vaccinated Americans on August 9, 2021, and the United States did not re-open its border to Canadian travelers until November 8, 2021.¹⁰ Even then, significant impediments to travel continued and Border Restrictions continued to impact the amount of traffic over the bridge.

The Border Restrictions were voluminous and varied during the pandemic.

⁸ December 2021 Affidavit, *supra*, paras. 49-51, Exhibits “H,” “J” and “K”, MR, Tabs 2, 2H, 2K and 2K.

⁹ December 2021 Affidavit, *supra*, para. 11, MR, Tab 2.

¹⁰ December 2021 Affidavit, *supra*, para. 12, MR, Tab 2.

The Lease

21. All terms not otherwise defined herein have the meaning ascribed to them in the Lease and the rent deferral agreements described below. Under the Lease, Duty Free agreed to pay Base Rent, Percentage Rent and Additional Rent. As a result, the Rent payable is tied to Duty Free's Gross Sales.

22. The agreement on the amount of Rent was largely based on traffic and revenue expectations, which were negatively impacted by the worldwide pandemic that prohibited virtually all cross-border travel and closed the bridge to non-essential travel.¹¹

23. The parties realized that the nature of this tenancy and the control exercised by other parties needed to be accounted for. Pursuant to subsection 18.07 of the Lease the Landlord agreed to consult with Duty Free about the impact of changes to Applicable Laws on the Lease as follows:

In the event an unanticipated introduction of or a change in any Applicable Laws causes a material adverse effect (*sic*) on the business operations of the Tenant at the Leased Premiers, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease. [emphasis added]¹²

24. Subsection 18.07 of the Lease is a very unusual and specific lease provision drafted to apply to the facts. Such a provision would not be found in a typical commercial retail lease. It was added when the Landlord declined to guarantee minimum levels of bridge travel.¹³

¹¹ December 2021 Affidavit, *supra*, para. 19, MR, Tab 2.

¹² December 2021 Affidavit, *supra*, para. 20 and Exhibit "A", MR, Tabs 2 and 2A.

¹³ Reply Affidavit of Jim Pearce, sworn December 2, 2022 ("**December 2022 Affidavit**"), para. 21, Responding Motion Record of Duty Free, dated December 2, 2022 ("**RMR**"), Tab 1.

25. Subsection 18.07 of the Lease, or similar provisions would only be included in a lease where regulatory changes outside of the control of the tenant would impact the underlying foundations for a lease making rent adjustment necessary. It is a “safety valve” to ensure the Lease terms are modified if and when the clause is triggered, and is intended to protect the Tenant from the consequences of material adverse effects caused by a change in Applicable Laws.¹⁴

26. Adverse Effect is defined as paragraph 2.01(c) of the Lease:

“Adverse Effect” means any one or more of:

...

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

(viii) **interference with the normal conduct of business**. [emphasis added]¹⁵

27. Applicable Laws is defined as paragraph 2.01(e) of the Lease:

“Applicable Laws” means any statutes, laws, by-laws, regulations, ordinances and requirement of governmental and other public authorities having jurisdiction over or in respect of the Leased Premises or the Property, or any portion thereof, and all amendments thereto at any time and from time to time, and including but not limited to the Environmental Laws. (emphasis added).¹⁶

28. Notwithstanding the:

- a. introduction and changes in Applicable Laws enacted by the Authority’s stakeholders from time to time that caused material Adverse Effects to Duty Free’s business and that have been ongoing throughout the Covid-19 pandemic,

¹⁴ December 2022 Affidavit, para. 22, RMR, Tab 1

¹⁵ December 2021 Affidavit, *supra*, para. 21 and Exhibit “A”, MR, Tabs 2 and 2A.

¹⁶ December 2021 Affidavit, *supra*, para. 22 and Exhibit “A”, MR, Tabs 2 and 2A.

including the Border Restrictions;

- b. acknowledgement by the Authority in the rent deferral agreements that “...travel restrictions and economic hardship created...by the Covid 19 pandemic...” resulted in the need for rent deferral;
- c. Acknowledgment of the economic hardship caused by Covid by the suspension of re-payment of rent arrears for the American side duty-free store;
- d. acknowledgment by the Authority in its motion record that in respect of Base Rent arrears “...there a dispute as to how much is owing...”;¹⁷ and
- e. letter from the Authority’s counsel at Tab 10 of the Exhibits to Ron Rienas’ Affidavit in the Authority’s motion record that it would conditionally accept 50% of Base Rent during Duty Free’s Covid-19 related closure period;

the Authority appears to take the position in the affidavit of Ron Rienas that full minimum Base Rent under the Lease is payable from July 31st, 2020 onward.

29. The Authority now seeks to terminate the Lease relying upon minimum Base Rent from December 14th, 2021 onward, ignoring the Authority’s covenant in subsection 18.07 of the Lease, and any inconvenient fact, act or omission.

30. The Landlord, 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:

¹⁷ Affidavit of Ron Rienas, sworn September 7, 2022 (“**Rienas Affidavit**”), para. 12, Motion Record of the Authority, dated October 7, 2022 (“**Authority’s Motion Record**”), Tab 2.

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.** (emphasis added)

31. The Canadian and New York State governments are equal stakeholders in the Authority, and are also responsible for the many of the Applicable Laws, including Border Restrictions, that caused material Averse Effects to Duty Free's business. They also stand to appropriate over \$6 million of improvements to the Leased Premises, and the good will created by Duty Free. In this regard, Duty Free has been nominated for many domestic and international awards as a duty-free store.

32. The Authority as the owner of the Peace Bridge and related assets is an "agent having jurisdiction" as that term is provided for in the Lease, and therefore, is a "Government Authority" as defined in paragraph 2.01(t) of the Lease:

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

33. The emergency Border Restrictions were in large part enacted by Canadian and U.S. governments, and by association the Authority as an agent is a Governmental Authority within the meaning of the Lease.

34. When the border was closed to non-essential travellers, the essential workers who were crossing the Canadian side of the border were daily crossers and did not have any duty-free allowance.¹⁸

35. Duty Free is required by subsection 9.04 of the Lease to comply with all Applicable Laws and keep its Licence in good standing, which it has always done.

36. Duty Free's expectation was and continues to be that the Authority would take into consideration the fact that its emergency Border Restrictions eliminated Duty Free's ability to operate the Permitted Use at the Leased Premises and to generate any retail sales for almost two years, when considering the impact on the Lease, and the appropriate adjustment to Base Rent.

37. Despite being among the hardest hit businesses by Covid-19 and associated restrictions, the rental assistance rolled out by Government Authorities completely failed to provide any meaningful measure of assistance to the duty-free industry in general, and specifically to Duty Free. The rental assistance programs available to Duty Free as a percentage of full contract rent was a small fraction of that available to other commercial businesses.¹⁹

38. Duty Free has applied for every government program in respect of commercial rent assistance available to it (CERS and the Tourism and Hospitality Recovery Program) for the benefit of the Authority, and has paid all sums received (and more when 20% of monthly Gross Sales exceeded the government rent assistance payment).²⁰

¹⁸ December 2022 Affidavit, para. 30, RMR, Tab 1

¹⁹ November 2022 Affidavit, para. 37, CMR, Tab 2

²⁰ November 2022 Affidavit, para. 43, CMR, Tab 2

Rent Deferral Agreements

39. On April 27, 2020, Duty Free entered into a rent deferral agreement prepared by the Landlord “due to travel restrictions and economic hardship created by the Covid-19 pandemic”.²¹

40. During the Rent Deferral Period, Duty Free was required to pay all Additional Rent, and Base Rent was deferred to be paid over an amortized period.²²

41. The first rent deferral agreement expired on July 31, 2020. Duty Free made all payments required under the first rent deferral agreement and the parties continued to act as if the agreement had been extended.²³

42. In November 2020, Duty Free accepted the Landlord’s offer to enter into a second deferral agreement, which had the same terms as the first agreement except that the amortization period to repay rent was doubled to two years. The Rent Deferral Period under the second deferral agreement was to be extended to the earlier of (i) March 31st, 2021 or (ii) the last day of the month following the date the duty-free shop fully reopened for business after the restrictions on non-essential travel between Canada and the US are lifted.²⁴

43. Notwithstanding that under the rent deferral agreement the Rent Deferral Period ended on March 31, 2021, the Canada-US border remained closed and the retail duty-free store remained

²¹ December 2021 Affidavit, *supra*, para. 24 and Exhibit “B”, MR, Tabs 2 and 2B.

²² December 2021 Affidavit, *supra*, para. 25, MR, Tab 2.

²³ December 2021 Pearce Affidavit, *supra*, paras. 25-26, MR, Tab 2.

²⁴ December 2021 Pearce Affidavit, *supra*, para. 27 and Exhibit “C”, MR, Tabs 2 and 2C.

closed. Again, the parties continued to act as if the agreement had been extended and Duty Free continued to pay Additional Rent to the Landlord.²⁵

44. The underlying principle of the deferral agreements was that Duty Free would not be required to pay Base Rent until traffic across the Canada-US border returned to normal levels and Duty Free was able to reopen its store to the public.²⁶

45. Duty Free continued to make payments and the Landlord continued to accept payment under the terms as set out in the rent deferral agreements. Duty Free also paid to the Landlord all government subsidies for rent, as set out below. The Landlord did not raise any objection until it demanded immediate payment of all Deferred Rent plus three months accelerated minimum Base Rent on September 8, 2021, being 13 days before Duty Free opened for business.²⁷

Landlord Delivers Notices of Default

46. On September 8, 2021, the Landlord issued two notices of default under the Lease. One in respect of a monetary default in which the Landlord demanded payment within 9 days of \$5,931,389.00 representing the full amount of all minimum Base Rent arrears without regard to the amortization schedule in subsection 2.3 of the November 2020 rent deferral agreement.²⁸

²⁵ December 2021 Affidavit, *supra*, paras. 29 and 30, MR, Tab 2.²⁶

December 2021 Affidavit, *supra*, para. 31, MR, Tab 2.

²⁷ December 2021 Affidavit, *supra*, para. 32, MR, Tab 2.

²⁸ December 2021 Affidavit, *supra*, paras. 36-38, MR, Tab 2. See also Affidavit of Christopher Schulze, sworn December 2, 2021 (“**Schulze Affidavit**”), Exhibit “G,” Application Record, returnable December 14, 2021 (“**AR**”), Tab 4.

47. Duty Free states the notice of monetary default is invalid since the unamortized portion of the Deferred Rent was not due and payable at the time the notice was issued since there had been no prior Event of Default.²⁹

48. The second notice of default demanded that Duty Free pay, within 14 days, September 2021 Minimum Base Rent in full as well as three months' accelerated minimum Base Rent being about \$1.2 million dollars plus \$10,000 of legal expenses and more taxes, based on alleged non-monetary defaults that:

- (a) Duty Free did not provide a replacement letter of credit after the Landlord, without notice and contrary to the parties' course of conduct to that point, applied Duty Free's full \$50,000 letter of credit toward Rent arrears even though the Canada-US border had not fully reopened, and Duty Free's retail duty-free store had not reopened yet;
- (b) Duty Free had not continuously and actively carried on the Permitted Use in the whole of the Leased Premises and it had not operated its business 24 hours a day, seven days a week, 365 days a year (which operation would have been in breach of Applicable Laws during a substantial portion of the period of Border Restrictions); and

²⁹ December 2021 Affidavit, *supra*, para. 38, MR, Tab 2.

- (c) Duty Free closed for 10 consecutive days without the prior consent of the Landlord (during a worldwide pandemic that resulted in travel restrictions and border closures).³⁰

49. Duty Free restored the \$50,000 letter of credit and re-opened the duty-free store, thus curing the non-monetary defaults, to the extent they were *bona fide* defaults.³¹

50. Despite the Authority's knowledge of the government imposed eviction moratorium making it unlawful to terminate the Lease, the Authority's counsel advised RBC's lawyer that the Authority intended to exercise its remedies under the default provisions of the Lease (ie. terminate the Lease anyway) during the non-enforcement period, without regard to the eviction moratorium.³²

51. The Authority is the only land border duty-free store landlord to contact a duty-free store tenant's creditor/bank for the express purpose of causing the creditor to initiate receivership proceedings because of what it stated was pending Lease termination, notwithstanding that it knew that it was prohibited from terminating the Lease by reason of the eviction moratorium under Part IV of the *Commercial Tenancies Act*, that was in place through April 2022.³³

Payment of Percentage Rent Since Re-Opening

52. Base Rent payable under the Lease is by a formula predicated upon twenty percent (20%) of Duty Free's Gross Sales, being the minimum gross sales anticipated at the time of entering into

³⁰ December 2021 Affidavit, *supra*, para. 39, MR, Tab 2.

³¹ December 2021 Affidavit, *supra*, para. 41, MR, Tab 2.

³² November 2022 Affidavit, para. 62, CMR, Tab 2

³³ November 2022 Affidavit, para. 93, CMR, Tab 2

the Lease, together with a minimum rent of \$4 million per annum paid monthly (subject to a calculation set out in subsection 4.03 of the Lease).

53. Since reopening its retail store, Duty Free has in good faith paid to the Authority Normal Rent.³⁴

54. Throughout the Covid-19 pandemic, Duty Free has paid all Additional Rent to the Authority, in the sum of approximately \$10,800 per month, including during the Closure Period.³⁵

55. The Authority has accepted all payments from Duty Free, including Normal Rent.³⁶

56. Duty Free had been paying the 20% of Gross Sales on or around the tenth day of each month after completing its accounting of Gross Sales for each month, which it delivered to the Authority in accordance with subsection 5.01 of the Lease. In response to a request from the Authority, made by way of alleging a default of the Lease, Duty Free adjusted its accounting practices to calculate its monthly Gross Sales on the last day of each month on a rush basis, so it could accelerate payment of its installments of Normal Rent to the Authority on the first day of each month.³⁷

57. Duty Free's Normal Rent payments have increased as Gross Sales have increased from close to 0% to about 50% of pre-Covid sales by summer 2022, and are currently 60% to 65% of pre-Covid-19 sales.³⁸

³⁴ November 2022 Affidavit, para. 54, CMR, Tab 2

³⁵ November 2022 Affidavit, para. 41, CMR, Tab 2

³⁶ November 2022 Affidavit, para. 55, CMR, Tab 2

³⁷ November 2022 Affidavit, para. 56, CMR, Tab 2

³⁸ November 2022 Affidavit, para. 57, CMR, Tab 2

58. Duty Free's sales remain about 35% to 45% below pre-Covid 19 levels. However, in recent months since the emergency border restrictions began to be eased and the Ontario provincial government restrictions have also been eased, and with the recent elimination of the ArriveCan app, Duty Free's sales have slowly, but consistently trended upward.³⁹

59. Assuming sales continue trending upward and no unforeseen reintroduction of government restrictions, Duty Free anticipates that as border traffic returns to its pre-Covid-19 levels, sales will continue to increase to a level which will enable it to be able to pay the annual minimum Base Rent provided for in the Lease.⁴⁰

60. Covid-19 related infections are again increasing and Ontario's medical system is discussing the possible re-introduction of mandatory masks. It is uncertain what the future may hold and for that reason it is important that certainty exist in respect of base rent obligations under the Lease in the event of further material Adverse Effects related to another change in Applicable Laws.⁴¹

Judicial History of the Dispute

61. This matter has been before the court on three occasions. On the initial occasion in December 2021, the court ordered that the Landlord's rights be stayed (along with all other parties with claims against the Tenant). The Landlord was present at that hearing, had an advance copy of the order sought, and sought no amendment.

62. At that time, and for several months previous, the Tenant was paying Normal Rent.

³⁹ November 2022 Affidavit, para. 112, CMR, Tab 2

⁴⁰ November 2022 Affidavit, para. 115, CMR, Tab 2

⁴¹ November 2022 Affidavit, para. *supra*, 115, CMR, Tab 2

63. The matter returned to court in January 2022. Prior to the attendance the Landlord received the Tenant's letter of January 14 outlining the Tenant's view of the Lease issues and proposing a mediation.⁴² The Landlord was also advised that the Monitor was to be given powers to be more involved in the Landlord Tenant dispute. The Landlord did not respond to the Tenant's proposal but did attend court. Again, the Landlord raised no issue. It is also worth noting that the Landlord received Normal Rent in January 2022 prior to this attendance, but made no complaint.⁴³

64. The third time this proceeding returned to court, in March 2022, the parties sought to appear before Justice Penny. The Landlord was advised of this planned attendance but elected not to attend this hearing.⁴⁴ Having heard no objection from the Landlord, the parties were able to proceed in writing. Again, the Landlord was silent despite having received Normal Rent for the preceding six months.

Court Officer Reports Rent is Being Paid

65. At each of the January 17 attendance and the March 23 attendance, the Monitor filed a report.

66. The Monitor in its first report in January 2022, confirmed to the court three things which are relevant to this dispute.

67. First, it confirmed that the Tenant "continues to dispute the rental arrears and the current rent owing." Second, the Monitor confirmed that over the cash flow period, being the three-month period ending in March 2022, the Tenant projected paying the Landlord "\$290,000" in the

⁴² November 2022 Affidavit, CMR, Tab 2, Exhibit A

⁴³ November 2022 Affidavit, para. 68, CMR, Tab 2

⁴⁴ Monitor's Second Report, dated March 21 ("**Second Report**"), para. 16.

aggregate. This is clearly much less than the \$333,000 per month the Landlord claimed. Third, the Monitor reported that it was being asked by the court to monitor and report on the negotiations between the Landlord and Tenant. The report was served on the Landlord.⁴⁵

68. In March the Monitor produced a further report for the Court. In it the Monitor confirmed that the Tenant has prepared a cash flow which confirms that the Tenant's compliance with the Appointment Order.⁴⁶ The cash flow continued to show payment of percentage rent, i.e Normal Rent. The Monitor report also confirmed that the Monitor was in communication with the Landlord. The Monitor also confirmed that the Landlord did not respond to communications from the Tenant related to the hearing. The Monitor also confirmed in its report that the Tenant was intending to pay \$424,000 in rent, in the aggregate, over the 4 months of the cash flow projection. The report was served on the Landlord.⁴⁷

69. In accordance with the Court orders, the Tenant provided monthly reports to the Monitor which included a cash flow which confirmed, among other things, the amount of rent being paid. Each cash flow showed percentage rent a.k.a. Normal Rent being paid.

70. The Monitor did not attend Court at any time to alert the Court that the Court Order was being violated, because it was not being violated. The Monitor had asked for and received a copy of the Lease and had received updates from the Tenant with respect to the ongoing attempts at negotiation, as required by the Court order.

⁴⁵ Monitor's First Report, dated January 14, 2022 ("**First Report**"), paras. 14, 16(d) and 17(a)

⁴⁶ Notice of Motion ("**NOM**"), para. 6, Motion Record of the Monitor ("**MR of Monitor**") March 21, 2022, Tab 1

⁴⁷ Second Report, pp 4 and 5

71. When the Landlord finally asked the Monitor in late July to agree to lift the stay for non-payment of rent, it is significant to note that the monitor said, “No”.⁴⁸

PART III - ISSUES AND ARGUMENT

Issue # 1: Did the Tenant fail to pay rent as required by the Court Order or violate the Court Order?

72. Tenant Position: There is no dispute that the Tenant paid rent when due each month and complied with the court order. The court officer has reported that the Tenant acted accordance with the court order.

Issue# 2: Did the Tenant fail to pay rent as required by the Lease?

73. Tenant Position: The Tenant paid rent as required by the Lease. It is conceded that this position is hotly contested by the Landlord and is the subject of a Cross Motion brought by the Tenant that requires the court to review and interpret the Lease in the context of the pandemic.

⁴⁸ Rienas Affidavit, para. 36, Authority’s Motion Record, Tab 2.

Issue # 3: Should the stay be lifted to allow for the termination of the Lease?

74. Tenant Position: There is no basis to lift the stay. The Tenant has acted in compliance with the Lease and the court order while the Landlord laid in the weeds before making its position known. The order has preserved the status quo which existed prior to the order being granted. The Tenant is proposing the most expeditious and reasonable path to allow for the determination of the landlord and tenant dispute. The prejudice to the Tenant from lifting the stay is much greater than the prejudice to the Landlord caused by maintaining it. The assets of the Tenant are being preserved by a stay and monitored by the court. The Landlord cannot prove it is suffering any prejudice at all until the Lease questions are determined whereas terminating the business now will cause immediate and irreparable harm to the Tenant.

Issue #1- Compliance with the Order

Landlord Never Sought the Standard Order in respect of Rent

75. In a debtor proceeding, such as a CCAA proceeding or a BIA proposal proceeding (to which the Landlord in its factum equates this proceeding), landlords routinely seek an order specific to the payment of rent and are aggressive in enforcing it. Often the following standard order provision is inserted:

“THIS COURT ORDERS that until a real property lease is disclaimed [or resiliated] in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the

date of this Order shall also be paid.”⁴⁹

76. The Landlord did not seek such an order. Instead, the landlord relies on section 11 of the Monitor order to say there is an obligation to pay rent. However, it is submitted that a standard CCAA order also includes Section 17 which reads⁵⁰:

“THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data 35 services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.”

77. Section 17 quoted above is identical to section 11 in the Monitor Order. However, as noted, in the CCAA landlords do not rely on section 17 as an order which directs the payment of rent.

78. The Landlord failed to follow the convention to seek the form of order which would protect the payment of rent that it understood to be payable by the Lease, in the manner they belatedly claim was due during these proceedings, notwithstanding that the issue of how much Base Rent is payable has been openly disputed for over a year. This is especially relevant in this matter when the Landlord had at least three separate occasions before the Court to seek such an order. Each time it was fully aware that it was not going to receive what it now claims is the amount owing.

⁴⁹ December 2022 Affidavit, RMR, Tab 1, Exhibit C, para. 9.

⁵⁰ December 2022 Affidavit, RMR, Tab 1, Exhibit C, para. 17.

79. Section 11 of the Monitor order, like Section 17 of the Standard CCAA order only mandates the payment of Normal Rent, which has been paid because that Normal Rent is the “arrangement between the parties” and or is payment in accordance with “normal payment practices”.

Court Order was Followed

80. The Tenant has acted in compliance with the court order as it understood it and as the Monitor applied it. Even if the Landlord’s position were correct and the rent had been short paid (which is expressly denied) it would still be inappropriate to lift the stay now for past wrongs. The Landlord has been directly involved in this process at all points and is a sophisticated party. To allow it to wait in the weeds, until the alleged arrears become untenable, only to spring up now and demand payment of an amount it knows the Tenant likely cannot pay, cannot be endorsed by this Court.

81. Doing so would be a violation of the “building blocks” approach that Justice Morawetz advocated in the Target CCAA should be applied when dealing with a proceeding in which orders are made upon which parties rely⁵¹.

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

⁵¹ [*Target Canada Co. \(Re\)*, 2016 ONSC 316](#), at para 81

82. Here, as in Target, the orders were amended several times, on notice to and in front of the Landlord. The parties have acted in reliance on the fact that the previous court orders were appropriate and that following them was appropriate. It is not available to the court in this circumstance to hold retroactively that the order was violated in the manner that the Landlord suggests.

83. The court could interpret the Lease now and decide now that the amount of rent to be paid going forward should be different than the amounts paid to date, but it can only do that if it is able to determine at the same time what the correct rent is in any given period where there is a change of Applicable Laws, which, as noted above, it cannot determine without looking at the entire relationship between the Landlord and Tenant, and by applying the Lease terms agreed by the parties in contemplation of a change in Applicable Laws materially impacting the Tenant's business.

84. In the *Hudson Bay* case, Justice Hainey granted interim relief under the *Courts of Justice Act* which required the payment of only one half of the rent owing for a period of time while that dispute was litigated. The Court of Appeal affirmed that Justice Hainey had the discretion to do that under the Courts of Justice Act. The Court of Appeal also affirmed relief from forfeiture in favour of the Tenant in that case.⁵²

85. Justice Pattillo had recourse to that same discretion under the *Courts of Justice Act* when he ordered that a stay be put in place and the status quo could continue. As ini, ultimately

⁵² [*Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., 2022 ONCA 585*](#) paras. 25 and 39 ("Hudson's Bay").

the court can decide, once it hears the ultimate motion, whether or not any additional amounts are payable, but in the interim, the fact that the rent being paid to the Landlord is less than the minimum Base Rent payable under the Lease (according to the Landlord), does not mean the court order is being violated or that in the Court was *ultra vires* in making an order that did not require payment of the Base Rent.

Issue #2: Did the tenant fail to pay rent as required by the lease?

86. Contrary to the Landlord's position, this is not a simple dispute in which there is an agreed upon amount of rent which has gone unpaid. On the contrary, the Court officer has attested to the fact that the Tenant has been paying rent during this process. Indeed, the amount of rent paid to the Landlord has steadily increased.

87. Even the Landlord concedes in its materials that the question of whether or not the Tenant is paying rent due by the Lease is connected to the question of what the obligations of the parties are under the Lease which in turn are tied to the interpretation of various specific sections under the Lease noted in the Cross Motion.⁵³ The interpretation of those sections under the Lease are directly tied to the conduct of the parties, both before and during the current court process.

88. It is also asserted that the conduct of the parties should also be viewed through the requirements of the Lease, to consult, to be reasonable, and the requirements of the common law, such as the requirement to act in good faith and estoppel.

⁵³ Duty Free's Factum dated November 28, 2022 ("**Factum**"), pp. 11 to 19

89. It is also asserted that the Lease also requires the Court to consider the actions of the governments and its impact on the business of the Tenant.

90. A key unresolved issue in the Lease is the interpretation of subsection 18.07 of the Lease. It should be noted this subsection was NOT initially in the draft lease contained with the Landlord's RFP materials but was specifically negotiated when the Landlord declined to guarantee minimum traffic levels.⁵⁴

91. That subsection was specifically added to the Lease, presciently it now seems, to account for changes in the ability of the Tenant to pay rent, or the fairness of any rent charged to the Tenant, in the event of change(s) of Applicable Laws causing material adverse effects on the Tenant's business.⁵⁵ Judicial determination of its meaning and application is needed to resolve this matter.

This Matter is a Contract Dispute, not Relief from Forfeiture

92. The Landlord factum characterizes the position of the tenant incorrectly as a relief from forfeiture application. Leaving aside for the moment that many if not all of the relief from forfeiture cases cited by the Landlord in its factum result in the landlord being required to grant relief from forfeiture (including the *Hudson Bay* case) it must be emphasized that there is no relief from forfeiture sought here because the Landlord has not terminated the Lease.

93. Rather, this is a motion where the Landlord seeks to lift the stay and terminate the Lease for non-payment of minimum Base Rent, which requires the court to determine if rent is or is not being paid in accordance with the rights and obligations of the Lease. In order to do that, the court

⁵⁴ December 2022 Affidavit, para. 6, RMR, Tab 1.

⁵⁵ December 2022 Affidavit, paras. 6, 19, and 22, RMR, Tab 1.

must interpret the Lease. The overriding objective of contractual interpretation is to determine “the intent of the parties and the scope of their understanding”.⁵⁶

94. This is, in fact, a contractual interpretation dispute. The court should direct the parties to compile a full record so that it can address the factors from *Sattva* in order to interpret the agreement.

95. The *Sattva* factors which govern contractual interpretation, as cited in *Weyerhaeuser Company Limited v Ontario (Attorney General)* [2017 ONCA 1007](#), are:⁵⁷

[65] The general principles guiding adjudicators about “how” to interpret a commercial contract were summarized in *Sattva*, at para. 47, and by this court in two 2007 decisions - *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007 ONCA 205](#), 85 O.R. (3d) 254, at para. 24, and *Dumbrell v. The Regional Group of Companies Inc.*, [2007 ONCA 59](#), 85 O.R. (3d) 616, at paras. 52-56. When interpreting a contract, an adjudicator should:

- (i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
- (ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and

⁵⁶ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633, at para. 47.

⁵⁷ *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, at para. 65.

(iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

96. The court does not have the record before it on this lift stay motion to answer those questions, but it needs that information in order to determine whether or not it is the Landlord, or the Tenant, who is being prejudiced by an incorrect interpretation of the rights and obligations under the Lease and how that impacts rent.

97. If this were a relief from forfeiture application, the court would also require evidence about how much the Landlord is actually owed, or how much the Landlord may be found to owe the Tenant, so that it could then fashion a just remedy to allow the Lease to come back into good standing over time. The court has broad discretion to fashion a remedy in such a case but it cannot do so until it understands the rights and obligations of the parties and the ability of the Tenant to make payments, if any payments are ordered.⁵⁸

Issue #3: Lift Stay

98. In order to lift the stay, the Landlord must show that it is suffering material prejudice and on a balance of convenience the stay should be lifted and that there has been a significant change of circumstance from when the stay was granted which prejudices the Landlord.

99. In *Fiorito v. Wiggins*, [2017 ONCA 765](#), the Court cited *Cumberland Trading Inc., Re* in holding that material prejudice is considered on an objective standard, referring to the degree of prejudice “suffered vis-à-vis the indebtedness and the attendant security and not to the extent that

⁵⁸ [Section 98](#) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; *Hudson’s Bay*, para. [43](#).

such prejudice may affect the creditor *qua* person, organization or entity.”⁵⁹ Material prejudice must also relate to the continued operation of the stay and, to result in a lifting of the stay. This is not a case where the Landlord would “receive nothing absent a lifting of the stay”. The Landlord will continue to receive the Normal Rent payments it has accepted since the stay was put in place, and it is anticipated the Landlord will actually receive larger monthly Normal Rent payments as border traffic trends back to pre-pandemic levels.

100. In the alternative, if this court were to consider the appointment order as akin to an injunction under the *Courts of Justice Act*, the Court would have to consider the balance of convenience and whether the facts as presented to the motion Judge are substantially different from the facts upon which the original order was given or have changed so dramatically that the factual underpinnings of the original order are no longer valid.⁶⁰

101. The Authority is unable to meet any of these tests.

102. As this process has gone on, the prejudice to the Landlord (if there is any, which is strictly denied) is declining.

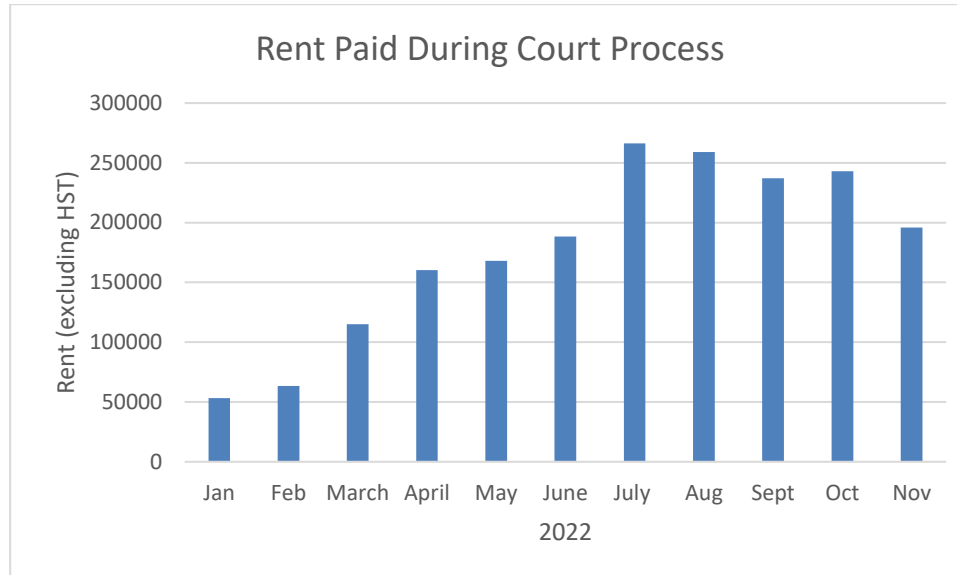
103. Set out below is a graph⁶¹ which highlights the rent paid by the Tenant during this process. It is clearly an upward trend. Ignoring November for the moment (as that rental amount was anomalously impacted by a colossal snow storm) it is clear that the delta between what the Landlord says it is owed and what it is being paid is shrinking. It has shrunk dramatically since the

⁵⁹ [Fiorito v. Wiggins, 2017 ONCA 765](#), at [para 31](#), citing [Cumberland Trading Inc. Re](#) at [para 11](#).

⁶⁰ [Les Equipements de Ferme Curran Ltee/Curran Farm Equipment Ltd. v. John Deere Limited, 2010 ONSC 3779](#) at [para 6](#).

⁶¹ December 2022 Affidavit, RMR, Tab 1, Exhibit B.

beginning of this process. As such, the prejudice to the Landlord is diminishing more or less monthly, and the tenant is coming into the busiest season of its retail year.



104. By comparison, if the court were to lift the stay, it knows the Landlord intends to immediately terminate the Lease, thereby ending the business of the Tenant, which is obviously an extreme prejudice. Or it would consent to the appointment of a liquidating receiver, thereby also ending the business of the Tenant, causing a severe financial loss to its owners who invested \$ 6 million dollars refurbishing the Leased Premises, which is again an extreme prejudice. As noted above, the business employs as many as 90 people.

105. It is also worth considering the nature of this specific business and its impact on the community. It provides a specific and unique function, namely providing duty free sales to those who cross the Canadian border. If a receiver was appointed upon the Landlord's termination of the Lease, RBC has indicated it will not expect a receiver to operate the business but will liquidate the inventory by in large part returning liquor and other product to suppliers.

106. The evidence is that it would likely be half a year or more before another licence could be issued if one is issued at all.⁶² One can also speculate that the absence of duty-free services at the Peace Bridge would impact travel patterns, as those seeking to use duty free and cross at one of the three Niagara area bridges would now be forced to cross at the other two location.

107. It is cold comfort to say that the prejudice to the Tenant is offset by replacing a functioning business with a legal remedy for relief from forfeiture and damages at some point in the future.

Landlord did not act with Urgency

108. The Landlord has not acted as though its concerns about rent were a matter of urgency. It took four more months from the lifting of the moratorium on commercial eviction in April 2022 until July 26th 2022 before the Landlord even raised the issue of a Lease termination motion. The Landlord's counsel missed a scheduled call to discuss its' July 26th letter attended by the other parties on August 10th, 2022. On August 15th the rescheduled call was held and the Landlord indicated it would serve its final motion record in a week or so. A draft notice of motion was served on or about August 19th and a draft affidavit was served later on or about September 8th, 2022. The parties attended court on October 5th and the Landlord had still not finalized its motion materials which were served on October 7, 2022 at which time the Tenant knew with certainty what issues it had to answer.

Why should the Existing Process end only to Start Another with the Same Goal?

109. The [Rules of Civil Procedure](#) require parties to act justly, expeditiously and with a view to the least expensive determination of every civil proceeding. The court is also directed to give

⁶² November 2022 Affidavit, paras. 116 and 119, CMR, Tab 2.

orders and directions that are proportionate to the importance and complexity of the issues and the amount involved. The proposal by the Landlord, to lift the stay and require the parties to attend another court to restart their dispute is highly inefficient and not expeditious.⁶³

110. The Landlord and Tenant both agree there is a material dispute about how the Lease is to be interpreted, and applied. However, the Landlord's approach to the hearing of the Cross Motion is inefficient and prejudicial to the Tenant. The Landlord urges that the question of the Landlord's conduct and the correct interpretation of the Lease should be done elsewhere and later. Essentially, the Landlord suggests that the stay be lifted, the Lease be terminated, everyone lose their jobs and the store should close, just so the Tenant can then appear in a different court and start a new piece of litigation against the Landlord to adjudge exactly the same issues that are already before this Court and seek a new stay or injunction from that Court. Why is this reasonable?

111. In comparison, the Tenant suggests that this matter can be heard before the Commercial List, at which point all issues between the Landlord and Tenant can be adjudicated by the same judge. The Landlord has repeatedly and erroneously argued that the Tenant is stalling, but any cursory review of the timeline establishes that is not the case.

112. The process proposed by the Tenant is in fact the process that will result in the just, most expeditious and least expensive determination of the issues. The order sought by the Tenant is proportionate to the importance and complexity of the issues and to the amounts involved in this proceeding.

⁶³ Rules [1.04\(1\)](#) and [\(1.1\)](#) of the [Rules of Civil Procedure](#).

PART IV - ORDER REQUESTED

113. Duty Free requests an Order dismissing the landlord motion, with costs and either a) ordering the parties to attend mediation or b) the reasonable scheduling of the cross motion.

ALL OF WHICH ARE HEREBY SUBMITTED THIS 23rd DAY OF DECEMBER BY:



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. [*Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, 2022 ONCA 585 at paras. 25 and 39, 43](#)
2. [*Fiorito v. Wiggins*, 2017 ONCA 765, at para 31](#)
3. [*Les Equipements de Ferme Curran Ltee/Curran Farm Equipment Ltd. v. John Deere Limited*, 2010 ONSC 3779 at para 6](#)
4. [*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 \(CanLII\), \[2014\] 2 SCR 633, at para 47](#)
5. [*Target Canada Co. \(Re\)*, 2016 ONSC 316, at para 81](#)
6. [*Weyerhaeuser Company Limited v. Ontario \(Attorney General\)*, 2017 ONCA 1007, at para para. 65](#)

Schedule B – Statutory Provisions

[Rules of Civil Procedure, R.R.O. 1990, Regulation 194](#)

[Rule 1.04](#)

Interpretation - *General Principle*

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

[Rule 1.1](#)

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

[Courts of Justice Act, R.S.O. 1990, c. C.43](#)

[Section 98](#)

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C.43, s. 98; 1993, c. 27, Sched.

[Section 101](#)

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

ROYAL BANK OF CANADA

and

Applicant

Respondent

Email address of recipient: See Service List

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

Proceeding commenced at Toronto

FACTUM OF PEACE BRIDGE DUTY FREE INC.
(Motion Returnable January 5, 2023)

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

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

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

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

Lawyers for the Respondent