

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

NON-CONFIDENTIAL APPEAL BOOK AND COMPENDIUM

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TAB 1

Dec 29/23 - ND

REGISTRAR / GREFFIER
COUR D'APPEL DE L'ONTARIO

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NOTICE OF APPEAL

THE APPELLANT, PEACE BRIDGE DUTY FREE INC., APPEALS to the Court of Appeal from the Order of the Honourable Madam Justice Kimmel ("**Motion Judge**") dated December 15th, 2023, made at Toronto ("**Order**").

THE APPELLANT ASKS that the Order be set aside and an order be granted as follows:

1. A declaration that subsection 18.07 of the July 28th, 2016 lease ("**Lease**") between the Appellant and the Buffalo and Fort Erie Public Bridge Authority ("**Respondent**") operated in the circumstances of this case to result in an abatement of rent during the affected period that subsection 18.07 of the Lease applies.¹

¹ Capitalized terms if not defined herein shall have the meaning ascribed to them in the December 15th, 2023 reasons for decision of the Honourable Justice Kimmel or the Lease.

2. That the application of subsection 18.07 of the Lease results in rent payable under the Lease for the period of April 2020 to October 2021 (“**Closure Period**”) equal to either:
 - (a) full Additional Rent and the greater of all COVID-related rent assistance it was eligible for and received or 20% of its monthly Gross Sales (“**Normal Rent**”); or
 - (b) an amount that the Court shall order be determined by way of a reference to be held before the Superior Court of Justice.
3. That the Base Rent payable during the Ramp Up Period is as set out in the schedule at paragraph 12 of the December 15th, 2023 reasons for decision of the Honourable Justice Kimmel.
4. That the Respondent pay costs of this appeal and the costs of the proceedings before the Honourable Justice Kimmel on such scale as is determined to be just by this Court; and
5. Such further and other orders as to this Honourable Court may seem just.

THE GROUNDS OF APPEAL are as follows:

Failing to give effect to findings that Base Rent abatement was required

6. The Motion Judge erred in that she 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?

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.

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

7. 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 Appellant in the circumstances of this case, taking into consideration the extent of the Adverse Effect on the Appellant's business; and found that the Respondent acknowledged that there was an impact to the Lease, and that a significant rent abatement was appropriate, not only for past rent, but future rent moving forward; but the Motion Judge erred by failing to grant the Appellant any remedy to give effect to the admitted intention of the parties that the application of subsection 18.07 of the Lease required a significant rent abatement.
8. Having found that the Landlord conceded that subsection 18.07 of the Lease was a "safety valve" to protect the Appellant, the Motion Judge erred in granting no remedy to the Appellant.

Errors relating to the interpretation of the Lease

9. The Motion Judge erred by holding that the application of subsection 18.07 of the Lease proposed by the Appellant asked the court to amend the Lease, when in fact the Motion

Judge was only being asked by the Appellant to apply the existing terms of the Lease, including subsection 18.07.

10. The Motion Judge erred by failing to consider pre-contractual representations by the Respondent of how subsection 18.07 of the lease would be interpreted as part of the factual matrix.
11. The Motion Judge erred by relying on language in subsections 4.05 and 18.08 of the Lease, to reject the Appellant's interpretation that Base Rent must be abated during the Covid-19 closure period, notwithstanding that subsection 18.07 of the Lease overrides those provisions when it is engaged.
12. The Motion Judge erred by interpreting subsection 18.07 of the Lease in a manner that renders it meaningless and leads to a commercially unreasonable result. In particular, the Motion Judge held that the outcome, if the parties could not reach a resolution in their negotiations, was that the clause provides no relief to the Appellant, despite also finding that the purpose of the clause was to provide relief to the Appellant.
13. The Motion Judge erred by failing to consider the factual matrix and existing circumstances that provide objective criteria for determining the impact on the Lease of the changes in Applicable Laws.
14. The Motion Judge erred by misinterpreting the law and finding that the parties intended further negotiations regarding the changes in Applicable Laws before the Lease came into effect, since it was impossible for the parties to know at time the Lease was signed that the Covid-19 pandemic or changes in Applicable laws would happen almost four years later.

15. The Motion Judge misinterpreted the law of part performance as it applies to contract interpretation and the remedies available to the Court arising from part performance by the parties to a contract.

Errors relating to reasonableness and the exercise of good faith

16. The Motion Judge erred by failing to consider that the Respondent and the Appellant amended the Lease to allow for the Appellant's duty-free store to remain closed until the Canada-U.S. border reopened when considering the reasonableness of the Respondent's actions, including issuing defaults and demanding the Appellant reopen the store under threat of Lease enforcement.
17. The Motion Judge failed to consider that the Respondent issued default notices it knew were unlawful to act on to intimidate the Appellant during the Ontario eviction moratorium.
18. Having found that the Respondent's stakeholders (the Canadian and New York State governments) were responsible for the changes in Applicable Laws that triggered subsection 18.07 of the Lease, the Motion Judge erred by giving the Respondents the higher degree of discretion allowed to ordinary commercial parties to pursue their own self-interest, when evaluating the reasonableness of the Respondents "hardball" negotiating tactics.
19. The Motion Judge erred by finding that without prejudice offers made by the Respondent were reasonable, despite the fact that they were impossible for the Appellant to accept, and came with significant conditions, including a requirement for third parties with whom there was no privity of contract, to provide personal guarantees while the border was closed.

20. The Motion Judge erred by failing to consider the vastly different treatment afforded by the Respondent to its other land border duty free store tenant that was similarly impacted by the Border Restrictions.
21. The Motion Judge misunderstood and misinterpreted the evidence regarding the Appellant's submissions regarding how the objective standard of profitability could be used to assess reasonableness of the Respondent's actions. At no time did the Appellant submit to the Court that it was required to protect the profitability of the business. The Appellant asked the court to focus on allowing the business to survive the pandemic, not for it to be profitable during it (which it manifestly was not in any event).
22. The Motion Judge failed to consider that the Respondent intentionally advised Royal Bank of Canada that it would terminate the Lease with the ulterior motive of triggering this receivership application by Royal Bank of Canada in order to indirectly terminate the Lease, when it knew it was unlawful to do so directly by reason of Part IV of the *Commercial Tenancies Act*.
23. The Motion Judge correctly concluded that if the Respondent was acting for the ulterior motive of seeking to terminate the Lease, rather than acting to preserve it, would not have been acting in good faith, but the Motion Judge made a palpable and overriding error by failing to consider that the totality of the Respondent's actions that were in furtherance of this ulterior motive.
24. The Motion Judge failed to hold the Respondent responsible for its failure of honest performance of the Lease.

Other errors

25. The Motion Judge erred by depriving the Appellant of the benefit of the “safety valve” it bargained for in respect of subsection 18.07 of the Lease by effectively finding that a mere four month deferral of rent from April 1st, 2020 to July 31st, 2020 (and no abatement of rent) is the only relief that the Appellant will receive arising from the Covid-19 pandemic and resulting changes in Applicable Laws that shut down its business for 18 months, and that the Respondent acknowledges will adversely affect the business for a total of 6.5 years.
26. The Motion Judge failed to understand the expert evidence and misapplied it.
27. The Motion Judge erred by on the one hand rejecting the Appellant as an expert for giving financial projections, but on the other hand giving undue weight to the Appellant’s projections of future sales made in the midst of the Covid-19 pandemic to accept the position of the Landlord, which error was compounded by the fact the Motion Judge had actual evidence before her of actual sales and performance during the period covered by the projections, which demonstrated the error in those projections and that they should not have been relied on by the Court.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

28. This is an appeal from a final order of a judge of the Superior Court of Justice, *Courts of Justice Act*, s. 6(1)(b). As such, the route of this appeal is dictated by the *Courts of Justice Act* and the Appellant has an appeal as of right.
29. The style of cause in this proceeding recognizes that these proceedings arose as an interim measure, ordered by the Ontario Superior Court of Justice pending the return of a receivership application by Royal Bank of Canada. However, it is not a receivership. The receivership application has not been heard and no receivership has been commenced. The Appointment Order expressly states that this matter is not a receivership under the *Bankruptcy and Insolvency Act* (“*BIA*”) and is a proceeding under the *Courts of Justice Act*.
30. The motion being appealed was heard in this proceeding with the Royal Bank of Canada style of cause as a matter of convenience, as expressly stated in paragraph 3 of the December 15th, 2023 reasons for decision of the Honourable Justice Kimmel.
31. In the alternative, if the Court determines that this matter is governed by the *BIA*, the Appellant states that leave is not required for the commencement of this appeal pursuant to ss. 193 (a) – (c) of the *BIA* as:
 - (a) The matters raised in the within appeal involve future rights, including the continuation of the Lease, which has an initial term that runs until 2031;

- (b) The decision is likely to affect other cases of a similar nature in the bankruptcy proceeding because the determination of the rent payable under the Lease for the affected periods will be a key factor in relation to the Respondent's express intention to terminate the Lease, a possible future lift stay motion, and a possible motion to grant relief from forfeiture or to determine the proper amount of rent payable as these proceedings continue; and,
 - (c) Rent payable and the costs payable under the Lease that is the subject of the appeal greatly exceeds ten thousand dollars.
- 32. In the alternative, if leave is required under section 193(e) of the *BIA*, the Appellant seeks leave to appeal the Order, and asks that the leave application be heard at the same time as the appeal.
- 33. It is appropriate that leave be granted because the appeal:
 - (a) Is of general importance to the practice of bankruptcy/insolvency matters and/or to the administration of justice as a whole;
 - (b) Is *prima facie* meritorious; and,
 - (c) Would not unduly hinder the progress of the herein proceedings.

Date: December 27th, 2023

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Court of Appeal File No.: COA-23-CV-1355

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

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

NOTICE OF APPEAL

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TAB 2

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

JUSTICE KIMMEL) FRIDAY, THE 15th DAY
)
)
) OF DECEMBER, 2023

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

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

ORDER

THIS CROSS-MOTION, made by the Moving Party, Peace Bridge Duty Free Inc. (“**PBDF**”), was heard November 1st, 2nd, and 3rd, 2023 at the courthouse located at 330 University Ave, Toronto, ON, M5G 1R7, the decision being reserved until this day.

ON READING the motion record of PBDF dated December 13, 2021, the Cross-Motion Record of PBDF dated November 13, 2022, the Responding Motion Record of PBDF dated December 2, 2022, the Supplementary Motion Record of PBDF January 2, 2023, the Supplementary Motion Record of PBDF February 13, 2023, the Supplementary Motion Record of PBDF dated September 26, 2023, the Factum of PBDF dated October 16, 2023, and Reply Factum

of PBDF dated October 27, 2023, and Compendium of PBDF dated October 31, 2023, and Brief of Offers of PBDF dated November 2, 2023, and the Costs Submissions of PBDF dated November 24, 2023, and upon reading the Factum of the Buffalo and Fort Erie Public Bridge Authority (the “**Authority**”) dated October 23, 2023, the Authority’s Brief of Excerpts from Transcripts dated October 23, 2023, Affidavits of Ron Rienas dated September 7, 2022, November 26, 2022 and March 1, 2023, Transcript of Mills dated August 17, 2023, Transcript of Jim Pearce dated August 31, 2023, Transcript of Ephraim Stulberg dated September 29, 2023, Transcript of Lisa Hutcheson dated September 29, 2023, and Affidavit of Amanda Singh dated October 23, 2023, and Brief of Documents of the Authority for Argument dated October 30, 2023, filed,

AND ON HEARING the submissions of counsel for PBDF and the Authority,

1. **THIS COURT ORDERS** that the PBDF’s motion is dismissed.
2. **THIS COURT ORDERS** that pending the return of the Receivership Application, PBDF shall continue to pay the agreed upon without prejudice rent as reflected in the May 17, 2023 endorsement of Justice Kimmel at paragraphs 9 and 10, subject to further orders of the Court.

 Digitally signed by
Jessica Kimmel
Date: 2024.02.12
09:03:59 -05'00'

Justice Kimmel

ROYAL BANK OF CANADA

and

PEACE BRIDGE DUTY FREE INC.

Applicant

Respondent (Moving Party)

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

ORDER

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Lawyers for the Respondent/Moving Party
Peace Bridge Duty Free Inc.

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

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

JUSTICE KIMMEL) WEDNESDAY, THE 17th DAY
)
)
) OF JANUARY 2024

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

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

ORDER (Re: Costs)

THIS CROSS-MOTION, made by the Moving Party, Peace Bridge Duty Free Inc. (“**PBDF**”), was heard November 1st, 2nd, and 3rd, 2023, and the motion being dismissed on December 15th, 2023, with the decision with respect to costs being reserved until this day.

ON READING PBDF's Costs Submissions Brief dated November 24, 2023, and Reply Costs Submissions dated December 1, 2023, and the Costs Submissions of the Buffalo and Fort Erie Public Bridge Authority (the "**Authority**") dated November 24, 2023, and Reply Costs Submissions of the Landlord dated December 1, 2023, filed,

1. **THIS COURT ORDERS** that PBDF pay the Authority net costs of the Cross-Motion and Lift Stay Motion in the total all inclusive amount of \$259,997.19, within thirty (30) days, subject to the stay in these proceedings that is currently in place pending the return of the Receivership Application and any other relevant considerations which may be raised with the court at a future attendance (if applicable).



Digitally signed by
Jessica Kimmel
Date: 2024.02.12
09:03:05 -05'00'

Justice Kimmel

ROYAL BANK OF CANADA

and

PEACE BRIDGE DUTY FREE INC.

Applicant

Respondent (Moving Party)

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

**ORDER
(Re: Costs)**

BLANEY McMURTRY LLP

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Lawyers for the Respondent/Moving Party
Peace Bridge Duty Free Inc.

TAB 3

CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2023 ONSC 7096
COURT FILE NO.: CV-21-00673084-00CL
DATE: 20231215

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *David T. Ullmann, John Wolf and Brendan Jones*, for Peace Bridge Duty Free Inc.,
the Moving Party

E. Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority, Respondent on
Motion

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023

REASONS FOR DECISION
PEACE BRIDGE DUTY FREE CROSS-MOTION
(LEASE DISPUTE)

[1] The economic effects of the COVID-19 pandemic were immediate and far reaching. The law and the courts have limits on what can be done to address contractual breaches caused by one party's inability to perform its contractual obligations in circumstances where their contract does not prescribe what will happen and the parties themselves have been unable to reach an agreement upon accommodations satisfactory to both. Despite the parties' inability to agree, this commercial tenancy has survived longer than many others because of the appointment of a monitor and a stay of proceedings granted as an interim measure in the context of a receivership application commenced by the Tenant's first secured lender. The Landlord did not initially oppose the stay which was granted, in part, because of a particular Lease provision that the parties agree required them to negotiate to try to preserve the tenancy. With the parties having done so in good faith, and failed, the court cannot force the parties to amend their lease or impose terms that are inconsistent with its express provisions.

[2] These are sophisticated commercial parties who found themselves in a dramatically changed economic environment in which the compromises that each was willing to make to try to preserve the tenancy were not enough to satisfy the other. Neither the Landlord nor the Tenant is at fault or to blame for the devastating effects that the COVID-19 pandemic and resulting border restrictions had on this Tenant's duty free business, nor can they be faulted for looking out for their own economic interests in their negotiations. Each did so while also making a good faith effort to preserve the

tenancy. The parties came very close to a final agreement, but unfortunately could not come to terms about the reduced Base Rent to be paid for the approximately eighteen month period in which the Tenant's duty free store was closed. The parties cannot be forced by the court to make an agreement, nor can the court impose upon them a new agreement, simply based on a Lease provision pursuant to which "the Landlord agree[d] to consult with the Tenant to discuss the impact of [the] introduction of or change in Applicable Laws to the Lease."

Procedural History

[3] By endorsements dated January 25 and April 4, 2023 (the "Scheduling Endorsements"), this court directed that the dispute between Peace Bridge Duty Free Inc. (the "Tenant" or "PBDF") and the Buffalo and Fort Erie Public Bridge Authority (the "Landlord" or the "Authority") in respect of the July 28, 2016 lease (the "Lease") of the duty-free shop at 1 Peace Bridge Plaza, Fort Erie on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York (the "Leased Premises") be heard within this receivership application as a matter of convenience and with the consent of all affected parties (rather than commencing a separate application). The parties agreed, and the court endorsed on January 25, 2023, as follows in this regard:

For the purpose of the Tenant's Cross Motion the Landlord is a Respondent to that motion and the court shall have jurisdiction to grant the relief sought against the Landlord by the Tenant therein, including, without limitation, with respect to damages, if any, to which the Tenant might be entitled. The Landlord and the Tenant agree that the question of the interpretation of rent payable under the Lease and the amount, if any, of any damages to which the Landlord is entitled to offset rent owing under the Lease as determined at the Cross Motion (or in any appeal arising therefrom) shall be binding on the parties for all purposes.

[4] A stay of proceedings against the Tenant was ordered on December 14, 2021 when this receivership application was adjourned and a monitor was instead appointed (the "Appointment Order"). The Tenant issued a notice of cross-motion dated November 13, 2022 (the "Cross-Motion") in response to the Landlord's motion to lift the stay of proceedings under the Appointment Order, in furtherance of the Landlord's desire to terminate the Lease for alleged defaults by the Tenant. The Scheduling Endorsements identified specific paragraphs of the relief sought by the Tenant in its Cross-Motion (1-5 and 11) to be adjudicated in this first stage of the Lease dispute. The parties to the Lease dispute are the Landlord and the Tenant. The applicant is not directly participating but has an interest in the outcome of this dispute. The receivership application has been adjourned in the meantime and is currently expected to return at the end of January 2024.

The Lease Dispute

[5] The Lease dispute revolves around the interpretation of s. 18.07 of the Lease, which provides that:

18.07 Regulatory Changes

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 Premises, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

[6] The parties agree that section 18.07 was triggered as a result of the COVID-19 pandemic and the bridge and border closure to non-essential traffic that was initially implemented effective March 21, 2020 for 30 days and subsequently extended (as discussed further below). Both the Landlord and the Tenant understood and intended that s. 18.07 could result in rental adjustments in the appropriate circumstances, taking into account the impact on the Tenant's business operations.

[7] Prior to the COVID-19 pandemic, for more than three decades, PBDF operated a retail duty-free store open 24 hours a day, 365 days a year, and employed approximately 90 staff.

[8] Starting in March of 2020 governments in both the U.S. and Canada enacted emergency border restriction legislation and related regulations that impacted the Peace Bridge border crossing ("Border Restrictions"). The Peace Bridge border crossing was closed to non-essential traffic from Canada to the United States ("U.S.") from March 21, 2020 to November 8, 2021. During this period only essential travelers, predominantly day crossing workers, who had no eligibility to purchase any duty-free products, were permitted to cross the border at the Canadian side of the Peace Bridge, virtually eliminating all PBDF's potential customers.

[9] The parties agree that these Border Restrictions caused material adverse effects on the Tenant's business operations and that s. 18.07 of the Lease became engaged.

[10] PBDF's retail store was closed from March 21, 2020 until September 19, 2021. It opened in September in the expectation of the conditional easing of restrictions on non-essential travelers into the U.S., which occurred on November 8, 2021. PBDF defines the "Closure Period" to be the period from March 21, 2020 to November 8, 2021. The final Border Restriction, which was the requirement for persons travelling from Canada into the United States to be fully vaccinated, was lifted effective May 11th, 2023.

[11] The Tenant invoked s. 18.07 of the Lease in April 2020. The discussions initially were centered around on two Rent Deferral Agreements (defined below). After the Tenant's duty free store re-opened in September 2021 the Landlord and the Tenant began to focus the discussions and negotiations on the rent to be paid by the Tenant both during the Closure Period and going forward. Proposals were exchanged. The parties attended a court ordered mediation in March of 2023. Their discussions and negotiations continued until at least August of 2023.¹ No agreement was reached.

¹ The last exchange of proposals in the evidentiary record for this Cross-Motion took place between March and August 2023. Although initially made on a without prejudice basis, the proposals exchanged up to August 2023 have been introduced into evidence without objection and both sides have relied upon them. Both counsel referred to the fact that further offers were exchanged between the parties after August of 2023 (from the Landlord on September 26, 2023 and

[12] By the time of the hearing, the parties had been able to reach an agreement in principle about the rent payable during the period commencing in November of 2021 and continuing until October 31, 2026, during which the Tenant would “Ramp Up” to paying \$4 million per annum in Base Rent as required under the Lease (the “Ramp Up Period”), as follows:

- From and after the Lease Year ending 31 Oct 2022—Base Rent of \$2M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2023—Base Rent of \$2.5M or 20% of sales, whichever is greater.
- From and after the Lease Year ending 31 Oct 2024—Base Rent of \$3M or 20% of sales, whichever is greater.
- From and after the 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.

[13] However, this agreement in principle was subject to the parties reaching an agreement about the rent payable during the Closure Period. The Tenant says that it paid what it could during that period (a total of \$544,000) and should not have to pay any more given that the duty free store was closed as a result of the Border Restrictions. The Tenant made some offers that would have resulted in it paying some more rent to the Landlord for the Closure Period over the life of the Lease, but those offers also involved an extension of the term of the Lease and an amendment to remove the requirement to pay Minimum Base Rent under the Lease. The Landlord made some offers that would have required the Tenant to pay some more rent for the Closure Period in the very short term, or to pay this “deferred rent” over a longer period of up to two years but with interest and security. The Landlord did not agree to extend the term of the Lease.

[14] The primary question that remains to be decided in this Lease dispute is whether the Landlord acted reasonably and in good faith in its consultations with the Tenant regarding the rent to be paid by the Tenant during the Closure Period. There is also a dispute about whether the court can order the remedy that the Tenant seeks and decide and impose upon the parties the Rent to be paid by the Tenant during the Closure Period in substitution for what the Lease provides, the very issue that the parties have been unable to agree upon.

from the Tenant on October 13, 2023), but those remain off the record and without prejudice. The court has not been apprised of the terms of these later offers and they have not been considered in this decision. They may be relevant when it comes time to deal with costs.

The Positions of the Parties

The Tenant's Position

[15] The Tenant contends that the Landlord did not act reasonably and in good faith in its consultations with the Tenant regarding the Rent (as defined in the Lease) to be paid by the Tenant during the Closure Period. The Tenant relies upon the impact of the change in Applicable Laws that led to the closure of the duty free store for eighteen months (from mid-March 2020 to early November 2021) that was immediate and catastrophic. The Tenant had no revenues, no business and no operations. It applied for all available government subsidies and assistance and paid those subsidies plus the HST on the full rent payable under the Lease to the Landlord, which it maintains is all that could reasonably be expected of it during the Closure Period in the circumstances.

[16] The Tenant maintains that what it has paid to the Landlord for the Closure Period is all that it should be required to pay and that the Landlord's insistence on anything more (at the time or in its proposals that required the payment of any "back rent" or "deferred rent" for that period) was unreasonable. The Tenant maintains that the operation of s. 18.07, taking into account the negative impacts that the Border Restrictions had on the Tenant's business operations during the Closure Period, required a temporary suspension of Base Rent payable under the Lease for the entire Closure Period in order to preserve the tenancy. Percentage rent was not payable because there were no sales. Additional Rent (which was minimal) was paid from the government subsidies and, at the request of the Landlord, the Tenant paid HST in accordance with the requirements of the Canada Revenue Agency ("CRA").

[17] The Tenant also contends that the Landlord was not acting reasonably or in good faith in that:

- a. From very early on in the Closure Period and throughout, the Landlord continued to make demands for immediate (or very short term) payments of Base Rent accruing;
- b. While the Tenant maintains that a demand for any amount of Base Rent during the Closure Period was unreasonable, even when the Landlord moderated its position and asked for a portion of the Base Rent accruing due during the Closure Period, the amounts demanded in the early offers were unreasonable and, even when the amounts were reduced, the proposed payment terms in all of the Landlord's offers were unreasonable;
- c. The Landlord threatened enforcement of its remedies (including remedies that were eventually rendered unlawful by a Province-wide statutory moratorium, such as taking possession of the Leased Premises and terminating the Lease); and

- d. The Landlord was looking for ways to terminate the Lease and replace the Tenant during the Closure Period, rather than to reach an agreement to preserve the tenancy, and was not just acting to protect its own commercial interests and contractual rights.²

[18] The Tenant now asks the court to make the following orders³:

- a) An order that, having applied section 18.07 and considering the adverse effects that the Border Restrictions had on the Tenant's sales, the rent actually payable by the Tenant during the Closure Period was equal to 20% of sales [which were zero], plus all additional rent and government assistance and that nothing further is owing for the Closure Period by the Tenant.
- b) An order that having applied section 18.07 and considering the adverse effects the Border Restrictions had and continue to have on the Tenant's sales, the Ramp Up schedule accepted in paragraphs 41 and 44 of the factums of the Tenant and the Landlord respectively, reflects the reasonable application of section 18.07 to the circumstances of this case in the Ramp Up period and that the parties are to comply with that schedule for the payment of rent to and until the Lease year commencing Nov 1, 2026, when the schedule has no further impact.
- c) An order that having applied a) and b) to the amounts actually paid, any overpayment by the Tenant should be set off by the Tenant against rent next due and any underpayment should be repaid to the Landlord in a reasonable period of time having regard to the ability to pay.

[19] The Tenants ask, in the alternative to b) above, that the court determine (based on the evidentiary metrics in the record⁴) and order the terms upon which rent is to be paid for the Closure Period, whether those be as last proposed by the Tenant or as last proposed by the Landlord, or such other terms as the court deems just. In paragraph 6 of the Cross-Motion, the Tenant asks, in the event

² In support of this contention, the Tenant asks the court to admit and consider the expert report of Ms. Hutcheson of JCWG who opines that the Landlord would be economically worse off if it ran an RFP and selected a new tenant to operate a duty free store on the Peace Bridge in the current economic climate, than if it retained the Tenant even under the terms that the Tenant last proposed. The Landlord objects to this expert report being admitted and argues that it should be given no weight, for various reasons addressed later in these reasons.

³ The specific orders sought are a variation on the relief in the Tenant's Notice of Cross-Motion which seeks the court's determination of: (a) whether, as a result of the application of s. 18.07, Base Rent was payable by PBDF; and, if so (b) what amount of the Base Rent PBDF was required to pay for: (i) April to September 2020; (ii) October 2020 to 8 November 2021; (iii) 9 November 2021 to 30 September 2022; and (iv) 1 October 2022 to 11 May 2023. The relief has evolved, as have the specific assertions, in light of events that unfolded while the Cross-Motion was pending. The court's April 4, 2023 scheduling endorsement directed that paragraphs 1-6 and 11 of the Cross-Motion be adjudicated at this preliminary phase

⁴ One evidentiary data point that the Tenant relies upon in support of what it contends the "reasonable" rent should be for the Closure Period is the expert opinion of Ephraim Stulberg. The Landlord objects to the relevance of, and to any weight being given to, this expert's opinion for various reasons addressed later in these reasons.

that arrears of Base Rent are determined to exist, for an order that those arrears be amortized over the balance of the term of the Lease.

[20] The Tenant contends that it would be a commercially unreasonable interpretation and implementation of s. 18.07 of the Lease if the court were to find that a failure of the parties to reach an agreement due to the unreasonable offers and/or lack of good faith on the part of the Landlord leaves the Tenant in the position of either having to agree to unreasonable terms or to defend allegations of being in breach of the Lease and seek relief from forfeiture, but with no recourse to the court to impose reasonable terms that ought to have been agreed to.

[21] The Tenant argues that the court has the power to do this through its power to interpret, implement and give effect to s. 18.07 and its objective of preserving the tenancy in the face of unforeseen and unprecedented circumstances that gave rise to the changes in Applicable Laws and the resulting material adverse effects on the Tenant's business operations. The Tenant says that the court can do this even if it does not find the Landlord to be in breach of its obligations under s. 18.07 or its contractual, statutory or common law duty of good faith.

The Landlord's Position

[22] The Landlord maintains that it was not required, by virtue of s. 18.07 of the Lease or otherwise, to temporarily suspend the requirement to pay any Base Rent payable under the Lease for the entire Closure Period.

[23] It is the Landlord's position that there is no reasonable interpretation of s. 18.07 that: (i) requires it to waive or suspend the payment of Base Rent; or (ii) automatically amends the Lease to remove or suspend the requirement to pay Base Rent. The suspension of Base Rent during the Closure Period was a cornerstone of the Tenant's position throughout most of the negotiations that the parties have engaged in since March 2020 and has been the biggest obstacle to reaching an agreement, from the Landlord's perspective.

[24] The Landlord does now agree that some rent abatement was appropriate but not a complete abatement. The Landlord denies that it was looking for ways to terminate the tenancy. It says, to the contrary, the Landlord did not take any steps to re-possess the Leased Premises or terminate the Tenancy despite the Tenant's steadfast unwillingness to pay any Base Rent during the Closure Period, the Tenant's default under both the First and Second Deferral Agreements (defined below) and its attempt to use the pandemic crisis as an excuse to renegotiate the Lease so to eradicate the Base Rent requirement permanently and extend the Lease term. Rather, the Landlord says that, while it did become impatient with the Tenant and made some demands, it did not take any enforcement steps and continued to make offers to the Tenant while waiting for the Tenant to make and revise its proposals and provide financial information to inform the continuing discussions.

[25] The Landlord maintains that its offers were reasonable when made, having regard to the situation, the Tenant's position and the information the Tenant made available to the Landlord at the time. The Landlord disputes the Tenant's premise that the ultimate resolution must be one that reflects the Tenant only paying the rent that it can "afford" in a given year or that the effect of s. 18.07 of the Lease was to guarantee that the Tenant would be profitable in the aftermath of the COVID-19 pandemic during the Ramp Up Period.

[26] The Landlord argues that the financial burden on the Tenant for its lost revenues during the Closure Period can be accommodated through deferred rent and interest and other terms while still preserving the tenancy. The Landlord is prepared to share part of that burden, as reflected in its most recent offers, but was not prepared to take on the entire risk of the Tenant's ability to pay its share without some interest and security.

[27] The Landlord maintains that it acted in good faith during these discussions with the Tenant and that its offers were reasonable. It maintains that it was entitled to negotiate from the starting premise of the agreed upon Lease terms and that it was not obligated to renegotiate the Lease to make the permanent changes that the Tenant was asking for when the Tenant finally came to the negotiating table. The Landlord points to the First and Second Deferral Agreements that the Tenant signed, which recognized that rent would be deferred, not completely abated, while the duty free store was closed. The Landlord eventually agreed to accept 50% of the Base Rent otherwise payable during the Closure Period, to be paid in the short term based on outside financing or investment to be obtained by the Tenant, or over the longer term with interest and security. The Landlord argues that there is a range of what would be reasonable to expect the Tenant to pay in rent during the Closure Period and that its offers were within that range.

[28] The Landlord asks that the Tenant's motion be dismissed because there is no basis for any finding of breach or that it did not act reasonably or in good faith. Having failed to accept the Landlord's offers of lease concessions, the Tenant remains obliged to comply with its obligations under the Lease and pay Rent in accordance with the Lease. However, since the Tenant is the subject of a stay in the receivership application, the Landlord acknowledges that it will not be in a position to act precipitously and terminate the Lease or re-possess the Leased Premises and the parties will still have the opportunity to try to reach a negotiated resolution. In the meantime, the Tenant may also consider whether it is appropriate to bring an application for relief from forfeiture.

[29] In the alternative, the Landlord submits that, even if it is found to have been in breach of the Lease or its duty of good faith to the Tenant, the court cannot re-write the Lease or impose new terms that have not been agreed to by the parties. It is the Landlord's position that the court does not have the power to impose new Lease terms, whether they be those proposed by the Tenant, those proposed by the Landlord or any others that the court deems appropriate. The only remedy available to the Tenant, according to the Landlord, is a claim in damages.

[30] The Landlord asks that if there is a finding of breach, any determination of damages be ordered to be adjudicated in a second phase of the Cross-Motion with the benefit of a complete evidentiary record and, if deemed appropriate, expert evidence. In the meantime, subject to the position of the applicant RBC regarding its receivership, the court would in those circumstances have the power to make an interim order regarding the rent to be paid by the Tenant (as it did previously in the May 17, 2023, the "Interim Rent Endorsement").

Matters that the Parties Agree Upon

[31] As the Lease dispute evolved, the parties were able to agree on certain matters that are relevant to its determination, including that:

- a. The Border Restrictions and associated regulations (that were initially enacted on March 21, 2020 and subsequently extended and expanded) were unanticipated changes in Applicable Laws that caused a material adverse effect on the Tenant's business operations at the Leased Premises and triggered s. 18.07 of the Lease.
- b. The Tenant closed its duty free store on March 21, 2020. While the parties do not agree upon whether the Tenant was required to close its store, there is no suggestion that it was unreasonable for the Tenant to have done so. All but two of the Canadian side land border crossing duty free stores closed around the same time. The two that remained open had unique reasons for doing so.
- c. The Tenant was within its rights to invoke s. 18.07 of the Lease in April 2020.
- d. The purpose of s. 18.07 of the Lease is to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent.
- e. Under s. 18.07 the Landlord was required to consult with the Tenant to discuss the impact of the Border Restrictions.
- f. The parties commenced discussions in April 2020 about the rent to be paid by the Tenant while its duty free store was closed but were not able to reach an agreement.
- g. It would be appropriate to afford the Tenant some Rent concessions under s. 18.07 as a result of the Border Restrictions.
- h. In making any decision with respect to Lease concessions to be made in favour of the Tenant as a result of the Border Restrictions, the Landlord was required to be reasonable and act in good faith.

The Lease

[32] A contractual provision such as s. 18.07 of the Lease must be interpreted in context. It does not exist in a vacuum.

[33] Appendix 2 to these reasons includes excerpts of select Lease provisions, for ease of reference.

[34] By way of overview, the Lease requires that PBDF pay Rent, comprised of Base Rent, Percentage Rent and any applicable sales taxes, property taxes, operating costs and utilities (also sometimes referred to as "Additional Rent"). The minimum annual Base Rent is \$4 million, or \$333,333 per month.

[35] The Base Rent amount under the Lease was proposed by PBDF as part of a Request for Proposal ("RFP") process undertaken by the Authority in 2016. The RFP required that those submitting bids agreed to pay Base Rent of at least \$2.5 million plus Percentage Rent. PBDF responded to the RFP and offered to pay Base Rent of \$4 million plus Percentage Rent. The Authority selected PBDF as the successful bidder. PBDF's response to the RFP, containing its proposal to pay,

inter alia, \$4 million per annum in minimum annual Base Rent, was attached to and forms part of the Lease.

The Facts

The Parties

[36] The Authority is the owner of the Peace Bridge, an international bridge that crosses the Canada-US border between Fort Erie, Ontario and Buffalo, New York.

[37] The Authority 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 (the “Board”).

[38] The Canadian and New York State governments are equal stakeholders in the Authority, and are also responsible for many of the Applicable Laws, including the Border Restrictions. The assets of the Authority will eventually revert to the Canadian and New York governments.⁵

[39] PBDF is a closely held company with four shareholders, each of which is represented on the company’s Board. PBDF has operated the duty free store on the Canadian side of the Peace Bridge since 1986.

Previous Findings of this Court

[40] The Landlord brought a motion to lift the stay put in place by the Appointment Order to enable the Landlord to exercise its remedies for default, including terminating the Lease and evicting the Tenant. See *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327. The motion was heard on January 5, 2023 and was dismissed by the court’s endorsement dated January 16, 2023, the “Lift Stay Endorsement”).

[41] Various findings were made in the Lift Stay Endorsement wherein the court decided not to remove the restrictions contained in paragraphs 9 and 11 of the Appointment Order, but rather to expedite the hearing of this Cross-Motion. A summary of some of the findings relevant to this Cross-Motion is as follows:

⁵ The parties disagree about whether the Landlord is a “Government Authority” as defined in paragraph 2.01 (t) of the Lease. The Tenant contends the Landlord is because its controlling shareholders are the New York and Canadian governments. The Landlord says it is not itself a governmental agency, board, tribunal, ministry or department within the defined meaning of “Government Authority” under the Lease, even if its shareholders may be and even if some of its board members are government officials, employees, servants or agents. Neither side suggested that whether the Landlord is, or is not, a Government Authority is material to the court’s determination of the Lease dispute. The Lease provisions that make reference to “Government Authority” are not relevant to this Lease Dispute. No finding is made, one way or the other, on this point. The Border Restrictions, like many other Applicable Laws, were enacted by Government Authorities. In this case both the Landlord and the Tenant were negatively impacted by these changes in the Applicable Laws.

- a. The Tenant's business was materially and adversely affected by the COVID-19 travel restrictions introduced by the Canadian and United States governments in March 2020. The land border was closed for over a year to all non-essential travel, until August 9, 2021 (on the Canadian side) and November 8, 2021 (on the American side). The re-opening of the border in August 2021 was gradual. The border restrictions were lessened but not entirely eliminated at that time. [para. 4]
- b. The Tenant closed the duty-free store on March 21, 2020. It partially re-opened on or about September 19, 2021.
- c. Shortly after the initial COVID-19 travel restrictions were introduced, the Landlord and Tenant entered into an initial rent deferral agreement dated April 27, 2020 [the "First Deferral Agreement"]. Under this deferral agreement, the Tenant agreed to pay Additional Rent throughout the Rent Deferral Period (as defined in that agreement), including without limitation, all operating costs and property taxes. The "Deferred Rent" was to eventually be repaid, with interest on specified terms. This agreement also obligated the Tenant to apply for and take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including rent assistance etc. [para. 14]
- d. The rent deferral agreement allowed the Tenant to defer paying the Base Rent until the expiry of the Rent Deferral Period on July 31, 2020. Thereafter, the parties attempted to negotiate a new rent deferral agreement [the "Second Deferral Agreement"], but that was never finalized. The Landlord indicated to the Tenant in November 2020 that it was looking for greater assurances about the unpaid (deferred portion of) Rent dating back to April 2020 and going forward. [para. 15]
- e. In the meantime, the Tenant continued to pay what it had agreed to pay under the April 2020 rent deferral agreement. As a result, very little Rent was paid by the Tenant (aside from basic utilities and taxes) in this timeframe since the Tenant was not earning any revenue and took the position that, despite there being no new rent deferral agreement, the terms of the first rent deferral agreement continued to apply. [para. 16]
- f. The Landlord did not agree to this and reserved its rights (relying upon, *inter alia*, the non-waiver provisions contained in s. 2.17 of the Lease). However, for much of the relevant time while this Lease dispute was pending the Landlord was not in a position to enforce certain of its rights due to legislation that had been put in place to protect

commercial tenants by imposing a Province-wide moratorium on the eviction and termination of commercial tenants. [at para. 17]⁶

- g. After the Tenant re-opened the duty-free store in September 2021, the Tenant continued to pay the Additional Rent it had been paying (e.g. utilities and taxes) and also began to pay rent equal to 20% of its gross sales. [para.18]
- h. The Landlord asserted that the Tenant was in default of its obligations under the Lease. That triggered an event of default under the Tenant's credit facilities and resulted in this application by the Royal Bank of Canada ("RBC"), the largest secured creditor of PBDF, for the appointment of a receiver over PBDF's assets and property. The application was adjourned on terms that included the appointment of a monitor instead of a receiver, by order of this court dated December 14, 2021 (the "Appointment Order"). [para. 6]
- i. The Tenant entered into a Credit Amending and Forbearance Agreement made as of October 8, 2021 with the RBC (the "Forbearance Agreement"). The preamble to that agreement stated that the Tenant had requested the bank to forbear "so that the Borrower has the opportunity to remain in business with a view to curing all defaults (including, without limitation, curing all defaults under the Lease, as defined herein)". [para. 19]
- j. The Landlord was not a signatory to the Forbearance Agreement. Under that agreement, the Tenant agreed to deliver, by no later than November 15, 2021, evidence satisfactory to the RBC that an agreement had been entered into with the Landlord concerning the defaults under the Lease to ensure that the Landlord would not terminate the Lease before the end of its current term. [para. 20]
- k. The Landlord and Tenant exchanged proposals in October 2021 in an attempt to reach an agreement about past due and continuing Rent owing. The Landlord rejected the Tenant's request to eliminate Base Rent from the Lease and to eliminate most of the Rent arrears for Base Rent. It offered various alternatives to reduce and/or defer the Base Rent payable. No agreement was reached by November 15, 2021. [para. 21]
- l. The RBC terminated the Forbearance Agreement and commenced this application for the appointment of a receiver. [para. 22]

⁶ This moratorium was imposed by temporary amendments to the *Commercial Tenancies Act*, R.S.O. 1990, c. L-7 that were repealed on December 8, 2022. The Landlord was also prevented from exercising its enforcement rights by the Stay imposed under the Appointment Order.

- m. After the Appointment Order was made, the Tenant continued to pay the Additional Rent and further rent based on 20% of gross sales by way of direct deposit. The Landlord continued to indicate that this was not sufficient and had not been agreed to. [para. 26]
- n. The attempts to negotiate a business resolution to the dispute that arose between the Landlord and Tenant about the Rent payable from and after March 21, 2020 did not result in an agreement. [para. 5]
- o. One of the purposes of the Appointment Order was to afford the Tenant more time to try to reach a commercial resolution of the Lease dispute with the Landlord. With no resolution after almost a year, this [lift stay] motion was brought by the Landlord by a Notice of Motion dated October 5, 2022. [para. 7]
- p. The negotiations to date have been paralyzed by each side's pre-conceptions of what an acceptable business solution would entail. These pre-conceptions have prevented any meaningful negotiation regarding the past Rent payable and Rent to be paid going forward under the Lease. While there is no requirement to mediate, the limited communications between the Landlord and the Tenant have been to some extent at cross purposes and might have more success if facilitated through a skilled intermediary. While not the Landlord's first choice, when asked, the Landlord indicated it would attend a mediation if the court so ordered. [para. 53]

[42] The parties were directed by the court's Lift Stay Endorsement to attend a mediation by March 31, 2023, which they did. They did not reach an agreement.

Detailed Factual Chronology

[43] The Landlord and the Tenant both acknowledge that many of the facts that they assert and rely upon in support of their respective positions and submissions are not in dispute. In addition to the facts summarized at the outset of these reasons that frame the Lease dispute and the findings previously made in the Lift Stay Endorsement, a more detailed chronology has been extracted from the evidence and exhibits filed and is summarized at Appendix 1 to these reasons. This outlines the uncontroverted events and dealings between the parties commencing when the Border Restrictions came into effect in March of 2020 and continuing until the exchange of proposals made by each of the Landlord and the Tenant between March and August 2023.

[44] The negotiations that ensued over this more than three year time frame did not resolve the entire Lease dispute. However, in the course of these negotiations the parties did reach an agreement in principle on the Ramp Up of Base Rent to be paid between November 2021 and October 2026, which was to be part of an overall agreement that was to include the Rent to be paid during the Closure Period (described earlier in these reasons).

The Rent that has Been Paid by the Tenant

[45] The Rent that the Tenant has paid since March 2020 is as follows:

- a. Since March of 2020, PBDF paid all Additional Rent owing under the Lease to the Authority, in the sum of approximately \$10,800 per month, including during the Closure Period.
- b. Since reopening its retail store, PBDF has paid (over and above the Additional Rent), on a without prejudice basis, the greater of all COVID-related rent assistance it was eligible for and received or 20% of its monthly Gross Sales.
- c. PBDF applied for every government program in respect of commercial rent assistance available to it and paid all sums received to the Landlord as Rent. However, the rental assistance programs available to PBDF represented a small percentage of full Rent payable under the Lease.
- d. The Rent Deferral Agreements provided: “Repayment of the Deferred Rent shall commence on the Restart Date. The aggregate amount of Deferred Rent together with interest thereon at the rate of 4% per annum shall be amortized over the Amortization Period and repaid by the Tenant in equal consecutive monthly instalments on the first day of each month from and including the Restart Date, without abatement or set-off, in the same manner as Rent.”
- e. Even though the Second Deferral Agreement was not signed by the Authority, PBDF operated as if Rent had been deferred as contemplated by the Second Rent Deferral Agreement and continued to pay the Additional Rent and remit the COVID-19 subsidies that it received to the Landlord.
- f. However, PBDF did not comply with the First or the Second Deferral Agreements in terms of repaying to the Authority the rent deferred thereunder after the expiry of the Rent Deferral Period on March 31, 2021.
- g. Taking into account what was paid by PBDF to the Authority during the Closure Period, the amount of Deferred Rent that accrued under the Lease but was not paid during the period April 2020 to September 2021 was \$5.7 million.
- h. At the request of the Authority in or about July 2022, PBDF paid the HST on 100% of Base Rent payable under the Lease, amounting to \$43,000 per month from April 2020. The HST payments were remitted to the CRA.
- i. Various interim without prejudice arrangements were put in place regarding the payment of Rent by the Tenant during the course of this application after it was commenced in December 2021, with the result that:
 - i. For the first Ramp Up Period (November 2021 to October 2022) the Tenant paid percentage rent in 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, which amounts to approximately \$2 million.

- j. In the Lease year ending October 31, 2023, the Tenant is on pace to pay the \$2.5 million of Base Rent specified for the second Ramp Up Period (November 2022 to October 2023). The amounts paid by the Tenant during this period were paid pursuant to court orders that required the Tenant, on a without prejudice basis, to pay the Base Rent specified in the Lease after the Monitor had provided a rent affordability assessment that indicated that the Tenant was financially able to make these payments.

Analysis

Basic Principles of Contract Interpretation

[46] The court must strive to interpret the Lease as a whole, giving effect to all of its provisions harmoniously under the lens of commercial reasonableness. The parties agree on the general principles of contract interpretation that include these among other concepts. I was reminded of the summary of those principles that was conveniently included in an earlier decision of mine (8254125 *Canada Inc. v. Celernus Investment Partners Inc.*, 2019 ONSC 3144, 92 B.L.R. (5th) 291, at paras. 8 and 9):

[8] ... The leading contract interpretation case from the Supreme Court of Canada, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, provides the following guidance (at paras. 47-48 and 57-58, with reference to various principles and authorities):

a. the overriding concern is to determine the mutual objective intent of the parties and the scope of their understanding as expressed in the words of the contract;

b. the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract;

c. the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;

d. the meaning of the words can be derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by it. The meaning of the document is not necessarily the same thing as the dictionary meaning of its words; the meaning of the document is what the parties using the words against the relevant background would reasonably have understood those words to mean;

e. the court should have regard to the surrounding circumstances and the factual matrix when interpreting a written contract;

f. the surrounding circumstances should consist only of objective evidence of the background facts at the time of the execution of the

contract; that is, facts that were known or reasonably ought to have been within the knowledge of both parties at or before the date of contracting;

g. in a commercial contract the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the nature of the relationship between the parties both before and after the contract is entered into, the context, and the market in which the parties were operating; and

h. the surrounding circumstances (factual matrix) should never be allowed to overwhelm the words of the agreement and should not be used to deviate from the text such that the court effectively creates a new agreement.

[9] The respondent also relies on recognized contract interpretation principles that have been developed in the context of contracts between commercial parties and recently summarized in the case of *Shaun Development Inc. v. Shamsipour*, 2018 ONSC 440, 94 R.P.R. (5th) 15, at para. 46, affirmed, 2018 ONCA 707, 94 R.P.R. (5th) 44:

a. the court presumes that the parties have intended what they have said;

b. the court construes the contract as a whole, 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;

c. the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties;

d. the court should interpret a contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity;

e. extrinsic evidence may be resorted to in order to clear up an ambiguity; and

f. while the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

Factual Matrix, Parol Evidence and the Landlord's Objections

[47] Considerable evidence and written and oral submissions were devoted to assisting the court in the interpretation of s. 18.07 of the Lease. Much of this focus was on the factual matrix, which is understood "to 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." See *Weyerhaeuser*

Company Limited v Ontario (Attorney General), 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, citing *Sattva Capital Corp.*, para. 47.

[48] By the time of the hearing, the parties had agreed that the purpose of s. 18.07 of the Lease is: *to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent*. The Tenant describes this provision as a “safety valve”. The Landlord does not disagree with this characterization. It is agreed that some Rent relief is appropriate where the Tenant's ability to pay rent is impacted.

[49] The Tenant also tendered evidence about discussions between the parties concerning s. 18.07 of the Lease and evidence of the subjective understandings and intentions of the persons responsible for negotiating the Lease for the Tenant. The Landlord objected to much of this evidence (a brief was filed outlining the paragraphs of the Mills and Pearce affidavits that contained objectionable evidence, much of it being of this character). Insofar as that evidence is about the purpose of s. 18.07 of the Lease, the evidence about that, and the objections to it, were largely overtaken by the agreement regarding that purpose (above).

[50] In terms of the genesis of s. 18.07 of the Lease, the uncontroverted evidence establishes that it was not included in the draft lease attached to the RFP, but was added to the Lease by the Landlord at the request of the Tenant. There were no changes to the wording of s. 18.07 from the time it was added to the draft Lease by the Landlord to when the Lease was signed.

[51] The Tenant tendered evidence about a meeting held on July 18, 2016 between the Landlord's and Tenant's representatives, at which various provisions of the then draft Lease were discussed before it was signed, including the proposed wording of s. 18.07. Notes were made and emails were exchanged, about which the Tenant's affiants have given evidence regarding their understandings at the time. They thought that the Landlord had agreed that there would be a Rent abatement if the changes in Applicable Laws affected the Tenant's business in such a way as to warrant it. While the Landlord has not always supported this interpretation of s. 18.07 and does not agree that this Lease provision requires a full Rent abatement, by the time of the hearing it had accepted that a reasonable application of this Lease provision in the circumstances of this case could entail a partial Rent abatement.

[52] There is a longstanding, traditional rule that evidence of contract negotiations is inadmissible when interpreting a contract: see *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, at para. 100, Côté and Brown JJ. (dissenting). The Tenant challenges this, pointing to the dissenting judges' observation that this rule “sits uneasily” next to the approach from *Sattva* that directs courts to consider the surrounding circumstances in interpreting a contract. The Tenant urges the court to adopt a more liberal interpretation of these rules of evidence about subjective intent and parol evidence since the Supreme Court of Canada stated in *Sattva* (at para. 47): “...the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine ‘the intent of the parties and the scope of their understanding’.”

[53] Even accounting for subsequent cases that have found that this passage of *Sattva* may open the door to consideration of parol evidence to inform how the contract would have been understood by a reasonable person at the time it was signed (see, for example: *Corner Brook (City) v. Bailey*,

2021 SCC 29, 17 B.L.R. (6th) 1, at paras. 56–57; and *Huber Estate v. Murphy*, 2022 BCCA 353, 46 R.P.R. (6th) 175, at paras. 33–36⁷), in this case the evidence that the Tenant has tendered about the pre-contractual negotiations primarily relates to the understood objectives and principles of implementation of s. 18.07 of the Lease that the parties now agree upon for the most part.

[54] Insofar as the Tenant has tendered evidence that goes beyond the acknowledged commercial purpose and genesis of s. 18.07 of the Lease, I do not find this evidence of the subjective understandings and intentions of the Tenant’s representatives to be particularly helpful, either generally or specifically. Generally, because one party’s subjective understandings and intentions do not assist the ultimate goal of ascertaining the objective commercial purpose and intent. Specifically, as discussed in more detail below, some of the Tenant’s evidence does not actually support the outcome that the Tenant urges upon the court, and is, in some respects, inconsistent with other express provisions of the Lease.

[55] For example, evidence that purports to show the Tenant’s desire and intention for there to be a provision in the Lease (specifically, s. 18.07) that correlated the minimum Base Rent with its actual sales (such that it would be guaranteed to have sufficient revenues to pay minimum Base Rent due under the Lease in the event of a change in Applicable Laws that adversely affected its business) does not assist the court. The court must give commercial meaning and effect to the entire Lease that includes express and unambiguous provisions of the Lease requiring the payment of a specified amount of minimum Base Rent that, unlike Percentage Rent, was not tied to any particular revenues or sales levels.

[56] Further, the suggestion that there was an understanding that this desire or intention that the minimum Base Rent be tied to actual sales was intentionally not expressly included in the Lease so as to maximize the prospects of recovery under business interruption insurance runs up against the entire agreement clause contained in s. 2.04 of the Lease. As well, the Tenant’s desire that there would, in such circumstances, be an abatement rather than a deferral of Rent is in conflict with s. 4.05(a) that states that there will be no Rent abatements except as expressly provided for in this Lease.

[57] The Tenant’s evidence that the amount of Rent it offered to pay in the RFP was largely based on traffic and revenue expectations as attached at Schedule D to the Lease is a one-sided view of how the Base Rent was arrived at. The Tenant seeks to introduce evidence about its own rationale for offering, in its response to the RFP, to pay \$4 million per year in minimum Base Rent. This amount is said to be tied to its projections that the annual sales would exceed \$20 million every year based on historic sales performance (under its own preceding lease of the Leased Premises). Specifically, the Tenant states that the rent provisions of the Lease were based on historic traffic and sales as well

⁷In both of these cases the question of whether pre-contractual negotiations are admissible was not decided because the evidence about those negotiations was not considered to be material to the outcome. The situation is the same in this case. The open question about whether *Sattva* has diluted or done away with the parol evidence rule remains to be considered in a case where it might make a difference to the outcome whether the evidence of contractual negotiations is admitted or not.

as sales projections premised on the free flow of traffic over the bridge and the existing Applicable Laws.

[58] While the Landlord was also aware of the historic sales performance and could mathematically calculate that the minimum Base Rent that the Tenant offered to pay of \$4 million is 20% of \$20 million, the Tenant acknowledges that this calculation and the assumptions that it made in arriving at its proposal for minimum Base Rent were not specifically discussed with the Landlord. Nor was this calculation or the premise that it was predicated on achieving a specific level of annual gross sales specified in the Lease. Yet, it is on the strength of this evidence that the Tenant argues that it should pay no Base Rent during the Closure Period because the \$4 million in minimum Base Rent that it offered to pay was, from the Tenant's perspective, supposed to reflect 20% of its anticipated minimum gross sales, and during the Closure Period, it had no sales (20% of zero is zero).

[59] This is pure evidence of the Tenant's subjective intention and understanding, which it admits was not directly shared with or communicated to the Landlord. All of the authorities cited by both sides consistently reinforce the basic tenet of contract interpretation that: the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. There is good reason for this. When a dispute arises the parties inevitably will have differing accounts of this and will have been motivated by different goals and objectives. The court's role once the dispute has arisen is to determine it objectively and reasonably, not what was subjectively understood or intended.

[60] The Landlord objects to the admissibility of the evidence of the Tenant's subjective understandings and intentions as improper parol evidence (offside of the entire agreement clause in s. 2.05 of the Lease and also the authorities that have shaped the factual matrix to be an entirely objective interpretive tool). I agree that this evidence is problematic and, even if admitted, it should be given little or no weight.

[61] Some of the Landlord's other evidentiary objections are to statements of inadmissible hearsay evidence on points of contention and statements of opinion about industry matters that the Tenant's witnesses were not properly qualified as experts to testify about. This too is problematic from an evidentiary perspective and should be given little or no weight.

[62] The Landlord did not bring a formal motion to strike the paragraphs of the Tenant's affidavits that it objects to. While no specific paragraphs of the Tenant's affidavits that were objected to have been struck out, little or no weight has been given to that evidence in this decision, for the reasons stated above.

[63] However, these evidentiary rulings are largely immaterial to the outcome of this case because the Landlord now acknowledges much of what the Tenant seeks to rely upon this evidence for in terms of interpreting and giving meaning and effect of s. 18.07 of the Lease. Considering the evidence as a whole, 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. Section 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.

[64] The parties disagree about how those principles should be applied to the circumstances of this case. What the Tenant can and should be required to pay in Base Rent for the Closure Period (and over what period of time should those amounts be paid and on what terms) is at the core of this Lease dispute. Fundamentally, the Landlord and Tenant disagree about whether what the Tenant can afford to pay is determinative of what is reasonable, and, even if it is, they disagree about how to determine what the Tenant can afford and whether the concept of affordability requires that the Tenant be profitable. The evidence that the Landlord objected to does not assist in the determination of these questions, which I will now address within the broader framework of the issues as the parties have framed them.

The Issues

[65] Since the parties agree that s. 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,

the court need not decide these, which are the first two of four issues that the Tenant has identified.

[66] The following issues remain to be determined, having regard to the positions of the parties⁸:

1. 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?
2. Did the Landlord breach s. 18.07 of the Lease?
3. Did the Landlord fail in its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered?
 - i. Was the Landlord working with the Tenant to try to preserve the Tenancy or with the ulterior motive of terminating the Lease?

⁸ The first and last of which the Tenant has identified and the others arise from the Landlord's position in response.

- ii. Were the Landlord's demands, proposals and other dealings with the Tenant unreasonable?
4. What remedy is available to the Tenant?
- a. If the Landlord breached its duty of good faith and/or s. 18.07 of the Lease, is the Tenant's only recourse to claim damages and/or seek relief from forfeiture?
 - b. Is it open to the court to determine what, if any, Base Rent is owing for the Closure Period and the terms on which it should be paid⁹, and if so, what is the appropriate amount for the Tenant to pay before the Ramp Up Period and on what terms?
 - i. If the Landlord has breached its duty of good faith and/or s. 18.07 of the Lease;
 - ii. If the Landlord has not breached its duty of good faith and/or s. 18.07 of the Lease.

Issue #1: What was the Impact on the Lease of the Border Restrictions and Resulting Adverse Effects on the Tenant's Business and Does that Affect the Base Rent Payable?

[67] According to the Tenant, the adverse effects of the Border Restrictions should inform the Rent accommodations to be afforded to the Tenant under s. 18.07 of the Lease.

[68] The Landlord does not agree that the Tenant had to close its duty free store when the Border Restrictions came into effect, but it does not contest that it was reasonable for the Tenant to have done so. As a result, the Tenant had no sales and no revenue from its business operations at the Leased Premises for virtually the entire Closure Period (the duty free store did re-open in September 2021 when the Canadian government lifted its travel restrictions but travel remained restricted for duty free customers going from Canada to the U.S. until the end of the Closure Period on November 8, 2021).

[69] The Tenant's internal forecasts at the time of the RFP had projected sales well in excess of \$20 million annually for the duration of the Lease. Its actual annual sales from 2016-2019 did not achieve its targets but, when averaged over the three Lease years immediately preceding the COVID-19 pandemic, the total sales for 2017-2019 were in excess of \$60 million (so an average of more than \$20 million per year). In contrast, the Tenant's annual sales were nil from April 2020 until August 2021 (such that the annual sales in the 2020 and 2021 Lease years, limited to the preceding and

⁹ If it is open to the court to determine what Base Rent the Tenant should be paying as a result of the Border Restrictions and adverse effects, there is no need to decide what Base Rent the Tenant should pay during the Ramp Up Period, after the Tenant's duty free store re-opened in the fall of 2021, because the parties have agreed on what that should be.

subsequent months, were comparably much lower). Its annual sales in 2022 were approximately \$10.82 million.

[70] Upon re-opening the duty free store, it has taken some time for the bridge traffic and duty free sales to ramp up. Since September 2021, the Tenant's sales have steadily increased but have still not returned to the pre-pandemic levels. The Tenant's projections given to the Landlord in March and August 2021 forecast that its annual sales would not reach \$20 million until the 2029 Lease year, although it was projecting positive cash flows starting in 2023.

[71] The Tenant contends that, if subsection 18.07 of the Lease is triggered, in the appropriate circumstances: (1) Base Rent would be reduced during the time the business was affected; (2) minimum Base Rent should be reduced to a level that it could afford to pay, taking into consideration the impact of changes of sales, *such that the Tenant would not be asked to operate at a loss due to the level of Base Rent being charged during the time its business was affected*; (3) *the reduced Base Rent would be abated, not deferred*. The italicized contentions are what the Landlord disagrees with.

[72] Having regard to the provisions of the Lease as a whole, it is not a commercially reasonable interpretation of the Lease to say that when there are no sales there will necessarily be no Base Rent payable and that it will be entirely abated rather than deferred. That interpretation is directly in conflict with both the entire agreement clause (s. 2.04) and the no abatement clause (s. 4.05(a)). I do not consider the interpretation that the Tenant propounds to reflect how the Lease would have been understood by a reasonable person at the time it was signed and, for the reasons outlined earlier, the Tenant's evidence regarding its own subjective understandings and intentions in this regard cannot be given any weight in support of this contention.

[73] Even if the Tenant's evidence of subjective intent and understanding in the course of the negotiations leading up to the signing of the Lease were to be admitted and considered, it does not lead to the inevitable outcome that the Tenant propounds, which would be an assurance that the Tenant would never have to operate at a loss and/or that requires a complete abatement of all Base Rent for the entire Closure Period.

[74] When the provisions of the Lease are read together and harmoniously, a commercially reasonable interpretation of the Lease must respect the clearly intended distinction between Base Rent and Percentage Rent. The Lease provisions could have been drafted to reflect an agreement that Base Rent was 20% of annual gross sales as long as they were at or close to \$20 million; that is not what the Lease provides for. It provides (at s. 4.03) that a minimum Base Rent of \$4 million per year is payable and that Percentage Rent is only payable if, upon the application of the agreed upon percentage to the Tenant's Annual Gross Sales in a given year, it exceeds the Base Rent Minimum of \$4 million in a given year.

[75] It is mathematically correct that Percentage Rent is thus only payable if gross sales exceed \$20 million in a given year, but the Lease does not provide for the converse, that the minimum Base Rent is not payable if gross sales are less than \$20 million in a given year. In fact, in 2018 and 2019 the Tenant's gross sales were less than \$20 million and it made no request to reduce the amount of Base Rent payable in those years. As the Tenant acknowledges, the conduct of the parties in the performance of the Lease can be considered in the court's interpretation of the Lease if the court considers there to be any ambiguity about whether the text and factual matrix of the Lease required

that Base Rent be considered to be a percentage of assumed annual gross sales of a minimum of \$20 million. See *Weyerhaeuser*, at para. 116. In this case, if there was an ambiguity, that evidence would militate further against the Tenant's interpretation.

[76] Nor is it a commercially reasonable interpretation of the Lease to say that when there are no sales due to an unexpected change Base Rent will necessarily be abated rather than deferred, given that there are other provisions of the Lease that contemplate circumstances in which the Tenant might have little or no sales. Section 18.08 (Unavoidable Delay in the performance of the Tenant's obligations under this Lease) expressly states that an unavoidable delay does "not operate to excuse the Tenant from the prompt payment of Rent and any other payments required by this Lease", and there is an independent provision of the Lease that states that rent will never be abated except in circumstances where the Lease expressly provides for an abatement (at s. 4.05).

[77] The Tenant's contentions (to the effect that s. 18.07 of the Lease must be interpreted and applied so as to render all Base Rent abated during the Closure Period) are not accepted by the court. Accordingly, the court must go on to consider the allegations that the Landlord breached its duty of good faith and/or breached its obligations under s. 18.07 of the Lease in the manner in which it conducted itself after the Border Restrictions came into effect.

Issue #2: Did the Landlord breach s. 18.07 of the Lease?

[78] There is no dispute that the Landlord engaged in discussions with the Tenant about the adverse effects that the Border Restrictions had on the Tenant's business operations and offered some accommodations to the Tenant as a result. On a strict reading of s. 18.07 that is all that this provision of the Lease expressly requires the Landlord to do, although it did more.

[79] The Tenant contends that when s. 18.07 is triggered, as it was when the Border Restrictions came into effect, there is a positive obligation on the Landlord to make applicable changes to the rent payable to give effect to the impact to the Lease. The Tenant further contends that s. 18.07 of the Lease must require more than idle discussion, which is to give effect to the intention of the parties that there be an actual change to the Lease terms when the circumstances dictate.

[80] The Landlord acknowledges that it had an obligation under s. 18.07 of the Lease to provide reasonable rent relief in the circumstances, and that its compliance with its obligations under 18.07 of the Lease depends on whether its actions to give effect to that provision were reasonable and undertaken in good faith.

[81] The Tenant points to the following further acknowledgments by the Landlord that:

- a. its conduct in making various rent relief offers was in furtherance of s. 18.07 of the Lease.
- b. there was an impact to the Lease, and that a significant rent abatement was appropriate, not only for past rent, but future rent moving forward.
- c. the magnitude of the adverse impact on the business would influence what level of consideration would be given to the Tenant in response to changes in regulations.

[82] Initially, the agreed upon accommodations were embodied in the First Deferral Agreement. Even though the Second Deferral Agreement was never signed by the Landlord, it did not take any enforcement action while the Tenant performed its obligations under the terms of that agreement. Further, even after the second Deferral Period ended the Landlord did not take any immediate enforcement action. Offers were exchanged back and forth and the *status quo* persisted for over a year.

[83] The Landlord did not give formal notice of its intention to take any enforcement steps until September 2021. By then, its recourse was restricted by the Province-wide moratorium on any eviction or termination of a commercial tenancy such as this. After the moratorium was lifted, the Landlord eventually came to court to seek a lifting of the stay of proceedings imposed in the Receivership Application so that it could then take enforcement action, but that was not until late 2022 and into early 2023, after the Tenant's store had re-opened and the parties had still been unable to reach an agreement about what the accommodations to the Tenant should be.

[84] As previously described, the recognized purpose of s. 18.07 of the Lease is to to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent. The Landlord was engaging with the Tenant in negotiations about the past and future Rent to be paid under the Lease in light of the Border Restrictions. During the periods of negotiation both before and after the duty-free store re-opened the Landlord was engaged with the Tenant in discussions and negotiations. The parties' positions evolved over time, as did their appreciation and understanding of the implications and effects of the COVID-19 pandemic.

[85] As I have found in the previous section of these reasons, s. 18.07 did not require a complete rent abatement of all Base Rent during the Closure Period as the Tenant contends. Nor does preserving the Tenancy necessarily mean that the Tenant was entitled to maintain some minimum guaranteed level of profitability (e.g. only required to pay percentage rent). The Tenant's insistence upon a complete abatement of Base Rent during the Closure Period and continued requests to eliminate the minimum Base Rent from its Lease created a significant obstacle to reaching an agreement. These were not terms that were required to preserve the tenancy.

[86] Conversely, the Landlord points to the Tenant's own sales projections provided during the course of their negotiations in defence of its demands for the payment of some Deferred Rent during the Closure Period. These projections are said to allow for the possibility of financing these payments in the short term against the Tenant's own future projected profitability. The Landlord's offers allowed for this to be achieved through external financing sources or equity infusions or, if the Landlord was going to have to effectively finance these payments by allowing them to be paid over time, then the Landlord required that its financing be supported by the security of personal guarantees. While these terms were not desirable to the Tenant, I do not find them to be objectively commercially unreasonable. The tenancy was not being terminated; it was just going to be less profitable over the life of the Lease. This reflects the harsh reality of the impacts of the COVID-19 pandemic that affected the economics of the Lease for both parties.

[87] The fact that the parties were not able to reach an agreement does not mean that the Landlord breached s. 18.07 of the Lease. Put another way, the Tenant has not established that the Landlord breached s. 18.07 of the Lease in the circumstances of this case where the Landlord did engage in discussions and negotiations with the Tenant with a view to reaching an agreement to amend, or

provide temporary relief from, some of the Lease terms to account for the adverse effects that the Border Restrictions had on the Tenant's business. Section 18.07 does not prescribe a formula for a Rent adjustment and does not provide a metric (e.g. sales or revenues) from which it is to be determined. It simply requires the Landlord to act in good faith and reasonably in its consultation and negotiations with the Tenant regarding Rent relief, having regard to the adverse effects on the Tenant's business, which it did do.

Issue #3: Did the Landlord fail in its duty to act in good faith in its dealings with the Tenant after s. 18.07 was triggered?

[88] This issue raises a number of sub-issues, namely:

- a. What is the duty of good faith?
- b. Was the Landlord working with the Tenant to try to preserve the Tenancy or with the ulterior motive of terminating the Lease?
- c. Were the Landlord's demands, proposals and other dealings with the Tenant unreasonable?

[89] These will each be addressed in turn.

a. What is the Duty of Good Faith in Contract Performance and the Exercise of Contractual Discretion

[90] There is an organizing principle of good faith that recognizes a duty to perform a contract honestly. This duty means "that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". See *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 62–63.

[91] In addition to the common law, s. 2.15 of the Lease, requires any discretion or approval or consent powers to be reasonably exercised by the Landlord. There is also a duty to act in good faith under the BIA when dealing with a debtor (such as the Tenant) that would have been triggered once the receivership application had been initiated in December 2021.

[92] The Supreme Court of Canada held in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1 that:

[4] The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion. This will be made out, for example, where the exercise of discretion is arbitrary or capricious, as Cromwell J. suggested in *Bhasin* in his formulation of the organizing principle of good faith performance. According to *Bhasin*, this duty is derived from the same requirement of corrective justice as the duty of honest performance, which requirement demands that parties exercise or perform their rights and obligations under the contract having appropriate regard for the legitimate contractual

interests of the contracting partner. Like the duty of honest performance observed in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, the duty recognized here is one that applies in a manner Cromwell J. referred to as doctrine in *Bhasin*, i.e., the duty applies regardless of the intentions of the parties (*Bhasin*, at para. 74).

...

[77] I add, however, the following comment as a general guide. For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement - e.g., matters relating to "operative fitness, structural completion, mechanical utility or marketability" - the range of reasonable outcomes will be relatively smaller (Greenberg, at p. 762). For contracts that grant discretionary power "in which the matter to be decided or approved is not readily susceptible [to] objective measurement - [including] matters involving taste, sensibility, personal compatibility or judgment of the party" exercising the discretionary power - the range of reasonable outcomes will be relatively larger (Greenberg, at p. 761). I emphasize, however, that this comment should operate as a general guide, not a means to categorize unreasonableness.

b. The Landlord's Motives and the Purposes of s. 18.07

[93] The Tenant alleges that the Landlord held the ulterior motive of seeking to terminate the Lease while it engaged in the discussions and negotiations with the Tenant from and after March 21, 2020. Having regard to the acknowledged purpose of s. 18.07 to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent, if the Landlord had this ulterior motive, it would not have been acting in good faith as it was required to do when it engaged in those discussions and negotiations. The Tenant also contends that the Landlord's proposals to the Tenant were not reasonable and were not made in good faith. This is disputed by the Landlord. The court must make a finding regarding the Landlord's alleged failure to act in good faith as it is a central consideration in the determination of this Cross-Motion.

[94] For this, the Tenant places reliance primarily upon the following conduct of the Landlord during the Closure Period:

- a. The demands made by the Landlord of the Tenant throughout, but particularly during the Closure Period, that the Tenant could not reasonably be expected to meet in terms of the amounts or timing for payment, such as demanding payment of full Rent on April 1, 2020, threatening default proceedings on May 6, 2020, threatening to issue a formal notice of default of November 13, 2020, demanding on December 9, 2020 that the Tenant pay \$1 million in unpaid rent by December 31, 2020 and the remaining accrued and unpaid and future accrued rent by March 31, 2021 (later in December offering the option of a longer deferral and repayment terms), issuing notices of default on September 8, 2021 for both monetary and non-monetary defaults, and threatening to exercise default remedies under the Lease on November 21, 2021.

- b. The November 20, 2020 resolution of the Board of Directors of the Authority approving the Second Deferral Agreement, which the Landlord then did not sign despite this approval, and instead used as leverage to try to extract an immediate payment from the Tenant in respect of the Deferred Rent, which demand the Board only later approved after it had already been made.
- c. The removal from the December 17, 2020 Board minutes of any reference to the Board's resolution "THAT in the event of default by Peace Bridge Duty Free, and subject to legal review, staff be authorized to negotiate lease terms with the 2nd bidder in the June 2016 RFP process" out of concern that "should this end up in court the last paragraph appears pre-determinative and could be construed as the PBA having a plan to oust PBDF. What happens in the event of default can be determined by the Board at a later date." This is compounded by the Landlord's acknowledgement that it did later reach out to that second-place bidder sometime in August of 2021.
- d. Applying the Tenant's security deposit to the outstanding Base Rent and demanding that it be replenished.
- e. An internal email dated March 21, 2021 between the Landlord's CFO (Ms. Costa) and General Manager (Mr. Rienas) contemplating what the Landlord's options might be if the Tenant does not re-open the store and an agreement is not reached on Back Rent, including the possibility of eviction once the restrictions had been lifted, because of a concern that the Tenant was intending to engage in a long, drawn out re-negotiation of the Lease.
- f. An internal email dated March 31, 2021 between Ms. Costa and Mr. Rienas speculating about the *Commercial Tenancies Act* eviction moratorium and the Landlord's course of action in light of it.

[95] The starting point for this analysis has to be a recognition that the Landlord is entitled to act in its own economic interests. After considering the trilogy of cases from the Supreme Court of Canada dealing with the organizing principle of good faith under Canadian common law (*Bhasin*, *Callow* and *Wastech*), the court in *2343680 Ontario Inc. v. Bazargan*, 2021 ONSC 6752 offered (at para. 28) the following observations:¹⁰

- a. Canadian common law has a long history of respecting private ordering and the freedom of contracting parties to pursue their own self-interest. The principle of good faith must be applied in a manner consistent with this history. The pursuit of economic self-interest, often at the expense of others, is not necessarily contrary to the principle of good faith. (*Bhasin*, para. 70; *Wastech*, para. 73);

¹⁰ This is a shorter list of selected extracts from the longer summary of dealings between the parties outlined at Appendix 1 to these reasons.

- b. A duty of honest contractual performance does not impose obligations of loyalty or trust. It is not a fiduciary duty. It does not mean that parties cannot legitimately take advantage of bargains they have reached. But it does mean that parties must not lie or knowingly mislead each other (*Bhasin*, paras. 60 and 65);
- c. Tethering the good faith analysis to a consideration of what was reasonable according to the parties' own bargain tends to prevent the analysis from "veering into a form of ad hoc judicial moralism or 'palm tree' justice." (*Wastech*, para. 74.); and
- d. Honest performance requires that the exercise of contractual discretion be carried out in a manner consistent with the purposes for which it was granted. Said another way, that it be carried out reasonably. The assessment of reasonableness may be expressed in the following question: was the exercise of discretion unconnected to the purpose for which the contract granted discretion? If the answer is yes, then the exercise of discretion has not been carried out in good faith. (*Wastech*, para. 69).

[96] From the Landlord's perspective, important context for these actions can be found in the following extracts that illustrate that the Landlord was under economic pressures of its own as a result of the Border Restrictions:

- a. From its June 20, 2020 letter to Canadian government officials, in which the Authority (as co-signatory) described the situation from its perspective since the border closure on March 21, 2023 as follows: "...car traffic has declined by 95% and truck traffic has declined by 22%. The Canadian Duty Free stores have been closed and the U.S. Duty Free stores are seeing only a small fraction of their normal business. Both federal governments have deemed our bridges an essential service to maintain critical bi-national supply chains. Accordingly, we are required to keep the border crossings operating while the revenues required to do so have been decimated."
- b. From its internal March 21, 2021 email, in which Ms. Costa elaborated upon the financial concerns that the Landlord was facing:

The longer the time goes on that they do not pay rent and refuse to open the store, I will have to book additional amounts as bad debt as their ability to pay and their desire to remain a going concern are in question as well as the fact that they are in default of the Lease and the rent deferral agreement. As it stands now, we do not have the commercial volume or cost cutting ability to make up the revenue shortfall (the amount I will need to reserve) when it comes to calculating the debt service coverage ratio. If the DSCR it is not met by the time we prepare the budget, we will have to institute another toll increase to make up for the shortfall in revenue in this next budget cycle which may have adverse impacts on traffic volumes.

[97] The Tenant says that the Landlord's demands were unreasonable and intended to force the Tenant out by making it impossible for the Tenant to meet them. However, even if the Landlord's demands were aggressive and its representatives were playing hardball with the Tenant at times, its

demands were grounded in the Lease terms that the Tenant had not only agreed to, but proposed, terms the Tenant is now seeking to renegotiate (e.g. to not pay any minimum Base Rent).

[98] The Tenant complains that the Landlord offered more favourable terms to the US duty free tenant at the Peace Bridge, but ignores that the lease terms for that tenancy were very different. The starting point for the consultations and negotiations has to be the specific provisions of the contract at issue, not how some other party was treated under some other contract.

[99] The Tenant points to its expert (Ms. Hutcheson of the J.C. Williams Group) who proffers the opinion that the Net Economic Return (“NER”) to the Landlord would be far better under the current Lease terms with the Tenant than the NER that the Landlord could expect after running a new RFP and seeking out a new Tenant in the aftermath of the COVID-19 pandemic (comparing for the lease years of 2024-2031). From this, the Tenant asks the court to infer that the Landlord was not acting in its own economic interests when it made demands that it knew the Tenant could not meet during the Closure Period with the (alleged) agenda of “ousting” the Tenant.

[100] I find that the Landlord has provided a reasonable and credible explanation for its conduct that renders the expert analysis of little value or weight. The Landlord says it was not approaching the matter of an alternative tenant for the Leased Premises from a comparative perspective, but was instead looking at this from the perspective of damage control if the tenancy could not be preserved.

[101] The fact that its Board was concerned with the optics of how that contingency planning might look if recorded in their meeting minutes is not inconsistent with the Landlord’s stated motive of damage control. Furthermore, there is no evidence to suggest that anything came of this overture to the prospective tenant who placed second in the RFP, which occurred a number of months after the December 2020 Board meeting. The Landlord says that it was protecting its position in the event that no satisfactory agreement could be reached with the Tenant and that it was considering how best to mitigate its losses in that event. The very fact that it continued to engage with the Tenant after this meeting, making proposals and counterproposals to the Tenant, is inconsistent with the Tenant’s theory that the Landlord was not trying to preserve the Tenancy.

[102] On balance, I do not find that the expert evidence about the economics of an alternative tenancy supports the inference that the Landlord was acting out of malice or for an improper purpose (rather than for the legitimate purpose of protecting its own economic interests) where the consideration of the alternative tenancy was, as here, not to replace the Tenant that might otherwise continue, but rather to replace the Tenant that was unable to continue.

[103] The Landlord’s recognition that there were a variety of potential outcomes and its exploration of a contingency plan, even one that could be less economically favourable to the Landlord, does not support an inference or finding that the Landlord was motivated in its dealings with the Tenant by a desire or intention to oust the Tenant. The Landlord denies that it has such motivation.

[104] Ms. Hutcheson also opines that:

- a. PBDF is paying (as at June 2023) 3.7 times to 12.8 times the leasing rate for commercial retail units in Fort Erie.

- b. PBDF appears to be paying the highest gross sales-to-rent ratio in the Canadian Duty Free sector, based on her discussions with Jim Pearce of PBDF and the absence of any statistical data to the contrary. According to Mr. Pearce, and based on the hearsay evidence of Mr. Pearce, Ms. Hutcheson suggests that the standard currently being achieved in Canada in the duty free sector for gross sales-to-rent ratios ranges from 10% to 16%.
- c. Compared to the average gross sales-to-rent ratio in the Canadian retail sector which ranges from 6 to 10%, the Base Rent obligations of PBDF at 157.3% in 2020, 251.2% in 2021, and 36.96% in 2022 are 3.7 to 41.9 times higher.

[105] While this further evidence is not entirely directed to the implication of ulterior motives to the Landlord, I will take the opportunity here to also address the objection of the Landlord to the evidentiary foundation of this aspect of Ms. Hutcheson's opinion evidence. This evidence is predicated in part upon information from an internal witness of the Tenant (Mr. Pearce) about standard gross sales to rent ratios for duty free stores in Canada. However, Mr. Pearce is not an industry expert. Further, he originally provided direct evidence on other topics, but not about this.

[106] After the Tenant's expert's report was delivered, the Landlord was not afforded a reasonable opportunity to cross-examine Mr. Pearce, despite the court's direction that it be permitted to do so after the Cross-Motion was adjourned and the timetable was amended to allow for the late delivery of expert reports from the Tenant. Offering to produce Mr. Pearce to be cross-examined in writing (or in person less than a week before the motion) was not compliant with the court's September 6, 2023 scheduling endorsement, in which the cross-examination of Mr. Pearce was expressly contemplated and required to have been scheduled sufficiently in advance so as to ensure that the exchange of factums, including the reply factum, could be completed by October 27, 2023.

[107] The Landlord should not be faced with having to contend with this expert opinion when it was not afforded an appropriate opportunity to challenge its foundation, in circumstances where the independent expert, Ms. Hutcheson, admitted that she has no expertise in the duty free retail space. Without it, the opinion evidence of Ms. Hutcheson about the comparable rent ratios in the duty free sector is not supported and cannot be relied upon. Her evidence about comparable rent ratios outside of the duty free sector is of limited utility given the acknowledged market differences.

[108] In any event, what this expert is ultimately saying is that the Rent that the Tenant agreed to pay under the Lease is too high in the current market. I do not find this aspect of her opinion evidence to be helpful to the determination of the issues that I must decide. The Lease does not prescribe a "market rate" adjustment to the Rent payable.

c. The Demands and Proposals

[109] Beyond the allegation that the Landlord was acting with the ulterior motive of trying to oust the Tenant, the Tenant contends that the Landlord was not acting reasonably or in good faith in that it made unreasonable demands of, and proposals to, the Tenant during the Closure Period and beyond.

[110] This court has been struggling with what it means to negotiate in good faith since long before the recent Supreme Court of Canada pronouncements on this subject. Cumming J. considered this in *Canada Trustco Mortgage Co. v. 1098748 Ontario Ltd. (c.o.b. Canyyz Properties Ltd. Partnership)*

(1999), 23 R.P.R. (3d) 82 (Ont. Gen. Div.), at paras. 24–25. He held that, as a matter of contractual interpretation, the lease agreement in that case should be interpreted to contain an obligation to negotiate renewal terms in good faith, but the evidence there did not establish a breach of this obligation:

The position at common law is that there may well be an implied term of a contract that the parties will act in good faith in the performance of their obligations. However, it is problematical as to whether there is any duty of good faith in the negotiation of a contract.

The lease in question, however, contemplates a potential further agreement that is based in part on the previous and continuing contractual relationship of the parties. The inclusion of a term to negotiate following the exercise of the parties' option to renew must give rise to something. This approach is consistent with the values of commercial efficacy and certainty that I outlined above. It is appropriate to interpret the provision in question here as demonstrating the intention of the parties to preserve the goodwill of their former contractual relationship. A previous relationship and an agreement to negotiate on renewal terms and conditions may not allow the court to infer what those terms and conditions would be, but the context imparts a duty of the parties to negotiate in good faith for renewal terms and conditions following exercise of the renewal option. By "duty of good faith" I mean nothing more than a requirement that the parties not negotiate in bad faith.

[111] This is not conceptually that different from the assertion in this case by the Tenant that the Landlord was not acting reasonably or in good faith (which the Landlord acknowledges it was required to do under s. 18.07 of the Lease) because it made unrealistic and aggressive demands for the payment of Base Rent during the Closure Period and threatened to exercise its enforcement remedies. These demands and threats are summarized in more detail in Appendix 1 to these reasons and variously, above.

[112] After making an initial demand for unpaid Base Rent payable on April 1, 2020, the Landlord offered to defer (not abate) Base Rent under the First Deferral Agreement. A similar offer was made in the Second Deferral Agreement. The Landlord's explanation for why this Second Deferral Agreement was drafted and proposed but ultimately never signed by the Landlord does appear to be consistent with the Tenant's theory that the Landlord was trying to extract something more from the Tenant despite having its Board's approval to sign the Second Deferral Agreement.

[113] As noted earlier in these reasons, this could be described as an aggressive negotiating tactic. This followed some earlier unrealistic demands for immediate payment of Deferred Rent accruing during the Closure Period, in amounts that the Landlord knew the Tenant did not itself have the resources to fund and would have to seek outside financing or investment to meet. However, one cannot lose sight of the fact that, while these demands by the Landlord may have been aggressive and unrealistic, the Landlord was still demanding less of the Tenant than its full performance under the Lease.

[114] Ultimately and despite not having signed it, the Landlord allowed the Tenant to operate for a long time under the terms of the Second Deferral Agreement, well past the expiry of the agreed upon Deferral Period (the latest of which was to March 31, 2021), which afforded the Tenant relief from the strict terms of the Lease (for example, deferring the minimum Base Rent and relieving it of the requirement under s. 9.02 to continue to operate from the Leased Premises after the Tenant closed the duty free store).

[115] The Tenant's first proposal made in January 2021 sought to amend the Lease permanently to eliminate all Base Rent, for the past and the future. This included an abatement of the Deferred Rent that it had agreed to pay under the two Deferral Agreements it had signed. The Landlord immediately advised the Tenant that these terms were not acceptable. The Tenant did not deliver its promised formal proposal until August 21, 2021 (despite having promised to deliver it in June). This proposal contained the same proposed amendments to the Lease that the Landlord had rejected in January 2021.

[116] This was not well received by the Landlord and precipitated the Landlord's September 8, 2021 Notices of Default, the Tenant's Forbearance Agreement with RBC that required it to reach a resolution with the Landlord to preserve the Lease by November 15, 2021, and the Tenant's October 15, 2021 proposal in which it offered to pay some of the Deferred Rent from the Closure Period and a payment schedule for increasing Base Rent over the Ramp Up Period now that the duty free store had re-opened. As part of this proposal, some permanent amendments to the Lease were also requested by the Tenant, most significantly, a five year extension. Negotiations continued, but because no agreement was reached, the RBC sought the Appointment Order.

[117] The next proposal from the Tenant was not made until March 2023 and it reverted to the position of no Base Rent being paid during the Closure Period and sought amendments to the Lease provisions for future Base Rent. This led to a further round of negotiations and eventually to an agreement in principle for Rent payable during the Ramp Up Period, but no final agreement on the past unpaid Base Rent (up until November 2021, including during the Closure Period). The Tenant's last on the record proposal made in August 2023 included a request for two five-year Lease extension options.

[118] Over the course of the more than three years of negotiations, the Landlord's demands were moderated over time. The Landlord eventually offered to split the burden of the Base Rent payable during the Closure Period 50/50 with the Tenant. The Tenant says this is not a real accommodation because that amount (\$2.7 million) represents more Base Rent to be paid to the Landlord during the Closure Period than what the Tenant has already negotiated to pay for an equivalent time during the first part of the Ramp Up Period after the duty free store re-opened. The Landlord says the Rent abatement and deferral that is reflected in the Ramp Up Period was part of an overall deal that, from its perspective, had to include some payment of Deferred Rent from the Closure Period, even though the store was closed and there were no revenues.

[119] I agree with the Landlord that the agreement regarding the Rent to be paid in the Ramp Up Period was part of a package. Thus, disconnecting them and comparing the two periods is not particularly helpful, especially when the negotiations were being undertaken against the backdrop of a reservation of strict legal rights on both sides.

[120] Despite its threats of remedial action, the first formal notice of the Landlord's intention to take enforcement steps was not provided to the Tenant until September 8, 2021. Further, even after giving formal notice of its intention to exercise of enforcement remedies eighteen months into the negotiations with no agreement in sight (in the fall of 2021), the Landlord continued to engage with the Tenant in negotiations that allowed for the partial abatement of Deferred Rent. The Landlord made offers and attempted to elicit offers from the Tenant and was engaged in discussions with the Tenant. The Landlord's offers included compromises that recognized the implications of the Border Restrictions on the Tenant's ability to generate sales revenue.

[121] The Landlord effectively did allow the Tenant to pay what it could (the subsidy money it received of \$544,000 plus HST which was for CRA purposes calculated based upon the full Base Rent Payable) while reserving its rights. In the meantime, while the Base Rent payments were under negotiation the Landlord effectively agreed to amendments or waivers of ss. 9.02 (continuous operations) and 4.05 (no abatement) to accommodate the Tenant's situation as a result of the Border Restrictions.

[122] During the Closure Period, while the Landlord's on the record positions were aggressive and at times unrealistic in terms of the demanded amounts and time allowed for payment, the Landlord's accommodations offered to the Tenant in respect of the Closure Period were within the range of possible accommodations for the parties to consider. The Landlord was entitled to negotiate from the starting position that the Tenant should make some arrangements to pay the Deferred Rent, which the Tenant had agreed to pay under the Deferral Agreements (and then did not pay).

[123] Likewise, while the Tenant's demands for full abatement of Base Rent during the Closure Period and for more permanent amendments to the Lease (including the removal of Base Rent altogether and to only pay percentage rent after re-opening, while also asking for options to extend the Lease term) go beyond what the court considers to be reasonable for the preservation of the Lease as a result of the Border Restrictions, they too were within the range of possible accommodations for the parties to consider.

[124] As was noted by the Court in *Wastech* (at para. 77), some types of contractual discretion (e.g. those relating to "taste, sensibility, personal compatibility or judgment of the party") will be less susceptible to objective measurement than others (e.g. those relating to "operative fitness, structural completion, mechanical utility or marketability"). There will be a relatively larger range of reasonable outcomes as a result of exercising the former types of discretionary power.

[125] No one could appreciate the full implications and effect of the COVID-19 pandemic while it was unfolding, especially in the early weeks and months. The pandemic was unprecedented and early on no one predicted that it, or that the Border Restrictions, would last as long as they did. Hindsight should not be used to assess at too granular a level the reasonableness of positions and offers as they evolved during these unprecedented times. The Tenant's positions at one extreme and the Landlord's positions at the other extreme of the range of possibilities made the prospect of a successful deal coming out of the parties' s. 18.07 discussions more challenging but not impossible. It is not uncommon in commercial negotiations for parties to take extreme positions while attempting to negotiate a compromise.

[126] As I have previously found, the preservation of the tenancy did not necessarily require the abatement of all Base Rent during the Closure Period or a guarantee that the Tenant will be profitable in every Lease year. Cash flow is important but can be supplemented from a variety of sources. Profitability over the life of the Lease might be a relevant consideration in assessing the impacts of the Border Restrictions and appropriate Rent accommodations, but I do not find it to have been unreasonable for the Landlord to insist upon the payment of some discounted Base Rent amounts that had been deferred during the Closure Period that still allowed for a return to profitability for the Tenant over time.

[127] The Landlord says that it did take into consideration the Tenant's own revenue forecasts for the duration of the Lease term in the proposals it made, that would have enabled the Tenant to operate at a loss to pay some of the Deferred Rent accruing during the Closure Period over some of the Ramp Up Period and eventually still become profitable within the Lease term. The Landlord estimates the total value of what it offered to the Tenant is the equivalent of an abatement of two years' Rent under the Lease, in addition to the additional time to pay.

[128] Having considered the totality of the evidence regarding accommodations to be afforded to the Tenant in light of adverse effects that the Border Restrictions had on the Tenant's business, the Tenant has not met its burden to demonstrate, on a balance of probabilities, that the Landlord was not acting in good faith with a view to trying to preserve the tenancy in the course of the consultations and negotiations with the Tenant either during or after the Closure Period.

Issue #4: What remedy is available to the Tenant?

a) No Breach, No Remedy for Breach

[129] Since I have not found that the Landlord breached its duty of good faith or s. 18.07 of the Lease, there is no need to decide what the remedy would have been if the court had found otherwise. However, I will briefly address the arguments and how the court would have approached the remedial aspects of the breaches alleged.

[130] The Landlord argues that the only remedies available to the Tenant would be damages or a direction from the court to continue negotiating towards an agreement.

[131] The Tenant contends that the Landlord's approach would result in s. 18.07 of the Lease being read in a way that renders it meaningless, resulting in a commercially absurd result having regard to the objective of preserving the tenancy, because: the Tenant must either agree to the Landlord's last and best offer (even if not reasonable and not made in good faith) or be stuck in a perpetual state of negotiation if it wants to preserve the tenancy, but face the risk default in the meantime if it is unable to pay the Rent demanded by the Landlord in accordance with the terms of the Lease in the absence of any new agreement (or let the damages accrue if it can afford to wait out the negotiations).

[132] The Tenant points to the adage that a commercial contract must be interpreted as a whole document "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" (2651171 Ontario Inc. v. Brey, 2022 ONCA 148, 468 D.L.R. (4th) 545, at para. 16). It should also be interpreted in a manner that is commercially reasonable and avoids commercial absurdity (Harvey Kalles Realty Inc. v. BSAR (Eglinton) LP, 2021

ONCA 426, at para. 6; *Weyerhaeuser*, at para. 65). These principles are sound. They can be reconciled by stepping back and looking at the broader context.

[133] The duty to negotiate honestly and exercise contractual discretion in good faith has been held to serve legitimate commercial purposes, even if it does not lead to an agreement. Wilton-Siegel J. observed in *Molson Canada 2005 v. Miller Brewing Company.*, 2013 ONSC 2758, 116 O.R. (3d) 108, at para.101 that:

There may well be circumstances where injunction or other equitable relief is an appropriate remedy, for example, where the purpose of such covenant [to negotiate in good faith] is to provide a period of time in which to allow one party to try to convince the other party to enter into the contemplated agreement. Further, there may be circumstances where out-of-pocket expenses, or similar costs, are an appropriate remedy, even if the court can neither write an agreement for the parties or award damages for the loss of the economic benefits that would have been received if the parties had reached an agreement.”

[134] The Landlord postulates that the law has changed since this decision and that the court would in this case also have the ability to award damages for breach of s. 18.07 of the Lease (if proven), which would be another way to avoid the commercially absurd result that the Tenant is concerned about. The damages may be for the loss of the tenancy and the benefit of the Lease (e.g. if the Landlord seeks to re-possess the premises and/or terminate the Lease for the Tenant’s failure to pay the prescribed Rent under the Lease and the Tenant is unable to obtain relief from forfeiture) or the damages may be for the difference between a reasonable amount of Rent for the Tenant to have paid and to continue to pay to preserve the tenancy, and what the Tenant otherwise pays under the terms of the Lease until the damages can be determined.

[135] I agree with the Landlord that this would have entailed a second phase to determine the damages, with the benefit of properly admissible expert evidence from both sides.¹¹ There is no need for that second phase in light of the court’s finding that the Landlord is not in breach of s. 18.07 and did not breach its duty of good faith.

¹¹ The Tenant’s Cross-Motion sought damages for different alleged breaches (not the breach of s. 18.07) which were deferred.

b) *Is it open to the court to determine what, if any, Base Rent is owing for the Closure Period and the terms on which it should be paid, and if so, what is the appropriate amount for the Tenant to pay and on what terms?*

i. *If the Landlord has breached its duty of good faith and/or s. 18.07 of the Lease;*

ii. *If the Landlord has not breached its duty of good faith and/or s. 18.07 of the Lease. [e.g. to order its implementation?]*

[136] Having found no breaches by the Landlord of s. 18.07 of the Lease or its duties of honest performance and to exercise contractual discretion in good faith, the remaining question is whether the court can nonetheless determine and impose adjusted Rent for the Closure Period.¹²

[137] The Landlord's position is that the court cannot, regardless of whether there is a finding of breach or not, determine the Base Rent to be paid during the Closure Period and effectively amend the Lease to impose new terms on the parties in the absence of any objective benchmarks or parameters upon which those new terms can be determined.

[138] The Tenant's position is that the court can in either scenario, and must do so and make an order declaring the amount of Rent to be paid by the Tenant during the Closure Period so as to give effect to s. 18.07 as a matter of its implementation, even if there has been no breach.

[139] The Tenant argues that because of the inherent uncertainty of unanticipated extraordinary events, the parties left the details regarding the adjustments to the Rent provisions under the Lease to be made as circumstances required over the life of the Lease as a matter of practical necessity. Section 18.07 of the Lease could not prescribe a specific formula or method for calculating the Rent adjustments because it was not possible to predict at the time the Lease was signed what the changes to Applicable Laws might be and what their impact on the Tenant's business operations might be.

[140] Now that the impacts are known, the Tenant asks that the court determine those adjustments to fill in the gaps that the parties were unable to agree to and implement s. 18.07 of the Lease. The Tenant says that to implement and give effect to s. 18.07 of the Lease, the court can determine the reasonable and appropriate adjustment to the Rent in a fair and equitable manner that is proportionate to the magnitude of the effect on the business and having regard to what the Tenant can afford to pay based on its sales.

[141] The Tenant relies as authority for this upon *Winsco Manufacturing Ltd. v. Raymond Distributing Co. Ltd.*, [1957] O.R. 565 (Sup. Ct.), in which the court stated in the context of pricing

¹² As noted earlier, if it is open to the court to determine what Base Rent the Tenant should be paying as a result of the Border Restrictions and adverse effects, then it does not need to decide what Base Rent the Tenant should pay during the Ramp Up Period, after the Tenant's duty free store re-opened in the fall of 2021, because the parties have agreed on what that should be.

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” (at para. 34 in the online version). I do not find this case to be particularly helpful or analogous as it arose in a different context, and s. 18.07 of the Lease clearly did intend for further discussions and negotiations by its express terms.

[142] However, as was observed in *Wastech* (at para. 77), and in other cases, there may be existing objective parameters within which determinations of what is reasonable and appropriate in the circumstances can be made by the court. The Landlord concedes that the court can intervene to impose a specific result on parties who agree to negotiate (or discuss) if the parties have agreed to objective criteria that can be applied by the court to determine the appropriate result, with reference to: *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 48 B.L.R. 212 (BCCA), *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93, 344 O.A.C. 363; and *1284225 Ontario Limited v. Don Valley Business Park Corporation*, 2023 ONSC 5595. However, the Landlord contends that, in the absence of objective criteria, the most the court can do is determine whether a party has complied with its obligation to negotiate—or in this case discuss.

[143] While s. 18.07 of the Lease does not expressly provide objective criteria for evaluating the impact of the Border Restrictions on the Lease, the Tenant asks the court to have regard to the factual matrix surrounding the formation of the Lease for the standards to determine the Base Rent that should be paid during the Closure Period. See *Molson*, at para. 116–18. This would require the court to determine that an understanding existed at the time the Lease was signed about how the Base Rent payable under the Lease would be impacted by a temporary closure of the Tenant’s duty free store that could, in turn, inform the interpretation of s. 18.07 of the Lease.

[144] In this regard, the evidence that the Tenant seeks to rely upon to inform the interpretation of s. 18.07 is the evidence about the negotiations in and around the July 18th, 2016 meeting, including Mr. Pearce’s “ask” for a good faith and reasonable adjustment to rent as appropriate in a fair and equitable manner, and Ms. Costa’s email response which was to refer to s. 18.07 of the Lease. Even if this evidence is admissible, it does not provide a proper evidentiary foundation from which the court can determine what a reasonable adjustment to the Rent payable would be for the Closure Period. There is no benchmark from which to determine what is “fair and equitable” mentioned in the Lease or in the factual matrix evidence that the Tenant seeks to rely upon.

[145] What the Tenant really wants the court to have regard to is its subjective intention and understanding at the time the Lease was entered into, that the Base Rent, while not part of the Percentage Rent, was based on its historical experience and forecasted minimum annual sales of \$20 million, and that the minimum Base Rent was to be 20% of that, or \$4 million. Earlier in these reasons it was determined that this was not admissible factual matrix evidence. Nor do I consider the mathematical derivative (that 20% of \$20 million in sales is equal to \$4 million) to be an objectively reasonable or appropriate benchmark to use to calculate the Base Rent payable during the Closure Period (which the Tenant contends should be zero, being 20% of zero sales).

[146] The Tenant’s own expert, Mr. Stulberg, was asked to prepare a report analyzing its ability to pay rent during: a) the period from March 2020 to December 2022, and b) in 2023, as a result of the decline in its revenues due to government-imposed restrictions on international travel following the

outbreak of the COVID-19 pandemic. He conceded in his report (at para. 55) and on cross-examination: “There is no standard or definitive metric that can be applied to determine what a reasonable level of rent would be for the period that was affected by COVID.”

[147] Mr. Stulberg’s approach was to analyze the Tenant’s ability to pay based on an assumed baseline profitability level, but there is no evidence in the Lease or the factual matrix evidence that was tendered that this was the basis on which the parties intended that a rent adjustment under s. 18.07 would be determined. Furthermore, Mr. Stulberg was not provided with material evidence about the Tenant’s own projections, nor did he consider whether the parties had agreed to any minimum level of profitability. He was also not made aware of the on the record offers that the Tenant had made to the Landlord when he opined about what the Rent that he considered to be reasonable for the Tenant to pay. In these circumstances, I can place little or no weight on Mr. Stulberg’s opinion about what a reasonable Rent for the Tenant to pay might be.

[148] Even if this expert opinion evidence could be considered reliable, it would only be relevant and useful if the court could order the Tenant to pay and the Landlord to accept a different amount of Rent than what the Lease prescribes for the Closure Period. I have determined that it is not appropriate in the circumstances of this case for the court to impose Rent adjustments for the Closure Period as a result of the Border Restrictions. There is nothing in the Lease to suggest that the parties wished to give up their right to agree (or not) on certain terms.

[149] What the Tenant is asking the court to do is re-write the Lease to substitute its determination of reasonable Base Rent to be paid during the Closure Period in the absence of any objective benchmarks in the Lease (or apparently at all according to the Tenant’s expert Mr. Stulberg) that the court could apply to determine the “reasonable” Base Rent. The Tenant’s position is that the court can objectively conclude that, because its store was closed and it was not making any sales as a result of the Border Restrictions, that impact dictates that the Tenant should not have to pay any of the \$4 million annual Base Rent that it agreed to pay under the Lease. I am not prepared to re-write the Lease in this manner. It effectively eliminates the distinction between Base Rent and Percentage Rent in the Lease.

[150] While the impacts of the change in Applicable Laws (the Border Restrictions) on the Tenant’s business operations (the closure of the duty free store) are to be discussed and taken into consideration by the parties the Landlord did not, by agreeing to this, give up all of its rights under the Lease. The court will not re-write the parties’ contract or impose terms inconsistent with what the parties agreed to without a clear agreement and direction from the parties to do so. The Lease does not provide for this, expressly or by implication. The court will not make a contract for the parties out of terms which are absent, indefinite or illusory. There must be reasonable certainty as to the intended terms of an agreement to agree, such as the amount of rent to be paid, if the court is to be asked to impose an agreement upon the parties. See *Winsco Manufacturing*, at para. 28.

[151] The Tenant also seeks to rely upon the doctrine of part performance because the parties have been paying roughly what had been agreed to during the Ramp Up Period pending the outcome of this Cross-Motion. This is suggested as an alternative basis for the court’s jurisdiction to step in and complete their agreement for them, where they have not been able to do so. In *Winsco Manufacturing*, the court determined (at para. 28 of the online version):

The law requires the parties to make their own contract and the court will not make a contract for them out of terms which are absent, indefinite or illusory. But, within the principles stated, terms will, however, be implied and particularly where there has been part performance: *Oxford v. Provan* (1868), L.R. 2 P.C. 135; *Kelly v. Watson*, 61 S.C.R. 482, 57 D.L.R. 363, [1921] 1 W.W.R. 958; *Ledyard v. McLean* (1863), 10 Gr. 139.

[152] I am unable to apply this reasoning to the agreement in principle reached in this case regarding the Ramp Up Period that the parties have been following during these proceedings. The without prejudice agreement in principle regarding the Rent to be paid during the Ramp Up Period was expressly made under a reservation of rights and, from the Landlord's perspective, subject to the parties reaching a further agreement on the Rent to be paid in respect of the Closure Period. To use that as a benchmark after the fact to determine the Base Rent to be paid during the Closure Period would undermine the essence of a without prejudice agreement such as was made.

[153] The parties have not been able to agree on a reasonable adjustment to Base Rent to account for the adverse effects of the Border Restrictions on the Tenant's business operations during the Closure Period, and the court is unable to implement s. 18.07 of the Lease by imposing a Base Rent adjustment because there is no benchmark or metric upon which to do so.

[154] The court asked whether the parties wished to make arguments that the Lease was frustrated. They both advised that they did not consider the doctrine of frustration to have any application.

[155] In the absence of a finding that the Landlord is in breach of its obligations, the only remedy available to the Tenant is one that would implement the intended purpose of s. 18.07 of the Lease that the parties engage in discussions with a view to preserving the tenancy. While the court strives to give effect to all provisions of a contract and presumes that the parties intended them to have legal effect,

the court cannot force the parties to reach an agreement if they are unable to do so, having made reasonable efforts (which they have done). It may be that there is no reasonable basis upon which the tenancy can be preserved in the aftermath of the COVID-19 pandemic. Unfortunately, many other commercial tenancies suffered a similar fate. If there is a reasonable basis upon which the tenancy can be preserved, the parties remain at liberty to continue their negotiations, subject to other steps and proceedings that may follow this decision.

[156] The Tenant asked at the conclusion of the hearing that, at the very least, the court order that the terms of the tenancy be continued on the basis of the Landlord's last proposal (or at least the last one that was in evidence, which was made in March 2023 and stated to expire after ninety days). While the Tenant may not have considered that offer to be reasonable at the time, it is the only metric or benchmark that the court could apply that the Landlord has propounded to be reasonable. The Tenant would prefer this outcome to the alternative of having to seek relief from forfeiture.

[157] The court cannot turn back the clock and order this offer from the Landlord, which has lapsed, to now be implemented. The Landlord has indicated since the early days of the Scheduling Endorsements that, if it is successful, it will not take any steps arising out of the court's decision on

this Cross-Motion until the Receivership Application has been heard. I understand that the Receivership Application has been scheduled for the end of January 2024. The stay of proceedings against the Tenant remains in effect. That timing creates a further opportunity for the Landlord and Tenant to continue their negotiations, which the court would encourage them to do based on the essential terms of the Landlord's March 2023 offer, updated to reflect relevant changes and the passage of time since then.

Summary of Outcome

[158] For the foregoing reasons, I dismiss the Tenant's Cross-Motion and decline to grant the orders that it seeks (as outlined in paras. 18 and 19 of these reasons).

[159] On the specific issues raised on this motion, I hold as follows:

1. 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.
2. The Landlord did not breach s. 18.07 of the Lease by refusing to agree to abate all Base Rent otherwise payable during the Closure Period. Section 18.07 does not require that the Base Rent be adjusted based on a fixed percentage of the Tenant's sales or revenues or that it be reduced to a level that guarantees a minimum level of profitability to the Tenant.
3. The Landlord did not breach its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered. The Landlord has not been found to have been acting with the ulterior motive of terminating the Lease. Nor were the Landlord's demands, proposals and other dealings with the Tenant unreasonable having regard to the acknowledged objective of attempting to preserve the tenancy and when considered in the context of the dealings between the parties and the evolution of their positions over time.
4. No Remedy is granted:
 - a. Given that there is no finding of breach by the Landlord, there is no need for the court to decide what remedy might have been available to the Tenant if there had been a finding of breach.
 - b. Without the parties having agreed at the time of contracting as to how such determination could be made, and in the absence of any established benchmarks, the court cannot determine and impose upon the parties an amount of Base Rent to be paid by the Tenant during the Closure Period, or terms upon which it is to be paid, that are different from what the Lease requires. The court cannot re-write or amend the Lease for the parties, nor can it force the parties to do so. Nor is that level of intervention by the court necessary in order to implement and give commercial meaning and effect to s. 18.07 of the Lease. Section 18.07 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.

[160] In light of the Landlord's undertaking not to take any enforcement steps pending the return of the Receivership Application (and the continuing stay) so that there is no uncertainty in the interim, if the Tenant continues to operate its duty free store from the Leased Premises, it shall continue to pay the agreed upon without prejudice rent for the Ramp Up Period, subject to further orders of this court. A similar order for the payment of rent pending the return of the Receivership Application was made in the Interim Rent Endorsement, but the amounts to be paid should during this interim period now align with what the parties have agreed to and have been following during the Ramp Up Period.

[161] If there are issues arising from this decision that require further clarification or directions from the court prior to the return of the Receivership Application, any party may contact the Commercial List office to arrange a case conference before me to consider the same.

Costs

[162] The April 4, 2023 Scheduling Endorsement directed that the costs of the Landlord's Lift Stay Motion (decided by the court's January 16, 2023 endorsement) are to be decided at the same time as the cost of this Cross-Motion.

[163] The parties were to have completed their exchange of Cost Outlines and originating and reply Cost Submissions by December 1, 2023 and to advise the court by December 8, 2023 if any aspects of costs had been agreed, or if not, how they are proposing to have the issue of costs determined.

[164] The parties confirmed on December 12, 2023 that they had exchanged their Cost Submissions and Outlines and had been unable to reach any agreement regarding any aspects of the costs of either the Lift Stay Motion or the Cross-Motion. The parties have indicated that they wish the court to consider their cost submissions after the decision has been released. The Tenant relies in support of its cost submissions upon offers made prior to the Cross-Motion that were not in evidence. The court has not seen or considered any offers that were not in evidence in reaching this decision.

[165] Unless the Landlord has further submissions to make regarding relevant settlement offers that the court has not yet received, the court will, in due course, render a decision on costs based on the written submissions that have now been exchanged and provided to the court as of December 12, 2023.

[166] I am grateful for the thorough and thoughtful submissions of counsel on both sides that have greatly assisted in the writing of this decision.



KIMMEL J.

Date: December 15, 2023

APPENDIX 1

CHRONOLOGY OF DEALINGS BETWEEN THE PARTIES

The following is a summary of the events and dealings between the parties commencing at the time the Border Restrictions came into effect in March of 2020 and continuing until August 2023 which was when the last offer that has been disclosed to the court was sent between the Tenant and the Landlord. The bolding indicates demands made by the Landlord that the Tenant considers to have been unreasonable at the times made.

- a. When the Canada-US border was closed to non-essential traffic in March of 2020, PBDF closed the duty free store. PBDF did not discuss closing the duty free store with the Authority or advise that it was closing the store until after it had done so.
- b. The Authority did not initially agree to defer payment of Rent for April of 2020. On April 1, 2020 the **Landlord wrote to the Tenant indicating that there was no provision for abatement of Rent in the Lease and that the Landlord was requiring payment of rent in accordance with the Lease terms.**
- c. PBDF thereafter invoked s. 18.07 in a letter dated April 3, 2020 and requested a meeting to discuss the unprecedented situation.
- d. A meeting was arranged and took place on April 11, 2020. Following that meeting, the Landlord sent a draft of the First Deferral Agreement on April 16, 2020 that provided for a Rent Deferral Period that would expire on July 31, 2020 (the “Deferral Date”).
- e. The Tenant responded with a counter-proposal on April 21, 2020, by which it asked for an option to extend the Deferral Date out as far as April 2021 if the border had not opened to non-essential travel and the traffic levels had not substantially recovered by then.
- f. The Landlord responded to the Tenant’s suggested changes to the First Deferral Agreement the same day, April 21, 2020, noting among other things that **the Landlord is not a bank and if the Tenant requires additional assistance it should be looking to traditional financial institutions.**
- g. At the Tenant’s request, its counter-proposal for the First Deferral Agreement was put to the Authority’s Board and rejected. Instead, the Board approved the version that the Landlord had provided. The Tenant was advised of this on April 24, 2020.
- h. Following a period of non-communication from the Tenant, the Landlord sent an email to the Tenant on May 6, 2020 with the following demand: “As you no longer appear to be interested in the rent deferral agreement that the PBA Board approved on April 24, 2020, please submit the April 1, 2020 and May 1, 2020 rent payments as required by the lease. **Failure to do so by the close of business tomorrow will result in the PBA initiating formal default proceedings under article 17.01 of the lease.**”

- i. The Tenant sent back the signed First Deferral Agreement to the Landlord on May 6, 2020 with a cover email indicating that there was still a need for further discussions about the implications.
- j. On August 18, 2020, the Tenant wrote to the Landlord, noting that the First Deferral Agreement had expired and suggested that the Deferral Date should be extended until the month after the border is fully re-opened.
- k. On October 29, 2020 the Landlord wrote to the Tenant about the need for a new deferral agreement and various other matters.
- l. The Landlord followed up two weeks later on November 13, 2020 with a draft of the Second Deferral Agreement, noting the Tenant's lack of response to the October 29, 2020 email and various defaults by the Tenant under the Lease and stating: "Failure to respond by November 18, 2020 to this e-mail and my earlier e-mail of October 29, 2020 describing how you will address the issues raised in both e-mails **will result in the PBA issuing a formal notice of default in the manner prescribed by Article 18.03.**"
- m. On November 16, 2020 the Tenant responded, asking why it had become urgent after the Landlord had waited months to send the draft Second Deferral Agreement. The Tenant also commented substantively that the Deferral Date should be extended to expire on March 31, 2021 rather than December 31, 2020, then only a few weeks away.
- n. The Authority amended the proposed draft Second Deferral Agreement to extend the Deferral Date from April 1, 2020 to March 31, 2021 (or earlier if the Tenant's duty free store opened earlier) and to allow for a two year payback after re-opening. This draft Second Deferral Agreement was approved by its Board by a resolution on November 20, 2020. That day, General Manager of the Landlord, Mr. Rienas, wrote to the Tenant stating: "The Board has tentatively approved the rent deferral agreement conditional on getting greater assurances as to receiving unpaid rent. As you know, zero rent has been paid since April 1, 2020. To that end the Authority is requesting the financial information requested in Articles 16.03 a), b) and c) of the lease. Please provide by no later than Tuesday November 25."
- o. The Tenant's 2019 financial statements and an HST reimbursement were also requested by the Landlord and the Tenant provided those to the Landlord on November 23, 2020.
- p. PBDF signed the Second Deferral Agreement in November 2020, but the Authority did not.
- q. After having received on December 8, 2020 certain financial and other information that the Landlord had requested from the Tenant, Mr. Rienas wrote on December 9, 2020 to provide comments on what had been received and advised the Tenant's representative (Mr. Pearce) that: "[the Authority] **is not prepared to be PBDF's bank and are not prepared to defer all of the rent payments till March 31, 2021.**

Accordingly, the [Authority] is demanding payment of 1/3 of the outstanding 2020 rent, amounting to \$1 million, by December 31, 2020 with the balance of the 2020 unpaid rent and anticipated 2021 unpaid rent to be deferred to March 31, 2021.”

- r. On December 17, 2020, the Board resolved to demand a partial rent payment from PBDF in the amount of \$1 million by December 31, 2020 and to develop with legal counsel a rent repayment schedule and associated guarantees of full payment.
- s. On December 21, 2020, **the Landlord demanded that the Tenant pay \$1 million of the Rent that had been deferred under the Deferral Agreements by December 31, 2020 and a further \$2.13 million in deferred Rent on a schedule to be agreed, and demanded that the Tenant start paying the full Base Rent under the Lease as of January 1, 2021.**
- t. The Tenant wrote to the Landlord on December 23, 2020 requesting the opportunity to discuss an extension of the rent deferral and the expected payment schedule.
- u. The Landlord wrote back to the Tenant on December 29, 2020 explaining it was “fully aware of the business challenges during the Covid-19 pandemic” and had taken those into consideration in the offer it made on December 21, 2020.
- v. On December 30, 2020 the Tenant sent a further response, noting certain objections and making it clear that the Tenant was not in a position to make the short term payments that had been demanded by the Landlord. The Tenant indicated it would provide the Landlord with its business plan by January 15, 2021 and suggested that a meeting be arranged thereafter.
- w. On January 15, 2021, PBDF provided financial projections to the Authority and made proposals to the Authority to address: (i) Rent payable under the Lease going forward; and (ii) repayment of the deferred rent by PBDF. This business plan was accompanied by the Tenant’s sales projections. The Tenant’s projections showed that it would become profitable in the short term if the Lease was amended as the Tenant was suggesting, predicated upon a permanent reduction in the Base Rent payable.
- x. On January 19, 2021, the Authority advised the Tenant that the “proposed financial business plan of eliminating Base Rent and moving to only % rent is unacceptable. It also ignores all the rent currently owed to the Peace Bridge Authority (PBA). Even in the rent deferral agreement that expired on July 31, 2020, PBDF agreed to pay deferred rent with Interest over time. Your plan is also silent on accessing federal government relief programs like the Business Credit Availability Program (BCAP) and the Highly Affected-Sectors Credit Availability Program (HASCAP).” The Authority further noted that the minimum Base Rent of \$4 million was a key factor in the Tenant’s RFP proposal having been selected and that it was “not prepared to alter the basis upon which the concession awarded. To do so would be unfair to the other bidders in the procurement process.”

- y. On March 25, 2021, the Tenant referenced its previous proposal and cash flow projections (and provided new ones that were substantively the same as the previous ones, but extended over a longer projection period and some numbers rounded) and asked for a mediation or more formal meeting with the Landlord to discuss them. The parties exchanged further letters between April 1 and 13, 2021, at which time the Landlord indicated that it wanted to wait to meet until the Tenant could provide its audited financial statements, which had been delayed.
- z. The Tenant provided further financial information to the Landlord on May 6, 2021. The parties met on May 13, 2021 and the Tenant indicated that it needed time to meet with RBC and provide its next proposal. The Landlord asked for it by June 1, 2021.
- aa. The Tenant's formal proposal was eventually delivered, but not until August 21, 2021. The proposal sought an abatement of all rent from March 21, 2020 until the Tenant's duty free store re-opened and then a switch to percentage rent only (no minimum Base Rent) after the store opened, and various other terms. This was accompanied by financial projections from the Tenant that were consistent with the previous ones it had provided.
- bb. The Landlord acknowledges it reached out sometime in August 2021 to the prospective tenant that had put in the second place response to the RFP in 2016 to see if they would still be interested in operating a duty free store on the Canadian side of the Peace Bridge. Nothing came of this.
- cc. **On September 8, 2021, the Authority issued notices of default**, for both monetary and non-monetary defaults by the Tenant, stating that it would exercise its remedies under the Lease arising from the alleged defaults, all of which arose during the Closure Period.
- dd. Those notices resulted in a default by PBDF under its creditor facilities with the RBC.
- ee. PBDF reopened the Canadian duty free store shortly after these notices of default were received in September 2021.
- ff. On September 20, 2021 the Tenant sent the Landlord proof that it had applied for government assistance under the Canada Emergency Rent Subsidy ("CERS"), and confirmed amounts received under CERS had been remitted to the Landlord. The Tenant's CERS applications were based on the full monthly minimum Base Rent payable under the Lease (\$333,333.33).
- gg. On September 30, 2021 the Tenant advised the Landlord that it would be making a further proposal to address Rent during Closure Period by October 15, 2021.
- hh. In the meantime, the Tenant and the RBC entered into the Forbearance Agreement dated October 8, 2021 that contemplated that PBDF would reach a resolution with the Authority to preserve the Lease by November 15, 2021.

- ii. Although the Landlord was not privy to the Forbearance Agreement when it was being negotiated and signed, that agreement authorized the RBC to communicate directly with the Landlord, and the RBC did so.
- jj. On October 15, 2021 the Tenant made a further proposal to the Landlord, in which the Tenant for the first time offered to pay \$2 million in Base Rent for the Closure Period over the full and extended term of the Lease without interest (to be paid off in monthly installments commencing on January 15, 2023). The Tenant also proposed a schedule for payments to Ramp Up to annual Base Rent of \$4 million over time, and a five-year extension of the Lease term from its current end-date of October 2031 to October 2036. This proposal also asked for an amendment to the rent terms to remove the requirement that sub-leases to food service pay 20% of their sales.
- kk. This was countered by the Landlord on October 26, 2021. The Landlord offered a different Ramp Up for future rent, and proposed that 50% of the unpaid rent from the Closure Period (“Back Rent”) be paid upon execution of the amendment to the Lease, with any HST credits received to be applied to the remaining Back Rent outstanding. The Landlord agreed that the Lease could be amended to allow for food service sub-tenant rents to be at market rates, approved by, and payable to, the Landlord. No extension of the Lease term was agreed to.
- ll. The Tenant made a further counter proposal on November 16, 2021. The Tenant asked for certain adjustments to the Landlord’s proposed Ramp Up regarding future rent, and agreed to pay Back Rent of \$2 million, to be treated as a no-interest loan paid off in monthly installments commencing on November 15, 2022 and continuing to October 15, 2036, upon the provisos that: (i) the Lease be amended to grant the Tenant “two options to extend the term for two additional periods of five years each”; and (ii) confirmation from the Landlord that all other amounts owing as Back Rent are waived, including those rents subject to the rent deferral agreement dated April 27, 2020. The Tenant also asked that the HST payments/repayments be handled in the normal course rather than as part of any agreement regarding Back Rent. The Tenant agreed to the Landlord’s proposed amendments regarding the food service sub-tenants.
- mm. No agreement was reached. The failure of PBDF to reach a resolution with the Authority by November 15, 2021 triggered a default under the Forbearance Agreement with RBC.
- nn. The Landlord’s counsel wrote to RBC on November 21, 2021 stating: “I am writing to advise that our client has been unable to resolve issues concerning the default of its tenant, Peace Bridge Duty Free Inc., **and our client intends to exercise its remedies under the default provisions of the Lease.** As you have previously requested, please accept this correspondence as advance notice of our client's intention.”
- oo. RBC brought this Application seeking to appoint a receiver in December 2021. In response to this application, PBDF requested from the court further time to reach a commercial resolution with the Authority. On December 14, 2021, the Appointment

Order was made, which included a stay for the purpose of providing a further opportunity to PBDF to try to negotiate a commercial arrangement with the Authority.

- pp. The Landlord wrote to the Tenant on August 2, 2022 reminding it of the “offer to provide an abatement equal to 50% of the unpaid rent that accumulated during PBDF’s COVID-related shutdown ... conditional on there being an arrangement in place ... concerning payment of the remaining 50%. We wish to be clear that our client is not prepared to grant an abatement of more than 50% and is not required to justify that business decision to PBDF.” It was also noted that if the Tenant wished “to present a proposal for the payment of the remaining 50% of the unpaid rent that accumulated during PBDF’s COVID-related shutdown, we require that it do so within 15 business days. Any such proposal must provide for regular monthly payments against the arrears over a maximum of 24 months and must include either a third-party guarantee from a solvent guarantor or security. Detailed going-forward financial modelling for the business and specifics with respect to any security or guarantee, including proof of the guarantor’s solvency, must be included with any proposal.”
- qq. The Landlord entered into a lease amending agreement with the tenant for the US duty free store at the Peace Bridge in late 2022, effective January 1, 2023. The original lease for the US duty free store had a built-in rent abatement because monthly rent was based on the previous year’s revenue. The US duty free tenant did not have a minimum base rent amount payable. The U.S. duty free store never closed. Its lease amending agreement required payment of some of the rent that had been deferred under its lease, for the period April 1, 2020 to December 31, 2022 during which the Landlord agreed to waive 80% of the rent that was otherwise payable. The Tenant agreed to repay its share of this deferred rent over five years with interest and was given the option for an additional 10 years of lease extension.
- rr. On March 13, 2023 the Tenant made a proposal to the Landlord pursuant to the court’s direction in advance of the court ordered mediation, which did not offer anything for Back Rent. The Tenant did so on the basis that it was not prepared to abandon its litigation position that nothing was payable by it during the Closure Period (subject to receiving the Landlord’s mediation position and to further negotiation at the mediation), for the period from December 2021 to the date of any settlement of the litigation. What the Tenant offered was to forgo its damages claims and to waive its right to pursue its litigation costs for this period. For the Go Forward Period (after any settlement), the Tenant proposed a permanent amendment to the Lease to provide for minimum Base Rent of \$2.5 million (instead of \$4 million) with Percentage Rent over and above that based on different sales levels than currently provided for in the Lease. This proposal also contemplated releases on both sides including directors, officers, shareholders etc.
- ss. On March 21, 2023 the Landlord made a counter-proposal to the Tenant for payment of 75% of the rent accruing due during the Closure Period up to November 1, 2021 to be paid within 90 days (with some alternatives offered to address tax considerations) and a further adjustment to the proposed Ramp Up from 2021 to 2025 (with amounts due from prior periods covered by the Ramp Up, in 2021, 2022 and 2023 to be paid

within 60 days). No options for Lease term extensions were provided for. This proposal asked for the sub-leases for food service providers to be executed within 60 days.

- tt. On August 22, 2023 the Tenant made a further proposal to the Landlord with reference back to the Landlord's proposal of March 21, 2023 and providing supporting calculations, in which the Tenant offered to pay \$2,851,500, being 50% of the rent arrears for the period up to November 2, 2021 (\$1 million within 60 days, \$1 million a year later and the balance two years later) and agreed to most of what the Landlord proposed for the Ramp Up, with small adjustments and more time to pay amounts past due. This proposal provided for an amendment to the Lease to add two five-year Lease extension options. The Tenant asked for more time to secure the sub-leases to food service providers. This was a time limited offer that was open until the then anticipated hearing date of the Cross-Motion on September 19, 2023.
- uu. On September 26, 2023 the Landlord made its last proposal to the Tenant, which was Without Prejudice and is not in evidence.
- vv. On October 13, 2023 the Tenant made its last proposal to the Landlord which was Without Prejudice and is not in evidence.

APPENDIX 2

(LEASE EXCERPTS)

2.01 Definitions

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

(c) "Adverse Effect" means any one or more of: (vii) loss of enjoyment of a normal use of property; and (viii) interference with the normal conduct of business.

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

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

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

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

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

2.04 Entire Agreement

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

2.15 Reasonableness

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

2.17 Amendment and Waiver

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

4.01 Covenant to Pay

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

4.02 Base Rent

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

4.03 Percentage Rent

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

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

The Tenant covenants and agrees with the Landlord that for each month (including any broken calendar month) of the Term or Extension Term, if applicable, the above percentage rates will be applied to the Tenant's Gross Sales during such monthly period (with the applicable percentage rate based on the Tenant's year to date Gross Sales for the then current Rental Year). If, during any month (including any broken calendar month) of the Term or the Extension Term the calculation of Percentage Rent in such monthly period (based on the Tenant's year to date Gross Sales for the then current Rental Year) exceeds (i) the Base Rent payable for such period (based on the year to date Base Rent payable for the then current Rental Year) plus (ii) the amount of Percentage Rent previously paid by the Tenant for the then current Rental Year, the Tenant will within twenty-five (25) days following the conclusion of such monthly period, pay the resulting difference together with all applicable taxes, to the Landlord as Percentage Rent.

...

[Percentage Rent is only payable if it exceeds the Base Rent Minimum of \$4 million in a given year]

4.05 Rent and Payments Generally

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

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

9.02 Conduct and Operation of Business

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

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

18.07 Regulatory Changes

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

18.08 Unavoidable Delay

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

The Tenant's Proposal in Response to the RFP appended as Schedule D to the Lease included at Tab F the Tenant's forecasted sales in the Lease Term to be:

Forecasted Sales (\$ million)

Year	1	2	3	4	5	6	7	8	9	10
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Sales	26.3	29.8	30.5	31.3	32.1	32.9	33.7	34.5	35.4	36.3
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CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2024 ONSC 372
COURT FILE NO.: CV-21-00673084-00CL
DATE: 20240117

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

COUNSEL: *David T. Ullmann, John Wolf and Brendan Jones*, for Peace Bridge Duty Free Inc.,
the Moving Party

E. Patrick Shea, for Buffalo and Fort Erie Public Bridge Authority, Respondent on
Motion

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023 (Written Cost Submissions dated November 24 and
December 1, 2023)

COSTS ENDORSEMENT
(LEASE DISPUTE)

The Lease Dispute: Summary of the Positions and Outcome

[1] This lease dispute between the parties was adjudicated over three days (in the procedural context of a Cross-Motion by the Tenant, Peace Bridge Duty Free Inc.) and decided by reasons of this court released on December 12, 2023 (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 7096). Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in those reasons for decision.

[2] A brief overview of the issues in dispute and the court’s rulings provides some context for the court’s decision on costs.

[3] This lease dispute revolved around the interpretation of s. 18.07 of the subject Lease, which provides that:

18.07 Regulatory Changes

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 Premises, the Landlord agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

[4] The parties agreed that section 18.07 was triggered as a result of the COVID-19 pandemic and the resulting Peace Bridge and border closure to non-essential traffic that was implemented by the U.S. and Canadian governments effective March 21, 2020 for 30 days and subsequently extended. They agreed that these Border Restrictions caused material adverse effects on the Tenant's business operations.

[5] The parties were in agreement that s. 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.

[6] Prior to the hearing, the parties reached an agreement in principal regarding the Rent to be paid during the Ramp Up Period, subject to reaching an agreement on the Rent to be paid for the Closure Period.

[7] The Tenant argued that the Landlord (the Buffalo and Fort Erie Public Bridge Authority) had not acted reasonably and in good faith in its consultations with the Tenant regarding the Rent (as defined in the Lease) to be paid by the Tenant during the Closure Period. As a result, the Tenant asked the court to make the following orders on its Cross-Motion:

- a) An order that, having applied s. 18.07 and considering the adverse effects that the Border Restrictions had on the Tenant's sales, the rent actually payable by the Tenant during the Closure Period was equal to 20% of sales (which were zero), plus all additional rent and government assistance and that nothing further is owing for the Closure Period by the Tenant.
- b) An order that having applied s. 18.07 and considering the adverse effects the Border Restrictions had and continue to have on the Tenant's sales, the Ramp Up schedule accepted in paragraphs 41 and 44 of the factums of the Tenant and the Landlord respectively, reflects the reasonable application of s. 18.07 to the circumstances of this case in the Ramp Up period and that the parties are to comply with that schedule for the payment of rent to and until the Lease year commencing Nov 1, 2026, when the schedule has no further impact.
- c) An order that having applied a) and b) to the amounts actually paid, any overpayment by the Tenant should be set off by the Tenant against rent next due and any underpayment should be repaid to the Landlord in a reasonable period of time having regard to the ability to pay.

[8] The Landlord disagreed.

[9] The Landlord maintained that there was no reasonable interpretation of s. 18.07 that: (i) required it to waive or suspend the payment of Base Rent; or (ii) automatically amended the Lease to remove or suspend the requirement to pay Base Rent. The suspension of Base Rent during the Closure Period was a cornerstone of the Tenant's position throughout most of the negotiations that the parties engaged in after March 2020 and that was the biggest obstacle to reaching an agreement, from the Landlord's perspective.

[10] The Landlord maintained that its offers were reasonable when made, having regard to the situation, the Tenant's position and the information the Tenant made available to the Landlord at the time. The Landlord disputed the Tenant's premise that the ultimate resolution had to be one that reflected the Tenant only paying the rent that it could "afford" in a given year and that the effect of s. 18.07 of the Lease was to guarantee that the Tenant would be profitable in the aftermath of the COVID-19 pandemic during the Ramp Up Period.

[11] The court found that just because the parties were not able to reach an agreement did not mean that the Landlord breached s. 18.07 of the Lease. The Tenant failed to establish that the Landlord breached s. 18.07 of the Lease in the circumstances of this case. The Landlord did engage in discussions and negotiations with the Tenant with a view to reaching an agreement to amend, or provide temporary relief from, some of the Lease terms to account for the adverse effects that the Border Restrictions had on the Tenant's business.

[12] The Landlord asked that the court dismiss the Tenant's Cross-Motion because there was no basis for any finding of breach or that it did not act reasonably or in good faith. The court ultimately accepted the Landlord's position and dismissed the Tenant's Cross-Motion.

[13] The Tenant requested, in the alternative to the relief it sought as described in paragraph 7(b) above, that the court determine and order the terms upon which Rent was to be paid for the Closure Period based on the offers that had been exchanged between the parties in the course of their negotiations. The Landlord challenged the court's jurisdiction to determine and impose upon the parties the Rent to be paid by the Tenant during the Closure Period in substitution for what the Lease provides, the very issue that the parties had been unable to agree upon.

[14] There were a number of evidentiary objections that the court had to rule upon. Many of them were ultimately not material to the outcome because the Landlord eventually acknowledged much of what the Tenant sought to rely upon as "factual matrix" evidence to interpret and give meaning and effect of s. 18.07 of the Lease. The parties eventually were in agreement that the meaning and effect of s. 18.07 required 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. Section 18.07 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.

[15] However, the positions and arguments advanced by the Tenant complicated certain other evidentiary aspects of the Lease dispute. Its allegations of a lack of good faith on the Landlord's part

led it down a path of attempting to attribute ulterior motives to the Landlord that were never proven. That led to production demands and added time to the cross-examinations. It also led to some disputes over the relevance of expert and factual matrix evidence that the Tenant tendered.

[16] The Tenant proffered expert evidence about the comparative net economic returns for the Landlord, between what the Tenant was proposing and what the Landlord could achieve if it undertook an RFP to find a new tenant. But the court ultimately found that the Landlord had provided a reasonable and credible explanation for its conduct and contingency planning (e.g. considering the prospect that it might need to look for a new Tenant) that rendered the expert evidence to be of little value or weight.

[17] That same expert's evidence in another area, about the comparable rent ratios in the duty free sector, was also challenged by the Landlord. The expert's opinion was predicated in part upon hearsay information from an internal witness of the Tenant (Mr. Pearce, who is not an industry expert) about standard gross sales to rent ratios for duty free stores in Canada. This witness had sworn an affidavit but did not provide the direct evidence himself and then did not make himself available within a reasonable time (as the court had directed) to be cross-examined. In any event, the crux of this expert's evidence, that the Rent that the Tenant agreed to pay under the Lease was too high in the current market, was not particularly helpful to the determination of the issues in question since the Lease did not prescribe a "market rate" adjustment to the Rent payable.

[18] Section 18.07 of the Lease does not expressly indicate objective criteria for evaluating the impact of the Border Restrictions on the Lease. The Tenant asked the court to have regard to what it attempted to characterize as the factual matrix surrounding the formation of the Lease for the standards to determine the Base Rent that should be paid during the Closure Period. In this regard, the Tenant sought to rely upon what was ultimately determined to be inadmissible evidence about the Lease negotiations.

[19] These evidentiary disputes added time and expense to the ultimate determination of the Lease dispute for both sides.

[20] On the specific issues raised on the Cross-Motion, the court eventually ruled as follows:

1. The Border Restrictions did result in adverse effects on the Tenant's business, both during the Closure Period and during the Ramp Up Period, which warranted some adjustment to the Base Rent payable by the Tenant.
2. The Landlord did not breach s. 18.07 of the Lease by refusing to agree to abate all Base Rent otherwise payable during the Closure Period. Section 18.07 does not require that the Base Rent be adjusted based on a fixed percentage of the Tenant's sales or revenues or that it be reduced to a level that guarantees a minimum level of profitability to the Tenant.
3. The Landlord did not breach its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered. The Landlord has not been found to have been acting with the ulterior motive of terminating the Lease. Nor were the Landlord's demands, proposals and other dealings with the Tenant unreasonable having regard to

the acknowledged objective of attempting to preserve the tenancy and when considered in the context of the dealings between the parties and the evolution of their positions over time.

4. No Remedy was granted:

- a. Given that there is no finding of breach by the Landlord, there is no need for the court to decide what remedy might have been available to the Tenant if there had been a finding of breach.
- b. Without the parties having agreed at the time of contracting as to how such determination could be made, and in the absence of any established benchmarks, the court cannot determine and impose upon the parties an amount of Base Rent to be paid by the Tenant during the Closure Period, or terms upon which it is to be paid, that are different from what the Lease requires. The court cannot re-write or amend the Lease for the parties, nor can it force the parties to do so. Nor is that level of intervention by the court necessary in order to implement and give commercial meaning and effect to s. 18.07 of the Lease. Section 18.07 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.

Costs Analysis

[21] Early in 2023 the Landlord brought a motion to lift the stay of proceedings so that it could exercise certain enforcement remedies under the Lease arising out of the non-payment of Rent by the Tenant that was heard on January 5, 2023. That motion was dismissed by an endorsement dated January 16, 2023 (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327). In an April 4, 2023 Scheduling Endorsement, the court directed that the entitlement/quantum/scale of any costs of the Landlord's Lift Stay Motion should be decided in conjunction with and at the same time as the court decides the costs of this Cross-Motion.

[22] The parties completed their exchange of Cost Outlines and originating and reply Cost Submissions for both the Lift Stay Motion and the Cross-Motion and advised the court that no aspects of the costs had been agreed upon and that they were seeking a decision of the court based on their written submissions. Their costs submissions were made without knowing the outcome of the Tenant's Cross-Motion or the court's reasoning for its decision. The parties' Cost Outlines and submissions were reviewed and considered by the court after the decision on the Cross-Motion had been rendered.

The Landlord's Position on Costs

[23] The Landlord, if successful, asked for an award of substantial indemnity costs of \$269,178.68 (based on 75% of its full indemnity fees) inclusive of applicable taxes. The Landlord also seeks \$20,160.54 in disbursements (inclusive of applicable taxes). This covers its legal fees and disbursements for the Cross-Motion and all interim attendances and steps (including the court ordered mediation and the July 25–26 procedural motion). The court's previous directions indicated that the costs of the mediation be "in the cause" of the Cross-Motion, meaning that the successful party on

the Cross-Motion could claim those costs. The court similarly ordered that the costs of the July 25–26 procedural motion be “in the cause” of the Cross-Motion, or as further directed by the court. Those costs of the Landlord have also been included in the Costs Outline submitted.

[24] There was a last minute adjournment of the Cross-Motion on September 6, 2023, as a result of which the court ordered that the Landlord would be entitled to its costs thrown away in any event of the cause, which have been calculated on a full indemnity basis to be \$8,930.00 for the appearance that day plus estimated (re)preparation time of \$13,300, which is also included in the Landlord’s Bill of Costs. It would appear that these amounts were included in the Landlord’s Costs Outline on a substantial indemnity basis although it claims to be entitled to more. The court will be ultimately guided by what is claimed in the Costs Outline as that is where the final amount of costs claimed by the Landlord is derived from. This is noted because it reflects a reduction from what the Landlord might have otherwise claimed.

[25] The Landlord certified its all-inclusive substantial indemnity costs of the Lift Stay Motion to be \$18,516.75 (representing 75% of its all-inclusive full indemnity costs of \$24,690.00 for that motion). The Landlord submits that there should be no costs of that motion, even though the stay was not lifted pending the determination of this Cross-Motion. Its position is that there was no successful party on that motion and that each party should bear their own costs.

[26] The Landlord argues that its Lift Stay Motion was necessary because of a lack of clarity about what the “normal” Rent that the Tenant was paying, and would therefore be required to continue to pay, at the time of the Initial Order and in the face of the Tenant’s continuing refusal to pay the Landlord anything other than what it was receiving under government assistance programs (and eventually HST remittances). Ultimately, as a result of that motion and steps taken and directions provided from the court thereafter, the Tenant did start to pay more than it had been paying, albeit on an interim without prejudice basis.

[27] The Landlord claims to be entitled to substantial indemnity (as opposed to partial indemnity) costs throughout based on s. 17.03 of the Lease, which provides that the Landlord is *prima facie* entitled to recover its costs on a substantial indemnity basis in matters involving: (a) the recovery of rent; or (b) other breach of the Lease where a breach is established.

The Tenant’s Position on Costs

[28] The Tenant, if successful on its Cross-Motion, asked to be awarded substantial indemnity costs (on the assumption that its success would be tied to the Landlord’s alleged failure to act in good faith), indicated in its Costs Outline to be \$653,704.09 (including disbursements of \$38,242.38, and all applicable taxes) with fees calculated at 80% of the actual amounts. The Tenant’s partial indemnity costs were indicated to be \$422,570.13 (with fees calculated at 50% of actual amounts and including the same disbursements and all applicable taxes). The amounts claimed by the Tenant were later

corrected and adjusted downward (partial indemnity at \$409,387.33 and substantial indemnity at \$640,521.29) to avoid double counting of one of the disbursements for expert fees.¹

[29] At the time of the Lift Stay Motion, the Tenant delivered a Bill of Costs indicating all-inclusive partial indemnity costs (calculated at 60% of actual costs) totalling \$29,342.03 and substantial indemnity costs (calculated at 90% of actual costs) in the amount of \$43,243.40, which was the amount it sought for that motion in its cost submissions. However, the Tenant's Costs Outline delivered after the Cross-Motion included all-inclusive total amounts for the Lift Stay Motion of \$84,831.92 on a partial indemnity basis and \$135,939.45 on a substantial indemnity basis. Although this appears from the description to include some (unspecified) fees for the Cross-Motion that had been backed out of the original Bill of Costs delivered for the Lift Stay Motion, no detailed explanation was provided for this discrepancy.

[30] In addition to the offers that were exchanged between the parties and in evidence for the court's consideration on the Cross-Motion, the Tenant submitted two further without prejudice offers for the court's consideration in the context of the decision on costs which reflect additional compromises that the Tenant was prepared to make as the Cross-Motion hearing date approached and as its financial circumstances improved. However, these were not strictly speaking Rule 49 offers so they do not carry with them the consequences of r. 49.10.

[31] In its cost submissions, the Tenant also requested an order directing the Landlord to reimburse it for additional expenses that it claims the Landlord's actions caused it to incur, because the Tenant blames the Landlord for the Receivership Application. These total more than \$285,000 in aggregate for the legal and professional costs of the Monitor (itself and its counsel) and for RBC's counsel. These claimed expenses introduce some more complicated issues into the costs analysis which do not need to be resolved since the Tenant is not being awarded any costs.

Costs Analysis

[32] The Court has discretion to award costs incidental to a proceeding pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Rule 57.01(1) enumerates a list of factors to be taken into consideration in exercising that discretion. Some of the relevant factors in this case include the amount at issue (in excess of \$10 million), the importance of the issues to the parties (significant to both sides given the amount at issue and the remaining term of the Lease and renewal options), the complexity and novelty of the issues (given the uniqueness of s. 18.07 of the Lease and the unprecedented COVID-19 pandemic and Border Restrictions that triggered it), and certain complexities previously mentioned arising out of evidence tendered by the Tenant.

¹ The Landlord complains that it requested, but was denied, access to the dockets to support the costs claimed by the Tenant. The Landlord also complains about disproportionate time spent by the Tenant's counsel on certain examinations. Since the Tenant is not being awarded its costs of the Cross-Motion these complaints do not need to be addressed.

[33] As noted by the Tenant in its cost submissions, modern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* (1999), 181 DLR (4th) 614 (Ont. C.A.), at para. 22.

[34] In terms of entitlement to costs, both parties' submissions were made on the basis that the successful party would be awarded its costs.

[35] The following is ordered regarding the entitlement to costs on the two motions:

- a. As the successful party, the Landlord is entitled to its costs of the Cross-Motion. Based on the court's previous endorsements, the Landlord was entitled to include in the costs sought its costs of July 25–26 procedural motion and of the mediation which the court directed be “in the cause” of this Cross-Motion. Nothing in the issues raised on the Cross-Motion or the cost submissions received give me cause to reconsider those earlier directions.
- b. The Landlord was not the successful party on the Lift Stay Motion and does not claim to be. It claims no costs for the Lift Stay Motion. However, the Landlord contends that the Tenant was also not successful on that motion and that neither party should be awarded costs of that motion. In my view, the Tenant was successful in resisting that motion and is entitled to some costs, but limited just to that motion.

[36] The Scale of Costs: The Tenant correctly observes that costs are typically awarded on a partial indemnity scale unless there is an offer to settle under r. 49.10 or a party engages in reprehensible or egregious conduct worthy of sanction by the court in the form of elevated costs on a substantial indemnity basis. *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, 100 O.R. (3d) 66, at paras. 28–31. Neither of these circumstances arise in this case.

- a. The Landlord itself acknowledges that the offers exchanged by the parties involved attempts to reach a “global” resolution that included non-monetary defaults and included provisions beyond the payment of the deferred rent/arrears and the ramp-up of the Base Rent. The Tenant likewise does not suggest that its offers, even the last two, triggered the cost consequences of r. 49.10. The offers were part of the good faith negotiations that s. 18.07 of the Lease obliged the parties to engage in.
- b. While the Tenant's positions and the relief sought on the Cross-Motion tended to complicate the issues and resulted in additional evidence that was not considered by the court to be relevant to the ultimate determination of the issues, this does not rise to the level of conduct that is worthy of a sanction by the court of elevated costs.

[37] However, the Landlord claims to have a contractual entitlement to substantial indemnity costs under s. 17.03 of the Lease.

[38] The following is ordered regarding the scale of costs on the two motions:

- a. The Landlord has a *prima facie* contractual right under s. 17.03 of the Lease to substantial indemnity costs of the Cross-Motion, which was clearly a proceeding

involving: (a) the recovery of rent. I see no reason to interfere with that contractual right, particularly given that it will not result in an award that the court considers to be unreasonable or disproportionate. As detailed below, the amounts the Landlord claims on a substantial indemnity basis are very reasonable and proportionate (in fact significantly less both in quantum and in percentage) in comparison with the amounts that the Tenant was seeking if it won. The Landlord's claimed substantial indemnity costs for the Cross-Motion are less than the Tenant's claimed partial indemnity costs for the Cross-Motion.

- b. The Tenant did try to settle the Lift Stay Motion, on terms that were not significantly different from what happened, namely that an interim arrangement was put in place so that the Cross-Motion could be adjudicated in a timely manner to avoid the court having to deal with concerns about the overlap of certain issues on the two motions, particularly on the question of whether the Tenant was in breach of the Lease during the Closure Period. However, there was technically no r. 49 offer. Partial indemnity is the appropriate scale of costs for the Tenant to be awarded for the Lift Stay Motion.

[39] Quantum of Costs: The Tenant submits that costs awards, at the end of the day, should reflect “what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties”: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (C.A.), at para. 24. This is now embodied in rr. 57.01(1)(0.a) and (0.b). See also *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2021 ONSC 753, cited by the Landlord.

[40] The following is ordered regarding the quantum of costs on the two motions:

- a. On the Cross-Motion, the amounts at issue were significant and the issues were important, particularly given the alleged failure to act in good faith and the complexities those allegations introduced into the evidence and ensuing objections (described in more detail above). Also as noted above, the amount of substantial indemnity costs claimed by the Landlord is reasonable and proportionate in light of these complexities and having regard to the principle of proportionality and the Tenant's objectively reasonable expectation that the Landlord would be incurring costs as it was. That fact that the Landlord's claimed substantial indemnity costs are less than the Tenant's claimed partial indemnity costs is telling. The Landlord has also applied a lower percentage to calculate its substantial indemnity costs than the Tenant did (75% as opposed to 90%) and did not insist on the full indemnity costs that it might have asked for arising out of the last minute adjournment. The Landlord is awarded its substantial indemnity costs of the Cross-Motion in the claimed amount of \$269,178.68 for fees (based on 75% of its full indemnity fees) inclusive of applicable taxes, plus \$20,160.54 for disbursements (inclusive of applicable taxes), for a total of \$289,339.22.
- b. The Tenant's Costs Outline for the Lift Stay Motion (that was stated explicitly not to include any of its costs for the Cross-Motion that were being incurred in and around the same time) sets out the appropriate amount for it to be awarded. The Tenant's claimed partial indemnity costs of the Lift Stay Motion in the all-inclusive amount of

\$29,342.03, although higher than the partial indemnity amount indicated by the Landlord for that motion, are not disproportionate or unreasonable. This amount of costs is awarded to the Tenant and shall be set off against the costs awarded to the Landlord on this Cross-Motion.

[41] This means that the Tenant shall pay to the Landlord net costs of the Cross-Motion and Lift Stay Motion in the total all-inclusive amount of \$259,997.19. In accordance with r. 57.03, but subject to the stay that is currently in place pending the return of the Receivership Application and any other relevant considerations which may be raised with the court at a future attendance (if applicable), the Tenant shall pay these costs to the Landlord forthwith (within 30 days of this endorsement).

A handwritten signature in dark ink, appearing to read "Kimmel J.", is positioned above a horizontal line.

KIMMEL J.

Date: January 17, 2024



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL

HEARING

DATE: February 9, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: ROYAL BANK OF CANADA v. PEACE BRIDGE DUTY FREE
INC.

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

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Brendan Jones		bjones@blaney.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Patrick Shea	Landlord	patrick.shea@gowlingwlg.com

ENDORSEMENT OF JUSTICE KIMMEL:

1. The parties appeared today to settle two orders arising out of my decision on the Tenant's Cross-Motion released on December 15, 2023 (the "Decision") and the related costs decision released on January 17, 2024.

2. The parties have now agreed to the form of costs order and a clean form of order has been provided.
3. The disagreement regarding the wording of order on the Tenant's Cross Motion (with respect to what rent the Tenant must pay during the interim period between the release of the Decision and the hearing of the Receivership Application, that was supposed to take place on January 29, 2024 but was adjourned at the request of the applicant, RBC, to April 26, 2024) appears to have arisen out of a lack of clarity in my choice of words in paragraph 160 of the December 15, 2023 Decision, for which I apologize.
4. The Landlord's position regarding what was ordered is correct and is reflected in the first sentence of that paragraph which reads:

In light of the Landlord's undertaking not to take any enforcement steps pending the return of the Receivership Application (and the continuing stay) so that there is no uncertainty in the interim, if the Tenant continues to operate its duty free store from the Leased Premises, it *shall continue to pay the agreed upon without prejudice rent* for the Ramp Up Period, subject to further orders of this court.

5. The Ramp Up Period is a period of time defined earlier in my decision (at paragraph 12) to be: the period commencing November 2021 and ending October 31, 2026. The "agreed upon without prejudice rent" that the Tenant was ordered to "continue to pay" during the Ramp Up Period (by the first sentence of paragraph 160 of the Decision) is the rent that is reflected in paragraphs 9 and 10 of the court's Interim Rent Endorsement (dated May 17, 2023, as defined in paragraph 30 of the Decision).
6. The concept of the payment of without prejudice rent by the Tenant prior to the Decision is also reflected in other endorsements, including the court's endorsement dated June 16, 2023 (at paragraphs 9 and 10) and the court's July 26, 2023 endorsement (at paragraph 4). The court's authority to order interim without prejudice rent pending the Receivership Application was also discussed in paragraphs 97 and 98 of the court's decision dated January 16, 2023 on the Landlord's Lift Stay Motion (see *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327).
7. The second sentence of paragraph 160 of the Decision states that:

A similar order for the payment of rent pending the return of the Receivership Application was made in the Interim Rent Endorsement, but the amounts to be paid should during this interim period now align with what the parties have agreed to and have been following during the Ramp Up Period.

8. The introduction of the words "but" and "now" appear to have caused some confusion. However, what is clear is that the only amounts that the parties have ever "agreed to" and had "been following during the Ramp Up Period" are those reflected in the Interim Rent Endorsement. It is also clear from various other paragraphs of the Decision that the court is not prepared to order the parties to follow only part of the agreement in principle that they had reached in respect of the Ramp Up Period when they had failed to reach an agreement on the period in which rent had not been paid in accordance with the Lease, including the Closure Period. The agreement in principle (about the rent to be paid during the Ramp Up Period that was subject to the parties also reaching an agreement about the rent to be paid during the Closure Period) and the without prejudice agreement (reflected in the Interim Rent Endorsement) are two different things.
9. When the Decision was rendered, the court understood that the continuation of the without prejudice agreement would only be a temporary continuation of the existing arrangement under the Interim Rent Endorsement until the return of the Receivership Application that had been scheduled for January 29, 2024, with only one rental payment coming due during that time frame.

10. However, on January 29, 2024 the Receivership Application was adjourned at the request of RBC for three months, to April 26, 2024. The issue of the amount of rent to be paid during this longer adjournment period was not addressed at that time. If this creates a problem for the Tenant, the continuation of the without prejudice agreement for the payment of rent is expressly stated to be subject to further order of the court. As has been the case in the past, if there is a concern about the ability of the Tenant to pay this rent until the Receivership Application is heard, the parties can arrange for a further attendance to address that concern directly. For that purpose, the court would expect to receive an affordability report from the Monitor, as was provided in the past. No such report was provided for purposes of today's attendance and there is no basis upon which the court can find today that the Tenant can no longer afford to continue to pay the agreed upon without prejudice rent during the now longer period pending the return of the Receivership Application.
11. Counsel for RBC took no position on this issue and advised that RBC will accept whatever the court confirms to be the order arising out of the Decision. The Monitor was not in attendance today and took no position.
12. This endorsement confirms and clarifies what was stated in the first sentence of paragraph 160 of the Decision (when read together with the second sentence of that same paragraph and various other paragraphs of the Decision, including paragraphs 2, 12, 13, 30, 44, 119, and 157) to be the operative order, that: the Tenant shall continue to pay the agreed upon without prejudice rent ... [as reflected in the May 17, 2023 Interim Rent Endorsement at paragraphs 9 and 10], subject to further orders of this court." This has now been reflected in an updated draft order.
13. The two Orders may now be issued in the revised forms that were provided after 4:30 on February 9, 2024 and have been thus been signed by me today.

A handwritten signature in dark ink, appearing to read 'Kimmel J.', with a stylized, cursive script.

KIMMEL J.
February 12, 2024

TAB 4

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

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY ACT 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

**NOTICE OF MOTION
(Motion Seeking to Adjourn the Application of Royal Bank of Canada)**

THE MOVING PARTY, PEACE BRIDGE DUTY FREE INC. (the “**Respondent**”) will make a motion before a Judge of the Ontario Superior Court of Justice (Commercial List) on December 14, 2021, at 10:00 a.m. or as soon after that time as the motion can be heard, via Zoom.

PROPOSED METHOD OF HEARING: The motion is to be heard by video conference.

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THE MOTION IS FOR:

1. An order adjourning the application of the Applicant, the Royal Bank of Canada (“**RBC**”), seeking to appoint msi Spergel Inc. as receiver (in such capacity, the “**Receiver**”), without security, of all the assets, properties and undertakings of the Respondent, which is scheduled to be heard on December 14, 2021 (the “**Receivership Application**”), until February 14, 2022; and
2. Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. The Respondent operates a duty-free shop on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York (the “**Premises**”), which it leases from The Buffalo and Fort Erie Public Bridge Authority (the “**Landlord**”);
2. The Respondent and the Landlord entered into a lease with respect to the Premises on July 28, 2016 for a 15-year term commencing on November 1, 2016 and ending on October 31, 2021, subject to the Respondent’s option to extend (the “**Lease**”);
3. The Respondent was required by the Landlord and agreed to undertake significant capital improvements to the Premises, which cost approximately \$6 million and lasted between August 2018 and May 2019;

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4. The Respondent is authorized by the Canada Border Services Agency (“**CBSA**”) to operate the duty free shop and holds an authorization from the Liquor Control Board of Canada to sell alcohol products in the store;
5. The duty free store is typically open 24 hours a day and 365 days a year, although the store’s hours were impacted by the pandemic. The business previously employed approximately 90 staff, including 40 employees, who live locally. The Fort Erie store is one of the busiest stores in the 49th Parallel and is steady from mid-March through to December;
6. The land border was closed between March 2020 and August 2021 for all non-essential travel. 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. The retail store entirely closed on or about March 21, 2020 and was partially reopened on September 19, 2021;

The Tenancy and Rental Deferral Agreements

7. Under the Lease, the Respondent agreed to pay Base Rent, Percentage Rent and Additional Rent (as those terms are defined in the Lease), which are tied to the company’s gross sales.
8. The amount payable for Base Rent and Percentage Rent can generally be described as approximately 20% of sales with a floor of \$4,000,000;
9. 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;

- 4 -

10. On April 27, 2020, the Respondent entered into a rent deferral agreement under which it was required to pay all Additional Rent, which it did, but Base Rent was deferred to be paid over an amortized period;

11. In November 2020, the Respondent 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 Deferred Rent (as defined thereunder) was doubled to two years;

12. During all Rental Deferral Periods, the Respondent paid all Additional Rent in accordance with its obligation under the rent deferral agreements;

13. 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;

14. 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 closed. The parties continued to act as if the rent deferral agreement had been extended and at all relevant times adhered to their obligations under the agreements;

Landlord Delivers Notices of Default

15. On September 8, 2021, the Landlord provided Duty Free with two Notices of Default, one relating to purported monetary defaults and one relating to non-monetary defaults;

16. The monetary default sought payment of approximately \$5.9 million of rent arrears 9 days later, which represented the full amount of all unpaid rent despite the fact that the Deferred Rent

- 5 -

was to be payable in equal installments over a two-year period. The Landlord threatened to seize the Respondent's property and/or terminate the Lease if payment was not received;

17. The Respondent disputes the accuracy of the amount of arrears of Rent identified in the monetary Notice of Default and takes the position that the Notice of Default is invalid;

18. The second Notice of Default was a non-monetary default alleging, among other things, that Duty Free breached the Lease by not being open for business 24 hours a day, 7 days a week, 365 days a year, and that it 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 even though the Canada-US border and the duty free shop had not reopened. The Respondent has cured these defaults, to the extent they were *bona fide* defaults;

19. Duty Free and the Landlord entered into without prejudice negotiations to try and settle issues related to the Notices of Default and the Lease. The negotiations did not result in an agreement;

Landlord Subject to Eviction Moratorium

20. The Respondent applied for and was approved for Canada Emergency Rent Subsidy ("CERS"). The Respondent obtained rent assistance under CERS between September 25, 2020 through to October 23, 2021, when the program was completed;

21. The Respondent sent notices to the Landlord that it had been approved for and received CERS payments, and remitted all CERS payments to the Landlord as rent. These payments were

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made in addition to the monthly payments of Additional Rent made during the rent deferral periods;

22. Not more than 12 weeks has passed since the day the Respondent was approved for the last CERS payment;

23. The Respondent meets the prescribed criteria under Part IV of the *Commercial Tenancies Act* and is protected from re-entry by the Landlord or from the Landlord exercising its right to distrain against the Respondent's goods or chattels;

Receivership Application

24. The Respondent is not in monetary default with RBC;

25. RBC made demand on its credit facilities with the Respondent as a result of the Landlord's Notices of Default;

26. On October 8, 2021, RBC and the Respondent entered into a Forbearance Agreement, which was to run until the earlier of either January 4, 2022 or an "Intervening Event," which included if the Landlord purported to terminate the Lease. The purpose of the Forbearance Agreement was to allow the Landlord and the Respondent to negotiate a commercial resolution regarding the issues surrounding the Lease;

27. On November 23, 2021, RBC terminated the Forbearance Agreement on the grounds that the Landlord and the Respondent had not reached a satisfactory agreement in respect of the Lease. The Respondent believed negotiations with the Landlord were ongoing at the time RBC terminated

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the Forbearance Agreement. RBC did not provide the Respondent with an opportunity to cure the default;

28. The Receivership Application was brought because of RBC's concern the Landlord may distrain the Respondent's goods and/or terminate the Lease;

29. RBC will not be prejudiced by an adjournment of the Receivership Application because its security is not in peril, at risk of deteriorating or otherwise being seized by the Landlord;

30. The Landlord is precluded from terminating the lease or exercising its rights of distrain pursuant to Sections 79, 80, 81, and 84 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7;

31. The Receivership Application is premature and not just and convenient from the perspective of the Respondent and its stakeholders. Given the complexities of dealing with the Respondent's inventory in a highly regulated environment, particularly during a busy time for sales, the appointment of a Receiver is more likely to initially damage the business;

32. With the recent opening of the Canada-U.S. border and a reduction in testing requirements for fully vaccinated travellers, the Respondent's business continues to be viable and December is expected to be a busy month for consumer traffic in the duty free shop;

33. An adjournment of the Application will permit the Respondent to reach a commercial resolution with the Landlord, taking into consideration the renewed and increased sales the Respondent is experiencing as a result of the border opening;

34. Rules 1.04, and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;

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35. Sections 79, 80, 81, 82, and 84 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7;
36. Non-Enforcement Period – Prescribed Tenancies, O Reg 763/20; and
37. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the Affidavit of Jim Pearce, sworn December 12, 2021; and
- (b) such further and other material evidence as counsel may advise and this Honourable Court may permit.

Date: December 13, 2021

BLANEY MCMURTRY LLP
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Lawyers for the Respondent

To: The Service List

ROYAL BANK OF CANADA

and

PEACE BRIDGE DUTY FREE INC.

Applicant

Respondent

Email address of recipient: See Service List

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

Proceeding commenced at Toronto

NOTICE OF MOTION

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Lawyers for the Respondent

TAB 5

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

Respondent

* * * * *

EXAMINATION FOR DISCOVERY

of **TIM CLUTTERBUCK**, a non-party witness, herein,
at the office of Penfound's Inc.,
at St. Catharines, Ontario,
held on Tuesday, the 30th day of May, 2023,
at ten o'clock in the forenoon,
pursuant to an appointment.

* * * * *

APPEARANCES :

Mr. Brendan Jones
(Blaney McMurtry LLP)

Counsel for the Respondent

Mr. Christopher Stanek
(Gowling WLG)

Counsel for the Buffalo and
Fort Erie Public Bridge Authority

* * * * *

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(i)

ONTARIO
SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

EXAMINATION BY MR. JONES

1 - 107

* * * * *

EXHIBIT:

PUT IN AT PAGE:

NONE.

* * * * *

UNDERTAKINGS REQUESTED:

FOUND AT PAGE:

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|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1. | To direct as to where the bylaws of the Authority can be found and if not found to produce them; | 10 |
| 2. | To advise whether the amount of unrestricted cash has gone up or down since 2021 and if so by how much;-
UNDER ADVISEMENT | 13 |
| 3. | To advise what documents were in the first brief that are not in the second brief and advise why they were removed; - UNDER ADVISEMENT | 16 |
| 4. | To provide copies of any emails, text messages or other written communication between the board members and operational staff between January 2020 and December 2021 that relates to the Duty Free stores tenancies, both on the Canadian side and on the American side - UNDER ADVISEMENT | 24 |
| 5. | To provide the documents that have resolutions that relate to the two Duty Free store leases; | 26 |

(ii)

UNDERTAKINGS REQUESTED:**FOUND AT PAGE:**

5	6.	To advise whether the board gave any guidance, other than the RFP, as to what an acceptable lease would be; - UNDER ADVISEMENT	29
10	7.	To provide any copies of draft resolutions that staff brought to the board in relation to the two leases; - UNDER ADVISEMENT	32
15	8.	To provide all reports and briefing notes that led to offers from the Authority to Duty Free; - UNDER ADVISEMENT	37
20	9.	To provide all the missing minutes and if redactions are in place advise as to what has been redacted and the basis for the redactions;	38
25	10.	To provide all the unredacted board minutes for the regular and executive board meetings from January 2020 to December 2021;- UNDER ADVISEMENT	40
30	11.	To provide copies of the lease and agreements with the American Duty Free store; - WILL ADVISE WHAT DETAILS CAN BE RELEASED, IF ANY	45
35	12.	To provide an unredacted copy of the American Duty Free store's rent agreement, if unable to provide, to advise why it is redacted;	54
40	13.	If available, to provide the agenda for each board meeting from January 2020 to December 2021;	55
45	14.	To provide notes taken by the executive assistant, or whoever was taking notes, for the board meetings during which the Peace Bridge Duty Free lease was discussed from January 2020 to December 2021; - REFUSAL	58
50			

(iii)

UNDERTAKINGS REQUESTED:**FOUND AT PAGE:**

5	15.	To investigate and see if there's copies of any letters sent to politicians and the Canadian Government regarding covid relief/support, advise if there are and if they can be produced;	62
10			
15	16.	To provide the unredacted version of the reports listed in the disclosure brief as privileged or advise what has been redacted and why, who authored the reports and who they were directed to; - UNDER ADVISEMENT	65
20	17.	To provide the unredacted version of the report at F2 and for the agenda date June 23 rd , 2016;- REFUSAL, WILL ADVISE WHAT WAS REDACTED AND WHY	66
25	18.	To advise as to when discussion happened with a third party potential tenant, with who, particulars of the discussion, and if there was written communication then provide a copy of whatever written communication there was;- WILL PROVIDE DATE, EVERYTHING ELSE UNDER ADVISEMENT	71
30			
35	19.	To look at the November 20 th , 2020 board minutes to determine why the lease deferral agreement was revoked;	84
40	20.	To provide copies of video board meetings held over the internet; - REFUSAL, UNLESS ALREADY AVAILABLE TO THE PUBLIC	87
45	21.	Advise if a lawyer representing the Authority was in attendance at the November 20 th and December 17 th , 2020 board meetings.	87
50	22.	The check meeting minutes and advise what led to the decision to revoke the rent deferral.	101

* * * * *

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TIM CLUTTERBUCK: SWORN

EXAMINATION BY MR. JONES:

MR. JONES:

5 1. Q. Can you please state your name for the
 record?

 A. Yes, Tim Clutterbuck.

 2. Q. And you've sworn to tell the truth today?

 A. Yes, I have.

10 3. Q. And today you're being produced as a
 representative of the board of the ...

 MR. STANEK: No, he's being produced under a
 court order.

 MR. JONES: Right, just ...

15 MR. STANEK: This is not an Examination for
 Discovery Counsel, I told you that yesterday in
 an email.

 MR. JONES: Well Your Honour -- Counsel, Her
 Honour's endorsement says that the Examination
20 will be a person designated from the landlord's
 board of directors.

 MR. STANEK: Mmhmm.

 MR. JONES: So ...

 MR. STANEK: As I said ...

25 MR. JONES: ... you are here today as the

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designated person on behalf of the board of
directors correct?

MR. STANEK: Under Her Honour's order.

A. Yes.

MR. JONES: Yes.

MR. JONES:

4. Q. Okay, and what's your position with the --
the authority?

A. I'm the chairman -- current chairman of
the Peace Bridge Authority.

5. Q. And how long have you held the position of
chairman of the board?

A. The chairman position is alternated year
on year, so I first held it in 2020, '21 and '23 --
or no, I'm sorry 20 -- I started in '17 I would have
been '17, '19, '21, '23 my apologies to that.

6. Q. So '17, '19' ...

A. '19, '21' ...

7. Q. ... '21 and '23?

A. ... and '23, correct.

8. Q. And those are the years that you held the
position of chairman and during the other years you
were a member of the board?

A. I was vice chairman.

9. Q. Vice chairman. And how long have you been

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on the board all together?

A. Since February of 2017.

10. Q. Okay. Okay, and as a member of the board what are your, sort of, obligations and duties?

5 A. We are oversight for management, for the, sort of, safe, efficient operation of the Peace Bridge as a conduit for commerce and the people.

11. Q. And with respect to the leases that the authority is a landlord for, what's your involvement as a member of the board?

10 A. Involvement would be basically approving leases that are brought forward by management as acceptable to the -- to the board.

12. Q. And is the board's role essentially to take the recommendations there as opposed to actively making recommendations or investigating and that sort of thing?

15 A. In the course of any negotiation there's oftentimes touch points with management. So on touch points advice would be given if it's required, we have a diverse board with a lot experience in a lot of areas so -- so we will -- we will touch point with management on various point in the process.

20 25 13. Q. And how are those -- what method of communications are those touch points done?

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5 A. Usually there's a prepared documents with support documents, so I'll come forward with a report to the board which will be summarized through the management team and then supporting documents and appendices. Oftentimes there's presentations as well.

14. Q. And those are take -- those take place at board meetings?

 A. Executive session and board meetings.

10 15. Q. And what's the -- I take it there's an executive session and there's another session?

 A. The regular session.

16. Q. Okay. And what's the difference between these two?

15 A. One's open to the public.

17. Q. So the regular session ...

 A. The regular session.

18. Q. ... and the executive ...

 A. Correct.

20 19. Q. ... is not?

 A. Yes.

20. Q. And is there communication with the staff from -- between the staff and the board outside of the formal meetings?

25 A. Yeah, there oftentimes would be individual

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communications for a variety of reasons, particularly the chairman and vice chairman will have discussions from time to time.

21. Q. With the staff or amongst themselves?

A. Normally through the general -- we'll talk amongst ourselves but normally we'd -- if we're talking to anyone we're talking to a general manager, I don't think we've ever spoken to anyone below that level.

22. Q. Okay. And sorry, what do you do -- what do you do for a living outside of the -- as a member of the board?

A. I'm currently retired, I retired in February of last year as the president of a steel company in Welland, Ontario. Alberta ASW. I currently do some consulting work, mostly on the management side.

23. Q. Okay. So sounds like it's fair to say you have considerable experience dealing with boards and ...

A. I've had some experience, for sure.

24. Q. And what's the -- can you help me out, what's the process for becoming a member of the board or is there a qualification for becoming a board member?

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5 A. So there's ten board members, five would
be from Canada and five would be from the US. The
Canadian members typically go through a pretty
arduous process of references, skills matrix
development, background checks, it's a fairly
thorough process to become a member of the board that
involves I think three references and detailed
questions of those references. And -- and reviews by
Transport Canada and eventually the -- the
10 acceptance, I think it is of the Privy Council.

25. Q. And that's for the Canadian members?

 A. Correct.

26. Q. And I guess the American members have
separate similar process that goes through the US?

15 A. Their process is prescribed, I think,
within their own sort of context, but I can't say I
know it fully, I just know that there's a member from
the Department of Transportation, the commissioner,
there's a member from the -- from the District
20 Attorney's office for the State of New York. There's
two other members who are lawyers in different
capacities and a former mayor of Buffalo.

27. Q. Okay. And sorry, those ones you were
talking -- you just mentioned those are all the
25 American members?

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A. US side.

28. Q. Okay. Is there some sort of internal document that sets out the guidelines for how that's done in terms of appointing members of the board what the board's -- kind of, what the authorities mandate is, that type of thing?

A. With respect to a document, that would be the Government of Canada sort of requirement, I can't say that I know of a specific -- there's a lot of forms which is very specific forms and a process which includes all the things I described. With respect to mandate there's -- there's a fairly healthy orientation that includes history, information, bylaws, act information, things of that nature, and then the members typically have had board experience and they understand the responsibilities of board members.

29. Q. Okay. So there -- there's no specific document that sort of sets out what the authorities mandate is that is provided to the board members?

A. I can't say that I can recall seeing a document that laid it out clearly like that.

30. Q. Okay.

A. Certainly it has direction of the general manager and -- and the team.

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31. Q. And the process that you talked about that's the for the appointment of the Canadian board members, that's administered by the Ministry of Transportation?

5 A. Transport Canada.

32. Q. Transport Canada.

A. I believe so, I believe that's how it's administered, yeah. And -- and I think it's awarded by the Privy Councils, if I have that wrong I apologize, but I'm pretty sure that's how it went down.

33. Q. Okay. And is there any reporting done from the Authority to the Ministry of Transport or any other Federal entity?

15 A. The -- the bylaws that give the Authority a fairly broad responsibility as it relates to what the management of the Authority and it's business, so there's the availability of -- there's I'm trying to think of the actual -- Consul General of Canada has a member who -- who's -- who comes in to our meetings routinely, it's public forum and there has been members of the press routinely in attendance, so other than that the only real interaction has been through appointment of -- of members.

20
25 34. Q. Okay. And you mentioned there's some

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bylaws that set out, so have those --. Counsel, can we have a copy of the bylaws that set out how the -- it sounds like that sets out how the Authority interacts with the ...

5 A. It ...

35. Q. ... Federal Government?

 A. ... it doesn't so much as it -- it does though talk to how we manage things within the, sort of, realm of the Authority. So purchasing -- I mean, it has rules around a variety of things that we -- we try to stay aligned with, but interaction with Transport Canada, I don't believe you'll find much in there on that.

36. Q. Okay. What are the bylaws called?

15 A. They're called bylaws.

37. Q. Bylaws of the Authority?

 A. Yes.

MR. STANEK: Are -- are they publically available?

20 A. I believe so, I believe so, and -- and I would ...

MR. STANEK: It's public Authority, they would be public.

 A. Yeah, there's -- there's ...

25 MR. STANEK: Okay.

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A. ... very little that's not publically available.

MR. JONES:

38. Q. Can you then direct us to where we can obtain a copy?

A. Well actually the first place to start would be the Peace Bridge website, but if it's different I'll tell Counsel and they'll get back to you.

MR. JONES: Okay so, Counsel, I mean, it sounds like they're publically available but in the event they're not you'll provide us with a copy?

MR. STANEK: Yeah, we'll direct you to where the bylaws can be found and if they're not where we direct you then -- or if we can't do that we'll produce them. ^

MR. JONES: Okay, thank you.

MR. JONES:

39. Q. And so what are the Authority's sources of revenue, I understand it has revenue from rent paid by the two Duty Free store leases?

A. Mmhmm.

40. Q. But beyond that what are the sources of revenue?

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5 A. It would be tolls, it would be any
agreements we have for wires or electricity that
would pass across the bridge. I'm not sure, I'm
trying think if there's anything else. I mean, the
tolls are both commercial and personal. I'm trying
to think if there's anything else of significance and
I -- I don't know how -- I'd hate to think I'm
missing something significant, I don't believe I am.

41. Q. Okay. And now in the 2021 financial
10 report it indicated that, the Authority's financial
statements indicated that there was seventy-seven
million dollars (\$77,000,000.00) of unrestricted cash
or equivalent on hand that represented about twenty-
five hundred (25,000) days, is -- first of all was
15 that -- that's accurate or is there something that
needs to be more ...

20 A. It -- it sounds like it's accurate. I
mean, we have a significant investment in the
business, I don't know exactly how the restricted,
unrestricted flows in that regard, but we just spent
ninety million dollars (\$90,000,000.00) on bridge
renovations, raised bonds to do so. And so whether
it's restricted or not, I think there's a portion of
if it, it's not called restricted but it is set aside
25 for the repayment of things like that as far as I

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understand, you can ask -- you can ask Karen, who will have much better feel for that when -- when she's here.

42. Q. Okay. And do you know whether that figure has changed since 2021, gone up or down significantly?

A. Yeah, it will -- it will have gone down, I can't tell you the numbers, to be honest with you.

43. Q. Is that you can determine or -- or you can provide us with an answer?

MR. STANEK: I can't think of why we would. How is that relevant to your lease?

MR. JONES: Well I think it is relevant. I mean, it's been -- it's been brought up in the Affidavits and there's been issues raised about whether or not ...

MR. STANEK: Is your -- is your position that they should raise tolls to subsidise your lease?

MR. JONES: I don't think we need to take a position on that way ...

MR. STANEK: Okay.

MR. JONES: ... one way or another, but if it -- I think there's some emails in there and it's been in the record that the Authority is saying that it needs to raise tolls or it needs this

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rent money for it's obligation.

MR. STANEK: Just trying to understand the relevance as to what the reserve fund would be for.

5 MR. JONES: Well it -- to the extent that the Authority is saying it needs this money to satisfy its obligations, I think it's relevant to understand if the -- if it's got significant unrestricted cash on hand.

10 MR. STANEK: Well we'll take that under advisement. ^

MR. JONES:

44. Q. And so what would happen I suppose if the -- if the authority ran out of money, like what happens in that scenario?

15 A. I don't know. I'll be honest, this is a - - this is an Authority that doesn't get a lot of financial support from the Canadian Government, so at this point I would say that we would -- we would have to investigate ways of raising money, and the only way you can raise money is raising tolls as far as I can see. We might be able to put more debt on the business, I don't know, we'd have to look at that, fairly healthy asset, but -- but certainly that would be -- we'd have a lot thing to explore before we

20

25

decided it was time to quit.

45. Q. Okay. And as I understand it, correct me
if I'm wrong, at some point all the Authority's
assets revert back to New York State and Canadian
Government?

A. Well it's -- that could be your
understanding, I don't know.

46. Q. So you don't about that?

A. I don't know.

47. Q. Okay.

MR. STANEK: I think Mr. Rienas has the
information -- the answer to that question, I
don't have it to give you right now but I think
it's somewhat more complicated than that.

MR. JONES: Okay, fair enough.

MR. STANEK: And it has to do with the
history of the Peace Bridge, which I think one
could look up and it has been documented.

MR. JONES: Okay, now I did have a question
about -- so we've received a three volume
document brief from your office, Counsel.

MR. STANEK: Okay.

MR. JONES: And we received it late last week.

MR. STANEK: Mmhmm.

MR. JONES: And that followed there was an

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earlier version of the disclosure brief that was provided as well and that was a hard bound document and a USB key, and I just want to understand it seems to me that not all the documents that were in the first disclosure brief are in the second disclosure brief?

MR. STANEK: Okay. I didn't compile the briefs, I don't have the answer to that questions. If you have specific questions about what's in the briefs or what isn't in the briefs I can take them back and provide you the answer.

MR. JONES: Okay. So I guess might as well ask the question now, but I guess what I'd like to know is what documents that were in the first brief are not in the second brief and ...

MR. STANEK: I'll have to take that under advisement and get you an answer because I don't know.

MR. JONES: No I understand, that's fine.

MR. STANEK: Okay.

MR. JONES: I'm not expecting you ...

MR. STANEK: So you've got an undertaking as to what documents were in the first brief that are not in the second brief.

MR. JONES: And why they're not in the second

brief.

MR. STANEK: I may know the answer as to why
but I'm not going to speculate, I've got my
undertaking. ^

MR. JONES:

48. Q. Okay, now if at any -- is there mechanism
whereby if the -- either the Canadian Government or
the New York State Government wanted to intervene in
what the Authority was doing, either with respect to
a lease or with respect to the operation of the
bridge or some other issue, is there a mechanism for
the Government to intervene?

A. As far as I could see there's been perhaps
one attempt to do that that was unsuccessful, so
perhaps if they got together and cooperated on
something that might be possible, but I -- at this
point I don't believe that there's a mechanism by
which they can intervene, that can always talk to us
and that's something we're open to, you know?

49. Q. Okay. You said that there was one
instance, what happened with that instance?

A. There was an incident I think that -- and
that was before my time on the board so I can only
speak about what I've heard, is that the New York
State Government had an interest in doing something

that perhaps wasn't aligned with the Canadian Government.

50. Q. Okay so ...

5 A. I'll leave it at that 'cause I don't know much more about it, yeah.

51. Q. So it was an -- it was an issue that the two governments weren't aligned and so whatever the New York State government wanted wasn't going to happen?

10 A. Right, that's what I understand anyway, that's history.

52. Q. Okay, and so where the two governments are aligned they would have an avenue of in -- of directing the Authority with what to do?

15 A. As far as I know we are elected these -- or nominated or appointed to these positions to run the Authority. If they don't like what we're doing they can take us out of the positions, that's my understanding.

20 53. Q. Okay.

A. I don't see anything else that has a path to what you're describing.

54. Q. Okay. And how do they remove a board member?

25 A. I mean, we're -- we serve at the pleasure

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of the board -- of the council so they can remove us too.

MR. STANEK: Is that the Privy Council?

A. Yes, yes.

MR. JONES:

55. Q. And correct me if I'm wrong, other than the board meetings where a member of the government can attend, there's no reporting obligation to the government?

10 A. We -- we have public reporting requirements and all of that would go to the government. So you would have your financials, your traffic stats, I don't think they have a regular avenue for information should they choose to, you know, follow it.

15 56. Q. Sorry, did you say they don't have a regular ...

A. They do.

57. Q. Okay.

20 A. Yeah, I mean, it was -- it's available to them, let's put it that way. 'Cause as I said the -- there is availability for a member to -- to come to meeting as they have access to all public documents.

25 MR. STANEK: I think Mr. Jones is making -- I think there's a distinction between reporting

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with respect to information and reporting with
respect to obtain approval.

A. Yeah, and we -- yeah there -- is that what
you're trying to --?

MR. JONES:

58. Q. Well -- I mean, I understand the
distinction that you're making so let's -- let's
flesh that out a little bit.

A. Yes.

59. Q. So ...

A. Okay.

60. Q. ... what you're talking about is reporting
in terms of information flow from the Authority to
the government?

A. Correct, yeah.

61. Q. And to the extent, you know, is there
anything that the Authority would require approval
from the government to do?

A. Not that I'm aware of. I mean, I can say
that I'm -- I just don't know, I -- I mean I -- I
would like to say definitely not but there's -- I'm
sure there's things that we can't do that there would
be some intervention but I can't tell you what that
is.

MR. STANEK: How about this, are you aware of

any circumstance in which the Authority has thought -- has sought approval from the government?

A. No. Is that fair, okay.

MR. JONES:

5 62. Q. Now earlier you told me that either the chair or the vice chair might speak directly to the general manager and have communications I take it about operational issues with the Authority, is that
10 what they would be ...

A. Things of that nature, yeah.

63. Q. Okay. And would they be -- include the leases or the tenancies for the Duty Free stores?

15 A. The issues associated with deciding on significant matters are all handled by the board. So discussions that might take place outside of that might be -- might be about timing of what we put on the agenda for the next meeting, whether we get
20 council to support that discussion, those types of discussions occur around bigger issues like that. If we're talking about staffing at the border that might be something we can give advice on but not direction. There's no direction given outside -- outside the border so we -- we manage that way.

25 64. Q. Right. So it sounds like you'd be

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communicating about what is going to be dealt with

...

A. Yeah.

65. Q. ... inside the meeting?

5 A. Yeah, and we might write recommendations about when it's a good time to get an opinion and things of that nature. So it's -- it might be a little bit more advisory but also support, but in fact it's -- there's no decisions made that aren't board approved.

10 66. Q. Okay. Now would -- during the covid pandemic from January 2020 until December 2021 would you have had any direct communications by email or text message or anything of that nature with the -- with the staff relating to the Duty Free store leases?

15 A. I don't recall anything in that period for -- so the year of '20 I wasn't the chair I was the vice chair, but I don't recall any specific discussions that would have been anything other than clarification. It might have been -- help me understand what's in this document that I'm reading, that sort of thing I think is fair game, but other than that and -- and I'm trying to think if there was ever a time we may gone beyond the general manager,

20

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typically not without him being fully aware of it, it might have been for a detail that perhaps would be better known by the finance person, so I'm not aware of anything that -- that hap -- transpired, I'm not saying it didn't happen, but it would be more clarification certainly, no direction.

67. Q. Okay.

MR. JONES: So Counsel, I'm going to request an undertaking for copies of any emails or text messages or other written communication between the board members and operational staff between that time period from January 2020 to December 2021 that relates to the Duty Free stores tenancies, both on the Canadian side and on the American side.

MR. STANEK: Why?

MR. JONES: What do you mean why?

MR. STANEK: Why do you want it?

MR. JONES: Well because it's relevant to ...

MR. STANEK: Why?

MR. JONES: ... the issue before the court.

MR. STANEK: Well why is it relevant to the issue before the court?

MR. JONES: Well the issue before the court is with respect to how the Authority managed the

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covid pandemic and specifically with respect to issues involving the Peace Bridge Duty Free lease and the operation of eighteen oh seven (1807) of that lease, and to the extent that issues about the lease are being discussed during the covid pandemic, that's why it'll be relevant.

MR. STANEK: You're asking us to search all communications between all board members and all staff members for a two year period because you say it somehow relates to how the -- how they managed covid, not your lease, to how it man -- how they managed covid, have I got that right?

MR. JONES: No, no I'm talking about emails and texts about this lease, the two leases.

MR. STANEK: Okay. They weren't sent to your client, so there's no -- you're not asking for communications to and from your client, you're talking about all -- all completely internal communications for two years concerning the lease?

MR. JONES: Correct.

MR. STANEK: Okay, I'm going to take that under advisement because I think that that is overly broad. Yeah, okay, that's what I've

said. ^

MR. JONES: I mean it doesn't sound like it would have been an extraordinary amount of communication, it would have been dealing with ...

MR. STANEK: He has already told you that all the -- all business was conducted at board meetings, so I'm not sure why you think this is relevant.

MR. JONES: Right, and it's clarifying what issues were going to be addressed.

MR. STANEK: Mmhmm.

MR. JONES: And -- and that type of thing, or what the meaning of certain things were.

MR. STANEK: Mmhmm.

MR. JONES: So that I think puts it squarely in the -- in the scope of relevance.

MR. STANEK: Mmhmm.

MR. JONES:

68. Q. Okay, and I take it directions would be given from the board to the operational staff by way of resolution, is that right?

A. Yeah, motions.

69. Q. Motions and resolution?

A. Mmhmm.

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70. Q. Okay. And those would put in writing
somewhere?

A. Yeah, they would be notarised in minutes.

71. Q. They would be found in the minutes,
anywhere else?

A. Well that's a good question, there's
probably a book that has to be kept in. I mean,
there's probably a ledger of sort within the -- the --
- I'm not a hundred percent (100%) sure to be honest,
I just know that they are notarised in the minutes
for our reference and for our review at the next
meeting.

72. Q. Okay. Okay, so can we then have an
undertaking to review the ledger of -- the ledger of
resolutions and or the minutes, wherever the
resolutions are found, and provide us with copies of
all of the documents that have resolutions that
relate to the two Duty Free store leases?

MR. STANEK: Yes.

MR. JONES: Thank you.

MR. STANEK: So all resolutions that relate
to the two Duty Free store leases.

MR. JONES: Yes, and like, provide us with
whatever document those are contained in --
within.

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MR. STANEK: The resolutions, not the entire book of -- book of resolutions, just the ones relating to the lease?

MR. JONES: Yeah, like, presumably there's pages that have the resolution that deals with the lease pages that don't have.

MR. STANEK: All right, I understand. Yes you have that undertaking. ^

MR. JONES:

73. Q. And those resolutions would contain the totality of the direction given by the board to the staff?

A. Yes, yes.

74. Q. And can you help me out with what level of autonomy or authority the staff -- I'm talking about the general manager and the other operations staff, have with respect to administering leases and dealing with leasing issues?

A. They are responsible for administering the leases, it would be totally within their scope.

75. Q. Okay. Now if the Authority's going to enter into a new lease, would that be within the scope of the staff?

A. Staff would bring it to the board for approval to proceed with exploring it and then

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eventually approval to -- or as I said earlier, touch points, and then at some point if there's an agreement or at least an understanding of an agreement come before the board to make sure that it's approved before it's signed.

76. Q. So would the staff have Authority to make an offer before getting authorization from the -- like, a particular offer for a lease?

A. Yeah, I can't say that's never happened but I don't recall it happening. I -- we typically on the touch points would be fully aware of what's going to be proposed. We might provide brackets within which to work, but -- but I -- typically we -- we would be part of the process.

77. Q. Okay. And with respect to this RFP that happened in 2016 were brackets provided by the Authority?

MR. STANEK: He wasn't on the board in 2016.

A. I don't know, I don't know what happened then. I came on in '17.

MR. JONES:

78. Q. Okay, well then can you undertake to advise us if there were brackets provided to staff with respect to what would be acceptable for the RFP process in 2016?

MR. STANEK: I would expect that that would be the RFP.

MR. JONES: I don't know.

MR. STANEK: Wouldn't that be the brackets as to what's acceptable, what's in the RFP

MR. JONES: I don't know, there may have been a resolution at a meeting or some other direction given, if -- if that's the answer then that's the answer.

MR. STANEK: I -- I think the answer to that Mr. Jones, is that it's a VRFP was issued, that's what was acceptable to the board as far the lease -- what the lease bids would be.

MR. JONES: Well can you confirm that there was other bracket given by the ...

MR. STANEK: Look to -- to move on I'm going to take that under advisement. So to ask someone at the board if there were brackets?

MR. JONES: Yeah, so you're asking if whether there was any guidance given by the board in terms of brackets of what would be acceptable for a successful lease in the RFP process?

MR. STANEK: Other than the RFP itself?

MR. JONES: Yeah, I -- I'm aware there's an RFP, what I'm asking for is if there was any

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other guidance given, because I think the RFP

...

MR. STANEK: Okay, guidance other than the
RFP as to what an acceptable lease would be.

MR. JONES: Thank you.

MR. STANEK: Well as I said, I'm taking that
under advisement. ^

MR. JONES:

79. Q. Now the resolutions that are passed during
the meeting are they base -- are they based on draft
resolutions that are proposed by staff before the
meeting?

A. Sometimes yeah, most times, yeah.

80. Q. Okay. So as a follow up to the
undertaking that we just talked about, about the
resolutions relating to the two tenancies, can we
also have copies of any draft resolutions that were
proposed by staff for the two tenancies?

MR. STANEK: What?

MR. JONES: So there's an undertaking -- you
just gave an undertaking ...

MR. STANEK: I know I -- I took under
advisement, your question is to what other than
the RFP set out what was acceptable in a
potential lease bid that would be made under the

RFP.

MR. JONES: I know that Counsel.

MR. STANEK: I did -- okay, now you want what?

5 MR. JONES: So there was a couple minute ago there was an undertaking to provide the resolutions that were passed relating to the two tenancies.

MR. STANEK: Yes.

10 MR. JONES: And so what I've asked for is any draft or proposed resolutions that were provided by staff during the covid period relating to the two tenancies because as I understand what would happen sometimes is the staff would come to the board with a proposed resolution for direction that it was looking for from the board.

15 MR. STANEK: Yeah?

MR. JONES: And the board could either accept that recommendation and give the resolution ...

20 MR. STANEK: I don't think you've asked those questions of Mr. Clutterbuck, so I -- I don't think you've established that there is any such thing as a draft resolution.

25 MR. JONES: Okay, I -- correct me if I'm wrong, I think his evidence was that sometimes

that would happen.

MR. JONES:

81. Q. So, Mr. Clutterbuck, is it fair what I
just described, that sometimes staff would propose a
draft resolution to the board for the direction that
it -- the staff was seeking to receive?

A. Yes.

82. Q. Okay. And the board would either accept
that recommenda -- or that proposed direction or it
might or ...

A. Correct.

83. Q. ... who knows.

MR. STANEK: Is that reflected in the
minutes?

A. It would be -- so there'd be a board
report that may have a recommendation and then there
would be the actual motion so sometimes the motions
are modified.

MR. STANEK: Okay.

MR. JONES: Right, so what I'm asking for is
an undertaking for any proposed resolutions that
were made from January 2020 to December ...

MR. STANEK: I'm going to take it -- so
proposed but not accepted resolutions?

MR. JONES: Well they may have been accepted

or they may not have been accepted.

MR. STANEK: Okay.

MR. JONES: Sorry, was that not ...

MR. STANEK: Relating to the lease?

MR. JONES: Relating to the two leases.

MR. STANEK: Okay, that's under advisement. ^

MR. JONES: Under advisement, thank you.

MR. STANEK: Because I -- I'm struggling with
why what was discussed is somehow relevant to
your case.

MR. JONES: I mean you -- you're entitled to
question ...

MR. STANEK: You have a written lease,
there's a five hundred (500) year old law called
the Statute of Frauds, I'm struggling with what
-- why all of these discussions are somehow
relevant.

MR. JONES:

84. Q. Now would the staff require a board
resolution or direction to enter into a lease
amending agreement?

A. Yes.

85. Q. What about for providing any type of rent
relief under a lease?

A. Yes.

86. Q. And that would include deferrals or abatements?

A. Yes.

87. Q. And would it -- would staff require authority to issue default notices under -- under the lease?

A. That would be agreed upon with the board, whether that would be direction or whether that would be a resolution I don't -- I don't recall.

88. Q. Okay, so it's something that would have to be agreed upon by the board but may or may not require a formal direction?

A. Correct, yeah.

89. Q. And what about terminating a lease, would that require a formal resolution?

A. Yes, for motion in that direction in this particular case.

90. Q. And so all those motions, they would require, what would it be a report, or a briefing note from the staff members, how would that work?

A. We would of had a series of briefing notes and then there would have been one -- I'm assuming in the case of a serious decision like that we'd probably have either a summary of briefing notes or another briefing note.

91. Q. Okay, and so in this case dealing with
this tenancy there was -- and I'm talking about the
Peace Bridge Duty Free tenancy on the Canadian side,
there was a series of rent deferral offers and other
5 rent -- I'll characterize them as rent relief offers
that were made by the landlord. So would all of
those offers been the result of what you've described
here, briefing notes and reports and ...

10 A. I believe everything in that -- as a
matter of fact, most of the things referred to as
offers were the same offer I think 'cause there was
no movement on any offer made by the Peace Bridge
Duty Free, if I recall correctly. So the original
approval to go forward with rent relief would have
15 been just repeated in subsequent documents.

92. Q. Okay.

A. Reiterated, I guess you'd say.

MR. JONES: Okay, so Counsel, could we please
have an undertaking for the reports that led up
20 to those -- those meetings and resolutions?

MR. STANEK: You've got the minutes I think,
right?

MR. JONES: Well I don't know actually, we've
got some minutes.

25 MR. STANEK: Yes.

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MR. JONES: But there's a lot of minutes that have just been -- that we don't have.

MR. STANEK: Okay.

MR. JONES: And there's a note here ...

5 MR. STANEK: There's a reason why you don't have some of the minutes and it's because the -- there was -- there are board meetings that Counsel attended and the -- and those minutes include Solicitor Client communications. I don't know that there were any reports. Were there reports prepared with respect to -- well with respect to what the Peace Bridge Duty Free's so-called offers?

10 A. The Peace Bridge Duty Free's offers? The only specific report I saw, and that was actually the offer that was provided by Blaney with the final business plan.

MR. STANEK: Okay, so there were no reports prepared other than that.

20 MR. JONES: No I think you were asking about the Peace Bridge ...

MR. STANEK: I see.

MR. JONES: ... Duty Free offer, and I'm asking ...

25 MR. STANEK: So were there any offer -- were

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there any reports prepared with respect to Peace Bridge Duty Free offers?

MR. JONES: Are -- are you talking about offers that came from the Authority to Duty Free?

MR. STANEK: No, from the Duty Free to the Authority.

MR. JONES: Right.

MR. STANEK: That's where I was at.

MR. JONES: I think Counsel, you're mixing it up. What I'm asking about is offers flowing from the Authority to the Peace Bridge Duty Free?

MR. STANEK: Were there any reports made with respect to those offers?

A. I believe there would have been a report in the early going, so I'm going to say the fall or 2021, something of that nature.

MR. STANEK: Okay, I'm going to -- we'll review it.

A. Yeah.

MR. STANEK: And I'm going to take it under advisement as a production, so there's a report in the fall of, when was it exactly, 2020 --?

A. 2021 I believe.

MR. STANEK: Okay.

A. Yeah, after I think they restarted.

MR. JONES: Okay. So there's a -- that undertaking ...

5 MR. STANEK: I -- I'm almost certain that that would contain legal advice, all right?

MR. JONES: So just to confirm the undertaking is to provide all reports and briefing notes that ...

10 MR. STANEK: No, you see I've taken under advisement, your question.

MR. JONES: Sorry, under advisement, I just wanted to clarify. So my question is to provide all reports and briefing notes that led to offers from the Authority to Duty Free.

15 MR. STANEK: Okay, to the extent that they are not privileged, I've taken that under advisement. ^

MR. JONES: Okay.

20 MR. STANEK: You asked about minutes okay, and there are -- and I was starting to say 'cause you didn't ask about reports, there are -- we can produce minutes redacted for solicitor client privilege.

25 MR. JONES: Right, and -- well I was going to

get to that.

MR. STANEK: Okay.

MR. JONES: Yeah, because we -- you know, we have several dates listed here.

5 MR. STANEK: Mmhmm.

MR. JONES: But me don't have the actual minutes.

10 MR. STANEK: Mmhmm, well we can produce those to you, but the -- I'll be candid about our concern, you guys are never going to stop looking for documents.

MR. JONES: Well I appreciate your concern but I think these are critical documents here that deal with the central issues.

15 MR. STANEK: Can we agree that we'll redact them for privilege and provide them?

MR. JONES: Well you -- I mean, as you said we're going by what the rules require.

MR. STANEK: Mmhmm.

20 MR. JONES: So I would like copies of the documents, to the extent there's something being redacted I would like you to tell us what's being redacted and the basis for the redaction.

MR. STANEK: Okay, I will do that. ^

25 MR. JONES: Okay. And so why -- I guess my

question is why weren't the documents included in the board meeting documents provided in the disclosure brief?

5 MR. STANEK: 'Cause they -- 'cause they contain solicitor client privileged information.

MR. JONES: All of these just because there's some -- there may be some solicitor client privileged information?

10 MR. STANEK: They ...

MR. JONES: So all ...

MR. STANEK: They're discussions that I attended, the solicitor in some cases was me.

MR. JONES: Okay, so ...

15 MR. STANEK: Okay, so we attended the -- the board meetings was there -- the purpose was to collect and discuss legal advice.

MR. JONES: Okay, so that's the basis for the privilege claimed in each of these?

MR. STANEK: Yes.

20 MR. JONES: Okay. Now can you -- I would like an undertaking, I don't expect you to know the answer to this right at this time, but I would like the dates of all the board meetings that were held beginning January 2020 to December
25 2021?

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MR. STANEK: You can take that from the
website, can't you?

A. It's all public -- public, whether it's on
a website or not I'm not a hundred percent (100%)
sure but basically monthly, in that window. Board
meetings, regular board meetings.

MR. JONES:

93. Q. Okay, so you can provide us with that
information?

MR. STANEK: There were twelve (12) each
year, one each month.

MR. JONES: Okay, so then can we please have -
- I'm going to ask for unredacted versions of
all the board meetings that were held between
the time frame?

MR. STANEK: Regular session?

MR. JONES: Both regular and executive
session.

MR. STANEK: I'm taking that under advisement
because I've already given you an undertaking
and now you're asking for what I've agreed to
give you in unredacted form. ^

MR. JONES: All right, thank you.

MR. STANEK: All right, I've taken that under
advisement.

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MR. JONES: And now to the extent that, and
I'm hope -- hopeful this is not an issue, but to
the extent that there's going to be some
redactions for solicitor client privilege
information I -- I expect that the rest of the
document would not be redacted?

MR. STANEK: Right.

MR. JONES: So, like, I would want to be able
to know who was at the meetings, what the issues
for discussion were?

MR. STANEK: Right, understood.

MR. JONES: You know, what briefing notes or
briefing reports were relied upon.

MR. STANEK: All right.

MR. JONES: So we'll -- we'll get all that
information?

MR. STANEK: Yes.

MR. JONES: Okay.

MR. STANEK: Is your next step to haul in
each one of these individuals and do an
Examination and ask for all of their emails?

MR. JONES: Well, Counsel ...

MR. STANEK: Is that your next step?

MR. JONES: Well Counsel, I mean, it would
have saved us some time if -- if we had been

provided with the document rather than just like
a ...

MR. STANEK: It would have saved no time, all
it would have done is led to more questions for
more productions of more documents from more
people.

MR. JONES:

94. Q. So are there any other tenants that the
Authority has other than the two Duty Free stores?

A. No, I don't think so.

95. Q. Did the Authority during -- like, since
the outset of the covid pandemic ...

A. Excuse me, Customs and Border Protection,
I believe, might be considered a tenant but I -- they
pay for the space we give them, so I guess you'd call
that rent or some sort of coverage of cost, but not
the Canada Border Service Agency, just the Customs
Border Protection.

96. Q. Like their offices ...

A. Yeah.

97. Q. ... or whatever that they have there?

A. Yeah, yeah. Sorry, forgot about that.

98. Q. Okay, did the board authorize the --
authorize enforcement proceedings for any other --
against any other lease other than the Peace Bridge

Duty Free during the covid pandemic?

A. How do you describe enforcement proceedings?

99. Q. So threatening to terminate a lease or ...

A. There was -- there was no need to.

100. Q. What -- why do you say that?

A. Well there was an agreement reached.

101. Q. With the other -- okay.

A. Yes.

102. Q. And what was that agreement?

A. To be honest with you I can't tell you the details of it, but I'm sure it's available.

MR. JONES: Okay, could we please have an undertaking for a copy of the agreement with the other tenant?

MR. STANEK: Is this the Canada Border Protection Agency?

A. No, that would be the Duty Free America.

MR. STANEK: Duty Free America.

A. Yeah. There was, I don't know, I can't remember the details, I'm sorry.

MR. JONES:

103. Q. And -- yeah, as I understand the lease for the Duty Free America store is structured a little bit differently, it's a lower base rent with a

separate additional rent ...

5 A. It's a lower revenue operation, roughly a
little bit more than fifty percent (50%) I think of
what might be available on the US side -- on the
Canadian side. It's a whole different -- it's a
small operation, but anyway it's different, you're
correct.

104. Q. Yeah, I -- I think the numbers that I saw
was -- I think they were American numbers but they
10 were like eleven million dollars (\$11,000,000.00) ...

 A. Yeah.

105. Q. ...versus -- American, versus just under
twenty (20) in Canada?

15 A. Yeah, so -- so yeah with the exchange
you're right, I suppose that would be correct.

106. Q. So it's about a twenty percent (20%) or
so?

 A. Yeah, twenty percent (20%) target, yeah.

107. Q. Yeah, and so was any different
20 considerations given to the -- the American Duty Free
operation?

 A. Typ -- no, I mean, there was no different
approach to rent relief, there was deferment, most of
our discussions around deferral. Like I said, you'd
25 have to look at the details to be clear but that --

that process took place with, I think there was a modest rent relief. But please look at the details.

108. Q. Okay.

A. My memory's not clear on that.

5 109. Q. Okay, fair enough.

MR. JONES: So can we also just to put it in context, can we have an undertaking for a copy of that lease as well?

10 MR. STANEK: It occurs to me that because there is another party to both the agreement and the lease that we may have to investigate as to whether it can be disclosed.

MR. JONES: Yeah, I mean if there needs to be a sealing order or something like that.

15 MR. STANEK: Okay, so the — the undertaking I gave you with respect to the — to the agreement, same thing with respect to the lease, I recognize the relevance of it, however there may be a restriction as to our ability to
20 provide it. And I need to -- we will need to investigate that, but I will also undertake to advise as to what can be -- what details of these arrangements, the lease and the agreement can be produced if any, okay? ^

25 A. I -- I think I should mention 'cause you

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asked me a question I didn't fully answer, but the Duty Free Americas didn't close during the period that there was a closure at the Canadian side, they continued to pay rent, so under the, sort of, rent deferral agreement that was initially established, so I think there was a different set of circumstances around Duty Free Americas.

MR. JONES:

110. Q. So Duty Free Americas, it didn't pay its base rent though?

A. It had no -- it had -- we had an agreement with both Duty Free's with respect to the interim, the short period, right?

111. Q. Right, so it only paid percentage rent?

A. Yeah, I believe it was percentage rent, yeah.

112. Q. Yeah, and that was ...

A. And they remained open. Yeah, the Duty Free Americas remained open for the period, providing whatever services they had to provide.

Unfortunately, the Peace Bridge Duty Free didn't, including not having services for transportation folks, like truckers. So we maintained that through the balance of 2020, if I remember correctly.

113. Q. And at some point the Peace Bridge Duty

Free did ...

A. Yeah.

114. Q. ... start servicing ...

A. Correct.

5 115. Q. Right.

A. They picked it up, I think it was after we may have mentioned to them that we would need to take their deposit to cover some of these costs, I think it was some reason that we felt that they may have changed their position, I can't recall. Anyway as it -- as it turns out, there was a period where we didn't have any service and then we covered that and then after that the Peace Bridge Duty Free picked it up.

15 116. Q. Right, so the -- I think the -- is it fair to say the US Duty Free store was paying what's called it's additional rent on their side?

A. Mmhmm, mmhmm.

117. Q. But they weren't paying their base rent?

20 A. The base rent correct, it was part of the deferral.

118. Q. And the Canadian store was also paying its additional rent throughout?

A. Right, correct.

25 MR. STANEK: When did the agreement end with

US?

5 A. I -- I'm going sa -- I -- I don't know the
-- I think it was initially a four month deal that
got extended, but I can't -- I think it was the fall
of 2020 it may have, or the early part of '21, I
honestly can't remember.

MR. JONES:

119. Q. Right, you're talking about the initial
rent ...

10

A. Yeah.

120. Q. ... deferral?

A. Yeah, which both sides signed. Both --
both Duty Frees.

121. Q. Right.

15

A. Yeah.

122. Q. So yeah, in -- just going back for a
minute, you talked about the offer that you recalled
happening in 2021. Now I want to just ask you about
the offers that happened in 2020 and those were the
rent deferral offers right?

20

A. Mmhmm.

123. Q. So those were essentially -- basically
take it or leave it, you'd agree with me, they were
take it or leave it offers made by the Authority to
the two tenants?

25

A. I ...

124. Q. They weren't through a negotiated process?

A. They were offers made that were accepted, I don't -- I don't know specifically if you'd call it a negotiation or not, but there were offers made that were accepted.

125. Q. Okay. And there -- there was a difference between the two offers, correct?

A. That's possible, I don't know, you can look at the details.

126. Q. Right, so could we have copies of the offer that was made, the rent deferral offer?

MR. STANEK: I thought you just asked for that.

MR. JONES: There was this subsequent agreement, I think, is what you were talking about.

MR. STANEK: Okay.

MR. JONES: With the -- I think that was done as a ...

MR. STANEK: So again...

MR. JONES: ... lease amending agreement was it?

A. In that case it was again, I believe a rent deferral, I don't think we changed anything in

terms of the agreement going forward. It was a deferral and they recognized the base rent that hadn't been paid as owed.

MR. JONES:

5 127. Q. I thought you said there was some ...

 A. They being the Dut -- Duty Free Americas.

 128. Q. Right.

 A. Is what I'm talking about.

 129. Q. I thought you said there was some rent ...

10 A. And that's why I asked you to check the details 'cause there could have been some debt -- rent relief, but that doesn't mean that they didn't recognize there was debt -- there was rent debt.

 130. Q. Yeah.

15 A. And -- and there was a plan for repayment that stretched over aa period, so again, it's all part of the details that are a couple years old in my mind now.

20 MR. JONES: Right. So Counsel, what I'm asking for is the earlier rent relief offer ...

 MR. STANEK: To ...

 MR. JONES: ... as well?

 MR. STANEK: You have the one to the Peace Bridge Duty Free.

25 MR. JONES: Yes, of course we have ...

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MR. STANEK: Yeah.

MR. JONES: ... our client's.

MR. STANEK: You want the one to the American?

MR. JONES: Correct, and I -- there's a
5 redacted version of it in the documents.

MR. STANEK: Right?

MR. JONES: And from the redacted version I
can see that it's a different agreement.

MR. STANEK: Yes.

MR. JONES: It's a one page document versus
10 ...

MR. STANEK: You -- then you have it, why are
asking for it?

MR. JONES: No I don't have it, I have pages
15 of black redaction.

MR. STANEK: Mmhmm. Well I'm sure that's
because it can't be produced. You -- you know.

MR. JONES: Okay, well I'm asking for an
unredacted, so I'm asking for the unredacted
20 rent deferral agreement or agreements with the
US Duty Free store.

MR. STANEK: To the extent it can be produced,
you already have it.

MR. JONES: No I don't.

MR. STANEK: Okay, you -- you're asking for
25

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business details of someone who's not a party,
why are you entitled to that?

MR. JONES: Well it's relevant to the -- like
...

MR. STANEK: You go -- you go ask ...

MR. JONES: ... you acknowledged earlier ...

MR. STANEK: ... the US Duty Free if you can
-- if you can have it, and if they give it to you
...

MR. JONES: That's ...

MR. STANEK: ... you have it.

MR. JONES: Counsel, that's not how it works.
This is not ...

MR. STANEK: What do you mean it's not how it
works?

MR. JONES: In the context of litigation it's
a relevant document.

MR. STANEK: Right, that we may not be able to
provide you due to confidentiality provisions.

MR. JONES: Okay, well if -- if you tell me
that it cannot be provided because of
confidentiality provisions then we can go to Her
Honour ...

MR. STANEK: You have a version and it's
redacted.

MR. JONES: I -- so I have a version that's been redacted.

MR. STANEK: Mmhmm.

MR. JONES: Is that being redacted because the Authority's position is that it's not permitted to release that information?

MR. STANEK: I'm not the person who redacted it, I'll find out.

MR. JONES: Well that's what I'm saying Counsel, I mean you're telling me ...

MR. STANEK: Well it's not what you're saying, what you're saying is ...

MR. JONES: ... you're telling me something that I already have and...

MR. STANEK: No, that's not what you're saying.

MR. JONES: No, excuse me. You're telling me I already have it when clearly I don't have it.

MR. STANEK: You would -- no, what you're doing is you're snooping through other people's businesses and lives just so that your client doesn't have to pay rent, that's what you're doing.

MR. JONES: I disagree with that, Counsel. I think what we've talked about is that it's a

relevant document which you acknowledged earlier
and so ...

MR. STANEK: Yeah, no ...

MR. JONES: ... that's why we're asking for
it.

MR. STANEK: ... it's not about relevance. But
what I'm telling you is one of the parties to
that document does not have representation at
this table.

MR. JONES: Counsel, the case law ...

MR. STANEK: And I can't speak -- I can't
speak for them.

MR. JONES: Counsel, the case law on this is
pretty clear that if there needs to be a sealing
order that can be dealt with, but if it's a
relevant document it's got to be produced.

MR. STANEK: I'll find out why it's redacted. ^

MR. JONES:

131. Q. Okay, so just going back to the board
meeting, would there also be an agenda for each of
the board meetings.

A. Yes.

MR. JONES: Okay, so Counsel, I would like the
agenda for each of those board meeting between
the time period we're talking about.

MR. STANEK: For two years?

MR. JONES: From January 2020 to December 2021.

MR. STANEK: To the extent that they were made available, we will give you the agenda. ^

MR. JONES:

132. Q. And that's for both the normal and executive right, would it be the same agenda?

A. No, two different agendas.

133. Q. A different agenda. Would you be taking notes during these meetings?

A. Typically I don't ...

134. Q. Okay.

A. ... take notes during the meetings so no, the answer would be no to that.

135. Q. Okay. Are -- is somebody taking notes at the meetings?

A. Well the minute taker would be taking notes, yeah.

136. Q. Okay. Would anybody else be taking notes of what's going on?

A. I honestly haven't noticed anybody taking notes, I mean, we're generally in discussion, and we're in presentation or some form of dialogue.

MR. JONES: Okay Counsel, can we have an

undertaking for the notes that were taken at the board meetings that addressed the Peace Bridge Duty Free tenancy during that time period?

MR. STANEK: No you can't.

MR. JONES: Okay.

MR. STANEK: You're asking for the notes from every single board member.

MR. JONES: Okay, well what about the board member who was taking the minutes?

A. It wasn't a board member, we don't -- the executive ...

MR. JONES:

137. Q. Sorry, whoever the --.

A. The executive, you we would -- we would have an executive assistant doing that.

138. Q. So they notes from the executive assistant?

MR. STANEK: Which get turned in to the board's minutes.

A. It goes in the minutes, yeah.

MR. JONES: Right.

MR. STANEK: He -- we've already been talking about the board minutes.

MR. JONES: I agree. So it's the executive assistant's board -- notes from the board

meetings during that ...

MR. STANEK: No.

MR. JONES: ... time period?

MR. STANEK: She's turned them in to the
minutes, those are the minutes. That's what the
board -- that's what the executive assistant to
the board does, she makes minutes.

MR. JONES: Okay, so I understand that
Counsel, but what I'm asking for is the notes
that subsequently become the minutes.

MR. STANEK: No.

MR. JONES: Okay, and why not?

MR. STANEK: They're not relevant. You have
the minutes.

MR. JONES: Okay, so that's a refusal for the
executive assistant's notes or whoever took the
notes.

MR. STANEK: First of all I don't know if they
exist, second of all they're not relevant, this
is an over broad request.

MR. JONES: Okay, well ...

MR. STANEK: You are simply fishing.

MR. JONES: Well let me just get the request
on the record and ...

MR. STANEK: Sure.

MR. JONES: ... you can give your response.

So my request was for the notes taken by the executive assistant, or whoever was taking the notes, for the board meetings during which the Peace Bridge Duty Free lease was discussed from the time period from 220 – January 2020 to December 2021?

MR. STANEK: Okay, that's a refusal. ^

MR. JONES:

139. Q. Okay, now can you just give me an idea, in your experience as the board member at the outset of covid, what type of issues resulting from covid were concerning the board at that time? Like, obviously it was a big change in the world and ...

A. Mmhmm.

140. Q. ... the Authority is square in the middle of the impact being that it operates a cross border ...

A. Mmhmm.

141. Q. ... bridge. So what were the concerns of the board?

A. Well we were concerned like anyone else about not just the fact that there was a potential for reduction in traffic across the bridge, there was also a concern of all traffic initially, we worried

about all traffic, commercial and otherwise, and then they established a process by which commercial could go across which was a relief to some degree. I was concerned our employees health and safety, we tried to move towards cash-less type interaction.

Concerned about work from home requirements, just a lot of things that -- and -- and of course our costs 'cause we had obviously to shave on the cost side to manage through the process so that -- that was a concern. We just had done, as I said, a fairly significant, ninety (90) plus million dollar expansion for which we raised money through bonds, obviously we were concerned about debt service coverage of our own because we had requirements. So there was a lot of things going on in the early going that would have had any board very concerned for what we were facing.

142. Q. Okay, and was the board or the Authority doing anything proactively about it's commercial leases, it's commercial tenancies?

A. Proactive?

143. Q. Like rather than having the tenants come to the board saying, "We have zero revenue or zero sales we need some form of arrangement"?

A. I believe, I -- I'm not sure that it was a

one way street in that regard 'cause I believe we came to agreements fairly quickly on deferral. So I might be wrong, but it seems to me we came to agreement fairly quickly for periods through to end of June or end of July. We were also looking for things that we might fit in to through a government opportunity relative to funding, so we were looking at Canadian emergency work type relief, which we didn't get. There's many things we weren't -- we didn't have available to us that private industry would have had available to it, so we were looking for support even relative to things like section six which is a CBSA requirement not to pay. So we were looking for sources of revenue that perhaps were different than before, so we had lots of things on the go.

144. Q. Okay, and support did it look for or request specifically dealing with commercial leases?

A. With respect to?

145. Q. Commercial leases?

A. Yeah.

146. Q. Like, subsidies from the government or, you know, some sort of support, was there any ...

A. Well I guess the only ...

147. Q. ... communication?

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5 A. ... support available that I understood
came from leases that were less than fifty thousand
dollars (\$50,000.00) per month, and that was put
before us by Duty Free Association and we looked in
to it and it wasn't available to us. We were looking
for support from the Canadian Government any way we
could get it because we were -- we thought we were in
a distress situation and we got none.

10 148. Q. So were there requests made to the
Canadian Government?

15 A. There were letters written I think, so we
would -- we would have met with different
politicians, like Vance Badawey and things like that,
trying to seek some form of support through --
through a pretty tough period 'cause I think we saw
other Duty Free -- I'm sorry, Duty Frees -- Bridge
Authorities getting some relief.

149. Q. Okay.

20 A. So, yeah, we were looking for ways to
manage our own cash flow. We didn't go looking for
ways to support our rent income as far as I can
recall, so anything there was, I thought, the
responsibility of the people that had to pay the
rent.

25 150. Q. Okay, you mentioned that letter were sent?

A. I believe so, so you -- we'd ...

151. Q. So ...

A. ... we'd have to look.

152. Q. Yeah, if there were letters sent to the
5 Canada -- it would have been to the Canadian
Government for support?

A. It would have been politicians and it
would have been to Canadian Government, and I can't
tell you in particularly what group, probably
10 Transport Canada, perhaps Privy Council, perhaps the
Prime Minister's office. I mean, there was a lot
going on, of course we were trying to find any avenue
for support.

153. Q. Understood.

15 MR. JONES: Okay, so Counsel, if there is such
a letter can you provide us with a copy, or
letters?

MR. STANEK: I'll -- we'll investigate and see
if there's any letters and then we'll advise if
20 there are and if they can be produced. ^

MR. JONES:

154. Q. Okay, now you're aware that the Peace
Bridge Duty Free was a tenant since the 1980's?

A. Yeah, I was aware of that.

25 155. Q. And are you aware of any concerns about

their -- them being an appropriate tenant up until
the on sent -- onset of covid 19?

A. I'm not aware of any, no.

156. Q. No not aware of any defaults or problems
with them as a tenant?

A. Not as of my time on the board, I wasn't
aware of anything.

157. Q. Okay. And you weren't around on the board
before the RFP processes?

A. No.

158. Q. And now is it fair to say that the rent
charged for the Peace Bridge Duty Free to operate the
Duty Free store at the bridge are -- they're paying a
high level of rent for the ability to participate in
the -- the Duty Free regime if I can call it that,
like, regulatory regime in terms of selling Duty Free
products to cross border shoppers?

A. I -- I mean, you're asking me to -- to
make an opinion I think, and ...

MR. STANEK: That's exactly what you're
asking.

A. Right. And so my answer would be you
stated they were around since the '80s, they knew
what they were getting into when they signed the
deal. They made a deal that they thought would win

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5 them the R – RFP process and it did. So I -- is it
high, I think you'd have to ask your client in -- in
that time frame, from my perspective it seemed normal
and fair at twenty percent (20%) range and that was
the starting point for the ut -- that particular
facility, which is much more upgraded than the
facility on the other side of the border. So anyway,
the answer I -- I don't have an opinion whether it's
high or not, but it seems appropriate for that period
10 because the people who signed the deal knew what they
were getting into.

MR. JONES:

159. Q. Right, and that's based on the experience
of how much traffic is flowing over the bridge and
15 what the sa -- the expected sales are going to be
based on ...

A. I would -- I would say ...

160. Q. ... the history of that data.

A. That must be what they use to make those
20 determinations, yeah, I don't know.

MR. JONES: Counsel, there's -- we talked
about the minutes that are listed as privileged
in the disclosure brief, there's also some
reports that are listed as privileged so.

25 MR. STANEK: Yeah.

MR. JONES: I would like the same undertaking to provide us with unredacted copies of those reports?

5 MR. STANEK: Again, we'll take that under advisement, we don't -- I mean, if they're privileged you're not entitled to the information.

10 MR. JONES: Okay, well if they're -- if privilege is being claimed over them you'll tell us what the basis for the claim of privilege is and what's being redacted?

MR. STANEK: Right.

15 MR. JONES: And you would -- you'll also tell us the author of the report, who it's directed to, essentially all ...

MR. STANEK: Yes.

MR. JONES: ... all the information that would not be -- like, would not be privileged should be provided.

20 MR. STANEK: Mmhmm, no, I understand. ^

MR. JONES: So one of the reports that was provided to us is at F2 and this is for the agenda date June 23rd, 2016.

MR. STANEK: He wasn't on the board.

25 MR. JONES: You're right.

MR. STANEK: Mmhmm.

MR. JONES: There's -- in any event, he won't be able to answer this either way then, but there is some redactions to this document and we would ask for an unredacted version of the document.

MR. STANEK: On what basis?

MR. JONES: Well it's a relevant document.

MR. STANEK: And it was produced.

MR. JONES: Well it was part -- partially produced with information redacted.

MR. STANEK: All right, so you want to know what information was redacted and why?

MR. JONES: Yeah, I would like to know that, but I would also like the unredacted version.

MR. STANEK: I'll give you what information was redacted and why. The balance of the question is refused. ^

MR. JONES:

161. Q. In one of the board meetings, and I think this was either in November or December 2020 or thereabouts, do you recall there being a proposed resolution or resolution directing or authorizing staff to negotiate with the second placed RFP participant?

5 A. Well I don't recall, there was always discussion around what we were going to do if this thing didn't work out, but we also received counsel on such things so I -- I don't recall us giving any direction to go talk to another party.

162. Q. There was a discussion about that?

 A. Yeah, certainly there would have been discussion on what we're going to do next.

163. Q. Right.

10 A. 'Cause there was concern for the solvency of the operation that was currently in contract with us. So we always talk about how we're going to mitigate, move forward and the rest of it, so that's a fair discussion. Action though on the other hand,
15 it would only happen if it was appropriate.

164. Q. And was there any communication with any other potential replacement tenants?

 A. Timing of that I'm not aware of, but I believe at some point there may have some -- some
20 discussion but I think it was much later in the process than the time you described, I'm not sure.

165. Q. Are you -- are you talking about internal discussions or are you talking about external discussions with a third party?

25 A. I wasn't party to them so I don't -- I --

I don't know, but I'm thinking if there was a discussion it was much later in the process than you described.

5 166. Q. Okay, now are you aware of whether there was any discussion with the potential replacement tenant at any point in time?

 A. There may have been a question of interest.

10 167. Q. What does that mean?

 A. It means that maybe are you interested in -- in bidding again, that sort of thing.

168. Q. Okay, and when -- when was that and ...

 A. I don't know.

15 169. Q. ... to who?

 A. But I'd say I'm just -- you're asking me about something that I do recall, but I also recall receiving advice and we were very careful about such action.

20 MR. JONES: Okay, so I would like to know when and who -- who was approached about interest as a replacement tenant, is that something that you'd be able to determine?

 MR. STANEK: Well it was on the advice of counsel right, everything with -- he just told
25 you that everything was contained within

solicitor client communications.

MR. JONES: Okay, and then -- but somebody approached a third party and asked them whether or not they might be interested?

MR. STANEK: I don't think that's what he said. He said he was ...

MR. JONES:

170. Q. Well that's what I'm trying to ask.

That's all -- that's what I want to know.

A. Yeah, so there was discussion about what we were going to do next, there's no question about that.

171. Q. So did anybody ever approach a third party and ask whether there was interest?

A. I am aware that there was a discussion, I don't know what it was.

MR. JONES: Okay, so that -- that's what I'm asking. Can you determine when that was -- when that discussion happened and who was involved in that discussion?

MR. STANEK: Mmhmm, okay so when discussion happened.

MR. JONES: Who was involved and the particulars of the discussion. I mean, if there's like, a -- if it was done in writing to

provide us with copies of the ...

MR. STANEK: I assume it was all privileged so we wouldn't have -- be able to give you the writing if there was any.

MR. JONES: It would be privileged communication with the third party?

MR. STANEK: Well, look, he said there was a discussion, he didn't say there was communication with a third party.

MR. JONES:

172. Q. No I thought that -- I'm sorry if anything's unclear, I'm asking whether there was anybody approached a third party?

A. As far as I'm aware there was a discussion, but who approached who I don't know.

173. Q. So there was a discussion with a third party?

A. And that's where we're going to give you timing.

MR. JONES: Yeah, that's what I was asking for Counsel.

MR. STANEK: Okay, all right.

A. Yeah.

MR. JONES:

174. Q. And so, do you know if the discussion was

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all verbal or whether it was in writing or --?

A. I don't remember seeing anything in writing.

MR. JONES: So what I'm for is the -- to tell us when the discussion happened, with who, particulars of the discussion, and if there was an exchange of communication then provide us with a copy of whatever written communication there was.

MR. STANEK: Well we're giving an undertaking as to when the discussion with the third party occurred. I'm going to consider and take under advisement all of the rest of that because it occurs to me, and I'll put this on the record, that when there's an insolvency proceeding commenced against your tenant that it's a completely reasonable thing to do to think of who's going to run our Duty Free store. So if it's after the insolvency proceeding I don't see any reason why you need to know any of that, if it's before I recognize it, but I don't think that there was any communications before I think it was all after. ^

MR. JONES: Okay, well if you're going to take the position that it -- that you're not going to

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provide it you'll just let us know that then?

MR. STANEK: That's right.

MR. JONES:

175. Q. Now with respect to the possibility of a
5 replacement tenancy was there any forecasts or
financial analysis done of what might be expected
from a replacement tenant?

A. No.

176. Q. Okay. Now I understand you were not on
10 the board when this RFP process was done, I would
like to know from the board whether it was made aware
of or informed of the addition of Section 18.07 to
the form of the lease before it was signed?

MR. STANEK: You've made specific allegations
15 of Ms. -- about Ms. Costa, who's waiting outside
to be examined. I would suggest that's a better
question for her.

MR. JONES: Well I would -- she can -- I'll
20 get her evidence, but I would like to know from
the board's perspective whether they received
it.

MR. STANEK: Whether they received what?

MR. JONES: Whether they were informed about
the addition of eighteen point oh seven (18.07).

25 MR. STANEK: You can ask her if she informed

the board.

MR. JONES: Okay, well in any event I'm asking him if ...

MR. STANEK: He doesn't know.

MR. JONES: Okay.

MR. STANEK: He wasn't there.

MR. JONES: I'm asking the question to advise from the board's perspective whether it was informed of the addition of eighteen oh seven (1807) and whether there was any explanation given as to ...

MR. STANEK: In the context of a question to Mr. Clutterbuck, that's refused. He wasn't there.

MR. JONES: So whether the board was informed about the addition of eighteen oh seven (1807) and whether there was any explanation given.

MR. STANEK: You can assume that the board was informed about the lease.

MR. JONES: Right, I understand -- I understand there was a form of lease that was part of the RFP process and the ...

MR. STANEK: Right.

MR. JONES: ... form of lease was changed to add section eighteen point oh seven (18.07) and

at the time eighteen point seven (18.07) was ...

MR. STANEK: If you --...

MR. JONES: ... added my question was ...

MR. STANEK: ... if you...

MR. JONES: ... whether or not the board ...

MR. STANEK: ... if you want to give evidence
...

MR. JONES: ... kept ...

MR. STANEK: ... I suggest that you take an
oath and be sworn, if you actually want to ask a
question Ms. Costa's waiting outside.

MR. JONES: Okay, so my question is -- and
I've said my question so I'm not going to repeat
it.

MR. JONES:

177. Q. Do you agree with me the addition of
Section 18.07 ...

MR. STANEK: Don't answer that.

MR. JONES:

178. Q. ... to the lease...

MR. STANEK: Don't answer that.

MR. JONES:

179. Q. ... would be something that the board
should have been made aware of?

MR. STANEK: Don't answer that question.

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Okay, he wasn't on the board at the time.

MR. JONES: I'm just asking based -- there's
noth -- as a board member and as the chairman of
the board if there was an addition to a form
lease that was in the RFP before it was
finalized ...

MR. STANEK: If you'd like to ask him a
question about Section 18.07 with respect to the
time in which he was a board member he can
answer that.

MR. JONES: Okay, well I'm asking whether or
not as a board member you would expect to be
advised of that addition before the lease was
finalized?

MR. STANEK: You want -- go ahead, answer the
question.

A. We would approve the lease agreement,
additions and deletions to the lease agreements occur
through the negotiating process, if it was relevant
we would be discussed -- it would be discussed with
us.

MR. JONES:

180. Q. And in your view is this something that
raises to the level that it should be discussed?

A. In our interpretation I would say that it

was -- from what I'm understanding is we believed it was language that was reasonable considering it didn't create any obligation, at least that's my feeling when I read it.

5 181. Q. And when you read it do you agree with me that it was added to address situations where ...

MR. STANEK: He has no idea as to how it was added or why, he wasn't on the board at the time.

10 MR. JONES: Okay, well in the application of it if the purpose is to address reduction of sales.

MR. STANEK: He cannot speak to it's purpose, he wasn't on the board at the time.

15 MR. JONES: Okay, well how it was applied in this particular situation?

MR. STANEK: How it was applied, you can ask him that.

MR. JONES:

20 182. Q. Right, so do agree with me that it addresses a situation where sales are affected by changes in government regulation?

A. When we say 'it' are we talking about the clause?

25 183. Q. Right, eighteen oh seven (1807).

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A. And the obligations of the clause, is that what you're asking me?

184. Q. So I'm asking, the clause is there, it's engaged when sales are affected by changes and regulations that are government made?

MR. STANEK: You're asking him to interpret the clause.

MR. JONES: Well how it was interpreted, right?

A. Yeah, and we interpret it to be that, yes, we should enter in to discussion but not obligated to make a change to the terms of the agreement.

MR. JONES:

185. Q. Okay, so based on this way that you interpreted it is -- you entered into discussions and what were the substance of those discussions?

A. Between the Peace Bridge Management and Peace Bridge Duty Free, we entered into discussions in terms of rent deferral immediately, which you were already aware of.

186. Q. Yeah.

A. And then we couldn't come to an agreement as to how we proceed, so it wasn't for some time after that that I understood that you were taking the position that that particular clause was an

obligation on behalf of the Peace Bridge Authority.

187. Q. Okay. So if I can summarize what I think you told me. So eighteen oh seven (1807) leads to discussions between the Authority and Peace Bridge Duty Free, those discussions involve the initial rent deferral agreement?

A. Mmhmm, yes.

188. Q. And then there's a second rent deferral agreement offer and there's some dispute as to whether or not that was agreed to or not?

A. Right.

189. Q. But that was part of it as well?

A. The second rent deferral, okay if -- I just want to make sure that I understand what you're referring to there?

MR. STANEK: He's referring to a document that was not signed by the Authority.

A. I see, I see.

MR. JONES:

190. Q. So are you familiar with -- I'll back up then if, do you know what I'm talking about?

MR. STANEK: No, he has no idea what you're talking about.

A. No, I don't.

MR. JONES:

191. Q. Okay, so there was the initial rent deferral agreement and there was a second rent deferral agreement, and I'm happy to take you to it.

MR. STANEK: No, there wasn't, there's a document attached to Mr. Pearce's Affidavit that he says is a second rent deferral agreement, this is signed by -- it's signed by him and no one else. And you're calling it a second rent deferral agreement.

MR. JONES: It's a form of agreement, what would you like ...

MR. STANEK: It's -- it's an exhibit to his Affidavit is all it is, and I'll cross-examine Mr. Pearce on it, don't worry.

MR. JONES: Okay, I just want to make sure that we all know what I'm talking about here. So it's at 'C'.

MR. STANEK: All right. This is the one you're talking about, rent deferral, it's exhibit 'C' to his Affidavit of December 12th, 2021, is that right?

MR. JONES: Well so let me just -- I'll take you to, it's at 'C' twenty-five (C25) of the disclosure brief, and ...

MR. STANEK: Okay, well I'll have to put it to

him.

MR. JONES: ... I think you would have
received it as an email from Ron Rienas.

A. Sorry.

MR. STANEK: It's okay.

MR. JONES:

192. Q. And if you flip the page the agreement is
attached to the email and I believe that one is
signed by -- on behalf of the Peace Bridge Duty Free.

A. So what is your question, sir?

193. Q. So my question there was, you remember I
asked you about the first rent deferral agreement was
part of the discussion under eighteen point oh seven
(18.07) and I was asking whether this one would have
-- as well was part of the discussion under eighteen
oh seven (1807)?

A. I think we were all looking for a path
forward, so would assume that this would be
discussions around the situation that we all were
aware of took place, yes.

194. Q. And then there was some subsequent of --
rent abatement offer that was made and that was also
part of the discussion under eighteen oh seven
(1807)?

A. Yeah, I mean from what I can see we were

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looking for a solution to an impasse, and we went from rent deferral to rent abatement, all the while arguing that full rent was due and owed, we were looking a path forward. So if -- if eighteen oh seven (1807) is the only clause that refers to having those dialogues would you do it as good business partners, one or the other, we're looking for a path forward and under no obligation as I could see it from eighteen oh seven (1807) to forgive rent.

195. Q. And then so this email that you just looked at 'C' twenty-five (C25) of the disclosure brief that seems to have been sent in -- on November 19th, 2020 in advance of the November 20th, 2020 board meeting, do you agree with me there?

A. Yeah, I agree.

196. Q. And the staff is recommending that this agreement be approved?

A. It looks like it in that email for sure, I don't recall the details. 2020 Ken was a chair, was I present at the meet -- well you don't have the minutes there. I'm pretty sure I was present, I don't think I missed any meeting to be honest with you.

197. Q. Yeah, you're on the ...

A. We would have been holding those by -- by

video conference. But so yeah, that would have been on the agenda, it would have been, as I had stated before, there were other recommendations that come before us we discuss them and take a course of action.

198. Q. Yeah, and so this one, my question is, so in November 20th, 2020 there's this signed -- there's this offer that's been made to Duty Free, or Peace Bridge Duty Free, Peace Bridge Duty Free has signed it back and the staff was bringing it to the board for approval to sign off on, and that agreement says that all rent is going to be deferred until March 31st, that's what the email says?

A. Mmhmm.

199. Q. And help me out with what happened at that meeting because instead of rent being deferred to March 31st, there's a demand that the tenant pay a million dollars (\$1 000 000.00) within a very short period of time, even though there's no sales or revenue to pay that million dollars (\$1,000,000.00)?

A. Right.

200. Q. And all rent deferred -- deferral seems to be off the table?

A. Right, right.

201. Q. So what ...

A. Yeah ...

202. Q. ... -- what happened?

A. The only thing I can tell you is I think something happened between the sending of that email and the board meeting the next day that might have given -- likely gave the board the sense that it wasn't being treated as other creditors are being treated and it might of had something to do with providing certain financial information to us. And I think -- and then I think Karen will know more detail, but there's definitely a change between that email being sent and what occurred the next day, and that may be coincident with something that you pro -- your client provided, I'm thinking that's what occurred. But again this is two year old memory, but I believe that's what occurred. I'd forgotten about the agreement so that tell you how much I remember about the situation.

203. Q. A lot has happened ...

A. Yeah.

204. Q. ... in the mean time.

A. Yeah.

205. Q. Would you be able to tell us what happened to cause the board to take such a one-eighty (180) position?

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A. Well I could look at the minutes and figure out whether I can determine what occurred.

206. Q. Okay, if you could do that?

A. Yeah.

MR. STANEK: We -- we'll give you that undertaking. ^

MR. JONES:

207. Q. So it's in the meeting in either November or December 2020 that caused the ...

A. Yeah.

208. Q. ... one-eighty (180).

A. Okay.

209. Q. Now these board meetings were held by Zoom or some sort of video?

A. Yeah. Yeah, yeah. It was definitely one of those platforms, I just can't tell you honestly, I don't remember which one.

210. Q. Were they -- were the meetings recorded?

A. Recorded I'm not sure if they record those meetings, I actually ...

MR. STANEK: I don't know the answer to that.

A. I believe we do.

MR. JONES:

211. Q. Okay.

A. I'll be honest.

212. Q. So ...

A. Now the executive section may not be recorded but the open session I believe is recorded.

213. Q. Okay. So if these -- any of the meeting between January 2020 and December 2021 were recorded, either the normal or the executive session, can you please provide us with copies of those recordings?

MR. STANEK: Well we've had a discussion of the minutes, I don't see the relevance of the recordings, and I'm going to investigate to see if they're publically available if they're recorded, if they're not I'm not going to produce them.

MR. JONES: Okay so, you're not going to produce either of the normal or executive minutes?

MR. STANEK: Right, well no, no minutes we ...

MR. JONES: I'm sorry.

MR. STANEK: ... we discussed the minutes.

MR. JONES: Yeah sorry, I misspoke, the recordings?

MR. STANEK: Right. I don't know that they exist, I don't know if they're able to be produced, I don't -- I don't know any of those things and I don't think you need them. You're -

— we've discussed what you can get out of the minutes.

MR. JONES:

214. Q. If -- you said something about whether
5 there are already publically available, do you know
if they are publically available can you direct us to
where they're ...

A. I didn't say that actually.

215. Q. Okay.

10 A. I think Mr. Stanek said ...

MR. STANEK: I said that, I said I don't know
if they are.

MR. JONES: Okay, well if they are you'll
direct us to where we can ...

15 MR. STANEK: Certainly, you're going to see my
face on some of them if you see the recordings,
you'll see other lawyers on them so, you know,
there's -- they have the same issues that the
minutes would have and I don't think that
20 producing the recordings solves anything, in
fact creates more problems and I don't think you
need them.

MR. JONES: Okay so, anyway you have our
question.

25 MR. STANEK: Yeah.

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MR. JONES: And...

MR. STANEK: And I refused it.

MR. JONES: Yeah, and if they are publically
available you'll undertake to direct us where
they're available?

MR. STANEK: Sure. I'd be surprised if they
were but --. ^

A. Who knows.

MR. JONES:

216. Q. So for those November 20th and December 17th
board meetings 2020, you'll tell us whether or not
there was a lawyer present?

MR. STANEK: Yes, November 20th and December
17th meetings. ^

A. Yes.

MR. STANEK: Well there's certainly lawyers on
the board, you're talking about external
counsel?

MR. JONES: I mean, yeah, a lawyer who's
representing the Authority.

MR. JONES:

217. Q. Can you tell me whether or not in the
course of the board meetings or interaction with
staff from the outset of covid onward there was any
specific discussion of -- with respect to Section

18.07?

5 A. I don't recall a discussion on that topic
until -- I'm not sure if it's when we saw it as a
disclosure to the 2021 financials, I -- I -- I try to
-- it seems to me it was late in the process when we
recognized this language was somewhat in discussion
or let's say, had differences of opinion. So again,
we were acting sort of in a -- as we did with the
other Duty Free in a way to move forward. The other
10 Duty Free continued to stay open and continued to
cooperate and pay rent, we weren't getting the same
sort of support with Peace Bridge Duty Free so the
task diverged.

218. Q. So just in terms of your comment about it
15 was raised late in the process, I just want to take
you to -- so for example, and I think it was raised
in other places, but here's an email from Greg O'Hara
to Ron Rienas dated April 3rd, and it's at Tab 'C'
four of the disclosure brief ...

20 MR. STANEK: Is Mr. Clutterbuck on that email?

A. What year?

MR. JONES: No.

MR. STANEK: He's not, okay then don't put it
to him.

25 MR. JONES: Well in fairness, Counsel, I would

like to ...

MR. STANEK: In fairness?

MR. JONES: I would li -- I would like to take
him to a letter that was sent by the board in
response to the email to Mr. Rienas.

MR. STANEK: And what was the date of that?

MR. JONES: Or sorry, the -- actually even
better, I can take you to Tab 'C' three. So 'C'
three there's an email from Ron Rienas to the
board.

MR. STANEK: Okay.

MR. JONES: And it encloses a letter dated
April 3rd to the board ...

MR. STANEK: April 3rd of what year?

A. What year?

MR. JONES: 2020, it says right on the
outside. And so I'm going to take your
attention to 'C' three, which is the email and
then 'C' five.

MR. STANEK: All right.

MR. JONES:

A. Okay, so this is again, let me just read
that highlighted area, a recession does not excuse
the tenant -- "this section does not excuse the
tenant from paying rent, there is a -- if there is

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going to be rent deferral or temporary reduction for the rent payment this need to be negotiated and agreed upon." So in fact ...

MR. STANEK: Maybe you want to take him to that letter?

MR. JONES:

219. Q. Right and so ...

A. It -- yeah, I think I get it.

220. Q. ... there's that email and then there's a response from the board to --.

A. Okay, yeah. Yeah.

221. Q. And so what's the board saying in that letter when it says, "Discussions with Authority management related to how obligations can continue to be fulfilled while recognizing the present circumstances"?

A. Yeah, yeah.

222. Q. What does that mean?

A. It mean we're going to agree to a rent deferral arrangement, not a rent relief or abatement. We -- I mean in that context I wouldn't -- wouldn't even think there was a dispute on eighteen oh seven (1807) so it was a clause that was just a number to me. When I became aware it was a dispute was much later in the process and that's why I guess it really

didn't raise its head to me as an issue until much later in the process, but that particular series of documents says what we did.

223. Q. Okay, so the eighteen oh seven (1807) was raised and in response they say we're going to direct management to deal with it ...

A. Yeah.

224. Q. ... correctly and ...

A. Which I think is what it...

225. Q. ... this was the rent ...

A. Yeah. I think ...

226. Q. ... deferral arrangement?

A. I mean, in my not perfect recollection but at least those documents do jog me to think that we're looking for solutions.

227. Q. Okay, and there was a reference here, he says further to the COVID-19 update circulated today, what was that? He's sending this email further to a -- something that was circulated earlier that day?

A. Yeah I don't know, I don't know what that would be specifically.

228. Q. Okay.

A. Again we're talking three years ago.

MR. JONES: Okay, can we have an undertaking to ...

MR. STANEK: No you're cross-examining Mr.

Rienas next week you can ask him.

MR. JONES:

229. Q. Okay, and am I right this would have been
5 the first communication that the board received about
rental issues for the Duty Free stores?

A. It would have been the first communication
for Peace Bridge Duty Free likely, it was March 20th I
10 think it shut down and that was like two weeks later,
so I think that's correct.

230. Q. Just a few more questions, or do you want
— sorry, do you want to a quick break.

A. I'm good.

MR. STANEK: You'll be ...

15 MR. JONES: Yeah, let's take a five minute
break ...

MR. STANEK: Sure.

MR. JONES: ... if that's okay with everybody?

COURT REPORTER: Off record.

20 **OFF THE RECORD**

MR. JONES:

231. Q. We've been provided at Tab 'C' three a
copy of the executives' section minutes from April
24th, 2020 and this has to do with the first rent
25 deferral agreement that took place. And at the --

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5 near the end of the minutes it says a discussion took
place around an email that was received from Peace
Bridge Duty Free that they did not feel the agreement
would work for them so they asked the board consider
additional offers, the board directed the general
manager to advise the Peace Bridge Duty Free that
although the board approved the original agreement as
submitted they would be open to additional
conversations as the situation develops. Do you
10 remember anything about that conversation at the
meeting?

A. Nothing more specific than what it
described there.

232. Q. Okay, and was -- in terms of the board
15 being open to additional conversations as the
situation developed, was the board open to a
percentage rent arrangement or ...

A. That part ...

233. Q. ... there was no dis ...

20 A. ... wasn't discussed, I think it was more
about we're open to options if you've got some other
thoughts, like -- and that's the way I would recall
that sort of situation, again remember we're one
month after the store has closed, thinking you're
25 going to reopen and just moving down a path like we

did with the other folks. So nothing more than that,
no -- I can't say of any detail that I can recall.

234. Q. Right, okay. So obviously as these things
progressed it's taking in to account the information
available at the time and how long the covid ...

A. Yeah.

235. Q. ... situation was going to last, and is it
fair to say that in the early days it wasn't expected
that it would be a pandemic that would last for
roughly two years?

A. Yeah, I -- I mean it's pretty fair to say
that, right?

236. Q. Or however long it's lasted?

A. It's pretty fair, I mean our first
agreement was 'til July 31st I think, so maybe we were
hoping. At lease if the pandemic was going to take a
different course that the structures would -- the --
the regulations would open the bridge a little bit
more freely.

237. Q. Okay, and you'd agree with me a reasonable
approach if the restrictions last for longer whatever
consideration is given to address the change in
regulations would last longer as well?

A. Yeah, we -- again, deferral was always on
the table.

238. Q. Okay, and would you agree with me that, you know, the extent of the adverse impact on the business would influence what's reasonable in terms of the level of consideration given in response to a change in regulatory rules?

A. I think in the subsequent offers made by the Peace Bridge we did recognize that there was an offer for abatement, so, you know, what you're saying I would say is fair to say.

239. Q. Yeah.

A. The level of it I guess is what you have to really determine.

240. Q. Right, so it's a matter of degree, like a small impact on business it would be reasonable for a small response, bigger impact reasonably requires a larger response?

MR. STANEK: I mean, on both businesses, right?

MR. JONES: I'm asking about with respect to ...

MR. STANEK: You're only talking about one business?

MR. JONES: ... this lease. No, I'm just asking about the lease.

MR. STANEK: Okay.

MR. JONES: The response to the lease.

MR. STANEK: Well, I mean, they both --
there's two sides to the lease, right?

MR. JONES: Counsel, I don't think it's a
trick question.

MR. STANEK: Well I just was wondering.

MR. JONES:

241. Q. Like, it's reasonable that ...

A. Yeah, I don't think there was anything
unreasonable about what we offered, let's put it that
way.

242. Q. Okay, and so did you answer my question
about ...

A. I think so. You asked about
reasonableness and I told you what I thought was
reasonable.

243. Q. Yeah, okay.

A. What we offered.

244. Q. Okay, fair, yeah.

A. Yeah.

245. Q. Now in terms of what happened in November
and December 2020, would you say it's reasonable to
go from the Authority telling -- or offering the
Peace Bridge Duty Free to defer rent until March 31st,
2021 and instead demand payment of a million dollars

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(\$1,000,000.00) by December 31st, and regular rent going forward?

5 A. Yeah, I think we talked about looking up the reasons to making a change to where we were in the one meeting, I can't remember the date. But certainly there was information made available to use by the Peace Bridge Duty Free that had us thinking there was an opportunity for us to receive similar recognition to some other creditors, so we thought that that was reasonable at the time. So at the time that's where we went.

246. Q. What exactly was it that ...

15 A. Well I think there was financials that showed cash position, that's a healthy cash position. Healthier than perhaps you recall, but in our minds healthy enough to support that sort of repayment for an obligation that I think was recognized on the year end statements, I can't remember the amount though. It might have been five million (5,000,000.00) or something, four million (4,000,000.00) or I don't remember the number.

20 247. Q. So you're saying that something changed from Dec ...

 A. We had information.

25 248. Q. ... November 19th to November 20th?

A. I don't know the exact date of the information, it may have been -- when was the meeting that you asked me about earlier?

MR. STANEK: November 20th.

MR. JONES:

249. Q. November 20th.

A. Yeah, okay. So then I think that you might want to check when financials were provided.

250. Q. But it -- they knew that -- sorry, the Authority knew that there was the store was not open and there was no sales being generated?

A. I'm just telling you why I think there may have been a change of heart, all right so that's -- that's all I can tell you. We definitely knew the store wasn't open, we kept promoting that it be opened.

251. Q. But it was never a condition of any of these offers, like the offer that you just reviewed.

MR. STANEK: It was a condition of the lease.

A. Yeah, it was twenty-four seven (24/7) open.

MR. JONES:

252. Q. Sorry, the offer that you were -- you just looked at from November 2020, it wasn't a condition that the store open to ...

A. I don't think that offer overrides the lease.

253. Q. Well in fair ...

MR. STANEK: In fact I think it specifically says that all other terms of the lease survive.

MR. JONES:

254. Q. Well knowing that the business was closed, the Authority entered in to the first rent deferral agreement, and the Authority did not say that the first rent deferral agreement is not binding because you're not open. They never said that.

A. This is true, I believe that's true.

255. Q. So ...

A. And that -- and that agreement came pretty early on and there was strong promotion to open which didn't occur, even after I think we shared with them that many other Duty Freees on similar structures were open. So ...

256. Q. So are you saying that that is the reason -- is that part of the reason that they million dollars (\$1,000,000.00) was ...

A. We were getting no rent so that was different situation that we were experiencing with our other contract.

257. Q. Well in fair -- just to correct you

there...

A. The -- the extra rent?

258. Q. ... 'cause I think you might have misspoken. Yeah.

5 A. Yeah, fair enough.

259. Q. The Authority was receiving the additional rent and it was receiving the government subsidy money?

A. Right.

10 260. Q. So ...

A. The government subsidy money I think was quite actually delayed if I remember correctly. I'm not sure at that point in time how far down the path you were, but I know that there was significant delays with respect to the different tranches of that. It was well in to 2021 before I think we saw more action, as a matter of fact it was mid 2021 if I remember correctly where we saw period three. I may be wrong but I -- I mean, that's something again, that's all facts, you could figure it out. So that -- I mean you're -- you're looking for, kind of, what was happening at the time and that's what was happening at the time.

20 261. Q. Right, but the -- you're not suggesting to me that the November agreement wasn't signed because

the store wasn't open?

5 A. I'm saying that may be and ex -- a part of the factors. I mean, there was no -- I mean, again, I told you that I'll look at the minutes and try and determine why it wasn't signed but I -- to -- in my mind you -- you're asking questions about things that occurred in a period of time, which is fair enough. And my thinking is I've got to try and transport it to that time, what did I see at that time, I described to you what we saw at that time.

10 262. Q. Okay. Would you at least agree with me that it's odd or it's unusual that a landlord would propose an extension of rent deferral to March 31st of the following year and instead of proceeding with that agreement demand immediate payment?

15 A. And as you find things out that are different than what you understood when you made an offer, it's totally normal to change that position. I don't think that's abnormal. I mean, in a business context we were suffering as well so I don't ...

20 263. Q. Okay, and you'll tell me what it is that changed the position?

A. Yeah, I'll have to look at that and see what it was, yeah. ^

25 264. Q. Okay. Now so you're aware that in late

2021 the Authority essentially told Peace Bridge Duty Free it's going to proceed with enforcing the lease?

A. Yes.

265. Q. And that meant lease termination?

A. Yes, through the defaults that we listed.

266. Q. Okay, and so that was conveyed to -- at least there's an email from Ron Rienas to Greg O'Hara on November 26th, 2021 saying in response to your letter in November -- November 16, 2021 "The board of the Buffalo and Fort Erie Public Bridge Authority has reviewed and discussed it in detail and does not accept your counter proposal, we intend to exercise our default remedies under the provisions of the lease." So as I understand there was an offer made, or a proposal made by the Peace Bridge Duty Free that was not accepted by the board?

A. Mmhmm.

267. Q. That would have been considered at a board meeting?

A. Correct.

268. Q. In November 2021, and then the direction was given to the staff that the board -- that the board is directing them to enforce the lease and terminate the lease agreement?

A. Correct.

269. Q. And at that point in time the Authority was aware that there was a moratorium on evictions in Ontario?

5 A. There was a moratorium on evictions for those who were service compliant, and whether you were or weren't service compliant I don't think we would have been able to had you been service compliant, well not you but your client, I'm sorry. So when it was available to terminate the lease
10 legally we would have received counsel on that and we would have acted under those circumstances.

270. Q. So at that point, when that direction was given it was the Authorities's view that it had the right to ...

15 A. Yeah.

271. Q. ... terminate the lease?

A. Yeah, that would be -- there's no other way to do it, if we didn't have the right than we probably wouldn't have given that direction so --.

20 272. Q. And at that point was the board aware -- or the Authority aware that the moratorium extended to April 2022?

25 A. We would have been aware but there must have been circumstances, I mean, perhaps it was the solvency issue. I don't know I -- I can't recall. I

can't recall.

273. Q. Okay, well you'd agree with me that whatever basis it was it was a monetary issue that was leading to the intention to terminate the lease?

5 A. Our positions were clearly opposed, quite different, in other words you're looking -- your client was look for full rent abatement and a much different go forward situation, and the Peace Bridge Authority felt that it had a right to some past rent, 10 they made an offer to that and those positions were maintained through a period of transfers back and forth, nothing much changing so it seemed like a stalemate, and at that point we -- we moved to terminate.

15 274. Q. All right. So if I can paraphrase, that was basically we haven't come to an agreement now and we're proceeding with lease termination ending these negotiations that are not going anywhere?

20 A. There's probably in the course of a discussion fifteen (15) points supporting that decision, so whether that's just the point that you're making or a number of other things, the dialogue was fluid.

25 275. Q. Okay, and when you said that the Authority had made an offer for some sort of rent abatement and

the Peace Bridge store had made an offer for what it wanted the rent abatement to be, and so is it fair to say basically, you know, the two sides were putting their position of what the appropriate rent abatement solution would be for their own perspective under eighteen oh seven (1807) and it just -- they didn't align?

A. It would be a fair statement and I guess on top of that we would -- we had seen no movement. So it's not like we made one offer and then said okay, you're going to terminate.

276. Q. Right.

A. There's just been no movement.

277. Q. So it just didn't come to an agreement?

A. Right.

278. Q. Okay.

MR. STANEK: No, he said that there was no movement.

MR. JONES: Right, so there's no movement and it didn't result in an agreement.

A. Mmhmm.

MR. JONES: I think ...

MR. STANEK: We meant no movement from your client.

MR. JONES:

279. Q. Okay, was there movement from the Authority?

5 A. Certainly, I mean our position moved to a substantial rent abatement from a hundred percent (100%) rent repayment. That's a fairly substantial move, also scheduled in a change in the base rent over a four years or five years subsequent and something to do with -- I can't remember what it had to do with the food services, but -- but and thinking
10 of the board is we'd come a long way from a hundred percent (100%) rent deferral of the base and so -- but we didn't see anything like that, it was just no we're not going to pay any past rent.

15 280. Q. And now it's the position that full rent is ...

A. Well no agreement was signed, these things were, I'm sure, passed in some sort of prej -- without prejudice status but no agreement was reached so we still have an agreement.

20 281. Q. Is there a formal document setting out what Authority the staff has to operate?

A. You asked me that earlier.

282. Q. Did I?

A. I think you did, yeah.

25 283. Q. Okay, I apologize.

A. No problem.

284. Q. And your answer was no?

A. My answer was I'm not aware of one.

285. Q. Okay. Okay, well thank you very much.

A. Thank you.

286. Q. Subject to the answers to undertakings and those under advisements and refusals those are my questions for today.

EXAMINATION CONCLUDED AT 1:19 P.M.

* * * * *

5 **THIS IS TO CERTIFY** that the foregoing is a
true and accurate transcription from the
recordings made by sound recording apparatus
to the best of my skill and ability.

E. M. McKee

10 -----
Penfound's Inc.

Transcript Ordered: May 31, 2023

Transcript Completed: June 5, 2023

15 Parties Notified: June 5, 2023

20 *The signature in coloured ink appearing at the end of this
transcript denotes that the contents have been certified as
correct by Elaine M. McKee, Penfound's Inc. A transcript
appearing with a signature in black ink or without a
signature is an unauthorized copy of the original and may
not be used for any purpose.*

TAB 6

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

* * * * *

EXAMINATION FOR DISCOVERY

of **KAREN COSTA**, a non-party witness, herein,
at the office of Penfound's Inc.,
at St. Catharines, Ontario,
held on Tuesday, the 30th day of May, 2023,
at ten o'clock in the forenoon,
pursuant to an appointment.

* * * * *

APPEARANCES :

Mr. Brendan Jones Counsel for the Respondent
(Blaney McMurtry LLP)

Mr. Christopher Stanek Counsel for the Buffalo and
(Gowling WLG) Fort Erie Public Bridge Authority

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(i)

ONTARIO
SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

EXAMINATION BY MR. JONES 1 - 125

RE-EXAMINATION BY MR. STANEK 125 - 132

* * * * *

EXHIBIT NUMBER: PUT IN AT PAGE:

- | | | |
|----|----------------------------------------------------------------------------------------------|-----|
| 1. | The email from Ron Rienas to the board of directors, dated December 17 th , 2020; | 62 |
| 2. | Ms. Costa's April 27 th , 2021 email with attachments; | 71 |
| 3. | The email from Ms. Costa to Mr. Rienas dated March 1 st , 2021. | 132 |

* * * * *

UNDERTAKINGS REQUESTED: FOUND AT PAGE:

- | | | |
|----|-------------------------------------------------------------------------------------------------------------------------|----|
| 1. | To provide a copy of the second place RFP proposal; REFUSED | 12 |
| 2. | To advise whether any other leases, including the US Duty Free store, contain a Section 18.07 clause; REFUSED | 15 |
| 3. | To review and provide any notes of a meeting between Ms. Costa and Mr. Rienas on or about July 19 th , 2019; | 36 |
| 4. | To provide the operating statement and balance sheets beginning in January 2020 until December 2021; REFUSED | 76 |

(ii)

UNDERTAKINGS REQUESTED:**FOUND AT PAGE:**

5. To advise what was redacted, and the reason for the redaction, in the January 19th, 2021 email from Ms. Costa to Mr. Rienas.

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* * * * *

positions?

9. Q. The positions is fine.

5 A. Okay, 'cause they've -- some people have retired in between then. I have a controller who reports to me, two cash auditors who report to me, a payroll specialist/HR person who directly reports to me, and then there are two accounting clerks that report to the controller, but indirectly report to me.

10 10. Q. Okay. And then so you report to Ron Rienas and then is the structure above Ron Rienas is the board of directors?

A. The board of directors, yes.

15 11. Q. Are you aware of any document that sets out what authority the Peace Bridge Authority staff have in running the operations?

A. There's bylaws that state certain positions, but that's --...

12. Q. Okay, there --.

20 A. ... it doesn't cover every position.

13. Q. Okay, just the bylaws, there's no other agreement or anything like that?

A. No. There's an org chart.

25 14. Q. Okay. And what does -- so you're the CFO, and can you just give me a summary of what your role

encompasses?

A. Sure. I'm responsible for all financial aspects of the Authority.

15. Q. Okay. And you're based out of the United States?

A. No, I'm based in Canada. I am a US employee, but our office is at One Hundred (100) Queen Street in Fort Erie, that's where I report to work.

16. Q. Okay, so you live in the US but you ...

A. Yeah, mmhmm.

17. Q. ... come to Canada to work. Okay, understood. Now, what is your involvement in terms of dealing with leases for the Authority's tenants?

A. So I -- I deal with whether they pay or they don't pay, I have had dir -- I have direct involvement in many of the leases.

18. Q. When you say many of the leases, there's the -- our client ...

A. There -- there's the Peace Bridge Duty Free we have on the US side, general services administration, which is the US government, so I can -- I've discussed their lease with them. We have brokers and tenants, other tenants like -- what would you call that? Like custom brokers.

19. Q. Yeah?

A. So we have brokerage tenants.

20. Q. Okay. And they have leases as well?

A. Mmhmm.

21. Q. And then the two Duty Free stores.

A. Yeah, there's a US Duty Free store as well.

22. Q. Now, the Peace Bridge Duty Free Inc., the tenant on the Canadian side, Duty Free store tenant, you're aware that it operated there for -- since the 1980s?

A. Yes.

23. Q. And are you aware of any issues with that tenancy prior to COVID-19?

A. None to my knowledge.

24. Q. You would agree with me it was a good operator?

A. I don't judge their operations, but the fact that they paid their rent on time, sure.

25. Q. They didn't have any issues with their landlord?

A. None that I'm aware of.

26. Q. Okay. And no defaults up until March 2020?

A. None that I'm aware of.

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27. Q. Okay. And you'd agree with me that what changed after 2020 -- March 2020 was the onset of COVID-19?

5 A. I agree that that -- well yeah, that was a big change in the world, sure.

28. Q. Okay. And would you agree with me that is the cause of the issues between the tenant and the landlord here?

A. I would say that's a fair statement.

10 29. Q. And you were involved in the RFP process in 2016?

A. Correct.

15 30. Q. And would you agree with me that the rents payable under these Duty Free store leases are higher because the operators are essentially paying for the right to be the sole Duty Free store in the immediate area and have access to all those sales of people crossing over the bridge?

20 A. I don't know if that makes their rent higher, the terms of what you're asking. Are you talking about all Duty Free stores across Canada?

31. Q. Well, in particular this one.

A. This one.

32. Q. Right?

25 A. So you're asking me why they --?

33. Q. They're paying for the right to be able to have the exclusive ability to sell Duty Free products to people crossing over the Peace Bridge.

MR. STANEK: Paying whom?

MR. JONES: Paying the Authority rent.

MR. STANEK: Paying rent. When they pay rent they're paying rent.

MR. JONES: Right. And so my question ...

MR. STANEK: They're leasing premises.

MR. JONES:

34. Q. Right, my question is would you agree with me that the reason that the rent is high is because what they're effectively paying for is the right to be the one to -- the only one to sell Duty Free products to people crossing over the Peace Bridge.

A. Their rent is high because that's the rent that they proposed in the RFP process. Why it's high or not, I -- I have no idea. They pay rent to -- to lease the premises, that lease allows them to have a licence to run a Duty Free store.

35. Q. Right, so you would agree with me that the ability to run a Duty Free store and sell Duty Free products to the -- 'cause they can only -- you agree with me they can only sell Duty Free products to travellers coming over the bridge that are eligible

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to buy Duty Free products.

A. In the Duty Free regulations there are stipulations of how or where a Duty Free store can be operated, yes.

5 36. Q. Right, so you agree with me on that point.

A. Yes.

10 37. Q. And so you'd agree with me that when the RFP process was happening and when bidders were bidding on what they would pay for this lease, what they were prepared to bid was influenced by the expected sales to -- the expected Duty Free sales of people crossing over the border.

15 A. I can't speculate what they -- why, what or how they based their rent, that was a de -- that's up to every bidder how they determine what level of rent they were gonna offer.

 38. Q. Would that surprise you if that was the basis?

20 A. I'm sure it was probably something that was considered.

 39. Q. Are you aware of anything else that would be considered?

25 A. I don't operate a Duty Free store, so I don't know what other things would be considered in determining what level of rent I would pay.

40. Q. Okay. You were involved in putting together the RFP documents?

A. Yes.

41. Q. And one of the things that was provided to bidders was the historic traffic and sales over the bridge?

A. I believe we provided historic traffic, I -- I don't recall whether sales of Duty Free store sales were included.

42. Q. In any event, would you agree with me that the Authority, all things being equal, is able to charge more rent because they're able to give the tenant that ability to sell Duty Free products to people crossing the bridge, ...

A. No.

43. Q. ... who otherwise --. You don't agree with me?

A. I don't agree with you because the -- the level of rent that your client is paying us was proposed by them. It's not the Authority charging them rent, that was what their proposal was to the RFP, was their base rent.

44. Q. So you don't think the -- by virtue ...

A. I don't pretend to ...

45. Q. ... of the fact ...

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A. ... know what's in their --...

46. Q. No, but I'm ...

A. ... how they calculate ...

47. Q. ... saying by virtue of the fact that
5 having this lease enables them to sell Duty Free
products that derives a benefit to the Authority in
the ability to receive higher rents. Like, I don't -
- you disagree with that?

10 A. I don't know what higher -- higher rent
relative to what, I guess is what I'm struggling
with. When you keep saying higher rent, higher rent
relative to what?

48. Q. Higher rent relative to a lease that would
not enable a tenant to sell Duty Free products.

15 MR. STANEK: Wait a second. Have you got
opinion evidence on that? You're arguing with
this witness, you asked your question, you got
your answer, you don't like it, move on.

MR. JONES: Okay, so the answer is no.

20 MR. JONES:

49. Q. So how many applicants were there to the
RFP process?

25 A. I don't recall off the top of my head, but
I wanna say there was at least six, I don't recall
the exact number.

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50. Q. Okay. And since the onset of COVID-19 has the Authority or anybody on behalf of the Authority contacted any of those applicants about the possibility or interest of becoming a tenant?

5 A. Not to my knowledge.

51. Q. Are you aware of a proposed board resolution that would authorize staff to engage with the second place RFP applicant about the possibility of becoming a tenant?

10 A. I don't recall.

MR. JONES: I'm going to ask for a copy of the second place RFP application.

MR. STANEK: Why?

15 MR. JONES: Well because there seems to have been an indication or a discussion about contacting the second place RFP proposal.

MR. STANEK: You allege that, you have no evidence of it. So we're supposed to do this based on your speculation?

20 MR. JONES:

52. Q. Okay, I'll try to take you to the document. Okay, so I've got a -- I'm going to show you a December 17th, 2020 email from Ron Rienas, it looks like it's to the board of directors and you're copied on it.

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MR. STANEK: Is this in the productions
somewhere?

MR. JONES: Yeah, it was in the USB
productions. So it says, "As discussed at this
5 morning's board meeting, Karen and I had a
conference call with our counsel Gowlings this
evening ...

MR. STANEK: And it recites legal advice.

MR. JONES: Well, it says, "I forwarded
10 Gowlings the resolution that the board approved
this morning."

MR. STANEK: So you repeat solicitor/client
communications.

MR. JONES: Well, the -- the resolution is not
15 solicitor/client communication.

MR. STANEK: Okay.

MR. JONES: So what I'd like to draw your
attention to is the resolution here.

MR. STANEK: "That in the event of default by
20 Peace Bridge Duty Free, and subject to legal
review, staff be authorized to negotiate lease
terms with the second bidder in the June 16,
2016 RFP process," that's what you rely upon to
say that there was contact with the second
25 bidder?

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MR. JONES: Well, I'm -- no, I asked the question whether there was contact with ...

MR. STANEK: Yeah, and she ...

MR. JONES: ... the second ...

5 MR. STANEK: ... said not to her knowledge.

MR. JONES: Right. And Mr. Clutterbuck was here earlier and he said there was contact with somebody.

10 MR. STANEK: He said -- he said there was a discussion about contact.

MR. JONES: No, we had this discussion earlier and that's not what he said, we went back and clarified it several times. He said there was a discussion with a third party, so ...

15 MR. STANEK: You've got an undertaking on that from Mr. Clutterbuck, right?

MR. JONES: I believe so.

MR. STANEK: Right, we'll give you that answer. What do you want to ask this witness?

20 MR. JONES: So what I was asking for is a copy of the second place RFP proposal.

MR. STANEK: No. ^

MR. JONES: Okay.

25 MR. STANEK: That would be, I would think, a violation of the RFP process.

MR. JONES: Counsel, this is within the context of litigation, there's a deemed undertaking, there's other ...

MR. STANEK: Really? What action did your client commence? What -- what proceeding are we in that's covered by the deemed undertaking rule, sir?

MR. JONES: Okay, Counsel, if it needs to be just by Justice Kimmel and we can get a ...

MR. STANEK: You're pretending that there's a lawsuit here when there is not.

MR. JONES: Okay.

MR. JONES:

53. Q. Okay, so you're aware of Section 18.07 of the lease?

A. Yes.

54. Q. Okay. And that section of the lease was not part of the original form of lease that formed part of the RFP proposal?

A. Correct.

55. Q. So it was added afterwards within the thirty (30) day negotiation window?

A. Mhmm. Yes, sorry.

56. Q. Okay. And you agree with me that that's not a standard provision that's in leases?

A. I'm not an expert in leases, there's lots of provisions that are included in leases. I don't know to say whether it's standard or not.

57. Q. Okay, is it in any of the other -- the Authority's other leases?

A. I would have to review every single lease to tell you that answer.

58. Q. Well during COVID-19 did it ever come up with any of the other leases?

A. No.

MR. JONES: So if it is in one of the other leases will you let us know? Otherwise we'll assume it isn't.

MR. STANEK: What -- you're going to make an assumption as to what?

MR. JONES: Well, if that same provision is in other Authority leases let us know other --...

MR. STANEK: No.

MR. JONES: ... otherwise we'll just assume it isn't.

MR. STANEK: We're not going to tell you if it's in somebody else's lease.

MR. JONES: Okay, well I'm suggesting to you it is not. And if I'm wrong you'll let me know?

MR. STANEK: And I cannot think for the life

of me what the legal impact of that assertion
is. You can make that representation --...

MR. JONES: Well --.

MR. STANEK: ... make that representation, but
we're not going to give you the other leases and
you may not assume what's in them.

MR. JONES: Okay. I'm not --. Fine, then can
you undertake to advise me if whether or not the
same clause is in the other leases?

MR. STANEK: Why is that relevant?

MR. JONES: Either you will or you won't.

MR. STANEK: Okay, I won't. ^

MR. JONES: Okay. And just so I'm
understanding, what's the basis for refusing to
tell us whether the other leases have a similar
clause?

MR. STANEK: Those leases aren't at issue in
this proceeding.

MR. JONES: Okay. Well, I think what's an
issue here is this is a specific clause that was
specifically put into this specific lease and
not included in other leases.

MR. STANEK: So?

MR. JONES: So that's all I'm asking to
confirm.

MR. STANEK: I cannot think as to why that makes leases that are not the subject matter of this proceeding relevant.

MR. JONES: Okay, so you're saying it's not relevant.

MR. STANEK: Your client does --.

MR. JONES: Is it then the ...

MR. STANEK: I'm going to put this on the record. Your client does not, by virtue of this order of Justice Kimmel, get to traipse through its competitors' leases, and bids, and all sorts of other things just because it wants to.

MR. JONES:

59. Q. So does the US Duty Free store have a similar provision?

A. I would have to review the entire lease.

60. Q. Okay, could you let us know?

MR. STANEK: Again, I -- do you -- has that lease been produced?

MR. JONES: No, I don't have a copy of it. If -- if it had been, I would look at it myself.

MR. STANEK: Then we're not producing any part of it because we don't have their consent. And I discussed this with you in Mr. Clutterbuck's examination in that when you ask for agreements

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and other things that -- including redacted agreements, I think it's doubtful we'll obtain the consent of third parties to produce things to you that you don't really need.

MR. JONES: Well I understand your position is that we don't need it, we say that we do and that's why we're asking for it.

MR. STANEK: Okay.

MR. JONES:

61. Q. You'd agree with me that the Section 18.07 deals with catastrophic events that would negatively impact the business of the Duty Free store as a result?

MR. STANEK: Should we review the clause?

A. I think I would like to review the clause of the lease.

MR. JONES: Do you have a copy of the lease, Counsel?

MR. STANEK: I'm sure in several places I have a copy of the lease. This is the heading, "Regulatory changes," right?

A. Yes.

MR. STANEK: That's it?

A. Doesn't say anything about catastrophic events. It states, "Regulatory changes in the event

an unanticipated introduction of or a change in any applicable laws causes a material adverse effect on the business operations of the tenant at the leased premises. The landlord agrees to consult with tenant to discuss the impact of such introduction of or change in applicable laws to the lease."

MR. JONES:

62. Q. Right. And so you would agree with me that this clause would be engaged when there's a catastrophic event, and in particular, a change in regulatory ...

MR. STANEK: Those are two questions.

MR. JONES:

63. Q. Okay, would you agree with me that this clause would be engaged where there is a regulatory change that negatively impacts the business?

A. If it was material then I would say that such type of regulatory change, positive or negative if it's material, would then trigger this clause for the tenant and us to have a discussion.

64. Q. Okay, so it applies whether it's positive or negative.

A. That's what -- doesn't distinguish between negative or positive in the lease.

65. Q. Okay, so I guess if it's a positive there

would be some sort of concession from the tenant to the landlord, and if it's negative ...

5 A. It doesn't say -- none of that's assumed, it doesn't say that. It just says there would be discussion, there's no talk of concessions or anything relative to anything ...

66. Q. Okay, isn't it ...

 A. ... that the lease states.

67. Q. ... the obvious implication that it would
10 have some sort of meaning?

 MR. STANEK: I'm sorry?

 MR. JONES:

68. Q. Doesn't -- isn't it obvious that there
15 would have to be some -- something that happened, something happen in the event it's triggered to give it some sort of meaning?

 MR. STANEK: Yeah, the unanticipated introduction of the change in any applicable laws.

20 MR. JONES: Right.

 MR. JONES:

69. Q. Anyway, my question is that to give it
25 some meaning when that happens some -- when the clause is triggered something would flow from that, like, there would be some action.

A. There would be a discussion.

70. Q. And that's it?

A. On the impacts. That's all that's required by the lease. I would speculate to say if anything would result from any type of discussion.

71. Q. Okay. And you'd agree with me that catastrophic changes would engage that section.

A. It doesn't say catastrophic, it says regulatory.

72. Q. I know what it says, but the intention is ...

A. I don't know. I would say no, it's not anything that doesn't have to do with an applicable law. If it was some other type of catastrophic event then I would say no, would not trigger that clause.

73. Q. A change in applicable laws that resulted in a catastrophic impact on the business would engage that.

A. I think just any change in the law that impacts their business in a material way triggers eighteen oh seven (1807).

74. Q. Okay. And you had a discussion with Mr. Pearce in July 2016 ...

A. Mmmhmm. Yes, I did. Sorry.

75. Q. ... about catastrophic events?

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5 A. I had a discussion in July 2016 with Mr. Pearce about a lot of different things relative to the lease. He provided a list of items to achieve, believed to be catastrophic, which he wanted the lease changed for to include abatements and certain things of that nature in which we declined.

10 76. Q. Would you agree with me that you said that you declined for most of -- or, some of the items he listed, but you agreed that regulatory changes would be included.

15 A. We -- we -- I stated that all of the things that he listed were normal business assumptions with the exception that if there were to be a regulatory change that would materially impact their business, and that's why eighteen oh seven (1807) is in there. There was no discussion, or assurance or anything that discussed abatement of rent in -- under any circumstance that would be included -- that is included in the lease.

20 77. Q. But you didn't discuss the need for an abatement with Mr. Pearce.

 A. He requested it and we said no on multiple occasions.

25 78. Q. Well didn't you say -- well, what you said is at this email, July 19th, 2016.

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MR. STANEK: Maybe we've got to put it to her.

MR. JONES: Yeah.

MR. JONES:

79. Q. So point number three, right, you say,
5 "You have also requested and had further -- we had
further discussions on the following topics." And
then number three is lease discussion in the event of
a catastrophic event, "We reviewed the examples
10 listed as catastrophic, we agree that the changes in
government regulations could materially impact the
business and have added Section 18.07 to the lease.
All other events were routine events of border
crossing."

A. That's what I stated in my email.

15 80. Q. So you're saying no to all the other
things, but yes to regulatory changes.

A. We acknowledged that regulatory changes
could materially impact the lease, we did not ever
agree to abatement of rent in that event, as per
20 eighteen oh seven (1807) in the lease. As -- as this
states, eighteen oh seven (1807) was added to address
that particular concern that they had.

81. Q. Right. And so what was his concern?

A. That a catastrophic event, as he defined,
25 this was one in many of the list of things that they

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had at that time, would impact the lease. And then they wanted to reopen the lease negotiations and we said no.

82. Q. So --.

A. When these things occurred.

83. Q. Well, sorry, what you said is what's in the email.

A. Okay, what I said was in the email.

84. Q. So he said that -- you'd agree with me he said that there's these catastrophic things that might impact the -- negatively impact the business and prevent them from being able to pay rent, right?

A. He provided a list of things that he claimed to be catastrophic.

85. Q. Right. And so maybe we should just go to it. At Tab 'H' of the disclosure documents -- do you have ...

MR. STANEK: I don't have that, no.

A. Which?

MR. STANEK: I don't know. Not the disclosure documents, we don't have them.

MR. JONES: You don't have the disclosure documents. Do you have these -- they're described as --.

MR. STANEK: I have the Affidavits, I have

what's before the court.

MR. JONES: I don't think these -- so cost of meeting notes. So this is what's described as cost of meeting notes.

MR. STANEK: Well, put them to her.

MR. JONES:

86. Q. Anyway, can you just flip through it first, since you have my copy, and just confirm to me what these are?

10 A. This looks like a list prepared by Jim Pearce.

87. Q. So the typed document was prepared by Jim Pearce you think?

15 A. Well, I'm just going by it has his name at the top.

88. Q. And is it your handwriting on it?

A. Yes, some of this looks like my handwriting.

89. Q. Is any of it not your handwriting?

20 A. Not that I can quickly tell by looking at this. This looks like my handwriting.

90. Q. So this is a handout that was provided to you by Jim Pearce at the July -- for the July 18th meeting?

25 A. I will assume so. I don't know if he

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handed it to me or sent it to me in an email.

91. Q. One way or another it got to you from Jim?

A. Well obviously, yes.

92. Q. And during that meeting he conveyed to you
5 the concerns about something catastrophic happening
behind -- beyond the tenant's control that would
materially affect its sales and that it had concerns
that it wouldn't be able to pay its rent and would
need a rent abatement?

10 A. He was concerned because we were
undertaking a construction project at the bridge,
which hadn't been done for a hundred (100) years or
so -- well maybe not quite a hundred (100) years, so
he was worried about that. And so he talked about a
15 bunch of different things through this list of what
he wanted in the lease.

93. Q. Okay.

A. These are his requests.

94. Q. Right.

20 A. And so what ultimately we agreed to is
what's in the lease.

95. Q. Okay. Just I would like to talk about
this meeting. Do you know when those handwritten
notes were made?

25 A. I can't recall when they were made.

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96. Q. Would they have been made at the meeting
or after the meeting?

A. I'm gonna just assume they would've been
either made then or shortly thereafter the meeting.

5 97. Q. Okay. Now, there's a page number at the
top, do you see that?

A. Right -- yeah.

98. Q. So can you go to four sixty-six (466)?

A. Is that gonna be in or -- this way?

10 99. Q. Sorry, not four -- four forty-six (446), I
apologize. Right, and so there's some handwritten
notes there. And can I see it just so I can just
direct your attention.

MR. STANEK: I think they have a copier here.

15 MR. JONES: Yeah?

COURT REPORTER: Yeah, ...

MR. JONES: Okay.

COURT REPORTER: ... I can photocopy.

MR. JONES: Let's go off the record for a
20 second.

OFF THE RECORD

MR. JONES:

100. Q. So there's a paragraph that has -- right
above it it says, "Business disruption due to bridge
25 closure," that's what you were referring to, right,

the bridge closure?

A. In the time that this was -- in 2016, we were undergoing the bridge redecking project, that's the context of which this discussion was.

5 101. Q. That paragraph, yeah.

A. Mmhmm.

102. Q. And so underneath there's some handwritten notes, are you able -- maybe I can read what I think it says, but you might be able to read your handwriting better than me. It says something ...

A. My eyesight has changed, ...

103. Q. Okay.

A. ... I have to look at it closer. What part are you wanting me to read?

15 104. Q. So if we start in the middle of the page it says, "This involves a third party. Not typical because there would be no loss because rent abatement -- and we do not want to get involved with the insurance company."

20 A. That's what -- that appears what that says, yes.

105. Q. Right, so what you're saying there is, if there's a rent abatement written into the lease there's a concern that the insurance company will say, in response to a claim being made, "Well there

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is no loss because you have a rent abatement written into your lease," you would agree with me that was the conversation?

5 A. The conversation -- this is what Peace Bridge Duty Free wanted in the lease, was rent abatement due to a bridge closure related to the construction project.

106. Q. Right.

10 A. We said no because you can insure for that on your own and we do not wanna get involved as with third parties relative to that. And if there were to have been rent abatement in the lease then there could be problems because an insurer would say, "Oh, you already got relief and we're not gonna pay." I'm
15 not an insurance expert.

107. Q. Right, but that was part of the conversation.

 A. It was a conversation.

108. Q. Okay. And did I accurately read that part
20 of your handwriting?

 A. That's what the words on the page say.

109. Q. Okay. And then you've circled the insurance clauses, so I guess that's what you were --
25 well tell me, why did you circle the insurance clause?

A. I have no idea.

110. Q. Okay.

A. There's a lot of notes on this page.

111. Q. Yeah. And then can you read what's at the
5 very bottom? It looks like it says, "We agree to --
."

A. I can't read what that other words says.
"We agree to give" something "leased premises. We
have obligations." I -- to be honest with you, in
10 the copy I can't read this, what that word says.

112. Q. So "We agree to give" something "leased
premises. We have obligations." Okay, and then the
bottom paragraph it says, "In the event that during
the term, and should it be necessary that issues
15 arise, something catastrophic beyond the tenant's
control, including but not limited to vehicle traffic
volume declines, bridge construction, changes in
government regulations, et cetera, that materially
impact the tenant's Duty Free sales, then the
20 landlord and tenant both acting reasonably and in
good faith agree to discuss the lease, including but
not limited to the rental terms -- term, et cetera."

A. That's what that states. And there's a
little handwritten note by me, it says, "No".

25 113. Q. Yes, so it says, "No" and there's an

underline. Do you know when that handwritten notes
was put there?

A. Would've been at the same time of all the
other notes.

5 114. Q. Okay, so it's either during the meeting or
after the meeting?

A. Yeah.

115. Q. Okay. So you're saying no to the whole
paragraph?

10 A. I would say yes, I was saying no to the
entire request, what they wanted added. At the time
when we had this meeting, I -- my note is no to this
request.

15 116. Q. Okay, but isn't that different than what
you wrote to him in the email?

A. What email are we referring to?

117. Q. The July 19th email.

A. Which was after this meeting.

118. Q. Right.

20 A. Okay, so then let's go back to the July
19th email.

MR. STANEK: This is it here.

A. Okay, so after we had our meeting
obviously there was further discussions that were
25 had. The July 19th email is the response more

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formally of what came out of our meeting on July 18th.

MR. JONES:

119. Q. Okay. But you agree with me it's not just
a flat no?

5 MR. STANEK: What?

A. It says no to the entire paragraph. And
then in the email it says, "We disagree that all of
the things you listed are catastrophic. We agree
that changes in the governmental regulations could
10 materially impact the business and have added Section
18.07 to the lease."

MR. JONES:

120. Q. Right.

A. "All other events listed are routine
15 events at border crossing." So our response after
our meeting on July 18th, the -- officially, you have
this email here, and added Section 18.07 in the
lease, that's the answer to that request.

121. Q. Right, so when he raises these things that
20 he's asking for you say, "You already have eighteen
oh seven (1807)"?

A. I can't recall what I ...

MR. STANEK: Mister --.

A. ... exactly stated.

25 MR. STANEK: No, no, no. Are you talking

about at the meeting when these notes are made?

MR. JONES: No, no, I'm talking about what's conveyed in that email.

MR. STANEK: All right.

MR. JONES: I see the note on the page.

MR. STANEK: So it doesn't -- the email forwards ...

MR. JONES: Well, Counsel, ...

MR. STANEK: ... the --.

MR. JONES: ... let me just ask my question.

MR. STANEK: I'm not going to let you confuse this witness.

MR. JONES: I'm not trying to confuse the witness. If anything ...

MR. STANEK: And -- and try to create a record of things that did not occur.

MR. JONES: I'm absol --.

MR. STANEK: I recognize that's your case.

MR. JONES: No Counsel, I'm absolutely not trying to do that. And if anything, I think the interjections are confusing the situation.

MR. JONES:

122. Q. So do you recall specifically the conversation being had with Mr. Pearce when reviewing that paragraph?

MR. STANEK: Which paragraph?

MR. JONES: Sorry, the bottom paragraph of the handout we were just looking at.

MR. STANEK: The handout or the email?

MR. JONES: The handout.

MR. STANEK: The handout.

A. So that's this?

MR. JONES:

123. Q. Yeah. Because ...

A. And you're asking me if I recall the exact conversation? No, I don't recall word for word what the exact conversation was. I will go by my notes, as you're going by my notes on this page, as the best recollection of what was verbally discussed in 2016, which there's a word that says, "No", which meant we didn't agree with any of what he wanted these -- this language put into the lease and we said no. After -- I'm certain after I had my meeting with Mr. Pearce, I went back and had discussions, attor -- I could've had attorney discussions, I could've had discussions with Ron, I'm not acting on my own. This email was sent to Mr. Pearce copying Ron Rienas the following day. This is what came out of the meeting. He asked for many things, again, his catastrophic event, "We agree that changes in governmental regulations could

materially impact your business and have added
Section 18.07 to the lease." So our response to his
request to catastrophic events related to regulatory
changes is eighteen point oh seven (18.07) in the
lease.

124. Q. I understand.

A. Okay, that's --.

125. Q. And so you said you had -- you would've
had conversations with counsel or with Mr. Rienas
after the meeting, do you remember those?

A. No, I don't recall.

126. Q. Do you have any notes from those meeting?

A. I have no idea.

127. Q. Well if you do can you provide us with
copies of those notes?

MR. STANEK: Why is her discussion with Rienas
material? Your client's made a number of
allegations about what she said to him, she's --
she's testified as to what occurred at the
meeting. Why are the discussions with Rienas
relevant?

MR. JONES: Well you don't think that
contemporaneous notes immediately afterwards, of
what happened during the conversation would be
relevant to that?

MR. STANEK: Relevant to what?

MR. JONES: To what ...

MR. STANEK: What's the issue you're -- that
you're ...

A. I ...

MR. STANEK: ... trying to collect evidence
on?

MR. JONES: Counsel, you can either --. I've
made the request for notes of this --.

MR. JONES:

128. Q. You don't remember specifically if you had
a conversation with Mr. Rienas or counsel immediately
afterwards?

A. I don't recall.

129. Q. And you don't recall if you would've had
notes or not from that conversation?

A. I -- no, I don't recall.

130. Q. So the only way to know what would have
happened is if there are notes that show what was
discussed during that conversation, if it happened.

A. I'm gonna -- probably was discussed at --
my meeting with Jim Pearce is noted here. If I had a
conversation after, I don't keep notes of every
single conversation I have with people at work.

MR. STANEK: Would you have notes, would there

be any place where you could look for the notes
of a specific discussion ...

A. I could look through ...

MR. STANEK: ... you had with Ron Rienas on
July 18 or July 19, 2016?

A. I could look.

MR. STANEK: Okay, we'll look. ^

MR. JONES: Thank you.

MR. JONES:

131. Q. Okay, now if I could ask you --.

Actually, before we flip forward, can you read what
that top note is?

A. On -- where are we?

132. Q. On the four four six (446) page.

A. Top note --.

133. Q. Just the handwriting near the top, I can't
read it.

A. It says, "Cost associate with issues
arising from the leased premises."

134. Q. Okay, thank you. Now, if I could ask you
to turn to four four eight (448). Now, this is also
notes from the same meeting, is it?

A. I will assume that they are.

135. Q. Now, the second last paragraph there's the
word "Complete" is written into various places.

A. Mmhhh.

136. Q. Is that your handwriting?

A. Yes.

137. Q. So you're -- so why were you writing
5 "Complete" or "With a total secession of traffic,"
what was the purpose of those notes?

A. I believe again this was what was
presented, as words that they wanted to have included
in the lease, ...

10 138. Q. Right.

A. ... through our discussions. Sure we were
talking. And this says, "In the event there's a
closure," and so I don't even know if I said this
aloud to Jim Pearce or not, it might've been a note
15 for myself, "Complete closure." And these were
things that we were gonna take back, review with
legal counsel and consider whether we would add these
things to the lease or not. And if you look at the
lease at the end, they're not in there because we did
20 not agree.

139. Q. Right. And so the -- to the right of that
paragraph -- or sorry, start to the left it says,
"Review," is that right?

A. There is a word that says review there,
25 yes.

140. Q. Okay. And then on the right side it says, "Attorney comments, ensure those stay with insurer," right?

A. That's what the words say.

5 141. Q. Okay. And so do you remember writing that or why you wrote that?

A. Again, most likely because I was going to confer with our attorney because these would be significant changes to the form of lease to which your client in the RFP responded that they accepted the lease as is without any changes. If -- if these, as written by your client, were to be put into the lease it would've put the entire RFP process in jeopardy because it is a significant change to which they said they were not gonna make any changes. And anything that they suggested, we conferred with our attorney to discuss whether or not should or should not be included in the lease.

142. Q. And so I'm going to suggest to you the issue with insurance here is that the Authority did not want a explicit rent abatement or rent reduction in the lease as a result of concerns about whether the insurance company would take the position that there was no loss, and then -- and that would jeopardize insurance coverage, will you agree with

me?

A. No. 'Cause the insurance coverage would have nothing to do with the Authority's position and our own coverage.

5 143. Q. Well what about the tenant's coverage? I think that's ...

A. I'm not an insurance expert.

144. Q. Well, I think ...

10 A. The tenant had a peril that they wanted to have insured, they could've conferred with their insurance broker to insure against certain perils.

145. Q. And so the Authority's position was that the tenant -- whatever perils could be insured the tenant should insure against those?

15 A. It's their decision to do whether they want to or not, but it's --.

146. Q. No, I'm asking you what the Authority's position was.

20 A. I don't know if we had a particular position. The position was we're not gonna get into the middle of something that could be insured, and they can deal with their own insurance company on a loss.

25 147. Q. Okay. Now, the paragraph below that's got a box and circle around it?

A. Mmhhh.

148. Q. Did you make those notes on the page?

A. That looks like my handwriting.

149. Q. Okay. And so there's sort of a semi-circular parenthesis around "As a guideline, material impact would be one in which Duty Free sales declined over a comparable three month period by five percent or more"?

A. I put those parenthesis there, this paragraph was presented by your client to us and it's -- no way, that's not catastrophic. And as you see, none of this is in the lease because no.

150. Q. So what did you say to Mr. Pearce at the meeting about this paragraph?

A. In the -- if you go back to the email ...

151. Q. No, no, I'm asking ...

A. I don't ...

152. Q. ... at the meeting.

A. ... recall what I verbally said to him at the meeting, I'm sure I told him "No", or "We'll review it" or something along those lines. 'Cause if you go back to the July 19th email where we say, "We reviewed the examples listed as catastrophic and all the others listed are routine events."

153. Q. Right.

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A. Which is what that paragraph, the last one that you're referring to are routine events that occur at a land border and as a normal business risk for any business enterprise to undertake.

5 154. Q. In your email you don't say anything about "The landlord and tenant both acting reasonably and in good faith, agree to amend this lease including but not limited to the rent terms, et cetera, as appropriate and in a fair and equitable manner."

10 A. I don't see it in my email and it's not in the lease, this is what they requested.

155. Q. Right.

A. Just because they requested it doesn't mean we agreed to it in principal or any other sort of fashion, we did not and we do not.

156. Q. I'm just --. You would agree with me that there's more to this paragraph that's not addressed specifically in your email.

20 A. I don't understand what you're asking me, "There's more to this paragraph."

157. Q. Well --.

A. The paragraph is here.

158. Q. So it says, basically, ...

A. Everything from the meeting was addressed in this email and/or the final lease. I don't

understand what you're asking me.

159. Q. Okay, maybe I can help clarify. So what I'm -- what I'm indicating to you is, first there's the list of -- the list of events that Mr. Pearce, correct me if I'm wrong, these are the events he said were catastrophic that would require consideration.

A. These were the lists of events that he wanted consideration and to have the lease include words that say, "Rent abatement" connected to them.

160. Q. Correct. And then he goes on to say, "If any of these events happen, that materially affect the Duty Free sales, then the landlord and tenant, both acting reasonably and in good faith, agree to amend the lease including but not limited to the rent terms -- term, et cetera." So what I'm saying is, he said if these things happen then this will happen, right? That's essentially what's in his email -- or sorry, in the handout here.

A. I mean, his paragraph just says what the paragraph says.

161. Q. Yes. And so your email addresses the list of events.

A. It appears to.

162. Q. And your email doesn't say anything about the consequences for one of those events occurring as

they're -- as it's described in this handout.

A. I don't under -- I'm getting -- you're -- this paragraph is in his minute -- or, in his list of things.

5 163. Q. Yeah.

A. You see I have a handwritten says -- that says, "Too far. Agree and amend." So that's too far, the Authority is not gonna amend the lease for any of these reasons, a guaranteed amend -- no. So
10 in the next day email this is the response from this meeting. I don't know what you're trying -- you're con -- I'm getting confused on what you're trying to infer from by just constantly repeating the same paragraph back to my email. My email addresses what
15 happened at this meeting is in this email and attaches the final version of the lease.

164. Q. So you pointed out "Agree and amend" is got a square around it, you put that square there?

A. Yes.

20 165. Q. Do you remember if it was before ...

A. With the words "Too far".

166. Q. That says, "Too far"?

A. 'Cause we would not do that.

167. Q. So agree to amend, that's what you
25 wouldn't agree to, right?

A. In my opinion. When I was meeting with Jim Pearce, yes, these are my notes of my opinion, "Too far".

168. Q. Okay. So the -- and what I'm trying to ask you is it -- the words "Too far" are pointing to that circled, "Agree to amend," right, so that's what you're saying is too far?

A. Those particular words, yes. And then as you read in the July 19th response email, everything else in here -- the only thing that we acknowledge is that a change in regulations, as it states in eighteen point oh seven (18.07). That's what came out of this whole meeting, that's what that -- that's the answer to all of his requests.

169. Q. Did you ever specifically tell Mr. Pearce, or do you remember specifically telling Mr. Pearce in writing or verbally that in the event of one of these events, and specifically the government regulations, that the landlord and tenant wouldn't act reasonably -- the landlord wouldn't act reasonably and in good faith to address the lease?

MR. STANEK: Do you want to repeat that question?

MR. JONES:

170. Q. Did you ever specifically say that the

landlord would not agree to act reasonably and in good faith to address the lease?

A. I believe it's in the lease that we act reasonably and in good faith.

5 171. Q. Right. And did you ever specifically say that the landlord would not consider changing the rent terms as appropriate and in a fair and equitable manner? Did you ever specifically say that to him?

A. I'm sure I did.

10 172. Q. That the landlord would not consider changing the lease ...

A. In -- in what --...

173. Q. ... terms in a fair ...

A. ... in what con -- in what context?

15 174. Q. In any context. Like, did you ...

A. I can't ...

175. Q. ... specifically say that to him.

A. In any lease are you gonna say, "We're never gonna look at anything?" No. Eighteen oh seven (1807) is there, so if something happened that triggered eighteen oh seven (1807), then there would be discussions made.

20 176. Q. Right. So what I'm suggesting to you is, you told him that "We don't agree with the vehicle traffic decline or the bridge constructions, we do

25

5 agree that changes to regulation apply. We don't agree that the lease will specifically say that it will -- that the landlord will agree to amend, we're not going to agree to that specific language, but everything else here is covered by eighteen oh seven (1807)."

A. No, that's not what that says.

177. Q. You disagree with that?

A. I do.

10 178. Q. Okay.

A. Because if everything in this paragraph was supposed to be eighteen oh seven (1807) it would've been at eighteen oh seven (1807). You're trying to --...

15 179. Q. So you're saying ...

A. ... I feel like you're trying to take what we talked about at a meeting and imply a section in the lease that that's what the section of the lease means. The section of the lease, if that's what it meant it would state that.

20 180. Q. Well didn't -- isn't this what Mr. Pearce brought up with you?

A. Mr. Pearce brought up with me this whole list of things that they wanted rent abatement for in the lease, we said, "No, we are not providing rent

abatement."

181. Q. So you specifically said no to him in that meeting, you're telling me?

A. I cannot recall if I specifically ...

5 182. Q. Okay.

A. ... said no to him; however, I do have subsequent emails that were sent to him in 2016, in October, which with I do say that.

183. Q. Okay, so I'm talking about ...

10 A. There is no provision for the rent to be reduced from the minimum for any reason.

184. Q. Okay, that's after the lease is signed.

A. But before it commenced.

15 185. Q. Okay, so what I'm suggesting to you is Mr. Pearce came to you with this request and you -- you told him eighteen oh seven (1807) addresses your concern.

20 A. In this subsequent email, yes, that's what we said, "Eighteen oh seven (1807) addresses your concern related to changes in the regulatory environment."

186. Q. Okay. And did the Authority subsequently agree or offer to abate the Duty Free store's rent?

A. When?

25 187. Q. After covid started.

A. There was a proposal that was given sometime, I believe, late 2020 or in 2021 that did include a forgiveness of fifty percent (50%) of the back rent that was owed at that time.

5 188. Q. Okay. And was the -- did the Authority offer to abate rent or agree to abate rent of other leases, the other Duty Free store, the American Duty Free store lease?

10 A. I'm uncertain if I am able to discuss what terms are within a different third party ...

189. Q. Okay, well ...

A. ... regar -- regarding their lease. So I don't know what ...

190. Q. Your lawyer's ...

15 A. ... the rules are, ...

191. Q. ... here.

A. ... if I'm allowed to answer something ...

MR. STANEK: You're asking the questions. She probably knows better than I do.

20 MR. JONES:

192. Q. Right, so I'm asking you the question.

MR. STANEK: She says she's unsure. I don't know, go ahead.

25 A. There is a subsequent agreement that was made with the US Duty Free store that if they fulfil

their obligation to repay their -- all their past rent that's due, that there would be -- there would be forgiveness of twenty percent (20%).

MR. JONES:

5 193. Q. And the US Duty Free store has a different type of rent structure, right, it's a lower base rent?

 A. Their lease is entirely its own lease. And I'm not sure that I'm at liberty to discuss what the terms of their lease are.

10 194. Q. Okay, going back to this handout, you've circled five percent and there's ...

 A. Mmhmm.

 195. Q. ... an arrow?

15 A. Yeah.

 196. Q. Do you know why you did that?

 A. Because it's ridiculous to think five percent decline in sales or traffic is catastrophic, it's a business risk.

20 197. Q. Okay, so the business -- so declines in traffic, just generally, are a business risk that's the tenant's problem.

 A. Yeah.

 198. Q. But a catastrophic event is something different that engages eighteen oh seven (1807)?

A. Again, it's a regulatory change, not a cat
-- your ...

199. Q. Sorry ...

A. ... a catastrophic event is something
different. Because if foreign currency exchange went
and the US dollars were five times more than the
Canadian dollar, ...

200. Q. You're right.

A. ... no Canadians would be crossing, is --
that could be a catastrophic event.

201. Q. You're right, no, you're absolutely right.
I used the wrong term. So it's a change in
applicable laws that causes a material adverse effect
to the business, that's ...

A. It just says a material change, I don't
think it says the adverse. Oh it does, okay, I'm
sorry, yes.

202. Q. Okay, so that's something different than
the regular risk that the tenant assumes by just
regular decrease ...

A. By just ...

203. Q. ... in traffic.

A. ... being in business.

204. Q. Yeah. You agree with me?

A. I would say regulatory change, yes.

MR. STANEK: He's talking about adverse effect. Right?

MR. JONES:

205. Q. Right, I'm talking about the adverse
5 effect of a change in regulatory, I think it says,
"Applicable laws," is a defined term of the lease.

A. "Applicable laws cause a material adverse effect on the business ...

206. Q. Right.

10 A. ... operations of the tenant."

207. Q. Right. So anyway, you'd agree with me
that that's different than the usual decline in
traffic risk that any tenant assumes as part of their
business.

15 MR. STANEK: I don't understand that question.

A. I don't, either. Because, I mean, a
regulatory law -- I don't know how a law is different
than any other business risk. You know, the people
in Ontario are selling pot right now, the government
20 decides to change its rules and you don't sell --
can't sell marijuana anymore, I mean, that's a risk
you took by getting into that line of work. People
who used to sell cigarettes, laws change, you can't
be in that business anymore. I don't understand what
25 you're asking me.

208. Q. Yeah, so in the normal course if you have a lease and laws change, you know, that's your problem, tough luck, right?

5 A. Well, it could also be if -- if -- what if, for example, the law change was and CBSA decides there's gonna be no more Duty Free's? So then I guess we would discuss the impact to the -- to a lease and whether you continue to have to still pay rent when your -- the government's put you out of business or -
10 - or your law is so that you can't operate.

209. Q. Right, that's what this is for.

15 A. I don't -- it just says a regulatory change, I don't know what that's for. I feel like you're putting words in my mouth, I feel like I've answered this fifteen (15) times to Sunday, fifteen (15) other different ways. I don't -- if you could just ask me very clearly what it is that you're asking me to agree to or -- or not agree to you because I feel like you're changing what you want me
20 to answer you whether I agree or not.

210. Q. No, you answered my question perfectly, thank you. All right, would you agree with me that the level of consideration that would be provided in the event eighteen oh seven (1807) is engaged would
25 increase ...

MR. STANEK: Wait a second, what consideration is mentioned in eighteen oh seven (1807)?

MR. JONES: Well, I think it's implicit that there's going to be some consideration, otherwise ...

MR. STANEK: You haven't established that that's how this witness understands the clause. And now you're putting to her that it's implicit, that something that's not even mentioned here is -- is something that the clause is about.

MR. JONES: Okay.

MR. STANEK: Where does it say "Consideration", sir?

MR. JONES: Well, there's got to be some meaning to the -- given to the words, right?

MR. STANEK: You meant the word "Discussion"? Yeah, there's meaning to that word.

MR. JONES:

211. Q. So for example, in the example you gave, if the Canadian Border Authority changed the regulations to say there's no more Duty Free stores, what -- is your view that the landlord would have satisfied its obligations if it had discussions that, you know, "Yeah, that's too bad that they did that to

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you, you owe us full rent," is that a landlord acting in good faith and satisfying ...

5 A. That would be something that would be discussed with our counsel on what -- what their legal advice would be for how we would deal with that. You're asking me to make answers about what the Authority would do, I'm not in a position to answer what the Authority would do because it ultimately is up to the board of directors to
10 determine what the Authority would do. This clause would say that we would need to have discussion, discussion would occur, discussion would be done with our counsel. And then whatever those discussions were, I'm sure as what our normal course of action is
15 would be to the board. You're asking me to speculate on something I have no idea what possibly an answer could be.

212. Q. Were you involved in having eighteen oh seven (1807) put into the lease?

20 A. As far as I was dealing with the RFP and dealing with Mr. Pearce at that time, and we had this meeting, I -- I had consultations with my coun -- with my legal counsel regarding his concerns.

MR. STANEK: She didn't draft it, the lawyer
25 ...

A. I didn't draft ...

MR. STANEK: ... drafted it.

MR. JONES: I appreciate that she wouldn't have drafted it.

MR. JONES:

213. Q. But you would've been in conversation with the lawyer drafting it and ...

A. I had discussions with our attorney.

214. Q. About eighteen oh seven (1807).

A. About the concerns that Mr. Pearce raised.

215. Q. But I'm asking you, ...

A. I don't know, ...

216. Q. ... like, are you involved ...

A. ... I feel that that's -- ...

217. Q. ... in putting ...

A. ... that is attorney -- that's attorney/client privileged information. I didn't write eighteen oh seven (1807).

218. Q. I understand you didn't physically write it, but were you responsible for it being added to the lease?

A. No.

219. Q. Okay, who was responsible for it being added to the lease?

MR. STANEK: Was it the lawyer?

A. The lawyer added it.

MR. JONES:

220. Q. Without any -- like, how did the lawyer
come to add it? He would've had to get instructions.
5 Like, who directed the lawyer, whose decision was it
to direct that section to be added?

MR. STANEK: Sometimes we use our legal
expertise, we don't always just act on
instructions.

10 MR. JONES: Okay, is that what happened here?

MR. STANEK: I can't speak for it, I wasn't
the lawyer at the time. But I don't think you
can assume that he was specifically instructed
to add it by anybody.

15 MR. JONES: I'm not trying to assume, that's
why I'm asking the question, Counsel.

A. The concerns of the Peace Bridge Duty Free
were discussed with our attorney. We discussed our
opinions, relative to what they asked for, with our
20 attorney. Our attorney drafted eighteen point oh
seven (18.07) based on their legal expertise. I'm
not gonna talk about what discussions we had with our
attorney because I feel that that's privileged
information, unless I'm directed to do so by my
25 attorney who is here.

MR. JONES:

221. Q. Okay, so that was -- am I right that the
eighteen oh seven (1807) was already in the lease
when you had the meeting with Mr. Pearce?

5 MR. STANEK: No, you already have the evidence
that it wasn't.

MR. JONES: Pardon?

MR. STANEK: We have spent the last hour
getting the evidence of the meeting, the email
10 afterwards that says, "This has been added".

MR. JONES: It was added before.

A. There's so -- what version is this lease?
The final version is version --. What version is
this one, eighteen (18), nineteen (19)? Prior to our
15 meeting in July Jim sent listings, which is similar
to this, of everything else that he wanted,
everything that we just talked about was discussed
with our attorney. Eighteen oh seven (1807) is the
answer to all of this.

20 MR. JONES:

222. Q. Okay.

A. Brought it up again, this is, like --...

223. Q. But that's not ...

A. ... again he brought up ...

25 224. Q. ... what my question is.

A. ... this -- this exact same stuff again at the meeting. So that's why the answer is what it is in the July 19th email, and it's eighteen oh seven (1807).

5 225. Q. Right, ma'am, but I'm just --. We'll go faster and we'll get you out of here if you answer my question. My question was, was ...

MR. STANEK: Wow!

A. I don't understand your question.

10 MR. JONES:

226. Q. So my question ...

A. And I feel like that was very rude.

15 227. Q. I'm not trying to be rude, I'm just trying to say that what you just said didn't answer my question. My question was, the eighteen oh seven (1807), was it already in the lease at the time -- the draft lease at the time of your meeting on July 18th?

A. I don't know.

20 228. Q. Okay. Now, did you or anybody else bring the addition of eighteen oh seven (1807) of the lease to the attention of the board specifically?

A. The board was given the full copy of the lease.

25 229. Q. Right. Did they ever specific -- was

their attention ever specifically drawn to the fact that eighteen oh seven (1807) had been added?

A. Not to my knowledge.

230. Q. Why not?

A. The board received the whole -- the full lease.

231. Q. Okay. Before April 3rd, 2020 did you communicate with anybody about how COVID-19 would impact the Duty Free leases?

A. Not that I recall.

232. Q. As of April 3rd, 2020 you were aware that there had been changes in laws that affected the border crossing?

A. I don't know if it was a law change, it was a --.

233. Q. The regulations.

A. I don't even know if it was a regulation at that time.

234. Q. Okay.

A. I think it was just an announcement or something, I don't know what legal term you wanna call it.

235. Q. Okay.

A. We call it restriction.

236. Q. Okay, so at April 3rd, 2020 you were aware

that there were some restrictions that would engage
eighteen oh seven (1807)?

A. I don't know whether eighteen oh seven
(1807) would've been engaged or not, it was April 3rd.

5 237. Q. Okay.

A. If you're asking for that -- that time, in
context of that time, everybody -- remember, it was
fourteen (14) days to slow the spread, that's all it
was on April 3rd.

10 238. Q. Okay, so I'm going to show you an email on
April 3rd, Ron Rienas is forwarding a letter from Greg
O'Hara to the board of directors, and I believe
you're copied on the email. And Mr. O'Hara's
bringing up eighteen oh seven (1807)?

15 MR. STANEK: You want the letter first?

MR. JONES: Well, ...

A. I mean --.

MR. JONES: ... it's the email's attaching the
letter, but what I ...

20 A. I'll say Greg O'Hara does mention eighteen
oh seven (1807) in his letter.

MR. JONES:

239. Q. Right. And Mr. Rienas mentioned it --
mentions it in his email as well.

25 A. Mmhmm.

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240. Q. So at that point, you would agree with me that eighteen oh seven (1807) is engaged, it applies?

A. I would say that Mr. O'Hara says that it does.

5 241. Q. Well based on what you wrote to Mr. Pearce in your email in July 2016 would you say it applies?

A. I mean, I -- I guess I would say that it could be -- it could apply.

10 242. Q. Okay. And so at that point, in April 2022, you're sending a letter saying that -- to the Peace Bridge saying that rent is overdue and there's no -- the lease does not provide for any rent abatement due to decline in sales, right?

A. That's correct.

15 243. Q. Okay, so at that point there's no talk of discussions or, you know, working together to resolve the rent issue, it's strict compliance with the lease?

20 A. At that time, yes, nothing that I was privy to.

244. Q. So at 'F' three of the document productions --.

MR. STANEK: I think -- I don't know --.

A. 'F' three?

25 MR. STANEK: I don't have these document

productions.

MR. JONES: Oh, Counsel, I just realized I forgot to mark this email as an exhibit.

MR. STANEK: That's right, you did.

MR. JONES: Can I mark it as an exhibit?

MR. STANEK: Okay.

MR. JONES: So I'll just mark that as Exhibit One.

MR. STANEK: You might want to describe it to Madame Reporter so it ...

MR. JONES: Yes.

MR. STANEK: ... makes some sense to the judge.

MR. JONES: Sorry I jumped around. So this is the December 17, 2020 email from Ron Rienas to the board, and mark this Exhibit One.

EXHIBIT NUMBER ONE: The email from Ron Rienas to the board of directors, dated December 17th, 2020 - Produced and marked.

MR. JONES: So I just wanted to take your attention to what's at 'F' three, and it's a report to the board of directors dated April

24th, 2020. And I believe the purpose of this report is the first rent deferral agreement, and there's some redacted information in the document. Counsel, can I request the un -- fully unredacted version?

MR. STANEK: You already did.

MR. JONES: Oh, I already did? Okay, well --.

MR. STANEK: You already got my answer in Mr. Clutterbuck's examination.

MR. JONES: Okay.

MR. STANEK: And that's -- that's for what, April 24, 2020?

MR. JONES: Yeah.

MR. STANEK: I hadn't given it to you already, and -- April 24 --.

MR. JONES: I think I made a general request for all unredacted reports.

MR. STANEK: Mhmm, that's right. And I gave you an undertaking to tell you why they're redacted.

MR. JONES:

245. Q. Now, was the American Duty Free store given the same rent deferral offer?

A. I don't -- I don't recall.

246. Q. Okay. And it looks to me -- this report

says that ...

A. They were given a rent deferral, if it was exactly the same, I don't recall.

247. Q. Yeah.

A. The leases are not the same. It doesn't mean that --.

248. Q. Okay. And it says that the Authority, in 2009, received five and a half million dollars (\$5,500,000.00) US in rent compared to about twenty-two (22) -- sorry, five and a half million (5,500,000) in rent compared to twenty-two million (22,000,000) US in toll revenue, does that sound right?

A. In 2009?

249. Q. '19?

A. That sounds reasonable.

250. Q. So rent is about twenty percent (20%) of tolls?

A. In that particular year. All that is in US dollars, so can fluctuate also based on currency exchange, sales levels, et cetera.

251. Q. Okay. And so the rent -- I'm going to give you an email that was in the USB productions. I'll give counsel a copy as well. And so this is an email from you to Kristina Carroll, Nancy Teal and

Mark DeVreede?

A. Mmhmm.

252. Q. Are those all Authority ...

A. Yes, those ...

5 253. Q. ... employees?

A. ... are my employees.

254. Q. Okay. Now this is an email dated April 27th, 2021. Now, if we go to the thirteenth (13th) page there's a excel spreadsheet chart.

10 MR. STANEK: What's the title of it?

MR. JONES: Peace Bridge Authority analysis of revenue [inaudible] Duty Free.

MR. STANEK: Okay.

15 A. Okay, I don't know. Go ahead. Can you just show me what page you're looking at just to make sure we're on the same page here of this?

MR. JONES:

255. Q. Okay, so here it has information about the base rent and payments from the American Duty Free store?

20

A. Mmhmm.

256. Q. And so you'd agree with me that the American Duty Free store stopped paying base rent in April 2020?

25

A. Yes.

257. Q. And am I right that its base rent is about a hundred -- one hundred thousand, three hundred and eighty-two dollars (\$100,382.00)?

5 A. That's based on how their lease is written, how it was calculated for that year.

258. Q. So the base rent changes ...

A. Yes.

259. Q. ... year by year? Okay, so January -- sorry, in 2020 it was about a hundred thousand
10 dollars (\$100,000.00) a year?

A. A month.

260. Q. Sorry, a month. And was that in US dollars?

A. Yes.

15 261. Q. And it looks like in addition to the base rent it pays additional rent which it looks like it says, "Additional rent is based upon gross sales levels less base rent"?

A. Yes.

20 262. Q. So how does -- and the first line underneath it says, "Point one six (.16) for the first three million (3,000,000)," and then it goes down?

A. Yes.

25 263. Q. So the additional rent is effectively like

a percentage rent minus whatever is paid in base rent?

A. It's what their lease calls for.

264. Q. Right, I'm just asking you how their lease ...

A. So where -- where -- base rent is what we get, calculated on prior years, and then as the year goes on we go through this formula and they owe additional rent based on sales, which then, depending on what they paid for the year, adjust their base rent for the following year, that's what their lease agreement is.

265. Q. Okay. And they don't have a separate line item for CAM and taxes, or operation costs or the --?

A. No.

266. Q. So during 2020 -- well before I ask that question, is this --. Am I right, then, that the CAM and taxes, and what would normally be charged under a commercial lease, that's under the US Duty Free store, it's effectively baked into the base rent?

A. They don't pay those things in the US, we don't pay taxes in the United States, we're tax free, United States. They take care of all of their maintenance, they're in a temporary store that's in the middle of a parking lot.

267. Q. Okay, so there's no charges provided for in the lease agreement?

A. Not to my knowledge, no.

268. Q. Okay.

A. They're in what's called a temporary store.

269. Q. And if we flip the page to the next page, am I right that this shows the amount of rent that was paid and unpaid for the Duty Free store on the US side in 2020?

A. That's what this sheet says.

270. Q. And did you prepare these documents?

A. No.

271. Q. Who prepared them?

A. They're prepared by staff, the regular course how we track sales, amounts paid, et cetera.

272. Q. Okay, is there any issue with the accuracy of these documents, ...

A. I would ...

273. Q. ... that you're aware of?

A. That I'm aware of? No.

274. Q. And if we flip to the next page, this shows, it's from April to the end of the year 2020, that the American Duty Free store paid a total of two hundred and sixty-nine thousand dollars (\$269,000.00)

in rent?

A. That's what this says.

275. Q. Okay. And that's accurate?

A. To the best of my knowledge.

5 276. Q. Okay, did the Authority ever issue any
default notices to the US Duty Free store?

A. No, they were in a deferral agreement.

277. Q. How long did the deferral agreement last?

A. I don't recall.

10 278. Q. Okay.

A. I thought this was about the Peace Bridge
Duty Free, I -- I didn't study up on the US side.

MR. JONES: So Counsel, we requested copies of
those agreements in the other examination, so
15 I'm not going to ask ...

MR. STANEK: And you have ...

MR. JONES: ... for them again.

MR. STANEK: ... my answers.

MR. JONES:

20 279. Q. Did the Authority ever threaten to
terminate the US store lease?

MR. STANEK: They're paying their rent. I'm
sorry, you can answer that.

A. That's okay.

25 MR. JONES:

280. Q. So was there ever a threat to terminate the lease?

A. There was no need to issue any type of termination notice, they were in a deferral agreement, they were paying rent. Part of the agreement.

281. Q. And so going back to the chart that we were looking at, the gross sales from -- and it's this one with the excel -- the first excel spreadsheet. The gross sales for 2019 look like they're just under twelve million dollars (\$12,000,00.00) American?

A. That's what the sheet says.

282. Q. Okay. And you have no reason to believe that's not the case?

A. I have no reason to believe that that's not accurate.

283. Q. So during the 2020 year, from what I see from this document and the next two, it looks like the American store was just paying sixteen percent (16%) of its gross sales, is that right, nothing else?

A. I would say they paid what the sheet says that they paid.

284. Q. Okay. So at -- there's an email that you

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sent, and it's --.

MR. JONES: Before we leave let me mark your April 27, 2021 email and the attachments as an exhibit, Exhibit Number Two.

EXHIBIT NUMBER TWO: Ms. Costa's

April 27th, 2021 email with attachments - Produced and marked.

MR. JONES:

285. Q. This is at Tab Forty (40) -- 'D' forty-seven (47). And this is -- you sent an email on November 18th, 2021, and at that time you say that the Peace Bridge Duty Free has paid the Authority one point six -- one million, six hundred and ninety thousand, nine hundred and sixty-three dollars (\$1,690,963.00) at that point, since April 2020. And I was hoping you could tell me, by that time how much had the American side Duty Free store paid?

MR. STANEK: We're not going to tell you that.

MR. JONES: Okay. Now ...

MR. STANEK: Do you even know?

A. I don't know.

MR. STANEK: Yeah.

MR. JONES:

286. Q. So you're aware that there was a rent deferral agreement in April 2020 that expired in July 2020.

A. With Peace Bridge Duty Free?

5 287. Q. Yeah.

A. Yeah.

288. Q. And then the parties continued, essentially, under the same terms for a few months afterward, after the agreement expired without any changes, is that right?

A. I think the agreement expired and it just kind of --.

289. Q. Nobody did anything.

A. There -- I guess, I wasn't necessarily part of every single communication or whatever that may have been occurring at that time. But really, nothing much happened.

290. Q. The status quo continued, effectively.

A. We weren't being paid during that time, correct.

291. Q. And then there was a subsequent rent deferral agreement that was prepared in October.

MR. STANEK: Draft agreement.

MR. JONES: Right.

MR. JONES:

292. Q. It was prepared in October, you would agree with me there?

MR. STANEK: We've seen it in the documents, yes.

MR. JONES: Yeah. I think we can go to the document if you'd like.

MR. JONES:

293. Q. Anyway, ...

A. I'm aware that there was a draft of a second deferral agreement.

294. Q. And you're aware that it was sent to the tenant, and it was signed by the tenant and returned to Mr. Rienas, and then it was taken to the board for the board's approval.

A. I believe it was -- it was taken to the board.

295. Q. Okay. And --.

A. For them to review.

296. Q. Right. And the board didn't sign the agreement.

A. I believe that's correct.

297. Q. And why not?

A. To be honest, I don't recall. The board is -- that's their prerogative to determine whether they wanna agree with, or not agree with, or --.

298. Q. Okay, do you recall that board meeting?

A. What was the date of this board meeting?

299. Q. I believe it was ...

MR. STANEK: November 20th, 2020.

MR. JONES:

300. Q. ... November 20th, 2020. And just to help you out, to provide context, there's an email at Tab 'C' Twenty-Five (25) from Mr. Rienas to the ...

A. Can I see this?

301. Q. ... board. And it encloses the signed agreement on behalf of the tenant, and it proposes a resolution for the Authority ...

MR. STANEK: A signed draft agreement. It's not an agreement 'til both people sign.

MR. JONES: I mean, I guess that's debatable, Counsel, but --.

MR. STANEK: Oh, it is?

MR. JONES:

302. Q. The email proposes a resolution to the directors to approve it?

A. This is just a recommendation that's included in the board report, it's up to the board whether they decide they're gonna approve it or not, and they didn't.

303. Q. Right.

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A. So then the deferral agreement's not approved.

304. Q. Okay, so the emails -- the proposed agreement says that the deferral's going to be 'til March 31st, 2021. And then at the bottom of this email it says, "Karen Costa, CFO, will speak to this issue when that report is considered." And it specifically referred to report nine zero nine twenty (90920), October operating statement and balance sheet. "The board will note that the Authority is reporting a two million dollar (\$2,000,000.00) bad debt allowance to reserve for any potential collectability issues." So first question, what's that report about?

A. Can I see the email so I can see what the exact title that it's referencing? If --...

305. Q. Yeah.

A. ... if I can get that?

306. Q. Yeah.

A. So nine oh nine/twenty (909/20), October operating statement and balance sheet would be our internal income statement and balance sheet that's reported to the board every month.

MR. JONES: Okay, could we please have an undertaking for a production of that report?

A. The report is only gonna show that I recorded a two million dollar (\$2,000,000.00) bad debt allowance attributable to the Peace Bridge Authority debt.

5 MR. JONES:

307. Q. Okay.

A. At that time we started reserving for bad debt because there's collectability issues.

308. Q. Right.

10 A. And we follow US gap, and so when you believe that there -- you're gonna have collectability problems that you're not gonna recover, you have to reserve.

15 MR. JONES: Okay, so could I then have copies of these reports beginning in January 2020 until December 2021?

MR. STANEK: No. ^

MR. JONES: Why not?

20 MR. STANEK: It's not in relation to your lease and it is not -- hasn't got anything to do with what's at issue in this proceeding.

MR. JONES:

309. Q. So you presented this report to the board?

25 A. It's part of the normal course of reporting financial results to the board.

310. Q. And those specifically in relation to a
bad debt attributable to this lease?

A. To that -- yes.

311. Q. And can you explain to me what happened at
that meeting that caused the board not to go with the
staff's recommendation?

A. I do not recall.

312. Q. Did you prepare remarks to present to the
board?

A. In relation to the operating and ...

313. Q. This meeting.

A. ... the financial statements? Yes, it's a
standard report.

314. Q. But did you prepare, like, notes to
present to the board?

A. No.

315. Q. Okay, do you remember what you said to the
board?

A. No because oftentimes I just present the
report, it's presented for information. If they have
questions, I -- if they had questions, I would've
answered them. Do I recall if they had any
questions? No.

316. Q. Do you remember speaking about this lease?

A. I don't recall.

317. Q. Okay, do you -- you agree with me that the Authority changed positions significantly from this email on November 19th into how they were interacting with the tenant after that board meeting.

5 A. No.

318. Q. Okay, do you agree with me that instead of granting a rent deferral until March 31st the Authority demanded payment of a million dollars (\$1,000,000.00) before the end of December?

10 A. I believe that there was a letter that was sent that demanded rental payment.

319. Q. And so that's a significant change in position.

A. Pos -- position to what?

15 320. Q. To saying that, "We're going to allow you to defer rent until March 31st".

A. The board never said that they would allow them to defer rent, that was a deferral draft agreement that was proposed to the board. They had discussion, they did not accept it, and so there were other discussions, I'm assuming that were done, and then the demand letter in December was what was sent forth.

20
25 321. Q. So you don't agree with me that the position taken from -- by the Authority prior to this

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November meeting, the position that the Authority took with respect to the Duty Free tenant before the meeting is considerably different than the position it was taking after the meeting.

5 A. I don't think it was a specific meeting in time, and I don't know to what you're referring. If you're trying to say everything was honky-dory with the Peace Bridge Duty Free until this meeting and then everything went south, that's not correct.

10 322. Q. Well no, I'm saying that the -- Mr. Rienas sends this agreement and asked them to -- asked him to sign it, so ...

15 A. Don't you think you should ask Mr. Rienas? I -- I can't pretend to know what his intentions were, ...

323. Q. No, but ...

 A. ... only what the words are on the paper.

324. Q. But, ma'am, you were presenting at this meeting.

20 A. I did not pre -- I presented a financial statement so that I could let the board know that there's a -- "Hey, there's a two million dollar (\$2,000,000.00) expense I put on the books relative to collectability of the Peace Bridge Duty Free rent."

25

325. Q. Right. And is there anything else that may have changed the position, is there any other reason why the Authority changed its position?

5 A. The Authority didn't change its position, the Authority continued to work with Peace Bridge Duty Free. The board makes their decisions. You're asking me to infer what the Authority collective decided, I'm only -- I only speak when spoken to at a board meeting. The board decides what it wants to do, the board did not accept the draft deferral agreement for whatever the reasons were for those board members.

10 326. Q. Well, you haven't provided us with the minutes of that meeting, what happened at that meeting.

15 MR. STANEK: And you have an undertaking from Mr. Clutterbuck.

MR. JONES:

20 327. Q. Right, so all I can do is ask you what happened at that meeting.

MR. STANEK: No you can't, ...

A. I'm telling you ...

MR. STANEK: ... you don't need to do ...

A. ... I don't recall.

25 MR. STANEK: ... that. You don't need to do

that, Mr. Jones. You don't need to ask a witness questions that she cannot answer.

MR. JONES: Why can't she answer them?

MR. STANEK: She told you why.

MR. JONES: She was there.

MR. STANEK: Mr. Jones you're being argumentative.

MR. JONES:

328. Q. So in December, early December 2020 there's some requests, some email requests being made for documents, financial documents in referencing Article 16.03 of the lease. My question is just very simple, at that point in time, December 2020, the Authority's not going through a refinancing, or a mortgage application or anything like that, are they?

A. No.

329. Q. In the years before COVID-19 did the Authority ask the tenant to produce a copy of its winter maintenance contract every year?

A. I believe there's things that are -- and forgive me, I don't know what they are, but there are certain things in the lease that they are required to give to us.

330. Q. Right. My question is did they -- every year did they -- you ask for it?

A. [No audible response.]

331. Q. Like, I understand there's a lot of provisions like ...

A. Yeah.

5 332. Q. ... you'll have a winter maintenance contract, and you'll have your HVAC system inspected, and you'll do this and you'll do that. I'm just asking, every single year was it the ...

A. Every single year, ...

10 333. Q. ... Authority's practice that ...

A. ... I'm not sure. Most likely it was asked for because they're responsible to maintain their property and their store was closed, so if any member of the public tripped and fell, and they --
15 it's their responsibility to plow those roads into there facility and the parking lot. We wanted to ensure that they were gonna comply with that.

334. Q. Okay. And what about the request for the HVAC system?

20 A. That I believe is in the lease.

335. Q. Right.

A. They're required to provide that.

336. Q. Right. Is it asked for every year?

A. Shouldn't have to ask for it, it's
25 required for it in the lease, for them to provide it.

We did ask because they didn't -- they hadn't provided it yet.

337. Q. Okay. My question is, is it the practice to ask for it every year?

5 A. It's required in the lease to be provided every year.

338. Q. Okay.

A. It was asked for because it was not provided as per the lease.

10 339. Q. So my question was just whether it's practice to ...

MR. STANEK: You've asked it three times now.

MR. JONES: Right, but I --. So you're not going to answer my question, I guess.

15 MR. STANEK: She has, three times.

MR. JONES: No. I'll move on.

MR. JONES:

20 340. Q. Okay. Tab 'C' Thirty-Three (33), you send an email to Mr. Rienas and you said it's in response to responses to questions that were asked by the Authority. And you say, "The continued lack of meaningful communication is maddening, they're still not providing the most important information requests to we made." And you say, "Once I read through the

25 attachments I will let you know what else might be of

concern.” But I just want to show this to you, and on the next page it looks like you’ve written in some notes to the paragraphs.

A. Can I see that?

5 341. Q. Right?

A. Mmhmm.

342. Q. So you say, “Finding out their current financial position in March 2021 is too late”?

A. Correct.

10 343. Q. So what is it too late for?

A. In the lease they’re supposed to notify us if they’re receiving -- if they are undergoing any sort of financial difficulty that would impair their ability to pay rent. I have -- there’s an email, which must be in this documentation somewhere, where that question is asked of Mr. Pearce and he says, “No, there’s no such thing.” We are permitted to ask them, when there’s questions about their abilities to pay rent or other things, for internal financial information. March 2021 would have us waiting until March of 2021 to see what is happening to their business and where they are financially through December 20th, 2020. So we are permitted, per the lease, to request internal financial information and they’re obligated to provide it when it is asked.

15

20

25

344. Q. Okay, so when you say, "Too late," what does that mean, too late for what?

A. It's stale information by that point in time. We wanted to understand were they undergoing any financial difficulties, Mr. Pearce said that they were not.

345. Q. But you knew their store was closed.

A. We knew their store was closed, he stated that they were not having any financial difficulties.

346. Q. Okay, so it was -- what would you do with that information?

A. We would analyse it, and look at it and review it. I believe during this time there were still talks about other things that were going on, whether anything -- there was gonna be any kind of additional deferral discussions or anything like that.

347. Q. So you were asking for it so you could -- ...

A. Could understand ...

348. Q. ... so the Authority ...

A. ... the position ...

349. Q. ... could make an offer for ...

A. I don't -- no.

MR. STANEK: Please let her answer the

question.

MR. JONES: I'm allowing --.

5 A. You're -- you're trying to say that's what
I -- we asked --. We asked for the information
because we wanted to understand where they were
financially.

MR. JONES:

350. Q. Okay. And what would you do with that?

10 A. We would discuss it internally to
determine what next steps we would take.

351. Q. Like what?

A. I don't know.

352. Q. Was -- so why would it be too late if you
didn't even know what ...

15 A. Do you read financial statements? If
you're gonna read a financial statement that's six --
from six months ago, just like if you're gonna look
at a stock market, how it was doing six months ago,
is that gonna help you make a decision on what to do
20 today? No. There's more up to date information
rather than waiting a year for someone's annual
audited financial statements. When you run a
business you have internal financial statements that
you use to help you operate your business, we are
25 permitted by the lease to request internal financial

information which is what we did. My statement simply means waiting 'til March to find out where they are as of November 30th ...

353. Q. Okay.

A. ... is too late.

354. Q. So you did some research into the CERS program, it looks like from the emails?

A. I looked up some information online.

355. Q. Okay. And was that with a view to determining whether or not the Authority could evict?

A. It was to determine whether they were complying with paying us as per the CERS program, ...

356. Q. Okay.

A. ... which was within -- you're supposed to be -- the -- the landlord is supposed to receive written notification, which is the CERS application, to notify that the tenant applied for CERS. And then there's so many days that the tenant has to pay the landlord the CERS money they received. We had a difficult time receiving all of the notifications from your client in any kind of timely manner. And oftentimes we wanted to determine that they were paying as per the CERS program.

357. Q. And you were looking into whether or not the Authority could evict them notwithstanding the

CERS program?

5 A. If they were in violation of a program,
and the Authority was able to -- to use its --
whatever legal remedies it wanted to, then it -- it
needed to be -- to understand what its options were,
what legal remedies were provided for that we were
able to exercise if decided to do so.

358. Q. Okay. And by that time, in March 2020,
10 had you already formed the view that the tenant
business was not going to be able to survive?

 A. In March of 2020? I think it was too ...

359. Q. 2021.

 A. In March of 2021? One of the reasons why
15 we asked for the documentation, to understand where
they were.

MR. JONES: Could we go off the record for a
moment?

COURT REPORTER: Off record.

OFF THE RECORD

20 MR. JONES:

360. Q. So at Tab 'C' Thirty-Five (35) there's a
letter sent from the Authority on December 21st, 2020
demanding one million dollars (\$1,000,000.00) by --
to be paid within ten days, by December 31st, 2020.
25 And then the obligation to pay rent under the lease,

as regular, falls due continues notwithstanding payment of rent arrears," so essentially the Authority is saying, "You have to pay a million dollars (\$1,000,000.00) within ten days and then your regular rent payments start January 1st, effectively. And also, you need an agreement for repayment of another two point one three million dollars (\$2,130,000.00)," is that -- you're familiar with that letter?

A. Mmhhh, yes.

361. Q. Okay. And so December 1st, 2020, you're aware at that point that there's no way that the Duty Free store can afford to pay that without any sales.

A. I don't believe I'm aware that without any sales they were unable to pay that. One of the reasons why we asked them for financial information.

362. Q. Okay, did you believe that they were able to pay that?

A. I don't know what their resources are. Companies have resources besides just current sales.

363. Q. Okay. So you didn't know if they could afford that. Did you form some sort of belief whether they were able to afford that?

A. We needed to ask for their financial information in order to determine whether they could

or they couldn't. We had no visibility as to whether they have -- shareholders have ability to pay, whether they have financial, revolving financial credit agreements or anything of that sort.

5 364. Q. Was a similar letter sent to the US Duty Free store at that time?

 A. I'm not aware. It's a different situation, it's a different lease. They were in rent deferral.

10 365. Q. Well, didn't the Authority withdraw the rent deferral or say it was withdrawing the rent deferral offer?

 A. From who?

 366. Q. From the Peace Bridge Duty Free?

15 A. You just asked me about the US side.

 367. Q. I know and you said they were under a deferral. And didn't the Authority make a deferral offer to the Peace Bridge Duty Free and then with -- purportedly withdraw it?

20 A. I believe a draft deferral agreement was sent, it went to the board, the board did not approve it.

 368. Q. So at what point did you form the opinion that the Peace Bridge Duty Free was not going to be able to survive covid?

25

MR. STANEK: What?

A. I don't under --.

MR. JONES:

369. Q. Did you form an opinion that ...

A. At that time?

370. Q. At what time? Like, did you form that
opinion?

MR. STANEK: They've obviously survived covid,
I don't really understand the premise of your
question.

MR. JONES:

371. Q. Did you form the opinion at some point
that the Peace Bridge Duty Free was not going to be
able to survive covid?

A. No.

372. Q. You never did?

A. No.

373. Q. You'd agree with me that you had
discussions about trying to get around the CERS
eviction moratorium?

MR. STANEK: To get around, what do you mean,
break the law?

MR. JONES: I mean exactly what I said.

MR. STANEK: To get around the ...

A. No.

MR. STANEK: ... moratorium.

MR. JONES:

374. Q. You didn't have any?

5 A. Did not have discussions to get around the
CERS moratorium.

375. Q. Did you keep track of the date when the
tenants eviction moratorium protections would end?

10 MR. STANEK: You mean did you -- did they
monitor your client's compliance with the law
and the only thing that was stopping the
eviction, is that what you mean?

MR. JONES: Counsel, I asked the question.

15 A. We monitored the Peace Bridge Duty Free's
compliance with the CERS program as per legal advice.

MR. JONES:

376. Q. Okay, did you do any research on your own
about what eviction rights might be available?

20 A. As I already stated, I read online what
the parameters were of the CERS program, and if a
tenant chose to not follow the CERS program then yes,
their protections -- the eviction moratorium, under
the CERS program, is no longer available to them.

25 377. Q. Okay, I want to take you to Tab 'D'
Fourteen (14) of the productions, and it's a March
14th email that you sent. March -- sorry, March 30th,

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2021 email. And it's an email to Ron Rienas, and specifically I want to draw your attention to the last paragraph. And you say, "I feel it is essential that we start developing a legal strategy to secure repayment of 2020 rent arrears. The next steps, assuming they will continue in default, as it appears from their actions to date, that they have no intention of curing the default nor open the store anytime soon." And then you say, "Perhaps we stop reminding them of their obligations under the CERS program and the third CERS periods available and if they fail to provide us with proof required for eviction protection, we proceed with our right to exercise our remedies under the lease." Do you remember this email?

A. I don't recall it, but this is my email.

378. Q. And so what are you expressing there?

A. I'm expressing what our rights are as a landlord of where we stood with the Peace Bridge Authority at that time.

379. Q. So at that time you want to proceed with eviction?

A. At that time we were going to monitor their compliance with the CERS program in order to protect our interests as a landlord, just as any

other business would do to protect their own
interests and to make sure that people are complying
with the legal requirements. To this date they
hadn't paid us rent, every proposal they proposed
insisted upon complete forgiveness of back rent.
There's a lot -- this -- these certain emails are
part of a larger chain of emails that are taken out
of context. But yes, this is what it says, I find
there's nothing wrong with that, monitoring how your
client was complying with the Canadian Government
CERS program.

380. Q. Well isn't that beyond just monitoring?
And you're suggesting that rather than reminding
them, "We should just take the opportunity to evict
them if they don't -- if they let it slip".

A. They didn't -- your client didn't let
things slip, we reminded them and reached out to them
repeatedly, we communicated with them multiple,
multiple times, all the time, every month. Ron
reminded them multiple times, I think almost all the
time about their obligations under CERS. We would
request their CERS verification, it would not be sent
to us. So -- and after this, too, there was also a
meeting in May of 2021 to discuss their financial
situation with them, relative to all these things.

381. Q. Okay. And so when you say you want to develop a stra -- develop a legal strategy to secure payment, what are you talking about there for the ...

A. Every proposal ...

5 382. Q. ... 2020 ...

A. ... they made always had us having to forgive a hundred percent (100%) rent. And so as a normal person would do, under the course of business, we're legally owed this rent money, it is wise for us to con -- to consult with our legal counsel to determine what our legal options are and develop a strategy to ensure that the Authority will receive what is due to them.

15 383. Q. And so what type of things did you have in mind when you sent that email?

MR. STANEK: Legal advice.

A. Legal advice.

MR. STANEK: That's what she had in mind, legal advice.

20 MR. JONES:

384. Q. Well, to secure payment. So were you thinking of getting guarantees, were you thinking ...

MR. STANEK: That would be the subject matter of the legal advice.

25 MR. JONES:

385. Q. Well, you're saying that that's privileged?

A. What I disclose to my attorney is privileged.

5 386. Q. Okay, so ...

A. We -- just -- just so you can stop there, at the May 2021 meeting we did ask for guarantees.

387. Q. And why were you asking for guarantees of non-parties?

10 A. They weren't a non-party, they're shareholders of -- of the tenant, they're owners of the business.

388. Q. So they have to provide a guarantee?

15 A. They didn't have to, we requested it. It's normal course of business for people to request personal guarantees on money that's due to them. When -- when people make loans to people it is standard practice in many times to request a guarantee.

20 389. Q. So ...

A. To that date we were unable to get any kind of resolution with your client. We asked for certain things just like they asked for things, we asked for things, too. They refused.

25 390. Q. So the Authority could've required, as

part of the RFP, that there be a guarantee -- a guarantor under the lease, but they didn't do that, right?

A. At that time, no.

5 391. Q. And there was no discussion of a guarantee?

A. I don't know if there was discussion, it wasn't included in the lease.

10 392. Q. And so you're saying that it was reasonable to ask the owners to guarantee what was approximately a six million dollar (\$6,000,000.00) obligation where ...

A. Yes I ...

15 393. Q. ... there --...

A. ... do say it's reasonable.

394. Q. ... where there's no sales?

MR. STANEK: After they didn't pay rent for ...

A. For --.

20 MR. STANEK: ... a year.

A. Yeah.

MR. JONES:

25 395. Q. Would you, would you guarantee a business that had zero sales, in the middle of a pandemic, and expose yourself to millions of dollars?

A. Doesn't matter what I would do. If it's my business, and I'm the one who believes in it, and I'm the owner, owners -- owners put in a lot more, yes.

5 396. Q. I think it has to do with reasonableness.

A. Well why are we the arbitral -- arbiters of reasonableness? We requested a guarantee, they declined, period. It's not unreasonable for us to ask.

10 397. Q. And there was no requirement for the tenant to retain any earnings in the lease, was there?

A. In the lease, no.

15 398. Q. And the Authority didn't require that as part of the RFP process?

A. At the time, no.

399. Q. So you had a meeting with the Authority -- sorry, with the Duty Free representatives in May 2021?

20 A. Yes.

400. Q. And you prepared a memo to file ...

A. Yes.

401. Q. ... of that meeting?

A. Yes, I did.

25 402. Q. And I believe it's at 'C' thirteen (13).

What was the purpose of this meeting?

5 A. The purpose of this meeting was to have
discussions with Mr. Pearce and Mr. O'Hara on what
the intentions were of the Duty Free going forward.
The store was still closed at this time, restrictions
had been eased at the border. So it was to discuss
their financial position just like -- you know, you
wanna point to eighteen oh seven (1807) discu --
discussions. That's what we were having,
10 discussions.

403. Q. And so at that point you were trying to
get them to put a personal guarantee on the table?

15 A. It was one of the many things we discussed
at that meeting. We discussed what was their plan,
were they -- what other government programs were they
looking into, what other things were they going to do
to try to help themselves and us so that we could get
through this -- this time of them not paying rent.

20 404. Q. So was it all about what they were doing?
Was there anything about what the Authority was
doing?

 A. As far as -- what do you mean what the
Authority was doing?

25 405. Q. Like ...

MR. STANEK: What are you talking about?

MR. JONES:

406. Q. Like in terms of rent relief or abatements discussed at this meeting?

5 A. I'd need to look at the notes. They had already put forth their proposals multiple times that the board had reviewed and had rejected. The board wanted us to have a meeting, which we did, to talk to them about what else -- "Where are you? What is your plan. Wow are you planning to come out of covid?"
10 Because they were very difficult to get conversations with and information from. This was after we finally got their financial statements and other interim financial information. We asked to have a meeting with them to discuss what those financial statements
15 showed because I remind you, Mr. Pearce made a statement, "No, there's no adverse financial things going on," and yet they got a qualified opinion about their ability to continue as a growing concern that year from their auditor.

20 407. Q. Okay. And so would you agree with me what you were trying to do was essentially get them to give a guarantee before the lease was -- before the Authority exercised its right to terminate the lease?

25 A. No, we were talking about many different options, that was one of them on the table.

408. Q. Okay.

A. We also asked them if they planned to resume the lease after the pandemic was over as it existed, and they said, "Not a chance." It's all in the notes from the meeting.

409. Q. Okay. And the idea to apply the security deposit against rent and then -- and then assert that that was a default against the Authority, whose idea was that?

A. It's provided for in the lease.

410. Q. Right, but whose idea was it to do that?

A. I don't think anybody -- it was any one person's idea.

MR. STANEK: It's a provision of the lease.

MR. JONES: I understand that.

MR. STANEK: Is there something nefarious about exercising your legal rights.

MR. JONES: Well, I think that that is against the spirit of the provincial legislation at the time, to apply a security deposit and -- against rent owing ...

MR. STANEK: I'm sure the ...

MR. JONES: ... and then assert ...

MR. STANEK: ... the province --...

MR. JONES: ... theirs is default.

MR. STANEK: ... I'm sure the province will be happy to learn that it was the spirit of their legalisation to allow your client to occupy the premises rent free.

5 MR. JONES: Well isn't that what the legislation says?

MR. STANEK: No, there's moratorium on evictions.

MR. JONES: Right.

10 MR. STANEK: No forgiveness of rent.

MR. JONES: No, I agree. But the -- they can't evict if there's non-payment of rent.

MR. STANEK: As long as they're complying with CERS.

15 MR. JONES: Right. And --.

MR. STANEK: And we didn't have information that they were complying with CERS at multiple points.

MR. JONES: So that's ...

20 MR. STANEK: They thumbed their nose at us, sir.

MR. JONES: Sorry, you're giving evidence that they thumbed their nose at?

25 MR. STANEK: You're the one arguing with me, it's your examination.

MR. JONES: Okay, so what are you relying on for the ...

MR. STANEK: Do you have some questions you want to ask?

5 MR. JONES: What are you relying on for the assertion that they thumbed our noses at us?

MR. STANEK: You keep -- you are doing it today, you're saying, "Well, there was an eviction moratorium, there was nothing you can do, we don't have to do anything, we don't have to pay rent."

MR. JONES: No, I'm saying that ...

MR. STANEK: That was their position. That was the way we perceived their position.

15 MR. JONES: And that's them thumbing their nose, ...

MR. STANEK: Mmhmm.

MR. JONES: ... saying that you're not allowed to evict?

20 MR. STANEK: Mmhmm.

MR. JONES: That's the -- that's the evidence that ...

MR. STANEK: Mmhmm.

MR. JONES: ... you're relying on?

25 MR. STANEK: Well it's not evidence, I'm

giving you my impression. It's not -- certainly not evidence, sir.

MR. JONES: Okay.

MR. JONES:

5 411. Q. I mean, is there any point in time where the Authority did not -- was not of the -- did not believe that the tenant was applying for CERS?

A. Yes.

412. Q. Okay, why is that?

10 A. Because we requested them to provide us with the proof of their applications and they would not. Multiple times we asked and they wouldn't.

413. Q. So there was -- and I've seen these letters saying that the Authority was asking them to apply for more periods faster.

15 A. Because we were -- CERS was already, let's say, in per -- they waited 'til the very last minute, which is in compliance with CERS, to the very last possible moment to apply for the CERS money, and then waited to remit that money 'til the very last possible moment to the Authority.

20 414. Q. And the Authority wanted them to do it faster so they ...

A. We wanted them ...

25 415. Q. ... could evict the tenant faster?

5 A. Not evict the tenant faster. But it
would've been an effort in good faith, "If period
four is open for CERS, I'll apply for period four.
And as soon as I receive period four money, I will
remit it to you, Authority, because I know that I
haven't been paying you rent for a year and a half."

416. Q. But I'm sorry ...

10 A. What they did was still under the
provision of CERS, which is their legal right to do
so, as we monitor when they applied and when they
paid us.

417. Q. But I'm sorry, these emails are all over
the place. You're ...

15 A. Because they're ...

418. Q. ... sending emails ...

 A. ... probably taken out of context.

419. Q. Sorry. No, you're saying that ...

 A. They're part of bigger chain.

20 420. Q. ... the first opportunity that arises the
Authority's going to evict them.

 A. I never said that.

421. Q. Well you're -- there's some emails that
certainly imply that.

 A. I didn't say, ...

25 MR. STANEK: Do you want to put --...

A. ... "At the very --...

MR. STANEK: ... put them to Ms. Costa?

A. ... the very first opportunity available,
let's evict them."

MR. JONES:

422. Q. Well, there's the email that you said
that, "Let's not remind them and then evict them."

A. It's not our job to remind a tenant to
follow the rent program that they're -- they're
relying on for their eviction moratorium. Just like
it's not our duty to remind a tenant that their rent
is due every single month. We did, though. You have
to remember this is also during a period of time
where they refused to open their store. They closed
their store without even notifying us ahead of time
that they planned to close the store, we found out
later. They refused to provide washrooms as against
the spirit of Canadian and Ontario legislation that
essential businesses should be provided services,
which they provided an essential service to truck
drivers, they refused to open their washrooms. We
opened the washrooms and staffed them with our own
employees.

423. Q. But by the time the CERS program is
activated, the Authority -- or, the Duty Free store

is cleaning the washrooms, right?

5 A. Because we finally told them, "You clean them yourself," after -- it's in a letter from Ron, I can't recall, summer of 2021, perhaps. It was August, July of that time after we had been cleaning them since March of 2020 with repeated "Please" for them to "Please open the store." They were not required to be closed, to "Please open the store to provide the service to the travellers, to the essential truckers."

10

424. Q. Has the Authority done any financial analysis of what rent or effective rent it might receive from a replacement tenant?

 A. No.

15 425. Q. In the meetings that you have attended, board meetings, are you aware of any non-financial reasons that the Authority -- for the Authority wanting to evict the tenant?

 A. Non-financial?

20 426. Q. Yes.

 A. At -- during the time that the store was closed, that was a default under the lease.

427. Q. But the store's no longer closed.

MR. STANEK: Because we sent you a Notice of Default.

25

MR. JONES:

428. Q. Right, so is ...

A. And then the store was opened.

429. Q. So the cured default, you're saying ...

5 A. You just asked me at any time, so I'm
telling you yes, at one point in time ...

430. Q. Okay.

A. ... there was a non-financial reason ..

431. Q. Okay, at that point ...

10 A. ... for default.

432. Q. ... in time.

A. That's what you asked.

433. Q. Okay, what about after the store opened?

15 A. After the store opened? Well, to be
honest with you, we were not provided their 2022
financial statements timely as per the lease, this
just occurred. It's a non-financial default.

434. Q. So that was raised as a reason to
terminate the lease?

20 A. Sir, you just asked me if there were any
non-financial reasons that could terminate the lease.

435. Q. No, no, ...

A. And I just ...

436. Q. ... I asked you ...

25 A. ... said there was.

437. Q. ... if there reasons that were considered,
non-financial reasons that the -- that played into
the consideration for the landlord wanting to
terminate the lease.

5 MR. STANEK: There's a moratorium 'til April.
They can't -- the lease can't be terminated.
That's what is before the court right now, can
the lease be terminated despite the fact that no
rent is being paid. It's in the court's hands
10 right now, so I'm really puzzled by your
assertions about terminating the lease. A
Notice of Default was issued when it was issued,
no bailiff was hired, no locks have been
changed. I don't understand why you keep going
15 on about the, you know, eviction of the tenant
when that has not occurred and was not even
attempted.

MR. JONES: Well it was certainly threatened.

MR. STANEK: It has not occurred and was not
20 attempted. You might think -- it is certainly
reasonable in my view to threaten eviction if
you haven't been paid for going on two and a
half years.

MR. JONES: So just so I'm understanding, the
25 Authority never had any ...

MR. STANEK: Three years.

MR. JONES: ... intention of terminating the lease unilaterally?

MR. STANEK: I didn't say that.

MR. JONES: Well, my question was, was there any non-financial reasons that the Authority wanted to --...

MR. STANEK: And you got the answer.

MR. JONES: ... the lease.

MR. STANEK: And you keep saying ...

A. Their refusal to open the store at that time in 2020 and 2021. And had there not been a moratorium on -- they were issued the default for that reason, it's a non-financial reason, they refused to open the store.

MR. JONES:

438. Q. Okay. And so ...

A. The store was not closed.

439. Q. Right. And I got that point. And then I said after the store opened were there any other?

MR. STANEK: And she gave you the answer.

A. And I just said one just happened.

MR. JONES:

440. Q. And that was a consideration of why the landlord wants to terminate the lease?

MR. STANEK: Jesus Christ.

MR. JONES: But that's ...

MR. STANEK: No.

MR. JONES: ... my question. My ...

5 MR. STANEK: It's before the court right now!

MR. JONES: So then ...

MR. STANEK: We can't -- we have no intention
of terminating the lease!

MR. JONES: Counsel, stop yelling at me.

10 MR. STANEK: Well stop being obtuse.

MR. JONES: I'm not trying to be obtuse, I'm
asking ...

A. I feel like you're trying to paint me in a
corner ...

15 MR. JONES: ... after --.

A. ... to fit your narrative.

MR. JONES:

441. Q. No, no, I'm not trying to put any ...

A. Yes you are.

20 442. Q. It's a very simple question.

A. I answered you.

443. Q. After the store opened were there any non-
financial reasons that the -- that lead to the
landlord wanting to terminate the lease? And I
25 understand that you said the 2022 financial

statements ...

MR. STANEK: The Royal Bank proceedings started very soon after that, then the matter was before the court. Any intentions with respect to termination at that point became mute, it's not a relevant question.

MR. JONES: Well I think it's relevant if the landlord is threatening to terminate the lease when it knows it's illegal to do so.

MR. STANEK: That, sir, is an incorrect statement. It was ...

MR. JONES: That it's not relevant?

MR. STANEK: The landlord did not consider terminating the lease at any point when it was illegal to do so.

MR. JONES: Okay.

MR. STANEK: And you -- if you want to make that assertion before the court, go ahead.

MR. JONES:

444. Q. So would you agree with me that by terminating the lease at this point, to bring in a new tenant, there will be a financial loss to the landlord?

A. It's already been reserved for, we've already incurred the financial loss.

445. Q. For downtime and pay a lower rent rate from a new tenant?

A. Who knows what -- if a new tenant, if that's the way that this thing ends up playing out, who's to say what their rent will be.

446. Q. There's been no consideration by the landlord of what that might be?

A. No.

447. Q. So at Tab 'E' Four of the productions there's an email that you're copied on, I think you printed off this email from Ron Rienas to the board. And Ron Rienas is saying that the Peace Bridge Duty Free store remained open -- or sorry, the US side remained open, the Peace Bridge, Canadian side, did not. And it says, "According to Peace Bridge's own numbers, seven percent of their sales come from truckers, meaning that it did not see two point two million (2,200,000) in revenue when they were closed for eighteen (18) months. These sales of two point two (2.2) would've amounted to four hundred and forty thousand dollars (\$440,000.00) in rent based on twenty percent (20%) of sales. Still a far cry from six million dollars (\$6,000,000.00) for that eighteen (18) month period, but certainly better than nothing." Do you know, did you ever discuss with Mr.

Rienas the basis for calculating what the trucker sales might have been?

5 A. That I believe was information he received from Duty Free of what the past percentage of their total sales, truck sales were.

448. Q. Pre-covid sales?

 A. Yeah, I believe so.

449. Q. And so is he applying the seven percent to what pre-covid sales might have been?

10 A. I don't know what he's applying it to there.

 MR. STANEK: You can ask him.

 MR. JONES:

15 450. Q. Okay, did you have any discussions about that analysis with him?

 A. No.

20 451. Q. So here's a March 10th email that you sent to Mr. Rienas. And in it I think you're saying -- you're talking about something similar, in the second paragraph you say, "I know we cannot evict them due to Canadian rules, but can we not seek some sort of court relief and seek to have them compelled to reopen the store? As you point out they have lost approximately one million dollars (\$1,000,000.00) in sales to commercial traffic, which would provide cash

25

flow to pay rent, additional back rent beyond the few CERS period they have applied for." So was that in the context of the same sort of discussion?

A. Same discussion as what?

5 452. Q. As the twenty percent (20%) of two point two million dollars (\$2,200,000.00)?

10 A. I think I was just taking Ron's numbers where he says, "They've lost approximately a million dollars (\$1,000,000.00) of sales and commercial traffic," because the store was still closed.

453. Q. Okay. And you're saying that if they had stayed open that would've amounted to about two hundred thousand dollars (\$200,000.00) in rent?

15 A. I don't believe I say it amounts to two hundred thousand dollars (\$200,000.00) rent in here.

454. Q. So what would it be, then?

A. I don't know.

455. Q. Okay.

20 A. You're trying to pin me to the twenty percent (20%) and he used the twenty percent (20%) 'cause that's what they were gonna -- whatever, arbitrarily decide to pay. You're asking me about what somebody else did, they're not my numbers. It was just a comment about ways they could've helped themselves because they were not compelled to close

25

the store. And on -- I'm a US person, so on the US side we could've went to court and had someone compelled to open their store. 'Cause our courts were open and doing different things, I know Canada was in a different situation. So my -- my understanding, I'm not fully abreast of Canadian law when it deals with business things, I'm much more familiar on the US side. And probably what comes through here is a little bit of my frustration in, you know --. It's March 2021, restric -- some restrictions had been lifted and still the store's closed, there's nothing happening, what -- what are - - what's going on? I mean, we can look to another paragraph in this email, it talks about the longer time goes on that they don't pay rent, refuse to open store, what that impact's gonna be to the Authority as far as booking additional bad debt. Our ability to meet our own covenants in relation to our bond holders to which we owe, you know, eighty (80) plus million dollars.

456. Q. So has that been impacted in any way?

A. At this point, no, thankfully. But, however, we have had to raise toll because unpledged revenues, which is what rents are, go to pay operating expenses. Pledged revenues belong to the

bond holders.

457. Q. Right.

A. To the extent that unpledged revenues are insufficient to cover operating costs, pledged revenues have to be used, which -- which they had to be used.

458. Q. And I right that the toll -- the toll revenue went down considerably during covid?

A. Yes, it did.

459. Q. By how much?

A. I don't recall offhand.

460. Q. So in this email you say, "I was just thinking maybe we could make some moves and position ourselves to be ready and ahead of the curve once all the covid protections are lifted so we can hopefully secure our position on the back rent and be able to move quickly, as I believe they plan to have some long -- some type of long drawn out renegotiation of the lease once things open on eviction, if necessary." So at that point you're saying that you want to put -- get the Authority in a position that it's got some security upon the amount of rent that's owed, right?

A. I'm trying to, as my -- as is my charge, to protect our interests of the Authority, and as any

prudent business person would be, it's to strategize and get yourself in a place to where you're either gonna secure some position on some of this back rent that's owed or get into a position where -- where you can move forward or whatever it's gonna be, as -- what was it? "I believe they plan to have some type of long drawn out renegotiation of the lease," and here we are two years later.

461. Q. All right. So ...

A. It's come to fruition.

462. Q. ... am I right that that's -- what you're talking about here is guarantees and eviction?

A. I'm not saying anything, I'm -- I'm -- I didn't say guarantees in here, I did say eviction if necessary. "Eviction if necessary" because that is one of the legal remedies that we are provided as a landlord.

463. Q. Right.

A. It's nothing nefarious, it's nothing evil, it is a remedy.

464. Q. No, I'm talking about, "And then secure our position on the back rent," if that meant guarantees.

A. It could mean guarantees, it could mean they have access to other financing that they could -

- could get, loans, other kinds of financing that they could get with other people, whether it be their shareholders, other banks, whatever that businesses do every day.

5 MR. STANEK: Mr. Jones, are you going to leave time for me to ask questions?

MR. JONES: How much time were you hoping to have?

10 MR. STANEK: I was hoping to have at least fifteen (15) minutes because at no point have you put Mr. Pearce's allegations about what Ms. Costa said to Ms. Costa. I think I'd like to put them to Ms. Costa so that she can respond to what Mr. Pearce says that she said. So I'd like
15 time to do that.

MR. JONES: And so are you referring to the pre-lease discussions?

20 MR. STANEK: I am referring to Mr. Pearce's Supplemental Affidavit of the 13th of February, 2023, paragraphs four through thirteen (13) where he describes a meeting with Ms. Costa and what he says Ms. Costa said. Ms. Costa is here, I haven't heard you ask her specifically about what Mr. Pearce says she said. And I think that
25 really the court would like to know Ms. Costa's

response to that.

MR. JONES: Well, we've got your response in a roundabout manner in a roundabout way through Mr. Rienas's Affidavit, right?

MR. STANEK: No, I'm talking about Ms. Costa, she's right here.

MR. JONES: Right, so ...

MR. STANEK: Mr. Pearce says there's certain things she said, are you going to put those to her or do I have to do that?

MR. JONES: So -- well first let's go through Mr. Rienas's Affidavit.

MR. STANEK: No, we're not going to do that.

A. May I have a -- I need to use the rest room.

MR. JONES: Sure.

A. I'm sorry.

COURT REPORTER: Off record.

OFF THE RECORD

MR. JONES:

465. Q. So I think I already asked you that you didn't specifically tell Mr. Pearce, during the July 2016 meeting, that there would be no rent abatements in the event of eighteen point oh seven (18.07), just that that was not language that was included in the

lease, right?

MR. STANEK: Look, I'm going to object to this because what you're doing is, you're looking at Mr. Pearce's Affidavit, which I've just taken you to, all right.

MR. JONES: Well, so ...

MR. STANEK: That is -- this is ...

MR. JONES: You're interfering with --. Like, what do you want?

MR. STANEK: All right, you know what, I will ask her these questions, okay? You can ask her what you like. Go ahead.

MR. JONES: Sorry Counsel, but you know, we've gone over this already.

MR. STANEK: All right, you don't need to go over it again then, sir. So if you're doing this at my request, I withdraw my request.

MR. JONES: For example, paragraph ten of Mr. Rienas's Affidavit, ...

MR. STANEK: Mr. Rienas's Affidavit.

MR. JONES: Yeah.

MR. JONES:

466. Q. It says that you told Mr. Rienas that you recollect that Mr. Pearce was told the Authority was not prepared to agree to commit to a rent abatement.

MR. STANEK: Which one, where are we?

MR. JONES: So this is the March 1st, 2023
Affidavit.

MR. STANEK: Okay. There's four of them, I
just want to know which one. Okay?

A. Where are we at?

MR. STANEK: Paragraph ten.

MR. JONES:

467. Q. So I think that's consistent with what you
told me earlier, that there was not going to be a
specific provision for rent abatement, right?

MR. STANEK: Do you want to read paragraph
seven to ten of the ...

A. Yes, please. Yeah.

MR. STANEK: ... Affidavit? Yeah, okay. It
starts there.

MR. JONES: And Counsel, just so it's on the
record, I think it's inappropriate to be
interfering with the examination in this way.

MR. STANEK: You promised a deadline of why
she could go and to be with her daughter.

MR. JONES: Right.

MR. STANEK: It's now four twenty (4:20).

There are certain things that I need to do, so I
brought it to your attention so that Ms. Costa

can go be with her daughter as she needs, okay?

MR. JONES: I -- listen, I had no intention of keeping her beyond four thirty (4:30). If we can't finish today then we can figure out another resolution.

MR. STANEK: We're finishing today.

A. Okay, so I'm reading through here and I don't know if one of you wanna ask me.

MR. STANEK: You've -- I think that ...

MR. JONES: Well, Counsel, ...

MR. STANEK: ... you've been asked, ...

MR. JONES: ... like, this is --.

MR. STANEK: ... there's --...

A. Okay, so now this is ...

MR. STANEK: ... there's a question on the floor, you've been asked about paragraph ten.

A. Okay. Of Ron Rienas's Affidavit.

MR. STANEK: Yeah, and it references ...

A. And he spoke to me. I advised that my recollection of the meeting that took place, referred to in paragraph seven through ten, ...

MR. STANEK: Mmhmm.

A. ... okay, differs from them, yes.

MR. STANEK: Okay.

A. I never told him that there would be rent

abatement.

MR. STANEK: Do you want to ask Ms. Costa as to in what respect ...

MR. JONES: Counsel, ...

MR. STANEK: ... her evidence ...

MR. JONES: ... come on.

MR. STANEK: ... differs? You asked the question about paragraph ten.

MR. JONES: Why don't -- Counsel, like, this is so inappropriate. You might as well be the one giving the evidence. You know what --.

A. And I think I did answer this question already in the stuff we did earlier and I said, "No, there was no rent abatement."

MR. JONES: Right, we've already gone through these questions, Counsel. This ...

A. As per ...

MR. JONES: ... was be --...

A. ... Ron Rienas's ...

MR. JONES: ... we talked about ...

A. ... ques -- paragraph ten.

MR. JONES: ... the insurance clauses, we talked about not wanting to create a situation where there's no loss.

MR. STANEK: If you're done I can ask some

questions. Are you done?

MR. JONES: No Counsel, I'm not. Now you've wasted ...

MR. STANEK: I'll wait.

MR. JONES: ... ten minutes of time. So there was an email -- right, this January 19th, 2021 email that you sent to Ron Rienas, it has some redactions on it. I would like to know what was redacted. Well, provide us with an unredacted copy or provide us with the information about what was redacted and why.

MR. STANEK: January 19, 2021? Okay, I'll tell you what was redacted and why. ^

MR. JONES: Okay, subject to the undertakings, and refusals, and under advisements those are my questions. Thank you.

RE-EXAMINATION BY MR. STANEK:

MR. STANEK:

468. Q. I'm going to ask you, Ms. Costa, this paragraph seven of the Affidavit of Jim Pearce, sworn February 23, 2023, he says, "I had a meeting with Karen Costa from the Authority on July 18, 2016," that's correct, isn't it?

A. Correct.

469. Q. Then he says, "One of the issues we addressed at that meeting was Duty Free's concern conveyed to the Authority in writing that if something catastrophic occurred during the term, that was beyond Duty Free's control and materially impacted sales, Duty Free would need an abatement of rent and potentially other terms of the lease to be addressed as well, otherwise there would be no way that Duty Free would be able to pay minimum base rent." Did -- was that one of the issues that Mr. Pearce raised at the meeting?

A. He raised issues about catastrophic events in a paragraph that he -- he wanted to put -- be put into the lease.

470. Q. Did he ever say that there were catastrophic events where there would be no way that Duty Free would be able to pay the minimum base rent?

A. No.

471. Q. "During our meeting," he says, going back to paragraph seven, "I made it clear to the Authority that Duty Free's main concern was its ability to pay minimum base rent. And if Duty Free's business was materially impacted by a significant event or change in circumstance outside its control." Did he express

that concern, about Duty Free's ability to pay minimum base rent?

5 A. Not about the ability, he just ex -- again, it was raised in the paragraph about these catastrophic events and if there were adverse impacts on their business, which they considered catastrophic of five percent decrease in sales.

472. Q. And with respect to those events, I think he says, "It would require a rent abatement that
10 would be in proportion to what Duty Free could afford to pay during the affected period having regard to gross sales." Did you discuss that on January 18, 2016?

 A. In the -- you mean ...

15 473. Q. A rent abatement ...

 A. ... June?

474. Q. ... that would --. Yes. A rent abatement that would be in propor --" July 18th.

 A. July, yeah, sorry.

20 475. Q. He said, "A rent abatement that would be in proportion to what Duty Free could afford to pay during the affected period having regard to its gross sales."

 A. No.

25 476. Q. No, that was not discussed?

A. No.

477. Q. Okay. And he attaches the exhibits that we've seen. And then it says, "At the July 18, 2016 meeting, Ms. Costa," you, "on behalf of the Authority conveyed to me that the Authority did not want the language of Subsection 18.07 of the lease to expressly refer to a formulaic rent abatement," is that correct?

A. We were not gonna put rent abatement in the lease.

478. Q. No rent abatement of any kind?

A. No, none of any kind.

479. Q. Okay. And he also says that you conveyed to him that you did not want to put in eighteen point oh seven (18.07) a right to a rent abatement because it concerned such an expressed contractual right that might prejudice the ability to successfully make a business interruption claim in the event of an event that was covered by insurance by reason of an insurer arguing that the contractual abatement right meant that, no, or a reduced loss existed in terms of any right to be compensated by insurance. Was that the reason that was not included in ...

A. No.

480. Q. ... eighteen point oh seven (18.07)?

A. No.

481. Q. Do you recall a discussion of insurance?

A. Yes.

482. Q. Have you told us everything today about
5 that discussion of insurance?

A. Yes.

483. Q. Okay. And then he says that you say, "As
a result, the Authority objected to express language
about abating rent for fear it would assist the
10 insurer to attempt to reduce insurance proceeds
otherwise payable." You already talked --...

A. Yes, ...

484. Q. ... you already told us ...

A. ... I already talked about that.

485. Q. All right. Then he says, paragraph eight,
"However, Ms. Costa made it very clear to me that the
landlord did not, in fact, object to the need for a
rent abatement to address events including changes in
regulatory rules that cause a material negative
20 impact on Duty Free's business." Did you make it
very clear to him that you did not object to the need
for a rent abatement?

A. No.

486. Q. Did he express that he needed a rent
25 abatement?

A. He might've talked about wanting rent abatement for a variety of things which we've already talked about. And -- no.

487. Q. So you never said this to him?

A. No.

488. Q. Ms. Costa, and then paragraph nine ...

MR. JONES: Counsel, I've got to object to the way you're phrasing these. Like, she's given her answer and then you're -- you're putting ...

MR. STANEK: This is a ...

MR. JONES: ... words in her mouth.

MR. STANEK: ... Cross-Examination, Counsel, re thirty-nine oh three (3903).

MR. JONES: Counsel --.

MR. STANEK: This is a Cross-Examination.

MR. JONES: Counsel, proceed, but the way you're putting words in her mouth is --.

MR. STANEK:

489. Q. Paragraph nine, "Ms. Costa made it crystal clear to me," Mr. Pearce says, "that the intention of the Authority was that when circumstances required it and Subsection 18.07 of the lease was triggered, with no right to business interruption insurance proceeds, that a rent abatement would be implemented."

A. That is incorrect and false, that was

never stated, that is not the intent, it never was.

490. Q. And then he says, "Given the lengthy
landlord/tenant relationship to date and our
generally good relationship with the Authority over
that period, I had no concerns about taking Ms. Costa
at her word." He doesn't say -- doesn't put any
words in your mouth there, so I'm not going to ask
you about that, okay? And he then talks about the
email of July 19th, which we've discussed. And then
he says, at paragraph eleven (11), "I want to
emphasize that it was expressed to me by the
Authority that the only reason Subsection 18.07 does
not explicitly say, 'Minimum base rent will be
abated' is because the Authority was concerned about
the language of Subsection 18.07 of the lease
impacting receipt of insurance proceeds as noted
above," is that correct?

A. No.

491. Q. Do you have any theory, or information or
belief as to why Mr. Pearce would say that?

A. I believe, and again it's just my belief,
that he -- this is what they asked for, and so
because it's what they asked for I think he believes,
hopes or interpreted, 'cause that's what he wanted it
to mean, that that's what eighteen oh seven (1807)

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Karen Costa - May 30, 2023

means. It doesn't. There's subsequent emails beyond
July of 2016 in which I expressly say to Me. Pearce,
in October 2016, that there is no -- I believe it
might be in a subsequent one of Ron Rienas's
Affidavits, that under no circumstance is there any
abatement of minimum base rent, to which he replies,
"Yes, thanks."

MR. STANEK: Okay, those are my questions.

A. And that was in October, 2016.

MR. STANEK: Those are my questions, thank
you.

COURT REPORTER: Off record.

OFF THE RECORD

MR. JONES: Just going back on the record to
acknowledge that the March 1, 2021 email from
Karen Costa to Ron Rienas is going to be Exhibit
Number Three. Thank you.

EXHIBIT NUMBER THREE: The email from
Ms. Costa to Mr. Rienas dated March
1st, 2021 - Produced and marked.

EXAMINATION CONCLUDED AT 4:36 P.M.

* * * * *

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Karen Costa - May 30, 2023

5 **THIS IS TO CERTIFY** that the foregoing is a true
and accurate transcription from the recordings
made by sound recording apparatus to the best of
my skill and ability.

E. M. McKee

10 Penfound's Inc.

Transcript Ordered: May 31, 2023

Transcript Completed: June 5, 2023

Parties Notified: June 5, 2023

15 *The signature in coloured ink appearing at the end of this
transcript denotes that the contents have been certified as
correct by Elaine M. McKee, Penfound's Inc. A transcript
appearing with a signature in black ink or without a
signature is an unauthorized copy of the original and may
20 not be used for any purpose.*

TAB 7

Court File No. CV-00673084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

TW/sp

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

This is the Cross-Examination of BEN MILLS on his Affidavit sworn the 1st day of January, 2023, held via videoconference at the Offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, 222 Bay Street, Toronto-Dominion Centre, Toronto, Ontario, on the 17th day of August, 2023.

A P P E A R A N C E S:

CHRIS STANEK

--- for the Buffalo and
Fort Erie Public
Bridge Authority

BRENDAN JONES
DAVID ULLMAN

--- for the Respondent

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1 --- upon convening at 9:30 a.m.

2 --- upon commencing at 9:33 a.m.

3
4 BEN MILLS, affirmed

5 CROSS-EXAMINATION BY MR. STANEK:

6
7 1. Q. Good morning. Your name is Ben
8 Mills. Is that correct?

9 A. That's correct. It's Robert
10 Benjamin Mills, is my full name.

11 2. Q. All right. You swore an affidavit
12 in this proceeding where the Royal Bank of Canada is
13 an applicant. You swore the affidavit on January 1,
14 2023?

15 A. Yes, that is correct, yes.

16 3. Q. So you were doing some work on New
17 Year's Day?

18 A. Yes, I like to be available.

19 4. Q. And you are a lawyer, sir, correct?

20 A. That's correct, yes, I am.

21 5. Q. You're a corporate lawyer?

22 A. No, I'm not. I'm more sort of a
23 regulatory administrative law lawyer, who has a
24 particular involvement in government procurement.

25 6. Q. I see. Do you regularly negotiate

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1 leases as part of your practice?

2 A. I wouldn't say "regularly". I do a
3 lot of different things, but I regularly advise
4 government entities or people dealing with
5 government entities regarding their negotiations,
6 because they often have unique aspects to them.

7 7. Q. Were you the lawyer in your office
8 that had carriage of the lease negotiations?

9 A. Correct.

10 8. Q. So there was no other lawyer that
11 was...

12 A. No.

13 9. Q. ...had carriage of the lease?

14 A. Not in my firm, no.

15 10. Q. So as far as any advice as to the
16 meaning of particular clauses in the lease, that was
17 you providing that advice?

18 A. Yes, you know, or on the basis of my
19 reading of the lease, yes, to say this is what I see
20 as the practical meaning and the legal meaning, for
21 the client, yes.

22 11. Q. And you were representing Peace
23 Bridge Duty Free in the negotiations of the lease?

24 A. Yes. I think the
25 negotiations...like, I was advising them and helping

1 them. The negotiations were primarily conducted
2 between the two parties, being the Authority and
3 Peace Bridge Duty Free, although I did have one
4 conversation at least with counsel at Gowlings.

5 12. Q. Mr. Darling? Was it...

6 A. Yes, that's correct, yes.

7 13. Q. Graham Darling was representing the
8 Authority?

9 A. Correct, that's correct, yes.

10 14. Q. When I say "the Authority" I mean
11 the Peace Bridge Authority, the body that is in
12 charge of the property?

13 A. Yes. Correct, absolutely.

14 15. Q. And your client was Peace Bridge
15 Duty Free?

16 A. Yes.

17 16. Q. Now, you say in your affidavit...you
18 make some descriptions of what Peace Bridge Duty
19 Free's business is based upon.

20 A. Right.

21 17. Q. You're an administrative lawyer
22 specializing in government. What is the Authority
23 premised on?

24 A. The Bridge Authority?

25 18. Q. Yes, what was your understanding...

B. Mills - 6

1 A. Yes, it's defined by statute what
2 its obligations are. I think it's...there is the
3 Peace Bridge Act that was passed by the Government
4 of Canada, and I assume there is a similar act or
5 regulation in the United States. I think it's at
6 the New York level, which is kind of surprising,
7 given that it's an international crossing, but in
8 any event, they are governed by the relative
9 obligations under those Acts.

10 Their business is to maintain and keep the
11 bridge running so that it's...you know, it's
12 available as a crossing for people moving between
13 Canada and the United States.

14 19. Q. What are its only sources of
15 revenue?

16 A. I understand it has...I don't know
17 all of its sources of revenue. I know...two sources
18 of revenue that I can...I think I can speak to. The
19 first source of revenue would be tolls. The second
20 source of revenue would be rents that they charge or
21 however else they charge through the property they
22 own.

23 So I assume that they have property. I
24 don't know of it personally, on the New York side,
25 as well as on the Ontario side. I'm familiar with

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1 the Ontario side, not the New York side.

2 20. Q. Now, I think the specific focus of
3 your affidavit was clause 18.07 of the lease.

4 A. Correct, yes.

5 21. Q. That's the specific issue you
6 provide your evidence on?

7 A. That's the specific issue that I was
8 advised that I could provide relevant evidence. I'm
9 not involved in this proceeding. So I just don't
10 know what is at issue, other than there is an issue
11 between the two parties.

12 22. Q. There is a couple of things that I'm
13 a little puzzled by.

14 A. Sure. I'm happy to resolve them.

15 23. Q. This lease was entered into as part
16 of an RFP process, correct?

17 A. Correct, yes.

18 24. Q. It was governed by the terms of the
19 RFP?

20 A. Yes, yes, and I think the terms of
21 the RFP contemplated that there would be some
22 negotiation after the RFP process, and indeed, those
23 negotiations happened. They were limited, but there
24 was a certain amount of negotiations that occurred
25 subsequent to the RFP.

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1 I don't know if the RFP had...sometimes we
2 see something called a BAFO process. So it's best
3 and final offer. I don't know if that was formally
4 engaged, but certainly in this context, and looking
5 at the lease, because it...or the RFP because it was
6 more loosely drafted than, for example, what the
7 federal government proper would be doing.

8 It allowed for discussions subsequent. So
9 it was basically the identification of the best
10 proponent, the best offer, and then a situation of
11 trying to resolve any outstanding matters to bring
12 the parties to final agreement.

13 25. Q. Exhibit C to your affidavit includes
14 the draft lease that was included with the RFP?

15 A. That's correct, yes.

16 26. Q. That, Exhibit C, the draft lease,
17 was a lease that Peace Bridge Duty Free was prepared
18 to enter into?

19 A. Yes, like, they...definitely. I
20 think they sought and moved forward with other
21 provisions and had concerns, but yes, I think Peace
22 Bridge's approach always was to put in a bid, and
23 then also to see if there is any additional
24 concessions that can happen subsequent to them being
25 identified as the top proponent. I think that was

1 their bidding strategy.

2 27. Q. But Exhibit C...

3 A. And just to clarify just on that
4 point, you know, I don't recall giving that advice,
5 but the advice I would have given is that the Bridge
6 Authority would have had discretion not to enter
7 into negotiations. They could have simply said,
8 "Look, the lease is the lease, the lease is the
9 lease as provided, and that's too bad, too sad for
10 you. We're not negotiating or having any further
11 discussions."

12 So like, they bid with that in mind, and
13 then subsequently identified as the top rated
14 proponent or, I guess, the best option for the
15 Bridge Authority, further discussions occurred.

16 28. Q. And the Exhibit C to your affidavit
17 does not include clause 18.07, correct?

18 A. It does not, as far as...yes, I'm
19 almost positive it doesn't, yes. Let me just
20 confirm. I looked at it in preparation for this,
21 but yes, it stops at 18.05...or 18.06, that's
22 correct.

23 29. Q. And you would agree with me that
24 even if you enter into negotiations after Peace
25 Bridge Duty Free is the proponent, significant

B. Mills - 10

1 changes to the financial terms wouldn't be allowed?

2 A. Not necessarily. It really depends
3 on the term of the RFP. I haven't...I don't think I
4 included the RFP in my affidavit, and I haven't read
5 the RFP. So my guidance would be one would have to
6 look at the RFP itself, and consider what
7 discretions the Bridge Authority reserved for
8 itself, because the Bridge Authority's perspective,
9 it would be concerned about, you know, running a
10 fair RFP process.

11 30. Q. Right.

12 A. Now, I think what the process that
13 they included was the notion that they would...you
14 know, there would be negotiations and finalization
15 of terms once the proponent is identified, but I
16 haven't looked at that RFP since 2016. So I just
17 don't know.

18 31. Q. Wouldn't a mandatory abatement if
19 certain events occurred affect the financial terms
20 of the lease?

21 A. Not necessarily. You're talking
22 like...you know, if somebody put it in a...for
23 example, if we were talking about an, you know, act
24 of God clause...the name is escaping me now,
25 the...something like that, you know, things came

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1 come up that you're dealing with that does this.

2 You know, and also, too, one must consider
3 that what is being proposed is...we're talking about
4 the consequences of extraordinarily unusual events,
5 being the pandemic, but you know, that's the
6 situation.

7 We're not talking about finetuning or
8 changing significant terms. It's saying, "Look, in
9 the event of certain eventualities, you know, we
10 need to, you know, have..." what I have described as
11 a safety valve.

12 I don't see that as changing the financial
13 terms of the lease. I see that as being, you know,
14 an opportunity to discuss and negotiate to deal
15 with, you know, an eventuality, and I don't see that
16 as offensive to the principles of procurement,
17 either, just as a procurement lawyer.

18 32. Q. But Mr. Mills, wouldn't another
19 bidder, looking at that, say...if the risk profile
20 of this lease changed, wouldn't another...after the
21 RFP closed, wouldn't another bidder have cause to
22 sue?

23 A. No, there are two parts to that
24 question. One, you would have to look at what we
25 would call contract A, which is the RFP itself, and

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1 consider what that RFP said, and I'm pretty sure,
2 given the nature of what...you know, how Peace
3 Bridge operated, that is, the Bridge Authority, and
4 I'm not using this in a disparaging term, but they
5 wanted to reserve as many rights for themselves so
6 as to come to the agreement that they wanted to come
7 to and that they thought was appropriate in the
8 circumstances.

9 So I imagine, and again, I haven't looked
10 at that RFP, but I imagine that RFP...in that RFP
11 Peace Bridge reserved for itself the opportunity to
12 negotiate with any or all bidders. So if they did
13 do that, which I expect they did, there would be no
14 cause to sue.

15 Secondly, you know, the lawsuit in this
16 context...you have to be very careful what we talk
17 about in terms of the lawsuit in the sense of what
18 is the damage to any other proponent, and also, too,
19 what other proponents may have proposed in their
20 lease or sought in terms of their negotiations.

21 So you know, if, for example, all of a
22 sudden, you know, they were to depart significantly
23 from the proposal that was out there that, you know,
24 it's going to be whatever...you know, it's going to
25 be a term of 50 years as opposed to 20 or something

1 that would manifestly change something, then maybe
2 somebody would do that, but they would be on the
3 hook for bid preparation costs, not much more than
4 that.

5 In this context, I see bid preparation
6 costs as being very minimal.

7 33. Q. You mentioned contract A.

8 A. Yes, that's the Ron Engineering
9 case, yes.

10 34. Q. Yes, the Ron Engineering case, I'm
11 very familiar with it.

12 A. Yes.

13 35. Q. When a compliant bid submitted,
14 contract A is formed?

15 A. Correct, yes.

16 36. Q. And after that, the parties cannot
17 depart significantly from contract A. Otherwise,
18 it's an unfair process and the other bidders could
19 sue, correct?

20 A. Yes, but you have to look at the
21 rules of the game. Contract A is on the basis...and
22 also Ron Engineering, you have got to think about
23 what was in that case.

24 Now, I can't remember. I'm getting that
25 confused with BG Checo, but if, for example, you end

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1 up into...well, actually if we want to case law, we
2 can talk about another case, too. There is a...Ron
3 Engineering is basically about saying, "Look, you
4 have entered into a contract. You have made
5 representations in that contract in and of itself,
6 that contract A. You have to adhere to those
7 representations, and if you fail to do so, then we
8 have got a...we have potentially got a problem," but
9 the contract A in this that we're talking about
10 often includes reserved rights.

11 So people, as they do in any contract, can
12 reserve rights for themselves and define the rules
13 of the game.

14 So you're asking me these question, but
15 you know, I haven't looked at the RFP. So I'm
16 answering in the abstract.

17 It does concern me. I know what you're
18 talking about, but I'm not prepared to say that a
19 lawsuit would have resulted to Peace Bridge
20 Authority on the basis of including this 18.07 and
21 that's a justification...

22 37. Q. Mr. Mills, yes, you may have
23 misunderstood me.

24 A. Yes.

25 38. Q. I'm not saying 18.07 is that type of

1 change.

2 A. Okay, yes. I am not going to give
3 you my legal opinion on stuff. I'm answering
4 factual questions.

5 39. Q. In fact, I think that 18.07 is not
6 that type of change. We can agree on that, right?

7 A. Okay, fair enough, yes.

8 40. Q. Do we agree on that, that 18.07 is
9 not the type of change that would put anybody
10 offside contract A on Ron Engineering?

11 A. I don't think so. I really don't.
12 I don't think it's fundamental enough in terms of
13 doing that.

14 41. Q. Right, but if something were
15 fundamental enough, that would be offside?

16 A. Potentially. You would have to look
17 at the RFP, you know. That would be my guidance,
18 and also, too, you know, like, people...you know,
19 there is a difference here, too.

20 Like, it's one thing...you know, clients
21 do...you know, I'm not speaking specifically of your
22 client or my client, but you know, there is...you
23 know, the prospect of a lawsuit is the prospect of a
24 business risk.

25 So if you're...you know, you see something

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1 that, you know, that could arguably be a breach, but
2 you're comfortable in taking that risk going forward
3 because of the business advantages of doing so,
4 then, you know, you're left with dealing with the
5 consequences of your actions.

6 It's not that it's wrong or immoral. It's
7 just that there are consequences to business
8 decisions that people make.

9 42. Q. But 18.07 didn't materially change
10 the economics of Peace Bridge Duty Free's bid,
11 right?

12 A. No, I think the numbers they
13 proposed stayed the same. Like, they were saying,
14 "Look, we agree this is the rent we're willing to
15 pay, but we are concerned about the particular issue
16 of disruptions."

17 You know, they were...you know, from where
18 we end up at 18.07 to where Peace Bridge...that is,
19 the Duty Free shop, originally started their
20 negotiation in terms of pressing for concessions
21 from the Bridge Authority, is very different.

22 They were looking for greater concessions
23 than the Bridge Authority was willing to give. I
24 think that's evident from the communications, and
25 then ultimately we end up at 18.07.

1 43. Q. But 18.07 doesn't change the risk
2 profile of Peace Bridge Duty Free's bid, right? It
3 doesn't change...

4 A. Well, yes, it does. You know, it
5 gives them...like, it gives them an opportunity to
6 deal with, you know, sort of, extraordinarily
7 catastrophic and unexpected events.

8 You know, so does it change the risk
9 profile on a day-to-day basis? No, you know,
10 because the risk profile associated with it
11 is...like I said in my affidavit, it's about the
12 traffic flowing through and able to extract money.
13 That's the general business risk that's associated
14 with this endeavour, is getting traffic to the
15 bridge and then extracting, you know, customers or
16 opportunities to sell from that traffic.

17 That's the normal thing that would happen,
18 and then there are all sorts of risks that come with
19 that. You know, you could have all sorts of risks.

20 You know, there is a pothole. There is a
21 car accident on the bridge that ties up traffic for
22 a day. You're not going to make any money because
23 the bridge is tied up.

24 There is some other, you know, events that
25 are just the normal course of business. That one, I

B. Mills - 18

1 would say, is the normal risk profile of this
2 business, and 18.07 really doesn't change that
3 normal risk profile of this business.

4 What it does do is address something that
5 is very, you know, different and unique, because
6 it's quite clear to me, anyway, and I think in the
7 communications from the Bridge Authority, that they
8 did not want to get into a situation where they were
9 revisiting rent on the basis of, you know,
10 fluctuations in, you know, in traffic due to
11 construction or due to whatever may occur in the
12 normal circumstances and happenings of the world,
13 but they...you know, this provision speaks for
14 itself.

15 I'm not going to start interpreting it for
16 you. It is what it is, but at the very least, they
17 were able to acknowledge 18.07 as being something to
18 deal with, something that...you know, I guess it
19 was, you know, one of those things where...you know,
20 an unknown.

21 I use the example, for example,
22 regulatory...in my affidavit, regulatory change
23 associated with cigarettes. Like, that's a revenue
24 source. That's a change that could have an impact
25 on this business, where revenue would be there one

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1 day and not be there the other day, and just be gone
2 because the government has changed its mind with
3 respect to the manner in which tobacco products are
4 sold.

5 44. Q. Okay. Well, let's talk about when
6 the clause first appears.

7 A. Sure.

8 45. Q. I sent you a document earlier this
9 morning.

10 A. Yes, yes.

11 46. Q. I mean, I can pull it up on the
12 screen if necessary, but you have it there.

13 A. No, I have it in front of me, yes.
14 So ask your question and I may have some comments on
15 the document itself...

16 47. Q. Sure.

17 A. ...in terms of whether I know it or
18 don't, yes.

19 48. Q. Let me first of all just identify it
20 for the record. It is...the title of it is:

21 "...Building lease between Buffalo and Fort
22 Erie Public Bridge Authority and Peace
23 Bridge Duty Free..."

24 And at the top it says "Draft", and then it has got
25 "11/06/2016" scratched out, and then inserted...it

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1 looks like it tracked changes, "13/06/2016".

2 A. Okay, yes.

3 49. Q. And I think this has been identified
4 as draft number 14. If you go down to the bottom of
5 the first page, the EDC Law, I know what that is
6 because that's from our Gowlings system.

7 A. Gowlings, yes.

8 50. Q. Yes, and it says "Version 14". So
9 would you agree that this is draft 14 of the lease
10 that you and Mr. Darling of Gowlings negotiated?

11 A. Look, I see it as a draft of the
12 lease. There is no doubt of that. Draft 14, you
13 know, I don't know. I see that little underlined
14 14. Let me just pull up the other document.

15 So the document you sent...let me just
16 see...just as you and Mr. Jones were talking, I had
17 an opportunity to consider what...yes.

18 So I have a different version of draft 14.
19 You know, going on...like, in terms of draft 14, I'm
20 talking about the EDC number, the last little number
21 on the bottom that says "/14".

22 51. Q. Yes.

23 A. I have a different version of draft
24 14 that is dated 13/06/2016, and it doesn't have
25 that crossed out date in it, and I received that

B. Mills - 21

1 draft that I'm talking about, the one that I have,
2 on...I received it from Mr. Pearce on July 13th,
3 2016, and it was him...

4 52. Q. So that's when you received it, July
5 13th, 2016?

6 A. Correct, and just to close off the
7 last comment, it was forwarded...at least this is
8 the way my e-mail looks. It was forwarded from
9 Karen Costa to Jim P. at Duty Free and Greg...or G.
10 O'Hara at Duty Free on July 13th, 2016 at 4:07 p.m.

11 So basically Greg got it...or Jim got it
12 and forwarded it to me. How it came to exist prior
13 to me getting it, I just don't know. All I know is
14 I got it on 2016/07/13 by way of Jim forwarding an
15 e-mail to me dated July 13th, 2016 from Karen Costa.

16 53. MR. STANEK: Do we have a copy of that,
17 Mr. Jones? Do we have a copy of that e-
18 mail?

19 MR. JONES: So Ben, are you referring to
20 just the non-tracked changes version, if I
21 can characterize it that way? Like, it
22 just doesn't have the crossed out.

23 THE DEPONENT: Oh, could be, could be.
24 That could be the issue, I don't have the
25 tracked changes, yes. I just have the

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1 clean version. So that's why the cross-out
2 doesn't exist, yes, but the file, and I
3 forwarded it to you, Mr. Jones, the e-mail,
4 so you have it.

5 MR. JONES: Yes. So I think that
6 is...yes. I think, Mr. Stanek, that e-
7 mail...you said Karen Costa, July 14th or
8 13th?

9 THE DEPONENT: July 13th.

10 54. MR. STANEK: No, the e-mail to Mr.
11 Mills, when Mr. Mills first received...

12 MR. JONES: I understand. I'm just
13 trying to track this down, Mr. Stanek.

14 55. MR. STANEK: My question is has that
15 been produced in this proceeding.

16 MR. JONES: I think the e-mail from Ms.
17 Costa would have. The e-mail from Mr.
18 Pearce to Mr. Mills may not have...it was
19 probably disclosed in schedule B, but not
20 produced.

21 56. MR. STANEK: May I have a copy of it?

22 MR. JONES: Let me take that under
23 advisement. I understand, you know, Mr.
24 Mills has given evidence about it today,
25 but I understand the request. So I'll

1 take it under advisement now.

U/A

2
3 BY MR. STANEK:

4 57. Q. Now, if we go...

5 A. So just one last comment on that. I
6 don't want to be...because dates seem to matter to
7 you guys, and good for you, I guess, but the file
8 that I have in terms of the draft lease, it says:

9 "...Duty free shop building lease draft_
10 7.12.16..."

11 So that's what I have that's material. So it's July
12 16th, the file name, that is.

13 58. Q. That's the file name you have.

14 A. That's the file name of the PDF file
15 that was forwarded to me on July 6th to July 13th,
16 2016.

17 59. Q. Okay. The document I sent you, as
18 you know, we agreed on the date that appears on it,
19 recognizing that neither you nor I created this
20 document.

21 A. I did not create it, no.

22 60. Q. Right.

23 A. But I can't confirm when it was
24 made.

25 61. Q. All right, so...

1 A. I have no idea.

2 62. Q. So if we scroll down to page 53 of
3 62 on this document...

4 A. I'm happy to do so.

5 63. MR. STANEK: Mr. Jones, can I make this
6 Exhibit 1 to this examination?

7 MR. JONES: Yes, for identification
8 purposes.

9 THE DEPONENT: Yes, because I can't
10 identify this document, yes.

11
12 BY MR. STANEK:

13 64. Q. You can't identify the document?

14 A. I recognize it's a draft of the
15 lease, but I don't know when it was created, you
16 know, what changes I'm looking at, who made those
17 changes. I could surmise, I guess, but I just don't
18 know.

19 65. Q. Since the other stuff hasn't been
20 produced, let's do it this way. Page 53 of 62, do
21 you see 18.07 "Regulatory changes"?

22 A. I do. I do see that.

23 66. Q. Right, and it's underlined?

24 A. Correct.

25 67. Q. And so that's an insertion into...

1 A. I agree, fair enough, yes.

2 68. Q. Now go to...

3 A. It's different from...just from the
4 RFP lease, if we want to use that as a baseline.

5 69. Q. That's right.

6 A. The RFP lease, that's an addition to
7 it, correct.

8 70. Q. What I'm trying to get at is this
9 doesn't appear in the RFP lease, but it now appears
10 in this draft which we're calling version 14.

11 A. Sure.

12 71. Q. We can call it something different.

13 A. Yes.

14 72. Q. It appears in this document, which
15 we haven't marked as an exhibit yet for some reason
16 known only to Mr. Jones, but let's compare this now
17 to the thing that I can't see, which is on your
18 computer system that you received from Mr. Pearce.
19 Does appear 18.07 appear in that document?

20 A. One second. I'll pull up what I
21 have got. I want to make sure. Yes, let me
22 just...let me just make sure it says the same thing,
23 if you just give me a second. I'm pretty sure it
24 seems to, but I have got too many windows open now.

25 MR. JONES: So Mr. Stanek, it's document

1 A2 in our client's disclosure brief, the e-
2 mail from Ms. Costa to Pearce, attaching
3 the draft lease.

4 73. MR. STANEK: Okay, Mr. Jones, so that
5 the court has some chance of figuring out
6 what we're doing here, which of these do
7 you want me to mark as an exhibit?

8 MR. JONES: I'm sorry, which...

9 74. MR. STANEK: He has looked at the
10 document I sent him, which you don't want
11 to mark as an exhibit, and he has looked at
12 a document...

13 MR. JONES: No, I said...

14 75. MR. STANEK: ...you haven't yet sent to
15 me. Which of these do you want to mark as
16 an exhibit so the court has some way of
17 figuring out what we're doing?

18 MR. JONES: That's fine if you would
19 like to mark it as an exhibit.

20 76. MR. STANEK: Okay.

21 MR. JONES: The point I was making is he
22 has not...

23 77. MR. STANEK: Can we mark this as Exhibit
24 1, please?

25 MR. JONES: Counsel, what I said was he

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1 is unable to identify...he doesn't think
2 that the date is accurate. So we're happy
3 to mark it for...

4 78. MR. STANEK: You said the date isn't
5 accurate. He has no information as to the
6 date.

7 MR. JONES: Okay. Well, he said what he
8 said, and there were some issues about
9 whether the date on the document was
10 accurate. So if you can mark it. He has
11 identified...to identify it, but he doesn't
12 know exactly...it hasn't been established
13 anyway when it was made or by whom.

14 79. MR. STANEK: He is still looking at a
15 document that I haven't seen, that I can't
16 mark as an exhibit because I don't have it.

17 MR. JONES: In fairness, Counsel, you do
18 have it.

19 THE DEPONENT: Well, I don't know if you
20 have it or not, but I think it's...that
21 would be...that's available.

22 80. MR. STANEK: So in the document...

23 MR. JONES: Counsel, go to document 2 of
24 our client's disclosure brief, and Mr.
25 Mills, you said it's a July 13th, 2016 e-

1 mail.

2 81. MR. STANEK: Mr. Jones, that is not the
3 document he is looking at. He is looking
4 at an e-mail from Mr. Pearce, not Ms.
5 Costa's e-mail.

6 THE DEPONENT: Yes, it just...

7 82. MR. STANEK: You're not here to give
8 evidence, Mr. Jones. Mr. Mills is.

9 THE DEPONENT: Just so that the court
10 understands...

11 MR. JONES: Mr. Stanek, in
12 fairness...like, don't yell at me. If you
13 could look at the e-mail, there is a
14 redaction at the top of it. So I think it
15 may be the exact same e-mail that Mr. Mills
16 is looking at. It just has a redaction on
17 the last e-mail of the chain, which I
18 suspect may be, although I'm looking at the
19 redacted version, the forward of the e-mail
20 to Mr. Mills, and the reason for the
21 redaction would have, of course, been that
22 it was an e-mail to counsel.

23 So can we just...all I'm trying to
24 do is make sure that what I'm telling you
25 is correct, that the e-mail that Mr. Mills

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1 is looking at is the same one that's in the
2 productions.

3 83. MR. STANEK: I'm going to get Mr. Mills'
4 evidence, okay, Mr. Jones. Is that all
5 right with you?

6 MR. JONES: If...fine.

7 THE DEPONENT: So here is my evidence...
8

9 BY MR. STANEK:

10 84. Q. All right.

11 A. ...with respect to this. I'm not
12 involved in this proceeding. I was asked to file an
13 affidavit speaking to my understanding of 18.7, how
14 it came to be. I filed that affidavit.

15 I don't know what other people have said.
16 I have no idea what is in your disclosure briefs.
17 You presented me with a document that is purportedly
18 dated...or that is dated in June. That caused
19 curiosity on my part.

20 85. Q. M'hm.

21 A. I went to see what version of the
22 document...if I had that document in my own e-mail,
23 to confirm what you're talking about, because I do
24 not have the benefit of your disclosure brief.

25 I went. I looked. I identified a

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1 document that would seem, if I may...and this is
2 what would seem to be, because I haven't been
3 through the document chapter and verse, all 60 pages
4 of it, to confirm, but it would seem to be that I
5 was provided the non-tracked or clean version of the
6 lease that is...the top part is dated whatever it
7 is, July...June...let's see. Let me pull it up.
8 June 13th, 2016.

9 My evidence is, now, is that I received
10 this document, and looking at my own files in order
11 to be helpful to the cross-examiner here, just to
12 move this thing along, that I received this via e-
13 mail on July 13th, 2016, that despite the fact that
14 the...and I received it from Mr. Pearce, and it was
15 Mr. Pearce forwarding to me an e-mail from Karen
16 Costa.

17 I do not know if Mr...if all the
18 attachments attached to the...or the attachment
19 attached and the lease attached originated from Ms.
20 Costa or not, because I didn't receive Ms. Costa's
21 e-mail. I only received Mr. Pearce's e-mail.

22 It would surprise me that he would include
23 a lease that was not forward to him. That would not
24 help anybody, but you know, I do not know that. So
25 there we go.

1 86. Q. So...

2 A. And furthermore, furthermore, the
3 document that I have in terms of the file name, the
4 electronic file name, says "Duty free shop building
5 lease - draft_7.12.16.PDF", and that's the evidence.
6 So...

7 87. Q. Thank you.

8 A. Where you go with that, I don't
9 know, but that's what it is.

10 88. Q. No, all I'm looking for is your
11 evidence, Mr. Mills. I'm not here to make arguments
12 today.

13 A. And then furthermore...and just to
14 go on and complete this, is the regulatory...the
15 document you forwarded me, the lease version you
16 forwarded to me, appears to be a tracked changes
17 version of the lease.

18 Like I just said, I received what appears
19 to be the clean version of that version of the
20 lease, and that I agree with you, 18.07 in the
21 tracked changes version does not appear in the RFP
22 version of the lease, and I can further agree with
23 you, because I think this is your next question,
24 that 18.07 in the clean version that I have, it
25 appears in that lease, and appears not as

1 underlined, but as part of the lease, because it's a
2 change that...whether somebody legally accepted it,
3 I don't know, but it's a change that was accepted
4 through the word processing process.

5 89. Q. And this change...

6 A. Yes.

7 90. Q. ...that you received...I think your
8 evidence is for the first time you received this
9 change on the 13th of July, 2016. Have I got that
10 right?

11 A. That's when I...well, I don't know
12 if I...okay, let me check my files then. I believe
13 that is the case.

14 91. Q. At the latest, it's July 13th, 2016?

15 A. Yes, that's when I received...I
16 received it on...that is my understanding, anyway,
17 yes, yes.

18 92. Q. Okay.

19 A. That's what I...I have got an e-mail
20 saying...

21 93. Q. We don't have any evidence of you
22 receiving it earlier, but at the latest, you
23 received it July 13th, 2016?

24 A. Correct, yes. To be clear, I don't
25 believe I received it earlier, but yes...

1 94. Q. I understand.

2 A. ...I can't confirm that, yes.

3 95. MR. STANEK: I understand, I understand,
4 but the document that I sent to you,
5 which...can I mark as Exhibit 1?

6 MR. JONES: That's fine.

7 96. MR. STANEK: Okay.

8
9 --- EXHIBIT NO. 1: Building lease between Buffalo and
10 Fort Erie Public Bridge Authority
11 and Peace Bridge Duty Free, draft
12 with tracked changes, dated June 13,
13 2016

14
15 BY MR. STANEK:

16 97. Q. In Exhibit 1, what appears there is
17 the same thing that appears in what Mr. Pearce sent
18 to you on the 13th of July, correct?

19 A. That 18.07, yes, I confirm that.

20 98. Q. And 18.07 in that form, completely
21 unchanged, is the same thing that gets into the
22 final lease?

23 A. Yes, I confirm to you...like, I can
24 take your word for it, but I'll confirm it.

25 99. Q. Don't take my word for it. Please

1 confirm it.

2 A. I'll confirm it. Yes, yes, that's
3 correct. Just to confirm, I was looking at Exhibit
4 D of my affidavit as being the lease as entered into
5 by the parties.

6 100. Q. And what it says is:
7 "...18.07 regulatory changes: In the event
8 an unanticipated introduction of or a
9 change in any applicable laws causes a
10 material adverse effect on the business
11 operations of the tenant at the leased
12 premises, the landlord agrees to consult
13 with the tenant to discuss the impact of
14 such introduction of or change in
15 applicable laws to the lease..."

16 That's what it says, correct?

17 A. Correct.

18 101. Q. And you agree that it makes no
19 reference to a rent abatement or a reduction in
20 rent?

21 A. It does not expressly state that,
22 no.

23 102. Q. And in your affidavit you talk about
24 catastrophic events. You agree that it makes no
25 reference to any catastrophic events, correct?

1 A. Yes, it does not say "catastrophic
2 events", those words, no.

3 103. Q. It makes no reference to any force
4 majeure?

5 A. It does not include the word "force
6 majeure".

7 104. Q. And there is no evidence that you
8 provided any comments on this clause to Mr. Darling
9 after it first appeared to you?

10 A. Yes, I don't...my conversation with
11 Mr. Darling, I think, was to...as I think back, was
12 not to so much debate that, but to basically try
13 and...well, there was a couple of other
14 miscellaneous issues that have nothing to do with
15 the parties' dispute at this point, but also I
16 believe I pressed Mr. Darling with respect to trying
17 to get...basically reiterating some of the arguments
18 that Jim and perhaps Greg had made to the Bridge
19 Authority previously, but he wasn't receptive to
20 that.

21 105. Q. Whatever the content of those
22 discussions, nobody changed 18.07, right?

23 A. Correct. It remained from July
24 13th, as far as I know, 2016, if that's the right
25 date, to the...to inclusion of the final lease.

1 Also, I think the lease was finalized, I
2 think...yes, sign off on the lease...I don't know
3 what it is dated, but looking...thinking about it,
4 it needed to be sort of done by the 25th in terms of
5 the negotiations so it could go to the board on
6 maybe the 28th of July. That's 2016.

7 106. Q. 2016. Now, your affidavit also
8 references a meeting July 18th between Jim Pearce
9 and Karen Costa.

10 A. Correct.

11 107. Q. You weren't at that meeting?

12 A. No, no, I wasn't.

13 108. Q. Your entire affidavit
14 representations about that meeting come entirely
15 from Mr. Pearce?

16 A. Not...I wouldn't say entirely,
17 because I do have the notes from the meeting, and I
18 believe I have included in my affidavit the e-mail
19 that was forwarded to me from Ms. Costa. So my
20 information would be my conversations with Jim in
21 the normal course of providing guidance in that time
22 period, and then secondarily, the documents that are
23 attached to my affidavit. That's the source of my
24 information.

25 109. Q. You have never spoken to Ms. Costa?

1 A. I have not, no, at least not that I
2 recall anyway.

3 110. Q. Not about the July 18th meeting or
4 anything else?

5 A. No, that's correct. Like, no, I did
6 not speak to her specifically about the lease. Have
7 I ever talked to her? I have no recollection.

8 111. Q. But you do interpret her July 19th
9 e-mail for the court?

10 A. The July 19th e-mail for the court,
11 well, it says what it says, but...

12 112. Q. Okay, it says what it says.

13 A. I think I quoted from it.

14 113. Q. But you have never spoken with Ms.
15 Costa to get her view of what it is that she wrote?

16 A. No, I did not. No, I did not speak
17 with her to get her information on what she intended
18 or not intended.

19 114. Q. And now so just to sort of summarize
20 all of this, the 18.07 appears in the drafts of the
21 lease prior to the July 18th meeting?

22 A. Right.

23 115. Q. Mr. Pearce delivers this handout
24 that's at Exhibit E to your affidavit at the July
25 18th meeting, right? That's what he told you?

1 A. Yes. Yes, yes, that's right. No,
2 I'm just thinking about...yes. Yes. Now, I don't
3 know if that was...you know, just to be clear, I
4 don't know...you know, and I don't speak to this in
5 my affidavit, but just to be clear, I think
6 discussions preceded the July 13th affidavit and
7 preceded this...

8 116. Q. July 13th affidavit, sir? I
9 don't...

10 A. Sorry, sorry, excuse me, my
11 apologies. I think discussions between Peace Bridge
12 Duty Free and the Bridge Authority with respect to
13 their finalization of negotiations, various concerns
14 with the lease, preceded Mr. Pearce's July 18th,
15 2016 meeting.

16 So what those were, you know, I haven't
17 turned my mind to it, but it's not as if that was
18 the only discussion on July 18th, 2016. I presume
19 that there were discussions that happened before
20 because the lease is being changed effective July
21 13th, 2016.

22 117. Q. For the purposes of this
23 proceeding...

24 A. Yes.

25 118. Q. ...clause 18.07 appears before the

1 meeting?

2 A. Correct, it does, yes.

3 119. Q. The meeting...

4 A. Before the July 18th meeting,
5 correct.

6 120. Q. The meeting between Ms. Costa and
7 Mr. Pearce occurs on July the 18th?

8 A. That meeting occurs on July 18th.
9 Was there other meetings? You would have to ask Mr.
10 Pearce.

11 121. Q. You weren't there. The only
12 thing...

13 A. I wasn't, no.

14 122. Q. Right, and then in the final lease,
15 18.07 appears completely unchanged?

16 A. From the 13th to the final lease,
17 let's call it, the 28th or the 25th...I can't
18 remember what it is dated, that's correct.

19 123. Q. So it's the same clause that you got
20 on July the 13th?

21 A. That's right. I don't know if other
22 aspects of the lease were changed. I can't speak to
23 that. I just haven't informed myself on that,
24 but...

25 124. Q. Despite...

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1 A. ...18.07 had not changed from the
2 13th to the finalization of the lease, that is
3 correct.

4 125. Q. Despite what any of the discussions
5 were on July the 18th, that clause didn't change,
6 right?

7 A. It did not change, no. It says what
8 it says. It had not changed.

9 126. MR. STANEK: Those are my questions.
10 Thank you.

11 MR. JONES: Great, we're done.

12 THE DEPONENT: Thanks for your time,
13 guys. Have a good day.

14
15 --- upon adjourning at 10:12 a.m.

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INDEX OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
1.	Building lease between Buffalo and Fort Erie Public Bridge Authority and Peace Bridge Duty Free, draft with tracked changes, dated June 13, 2016	33

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Please be advised that any undertakings, objections, under advisements and refusals are provided as a service to all counsel, for their guidance only, and do not purport to be legally binding or necessarily accurate and are not binding upon Victory Verbatim Reporting Services Inc.

I hereby certify the foregoing to be a true and accurate transcription of the above noted proceedings held before me on the **17th DAY OF AUGUST, 2023** and taken to the best of my skill, ability and understanding.

Certified Correct:



Trina Wannamaker
Verbatim Reporter



TAB 8

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

* * * * *

CROSS-EXAMINATION UPON AFFIDAVITS

sworn September 22, 2022, November 26, 2022 and March 1, 2023

by **RON RIENAS**, a non-party witness, herein,
at the office of Penfound's Inc.,
at St. Catharines, Ontario,
held on Wednesday, the 23rd day of August, 2023,
at ten o'clock in the forenoon,
pursuant to an appointment.

* * * * *

APPEARANCES :

Mr. Brendan Jones Counsel for the Respondent
Mr. David T. Ullmann (Via Zoom)
Mr. Nadav Amar (Student-at-Law)
(Blaney McMurtry LLP)

Mr. Christopher Stanek Counsel for the Buffalo and
(Gowling WLG) Fort Erie Public Bridge Authority

* * * * *

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(i)

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T SCROSS-EXAMINATION BY MR. JONES1 - 205EXHIBIT NUMBERPUT IN AT PAGE:

1.	Notice letter sent by Ms. Costa to the Duty Free America store;	7
2.	April 24 th , 2020 e-mail from Ron Rienas to Mr. O'Hara;	12
3.	American Duty Free lease document;	25
4.	June 30 th , 2020 letter to the government;	30
5.	November 20 th , 2020 Board meeting minutes;	71
6.	November 20 th , 2020 e-mail to Mr. O'Hara;	71
7.	November 20 th e-mail with full responses;	73
8.	November 23 rd , 2020 e-mail from Jim Pearce to Ron Rienas;	75
9.	December 17 th , 2020 Board meeting minutes	82
10.	December 21 st , 2020 e-mail chain including the December 17 th , 2020 e-mail and December 21 st , 2020 letter attachment	92
11.	December 23 rd , 2020 response to the Authorities' letter of December 21 st , 2020.	94
12.	December 29 th , 2020 letter responding to the Peace Bridge Duty Free's response to the December 23 rd , 2020 letter	94

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EXHIBIT NUMBER**PUT IN AT PAGE:**

- | | | | |
|----|-----|---------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 5 | 13. | e-mail dated July 19 th , 2016 between Ms. Costa and Mr. Pearce | 120 |
| 10 | 14. | Board minutes from the October 25 th , 2021 board meeting; | 134 |
| | 15. | A copy of the by-laws; | 182 |
| 15 | 16. | The March 31 st , 2021 e-mail regarding the CERS summary; | 189 |
| | 17. | The March 31 st , 2021 e-mail entitled 'Interest and comments about non-rent defaults and our rights'; | 189 |
| 20 | 18. | The November 19 th , 2020 e-mail from Mr. Rienas to the Board of Directors recommending the rent deferral agreement be approved. | 205 |

* * * * *

UNDERTAKINGS REQUESTED:**FOUND AT PAGE:**

- | | | | |
|----|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 30 | 1. | To provide a list of the months that the entire SERS allocation was not submitted to the Authority; | 60 |
| 35 | 2. | To provide anything in writing with respect to the December 17 th , 2020 Board meeting; | 83 |
| 40 | 3. | To check with Karen Costa to see if the one million, two hundred and fifty-five thousand, four forty-seven point seven four (1,255,447.74), is before or after the twenty percent (20%) rent reduction; | 112 |
| 45 | 4. | To provide the underlying calculation of how the number in the January 5 th , 2023 letter for base rent was arrived at; | 114 |

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UNDERTAKINGS REQUESTED:**FOUND AT PAGE:**

- | | | | |
|----|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 5 | 5. | To review e-mails and search to determine whether or not a draft of the e-mail dated July 19 th , 2016 was received and provide copies of the draft and any responses; -REFUSED | 121 |
| 10 | 6. | To provide the Board minutes authorizing Mr. Rienas to reach out to the second RFP bidder; | 138 |
| 15 | 7. | To advise whether it was, in fact, not in August of 2021 when the conversation took place with the second place RFP bidder; | 143 |
| 20 | 8. | To provide the rent amount that was paid monthly by the US tenant from April 2020 to May 2023 when the last border restriction was lifted; REFUSED | 160 |
| 25 | 9. | To advise whether the base rent in 2021 and 2022 was based on 2019 sales or covid years; REFUSED | 162 |
| 30 | 10. | To provide copies of those RFP responses that are referred to in paragraph four of the Respondent's March 1 st , 2023 Affidavit of Documents; REFUSED | 190 |
| 35 | 11. | To provide a copy of the real time traffic data that is referred to in paragraph eighteen (18) of the March 2023 Affidavit of Documents. | 203 |
| 40 | | | |

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RON RIENAS: AFFIRMED**CROSS-EXAMINATION BY MR. JONES:**

1. Q. So your name is Ron Rienas?

5 A. Yes.

2. Q. Okay. And just for the cross-examination today, you'll have to verbalize your answers rather than nodding or "mmhmm." Okay. And you've been sworn to tell the truth this morning?

10 A. Yes.

3. Q. And you are the general manager at the Buffalo and Fort Erie Public Bridge Authority?

A. Correct.

4. Q. And how long have you been the general manager there?

15 A. Since 2003.

5. Q. And did you hold any jobs with the Authority different from the -- I'm going to call the Buffalo Fort Erie Bridge Authority, the Authority, have you held any other jobs there?

20 A. I was the facilities manager from 2000-2003.

6. Q. Okay. So you started working there in 2000?

25 A. Correct.

7. Q. And in your current role as general

manager, who do you report to?

A. The board.

8. Q. The board of directors. And who reports to you directly?

5 A. The chief operating officer and chief financial officer.

MR. STANEK: Is Mr. Rienas speaking loud enough? Okay. Great.

MR. JONES:

10 9. Q. Okay. So the chief financial officer, that's Ms. Costa?

A. Correct.

10. Q. And the operating officer is?

A. Tom Boyle.

15 11. Q. Tom Boyle. Okay. And can you explain to me, in general terms, what your job as general manager, what are your job duties, what does that role involve?

20 A. I'm basically the chief officer, chief executive officer of the Authority. I'm responsible for all the day to day operations of the Authority, reporting directly to the Board.

12. Q. Okay. And that's a full-time position?

A. Correct.

25 13. Q. And do you have any legal training or

legal background?

A. No.

14. Q. And do you have any particular familiarity
with commercial leases, other than dealing with them
in your role as a general manager?

A. No.

15. Q. Okay. And we're here over a lease dispute
involving the Peace Bridge Duty Free store that
operates on the Canadian side of the border, and as I
understand, it's been a tenant of the Authority since
1986?

A. Correct.

16. Q. And in your time at the Authority, prior
to the onset of Covid-19, the Peace Bridge Duty Free
has always been a good operator as a store?

A. We've had some issues.

17. Q. Okay. It was not in default under its
lease before Covid-19.

A. It was not.

18. Q. Okay. And in terms of the Authority's
decision-making process, am I correct in my
understanding that the Board of Directors is the
decision maker with respect to commercial leasing
issues?

A. They would ultimately approve the lease,

correct.

5 19. Q. Okay. So they would -- they would approve the lease and they would approve any amendments to the lease.

A. Correct.

20. Q. And as I understand, the Board makes its decisions by way of resolution?

A. Resolution or motion, correct.

10 21. Q. So there's a motion and then there would be a resolution arising out of the motion?

A. Mmhmm.

15 22. Q. Okay. And then, as I understand your role, as the general manager, is to carry out the decision of the Board, based on the Board's directions given through the resolutions.

20 A. Right. I mean, we provide advice to the Board, legal counsel, other staff, other folks, but ultimately the Board makes their decision and I act on the advice of the Board.

23. Q. Right. So those -- when you say "advice of the Board," you're talking about the directions given by way of resolutions?

25 A. Correct. But there's always some nuance to some of that.

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24. Q. What do you mean by nuance?

5 A. Well there may be circumstances where the Board may approve -- approve something and say, "Well, make sure that this gets done," that type of thing.

25. Q. And that's something other than what's in its resolution?

10 A. Correct. Yeah. I mean, you have to understand, every general manager interprets the direction of the Board. So there's the actual motion that a Board approves, and then there could be other circumstances that effect timing or how that's actually accomplished.

15 26. Q. Okay. So are you saying to me that the Board's directions are not necessarily what are contained in its resolutions?

A. No. No I'm not saying that.

27. Q. So what the Board's directions are contained in their resolutions?

20 A. Yes, the Board's directions are, but how those are carried out, there's oftentimes nuance and then circumstances may change as a result of things that happen after a Board adopts a resolution. There could be further discussion, there could be
25 circumstances that impact the actual implementation

of a Board direction.

28. Q. Okay. And as I understand, all the directions that are given by way of resolution are all recorded in the minutes of the Board meetings?

A. Correct.

29. Q. Okay. So you're here today for a cross-examination on your Affidavits that have been filed in this matter.

A. Mmhmm.

30. Q. And I have, I believe it's three Affidavits that you've sworn. There's a September 7th, 2022, there's a November 26th, 2022, and there's a March 1st, 2023. Correct?

A. Correct.

31. Q. Okay. And you have those Affidavits with you today?

A. Mmhmm, yes.

32. Q. Excellent, thank you. And before we get into that, I guess, you received the Notice of Examination for today and we requested that you bring with you a notice that was sent to the American Duty Free store.

A. Right.

33. Q. And so before we got started today, your Counsel has provided me with this Notice letter dated

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January 5th, 2023 from Ms. Costa to duty free

Americas. And so, this is the Notice letter that was sent pursuant to the sixth amendment of the duty free Americas lease?

A. Correct.

34. Q. I take it? Can we just mark this as the first Exhibit to the examination?

COURT REPORTER: Sure.

EXHIBIT NUMBER ONE: Notice letter sent from Karen Costa to the Duty Free Americas - Produced and marked.

MR. JONES:

35. Q. Okay. So I'm going to begin with your September 7th, 2022 Affidavit.

MR. STANEK: September 7th, '22?

MR. JONES: Yes.

MR. JONES:

36. Q. At paragraph five of your Affidavit, you talk about the Authority receives its revenues from tolls as well as rental -- as well as rental and fee income. And with respect to the toll revenues, do I understand correctly that the large part of the toll revenue comes from commercial truck traffic?

A. Correct.

37. Q. And is it fair to say that during the Covid-19 pandemic, the commercial truck toll revenue was relatively unimpacted?

5 A. Not initially. The first couple of months after Covid it was quite dramatically impacted, but after that it stabilized.

38. Q. It returned essentially back to normal?

A. Pretty much, correct.

10 39. Q. And in terms of the Authority's revenues, do you agree with me that during the pandemic years, that the revenues of the Authority exceeded its expenses in each year?

15 MR. STANEK: Wait a second, why is that relevant?

MR. JONES: Well, we'll get to why it's relevant, but...

MR. STANEK: Who cares?

20 MR. JONES: Well, I think it's quite relevant here because a lot of the correspondence back and forth was about how the Authority required rental revenue to satisfy its obligations.

MR. STANEK: Is the Authority on trial here about its revenue?

25 MR. JONES: So you're not going to answer the

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-- is it a refusal?

MR. STANEK: It's not a refusal, I just want to put my objection on the record. Mr. Rienas can answer.

5 A. You have to understand that there is -- there's difference between pledged revenue and unpledged revenue. So all of our toll revenue is pledged revenue for our -- to our bonds. We operate on the non-toll, basically the non-toll revenue. So
10 I can't tell you exactly what our, whether expenses, revenues exceeded expenses for the non-pledged revenues. I don't know that exactly.

MR. JONES:

40. Q. So for overall revenues, they exceeded
15 expenses of each year of the pandemic?

A. I believe so, correct.

41. Q. Okay. So in paragraph seven of your Affidavit, you referred to the April 27th, 2020 rent deferral agreement.

20 A. Correct.

42. Q. And that was entered into between the Authority and Peace Bride Duty Free Store, right?

A. Correct.

43. Q. And am I correct there was no negotiation
25 about the form of the first rent deferral agreement?

10
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A. My understanding, it was prepared by our counsel, reviewed by Duty Free's counsel and it was ultimately executed.

44. Q. Okay. You'd agree with me that Peace Bridge Duty Free provided some feedback in terms of why it didn't think the first rental deferral agreement was appropriate? And then the Authority determined that it was not going to make any changes to the agreement, that it was essentially a take it or leave?

A. Well their -- my understanding is their initial position was, they immediately wanted a rent abatement. Mr. O'Hara immediately said, "We don't want to pay rent for April," this was at the very, very beginning of the pandemic. My recollection is, we reviewed with a number of other border crossings and no one was giving rent abatements as requested by Mr. O'Hara.

45. Q. So I'm going to show you the, there's an e-mail exchange that you had with Mr. O'Hara on April 23rd and 24th, around the time of the agreement, when it was circulated, and I think Mr. O'Hara...

MR. STANEK: Why don't you show him the document?

MR. JONES: Sure.

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MR. STANEK: Rather than giving us your interpretation.

MR. JONES: Sure.

MR. STANEK: You're directing him to the e-mail from Mr. Rienas to Mr. O'Hara?

MR. JONES: Yes. And, you know, it's to be read in context, obviously, with --.

MR. STANEK: Okay. Because the second part, the one from Mr. O'Hara looks incomplete. If you have questions, just ask.

MR. JONES: No I don't have questions about Mr. O'Hara's e-mail ...

MR. STANEK: Okay. That's fine.

MR. JONES: We can pull it up, if there's any issue.

MR. JONES:

46. Q. But essentially, you would agree with me that the Peace Bridge Duty Free requested some different terms to the agreement, and the Board essentially said no, that they were proceeding with the -- they're not going to make any changes to the original draft?

A. Correct.

47. Q. And now there's an e-mail that's been in -
- it's in the productions and I can take you there,

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but I think around this time you had said to Mr.

O'Hara that essentially, there would be further discussions about the lease and the rent payments as the matter progresses in the future.

5 A. Right, right.

48. Q. You'd agree with me...

 A. I mean, this was early in the pandemic. There was lots of discussion going on.

49. Q. And so this first rent deferral agreement is at Tab Two of your -- it's the second exhibit of your Affidavit. Do you have that? Oh and before I move on, I'm just going to mark this as the second Exhibit.

15 MR. STANEK: All right so this is the -- it might be an idea to describe it for the record.

 MR. JONES: Thank you, Mr. Stanek. The April 24th, 2020 e-mail from Ron Rienas to Mr. O'Hara.

20 **EXHIBIT NUMBER TWO:** The April 24th, 2020 e-mail from Ron Rienas to Mr. O'Hara - Produced and marked.

25 MR. STANEK: That's fine. I'm on Tab Two now, my stuff's at Tab Three for some reason, I must have got mixed up with something else.

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MR. JONES: So Tab Two is the -- Tab Two is the first deferral agreement.

MR. STANEK: That's not helpful. Oh here it is. Yeah, maybe we --. Here it is, we've got it.

MR. JONES:

50. Q. Okay. So this is the first rent deferral agreement, and now, as I understand, the Authority's position is that the first rent deferral agreement expired on July 31st -- that's the rent deferral period?

A. Correct.

51. Q. July 31st, 2020. And so is it your evidence that the Peace Bridge Duty Free was required to being repayment for the deferred rent as of August 1st, 2020?

A. No. That's not what it says.

52. Q. No?

A. That's not what the deferral agreement says at all.

53. Q. Okay. Help me out then, what's the -- when does the repayment begin?

A. After the store reopens. After the border restrictions are lifted and the store reopens, it's very clear. It's 2.2.

54. Q. Sir, I'm looking at the restart date means the day immediately following the last day of the rent deferral period.

5 A. Let me find the section here. Repayment of the deferred rent, 2.3.

55. Q. The restart date is the last -- the last defined term.

A. That may then have been in the second deferral agreement. We talked about the ...

10 56. Q. The second rent deferral agreement, the Authority's taken a position, it's not binding.

A. Well there was deficit draft, well it was executed by Peace Bridge Duty Free, but not executed by the Authority.

15 57. Q. Okay. In any event, getting back to this agreement, this first deferral agreement. So is it the Authority's position that Peace Bridge Duty Free was required to begin paying rent as of the restart date?

20 A. That's what it -- yeah, that's what it says. If I recall correctly, there were discussions, telephone discussions throughout the period in August, September, given where the government was going with that. So we did not make that an issue
25 with Peace Bridge Duty Free, nor did they.

58. Q. So you didn't call on rent to be paid?

A. No, we did not.

59. Q. And so is it the position though that rent was payable as of August 1st, 2020?

5 A. Well that's what the agreement says, but at the time we were still having discussions and working with Peace Bridge Duty Free to see what was going to happen with the Covid. We were asking the Duty Free, for example, right from the outset that 10 they should be opening the store, I think that started, those discussions started in April with them related to that. So there was ongoing discussions throughout, beyond the restart date in this agreement.

15 60. Q. Sorry. When you said "April," that's April 2020?

A. Correct.

61. Q. And is it the Authority's position that full base rent, full rent under the lease is payable since the restart date, August 1st, 2020? 20

A. Our position is the rent should have been paid since the restart date, correct.

62. Q. The full rent?

A. And we repeatedly said that to them.

25 63. Q. Okay. So as of August 1st, 2020 then,

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there's effectively no impact to the lease of the pandemic and the associated break?

5 A. Right. But we did not push that given the circumstances that were actually in place at that time. We did not, on August 1st, send a letter to them demanding immediate payment. Like I said, there was lots of discussions going on throughout that period of time.

64. Q. All right, but I'm just trying to
10 understand, the Authority's position is essentially, after August 1, 2020, there's no impact on the lease?

MR. STANEK: The lease is the lease. It says what it says. The Authority relies upon the language in the lease.

15 MR. JONES: Right. And I'm saying, as a result of the changes in the border restrictions and the Covid laws, and all the regulations arising from Covid in terms of the closure of the border to non-essential travel, to the
20 Ontario stay at home orders, as of August 1st, 2020 forward, the lease is not impacted by any of those changes and laws and regulations. Is that the Authority's position?

MR. STANEK: I don't understand your position
25 -- I don't understand your question, sorry.

MR. JONES: Well ...

MR. STANEK: The lease says what it says, the lease, the rent deferral agreement says what it says.

MR. JONES: All right. And they're not impacted by the laws?

MR. STANEK: What do you mean, "impacted?" They're not altered, they're not amended by ...

MR. JONES: They're not changed or anything, there's no consideration?

MR. STANEK: What do you mean consideration? Was there not renegotiation, somebody offered them some money?

MR. JONES: Well did that go into the -- did that change the lease?

MR. STANEK: Did what change the lease?

MR. JONES: Sorry, I don't want your evidence, Counsel.

MR. STANEK: Well I'm trying to understand your question, because it doesn't make any sense to me.

MR. JONES: Well my question is simple. Has there been any impact to lease, any changes to any of the lease terms?

MR. STANEK: No.

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MR. JONES: No? Okay. And it's the Authority's position -- okay. And was this first rent deferral agreement based on impact to the lease resulting from the change in government regulations, and ...

MR. STANEK: Impact to the lease, or impact on Peace Bride Duty Free?

MR. JONES:

65. Q. Well 18.0 -- if we go to 18.07 of the lease, and, Mr. Rienas, are you familiar with this provision of the lease?

A. Yes.

66. Q. So 18.07 of the lease, the heading is "Regulatory Changes," and it says, "In the event of an unanticipated introduction of, or change in any Applicable Laws," capitalized, "causes a material adverse effect on the business operations of the tenant at the leased premise, the landlord agrees to consult with the tenant to discuss the impact of such introduction of, or change in applicable laws, to the lease." So what I'm talking about is the impact of such introductions of, or change in the applicable laws to the lease. So was this rent deferral agreement based on an impact to the lease pursuant to 18.07?

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A. No it was based on the consultations that we had with Duty Free, as required by 18.07.

67. Q. So this rent deferral was based on ...

A. Consultations with Duty Free.

5 68. Q. So you're saying -- and that's pursuant to 18.07?

A. Correct. We had -- we consulted with Duty Free because they said, 18.07 is applicable, Mr. O'Hara said that right from the outset. We said, "Fine, we're going to consult with you." We did the deferral agreement, we had discussions after the restart date on how this was going to be continued on. We had discussions about a second deferral agreement. All of that was in compliance with 18.07.

10 69. Q. Okay. And so then going beyond August 20, 2000 -- sorry, August 1st, 2020, is it fair to say that the parties just haven't been able to reach an agreement of what the impact to the lease is as a result of the changes in laws?

20 MR. STANEK: No that's not what 18.07 says.

MR. JONES: Sorry Counsel, I'm asking the witness the question.

A. Can you repeat the question?

MR. JONES:

25 70. Q. So is it fair to say that beyond August

1st, 2020, the parties have not been able to reach an agreement, come to an agreement, on what the impact to the lease is as a result of the changes in the applicable laws?

5 A. No. That's not a fair representation. We both agreed that there was an impact on our operations and on Peace Bridge Duty Free operations, and every operation as a result of the pandemic.

71. Q. Right. I don't think there's any dispute. The Authority's not disputing that 18.07 is engaged, as I understand it.

10 A. We have consulted with Duty Free as required by 18.07.

72. Q. Right. So there's no -- you agree with me that 18.07 is engaged as a result of the changes?

15 A. Yes.

73. Q. They would ...

MR. STANEK: It was regulatory changes, material ...

20 MR. JONES: No that's fine, Counsel. I think it's, we're all...

MR. STANEK: It says, "Regulatory change."

MR. JONES: Yes.

25 MR. STANEK: It doesn't say, "loss of income." It doesn't say, "because we want it." It says,

"regulatory changes."

MR. JONES: Well that's the heading.

MR. STANEK: Yep.

MR. JONES: The clause says what it says.

MR. JONES:

74. Q. So anyhow, we're in agreement that the clause was engaged. We're in agreement there was an impact -- right, there was an impact to the Authority, there was an impact to the lease, there was an impact ...

A. Yes. Clearly.

75. Q. Okay. And so, since then there's been no agreement between the two parties about what the impact, what the case of the lease is?

15 A. Not for lack of trying, but correct. There is no, there is no yet -- there is not yet an agreement.

20 76. Q. Right. I don't think that's contentious. Okay. And so, as a result of the Covid-19 pandemic and the border closure, the Authority also entered into a rent deferral agreement with its American tenant, correct?

A. Correct.

25 77. Q. And, if you don't have a copy of that I can provide you with what was given to us. Do you

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have a copy of it? I can, here -- I'll give you a copy.

MR. STANEK: That's the lease.

MR. JONES: Right.

MR. JONES:

5
78. Q. So this is how -- this is the document that was given to us, and this is the lease with the amending agreements.

A. Correct.

10
79. Q. Okay. And so as I understand, if you go near the back of the package I handed to you, the fifth amendment to the lease is dated April 27th, 2020, so the same date as the Peace Bridge Duty Free amendment. So this is the deferral agreement?

15
A. Yeah.

80. Q. And I'm going to ask you some questions about that, but before I do, I just want to make sure that this lease document that was given to us, and there's six amendments to the lease, that's the complete lease with the American Duty Free store?

20
A. Correct.

81. Q. There's no other written lease amendments?

A. Correct.

82. Q. Okay. And so as I understand here, this
25
rent deferral agreement deferred rent for April to

June 2020, correct?

A. Correct.

83. Q. And is it the Authority's view that the US store had to begin paying back its deferred rent on January 1st, 2021, as set out in paragraph five of this agreement?

A. I think we treated the US Duty Free in a similar manner, in that we did not demand payment on the, January 1, 2021.

84. Q. Okay. Did it demand payment in 2020 at all? Or sorry, did it demand payment of any of its base rent in 2020?

A. In 2020? No.

MR. STANEK: You mean, did it demand at any time, of the base rent, payable in 2020? Is that your question?

MR. JONES:

85. Q. In 2020, did it demand payment of any base rent that became payable in 2020?

A. I don't believe so.

86. Q. Like from, I guess, the rent up until June was deferred, but from July onward, it was not deferred, correct?

A. Correct.

87. Q. And it didn't demand payment of that rent

in 2020?

A. Correct.

88. Q. And it didn't demand payment in 2021
either?

5 A. Correct. Understanding though, that the
store was open throughout this process. So they were
actually paying us rent throughout this, the entire
pandemic. So they were in fact paying us. It's not
like they weren't paying us, I mean, they were paying
10 us.

89. Q. You agree with me Peace Bridge Duty Free
also did pay the Authority throughout their
additional rent?

A. Again, two totally different leases.

15 90. Q. So that's a yes?

A. Totally different circumstances.

91. Q. Well, I mean..

A. There's base rent, there's percentage
rent, and there's additional rent.

20 92. Q. Okay. Well you agree with me that -- my
question is simply that, Peace Bridge Duty Free did
pay their additional rent?

A. They paid additional rent, as was required
because they were still occupying the store.

25 93. Q. In paragraph eleven of your Affidavit you

say that the Authority did not receive any Covid related assistance.

A. Correct.

94. Q. Did it apply for any Covid assistance?

A. We were not eligible for the stated programs, but we did request approval for some special funding from the government through several letters that we sent to various ministers involved.

95. Q. Okay. Now, so you applied for a wage subsidy, or are you just talking about ...

A. We're not eligible.

96. Q. Not eligible?

A. Correct. We reviewed it and we were not eligible for any wage subsidy, nor any subsidy, so we did not receive any funding at all from either the Canadian government or the US government.

97. Q. I'm just going to mark the American lease document as Exhibit Three.

A. Okay.

EXHIBIT NUMBER THREE: American

Duty Free lease document - Produced and marked.

MR. JONES:

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98. Q. I believe there was a letter sent on June 30th -- was this what you're referring to in the request for assistance?

A. Correct. This was one of several letters that was sent.

99. Q. Okay.

MR. STANEK: Do you have questions about this?

MR. JONES: I do have a question about this.

MR. JONES:

100. Q. So in the first paragraph of the second page, it says, "Due to the Covid-19 pandemic, the Government of Canada and the United States closed the border on March 21st, 2020 to all non-essential travel. Since that date, car traffic has declined by ninety-five percent (95%) and truck traffic has declined by eighty-two percent (82%). The Canadian Duty Free stores have been closed and the US Duty Free stores are seeing only a fraction of their normal business. Both federal governments have deemed our bridges an essential service to maintain critical binational supply chains. Accordingly we are required to keep the border crossings operating while the revenues required to do so have been decimated." And so here, this is a letter that, as I understand, is being sent jointly by the Authority

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and the Niagara Bridge Commission that operates at least one -- has at least one Canadian duty free store on its property. Or sorry, it's the Rainbow Whirlpool and Queenston Lewiston Bridges, correct?

5 A. Correct.

101. Q. So three duty free stores?

 A. No.

102. Q. How many duty free stores?

 A. Two duty free stores.

10 103. Q. Two duty free stores. So anyway, what this letter is saying is that all the three Canadian duty free stores are closed?

 A. I'm not sure if they were fully closed at that time, June, they probably were.

15 104. Q. Well the letter says they're closed.

 A. They were closed, I believe, in June. I think they reopened sometime later.

 105. Q. And their American stores are open?

 A. Correct.

20 106. Q. And so do you agree with me that there was a difference in, generally, Canadian stores were closed and American stores were open?

 A. These duty free stores were closed. Not all Canadian duty free stores were closed.

25 107. Q. All right. You've mentioned two in your

Affidavit did not close.

A. At least two.

108. Q. Is it only two?

5 A. I'm not sure exactly, because we're looking at the major bridge crossings. I believe the Bluewater Bridge and the Ambassador Bridge, because they were commercial crossings, were, they remained opened.

10 109. Q. So in any event, of the thirty (30) or so Canadian land border duty free stores, you're not aware of any others that remained open?

MR. STANEK: Aware of any others that remained closed? He's just not aware of it. Is there a question?

15 MR. JONES: My question's my question.

MR. STANEK: All right.

MR. JONES:

110. Q. So you're not aware of any others?

20 A. Other duty free stores being open? During that period of time? No.

111. Q. And would you agree with me that the land duty, land border duty free stores essentially fell through the cracks with respect to government programs in Canada?

25 A. I wouldn't necessarily agree, it depends -

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- depended totally on the way they were structured, the way the lease, each lease is different. Some were eligible because their rent was less than, I think it was a fifty thousand dollar (\$50,000.00) threshold, so, all of them are different. Some didn't -- some actually did not have a landlord-tenant relationship with the border crossings, so each one is different, so.

112. Q. Okay. In any event, the Peace Bridge Duty Free, this current tenant, the tenancy that we're here about fell through the cracks, you'd agree with me there?

MR. STANEK: Fell through the cracks of what?

MR. JONES:

113. Q. The government subsidy programs for commercial leases.

A. No they were eligible for the program, they were eligible for queues just like any other business. They were eligible for CERS, like any other business. The magnitude...

114. Q. That's what I mean.

A. But again, the leases, because the leases were different than standard commercial -- commercial leases, I can't speak to whether they fell, fell between the cracks.

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MR. STANEK: They're certainly the only one
who's still in a dispute with their landlord.

MR. JONES: So I'm going make this June 30th,
2020 as the fourth Exhibit. So if we turn to
twelve (12) of your Affidavit ...

MR. STANEK: Want this back?

MR. JONES: You can ...

MR. STANEK: Marked as Exhibit Four?

MR. JONES: Yes.

EXHIBIT NUMBER FOUR: June 30th,
2020 letter to the government -
Produced and marked.

MR. JONES:

115. Q. So I'm turning your attention to Paragraph
Twelve (12) of your Affidavit, and here you say that
essentially the tenant is in default under their
lease and you refer to notices of default dated
September 8th, 2021 that are attached at Tab Three, or
Exhibit Three of your Affidavit.

A. Correct.

116. Q. Now in terms of the notices of default, do
you agree with me that the only reason to deliver a
formal notice of default to a tenant is as a

precursor to terminating the lease, implied that the lease provisions are with the Commercial Tenancies Act?

MR. STANEK: Is that a legal argument?

MR. JONES: Well is there another reason to deliver a...

MR. STANEK: Well why don't you ask him why he delivered it, that's probably a better question.

MR. JONES: I asked my question how I did.

MR. STANEK: All right. Okay.

MR. JONES:

117. Q. So is there?

A. Well we obviously reviewed this with legal counsel to make sure that everything we're doing is in compliance with the law, and given the circumstances at the time, a notice of default was sent.

118. Q. All right. And there's no other reason to serve a formal notice of default than as a precursor to terminating the lease in order to comply with the provisions of the lease and/or with the Commercial Tenancies Act?

A. Well we wanted -- we wanted the tenant to comply with the lease. Primarily, we wanted the store to open.

119. Q. So the reason to do that was to demand
that the store open, and I think that's the ...

5 A. We repeatedly asked. We repeatedly asked
that the store -- that the store be opened. We asked
for a proposal, I think it was back in May of 2021,
got nothing in response. We're being slow-rolled on
CERS throughout the process. So.

120. Q. So the notice of default pursuant to
subsection 19.2 of the Commercial Tenancies Act, this
10 is the, I'll call it the "non-monetary default," and
it's asserting that the tenant is in breach of
section 9.02 of the lease relating to conduct and
operation of business, that's what you're referring
to?

15 A. I can't recall.

121. Q. Well do you have the notice? Exhibit
Three of your Affidavit?

A. Tab Three or?

MR. STANEK: Tab Three. Nope that's not it.

20 Okay. So here it is, right there. The first
one is about rent. Okay.

MR. JONES:

122. Q. Right. So in your Affidavit, you said
that the Authority delivered the notice to PDF --
25 PBDF, that it intended to exercise remedies under the

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lease, and in the notice itself it says on the last paragraph of page two, "the Landlord hereby gives further notice that if the Tenant does not make such payments and remedies such defaults on or before four p.m. (4:00 p.m.) September 19th, 2021, then at any time thereafter without further notice or demand to the Tenant, the Landlord intends to exercise its rights under the lease or at law." And so what you're referring to here in your Affidavit, and what's referred to in the notice essentially is that the, by remedies under the lease, you mean terminating the lease, right?

A. It says it what it says. Drafted by our lawyers, so.

123. Q. Well it says "exercising its remedies."

A. Right. So I guess that is a remedy, correct?

124. Q. "Exercise remedies under the lease." So that's what you're referring to, is terminating the lease?

A. That's an option.

125. Q. Well what are you referring to here?

A. What we really wanted was the store -- for them to cure the defaults in the lease. That's what we wanted. If they didn't, then we wanted to

maintain whatever remedies we had, including
eviction.

126. Q. And at the time this notice was delivered,
the Authority was aware there was an eviction
moratorium among the Ontario law?

MR. STANEK: So was your client.

MR. JONES:

127. Q. The Authority was aware?

A. Correct. As long as it complied with all
the terms and conditions of the CERS program. And
that letter was sent within the context of us
believing that they were not in compliance with the
CERS program. And that was subsequently rectified by
Peace Bridge Duty Free when they finally sent us the
information that we had been requesting for months.

128. Q. Okay. And so what's the factual basis for
taking the position that the moratorium didn't apply?

A. Because there's certain requirements under
the CERS program in terms of notification and payment
that needed to be fulfilled, and given the lack of
information, we believed that they were in violation
of the CERS program, and that allowed us in
accordance with the -- the moratorium provisions to
an effect, seek the remedies that were allowed us
under the lease.

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129. Q. So you were aware they were applying for CERS and paying CERS money to the Authority before September 8th, 2021?

5 A. We were aware they were paying. They weren't -- in our opinion they were not paying in accordance with the intent of that program, which was to have lease -- lease monies flowing to the landlord, to assist the landlord. That's not what was happening with Peace Bridge Duty Free.

10 130. Q. Okay. But my question was, were you aware that they were applying for and they were receiving CERS money before September 8th, 2021?

MR. STANEK: Yes, but they weren't paying the rent.

15 MR. JONES: I'm asking the question.

MR. STANEK: That's what he said, he said they were applying for it, they were getting the money, they weren't paying the rent.

MR. JONES:

20 131. Q. And so knowing that they were applying for, receiving CERS money, the Authority here, what you're saying, is they waited for what they believed was an opening where it was no longer protected under the laws, under the Commercial Tenancies Act, 25 eviction moratorium, and that's when it delivered the

notice of default?

5 A. When we believed they were not in
compliance. You have to understand the context.
We'd been asking for months and months for the store
to reopen. We're asking over and over again, "Open
the store." They refused to do that, costing us
millions of dollars, and so come September, they're
not complying -- in our opinion, complying with the
terms of the CERS program. Yes, we wanted to move
10 with eviction because that allowed us to get someone
to open the store. That's what we wanted. We wanted
the store to open.

132. Q. So you thought this was an opportunity to
evict, because there was some lapse in ...

15 MR. STANEK: I think you need to listen to the
answer that your questions elicit, Mr. Jones,
that's not what he said.

 MR. JONES: I'm listening to the --
respectfully Counsel, I'm listening to the
20 answer, and I'm asking the question.

 A. We wanted the store to be opened by Peace
Bridge Duty Free. That's who we wanted to open the
store. Their failure to do so repeatedly,
repeatedly, led us to come to the conclusion that the
25 only way we were going to get the store opened was if

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we had an operator that was prepared to open the store.

MR. JONES:

5 133. Q. Right. So you were asserting a default under the lease that they weren't opening the store, despite the fact that the border was still closed to non-essential traffic at that time?

10 A. No the border was open already. It was beyond, there was much traffic beyond the essential traffic by September of 2021.

 134. Q. Well no. As I understand, the American border was open to non-essential traffic from November 8th, 2021.

15 A. I can't recall the exact, exact dates, but I believe there was some opening of -- of the border in September already. And we had no indication from Peace Bridge Duty Free that they had any intention of opening the store, in fact to the contrary, they weren't paying us anything, including slow-rolling us on every possible ...

20

 135. Q. I just want to...

 MR. STANEK: Don't interrupt him, he's answering your question.

 MR. JONES: But before we get down that road, because I think there's confusion about the

25

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border opening dates. As I understand, the Canadian border was open to non-essential traffic before the American border was open. And the American border, which is the border that the Peace Bridge Duty Free is serving traffic from Canada to America, was open on November 8th 2021.

A. But that was ...

MR. STANEK: Is that your evidence, Mr. Jones?

Is there something you'd like to take him to?

MR. JONES: Well no.

A. But any of that is -- all of that is irrelevant. We were asking since April of 2020 that the store reopen. It really didn't matter to us whether the border was open or not. There was traffic crossing, millions of trucks crossed during that period of time. We believed that the store could be open just like other stores were open. Essential travel was crossing. It was relaxed, I believe the number of cars crossing continuously increased, the store could have been opened much earlier than September of 2021.

MR. JONES:

136. Q. So your evidence is that whether or not the border was, the US-Canada border travelling to

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the United States was open to non-essential traffic
was not relevant to whether the Peace Bridge Duty
Free shop had to open?

MR. STANEK: His position is he's relying on
the lease. The lease didn't say that they could
close.

MR. JONES:

137. Q. You're relying on the lease and you're
saying that it's irrelevant whether or not the border
is closed to non-essential traffic?

A. The lease has an obligation that they be
open twenty-four seven (24/7).

MR. JONES:

138. Q. Right. But my question ...

A. Other duty free stores were open. This
store could have opened. They're a major, one of the
major commercial border crossings, creating a revenue
opportunity that many other border crossings did not
have. They chose not to open, in violation of the
lease.

139. Q. And so your position -- my question that
I'm putting to you is, that you're saying that it's
irrelevant whether the border crossing was closed to
non-essential traffic in terms of whether Peace
Bridge Duty Free was required to open their store.

That's your evidence?

A. The lease says they have to be open.

140. Q. Yes or no question.

A. They could have been opened. Let me give
you an example.

141. Q. No I don't want an example, sir. I just
...

MR. STANEK: You asked your question, you got
your answer, I think you should move on now.

MR. JONES: Well I didn't get an answer,
because it's a yes or no question.

MR. STANEK: You just don't like the answer,
sir.

MR. JONES:

142. Q. Okay. My question is simple. I'm putting
it to you that your, that the Authority's position or
what you've told me is that the obligation of the
tenant to open its store --.

MR. STANEK: Is in the lease.

MR. JONES:

143. Q. The -- whether or not the -- so let me
rephrase the question. Whether or not the border is
closed to non-essential traffic is irrelevant to
whether the store has to open, that's what you're
telling me. Yes or no?

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5 A. The store has to be open. It could have
been open, all the other stores are open. In fact,
Peace Bridge Duty Free had a store at the airport,
Hamilton airport, that remained open throughout the
pandemic. Our position is, they could have been
open, the lease required them to be open. So
regardless of what the circumstances are, yes, they
should have been open.

10 144. Q. Thank you. So the answer to my question
was yes.

MR. STANEK: The answer to your question is
what's in the record, Mr. Jones.

MR. JONES:

15 145. Q. I would like to take you to paragraph
twenty-seven (27) of your Affidavit. And you can
take a moment to read it.

MR. STANEK: Twenty-seven (27)?

MR. JONES: Yes. It begins with, "It was my
hope --."

20 MR. STANEK: Okay.

MR. JONES:

25 146. Q. Okay. So now we know that there was some
discussion about a second rent deferral agreement
that was going on in November, and then you say here,
that there was an indulgence, that indulgence --

5 sorry, to give context, you're saying basically,
Peace Bridge understood that any deferral of rent
after July 31st, 2020 was an indulgence provided by
the Authority, and that indulgence was provided by
the Authority in the context of certain restrictions
imposed by the province of Ontario on the right of
commercial landlords to evict tenants based on the
failure of the tenants to pay rent. So is it your
evidence that from at least December after the,
10 December 2020 after the second deferral agreement was
discussed that the indulgence afterwards was entirely
based on the eviction moratorium in Ontario?

A. Correct.

147. Q. Now as I understand at some point the
15 Authority advised Peace Bridge's lender, RBC, that it
was intending to exercise its -- exercise its
remedies under the eviction moratorium and that was
sometime in the fall of 2021.

MR. STANEK: Where'd you get that? That's
20 not in his Affidavit.

MR. JONES: Well.

A. I think that's in Dick Pearce's Affidavit,
I think that's incorrect.

MR. JONES: Okay. There was no communication
25 ...

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MR. STANEK: I sent out the notices, sir, and
I assure you, I did not send anything to RBC.

MR. JONES: There was no communication with
RBC at all?

MR. STANEK: No.

MR. JONES: In the fall or winter of 2021?

MR. STANEK: No. RBC found out about this in
some way that we don't know.

MR. JONES: No I'm not saying that they
originally found out, but at some point ...

MR. STANEK: I got a call from RBC's lawyer.
That was the first contact with RBC.

A. And I wouldn't even know who to contact.

MR. STANEK: Me either. That what you just
said, sir, is a complete fabrication.

MR. JONES: Well if I'm mistaken, I apologize
for that, but I -- can we go off the record for
a moment?

MR. STANEK: Sure.

OFF THE RECORD

COURT REPORTER: Back on record.

MR. JONES: So I'm looking at the Affidavit of
Jim Pearce sworn November 13th, 2022, and at Tab,
Exhibit 'G' there is a November 21st, 2021 e-mail
from Chris Stanek to Sanj Mietra and as I

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understand, Mr. Mietra is counsel for RBC?

MR. STANEK: Yeah. He asked me to send him an e-mail. He called me.

MR. JONES: So this e-mail says, "Mr. Mietra, as you know we represent the Buffalo and Fort Erie Public Bridge Authority. I am writing to advise that our client has been unable to resolve issues concerning the default of its debt as Peace Bridge Duty Free Inc., and our client intends to exercise its remedies under the default provisions of its lease. As you have previously requested, please accept this correspondence as advance notice of our client's intention." So that's what I was referring to.

MR. STANEK: Yeah. No. Mr. Mietra called me, he said he found out about the default, ...

MR. JONES: I know that he ...

MR. STANEK: ... he asked me to send him this e-mail.

MR. JONES: Counsel, Counsel.

MR. STANEK: So I sent him the e-mail.

MR. JONES: I'm not asking you questions.

MR. STANEK: This is my e-mail.

MR. JONES: But Counsel, I was trying to ask a question of the witness.

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MR. STANEK: Okay.

MR. JONES: And I --.

MR. STANEK: He didn't send the e-mail.

MR. JONES: I didn't suggest that he sent the
e-mail.

MR. STANEK: All right.

MR. JONES: I suggested that at some point in
the fall of 2021, the Authority advised RBC that
it intended to exercise its rights under the
lease, and you agree with me, that's exactly
what this e-mail is.

MR. STANEK: Because RBC was intending ...

MR. JONES: I'm not asking you why. I'm just
...

MR. STANEK: No. Here, I'll put it on the
record anyway, because RBC was intending to
exercise its rights ...

MR. JONES: Counsel.

MR. STANEK: ... under its loan.

MR. JONES: Counsel. Counsel.

MR. STANEK: Which they were planning ...

MR. JONES: Counsel.

MR. STANEK: ... and did.

MR. JONES: Inappropriate.

MR. STANEK: Shortly after this e-mail.

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MR. JONES: You're not here to give evidence.

MR. STANEK: Well, you're trying to create a record of things that did not happen, sir. So I'm here to correct it.

MR. JONES: Counsel. If anybody's trying to create a record of things that didn't happen, it's on that side of the table, because you've told me ...

MR. STANEK: Really? Are you calling me a liar, sir?

MR. JONES: No. I'm telling you that when I said that this happened, you told me it didn't, and it was a complete fabrication. And so I'm pointing you to the evidence.

MR. STANEK: No. What you said was ...

MR. JONES: Counsel, I don't want to argue with you.

MR. STANEK: Someone from the duty free called RBC or told RBC about the default.

MR. JONES: No that's not...

MR. STANEK: That did not happen, sir.

MR. JONES: No that's not what I said, Counsel.

MR. STANEK: All right. Well the record will show what it shows.

MR. JONES: And I don't want to argue with it,
I'm simply asking questions.

MR. JONES:

148. Q. So would you agree with me that around
5 this time when the Authority determined it was going
to exercise its remedies under the lease, that it
knew that doing so would cause the receivership
application to be brought by RBC?

MR. STANEK: No. You've got the order wrong.
10 RBC was considering the receivership application
before this --, before that e-mail. That's why
Mr. Mietra called me.

MR. JONES: So you're saying no. The
15 intention to inform -- the Authority did not
know that it's advising the lender that it
intended to ...

A. We didn't advise RBC. They were aware
of it already.

149. Q. No?

20 A. We didn't advise them. RBC was already
aware of it.

150. Q. What I'm saying -- you're advising that
the client -- that our client, which is the
Authority, correct?

25 MR. STANEK: Mmhmm.

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MR. JONES: Intends to exercise its remedies
under the default provisions of the lease.

MR. STANEK: That's why they sent notices of
default, and they intended to rely on the
5 notices of default to the extent that they
could.

MR. JONES: Well the notice of default was
already sent.

MR. STANEK: That's right.

MR. JONES: So what I'm saying here, is that
10 the Authority knew that by telling the bank that
it was going to exercise its remedies under the
lease, that it knew the bank would move forward
with the receivership.

MR. STANEK: Incorrect. That's complete --
15 that's complete fabrication. They knew about it
before they -- he called me. He knew about the
default.

MR. JONES: I'm not asking -- Counsel, I'm not
20 asking about the default, I don't think that
there's -- nobody's disputing that the bank is
aware of the default as of November 21st, 2021.

MR. STANEK: That e-mail was sent because Mr.
Mietra specifically asked me to send it to him.

MR. JONES: Okay. And ...

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A. You're saying -- but you're suggesting,
your question to me, that we notified the bank.

MR. JONES:

151. Q. No I'm not ...

A. That's what you asked.

152. Q. I'm not saying you notified the bank of
the default. My question is, you notified the bank
on November 21st, that it intends to -- that the
Authority intends to exercise its remedies under the
default provisions of the lease.

A. That's what the notice of default in
September said.

153. Q. Okay.

A. What's the, what's the, what's the date on
that?

154. Q. November 21st, 2020.

A. Okay. Two months later.

155. Q. Yes. And so I'm saying that this, when
this e-mail was sent, it was sent with the knowledge
that advising the bank that the landlord is moving
forward with lease termination would cause the bank
to go forward with the receivership.

MR. STANEK: No. The bank's position, sir,
has always been that they wanted the landlord
and Peace Bridge Duty Free to work out their

differences.

MR. JONES: Right.

MR. STANEK: Peace Bridge Duty Free's position has not been helpful to any resolution, and Mr. -- I told Mr. Mietra that on the telephone, he asked me to send him an e-mail, and you'll note that that e-mail says we were not able to reach an agreement with these people.

MR. JONES: Right. I'm not challenging you on what the e-mail says.

MR. STANEK: But it was not sent to invoke any sort of action on behalf of the bank. The gentleman asked me for an e-mail, I sent it to him. They knew about this. The bank knew what it was going to do, and they make their own decisions independently.

MR. JONES:

156. Q. So prior to April, so taking you to paragraph thirty-three (33) of your Affidavit. You say that prior to April 22nd, 2022, there was no practical reason for the Authority to request permission or seek an order permitting it to exercise its remedies under the lease based on a failure of PBDF to pay rent in accordance with the lease. So you're referring to the eviction moratorium under

Ontario law?

A. That's what the rest of that paragraph says.

157. Q. Correct. So you'd agree with me that there was also no practical reason for delivering a notice a default threatening to exercise the remedies under the lease either?

MR. STANEK: What?

A. I'm not following you at all.

MR. JONES:

158. Q. Well if there's no practical reason to seek an order permitting the exercise of the remedies ...

MR. STANEK: You're reading that wrong. The practicality is, there's a provincial moratorium.

MR. JONES: I'm asking the witness, Counsel.

MR. STANEK: All right.

MR. JONES: This is his evidence. This is his Affidavit.

MR. JONES:

159. Q. You say there's no practical reason for the Authority to request permission for an order permitting the exercise of its remedies under the lease based on the failure of PBDF to pay rent in

accordance with the lease?

A. Prior to the 22nd of April 2022?

160. Q. Right. And so ...

A. Because that was the moratorium date.

5 161. Q. So there was also no practical reason to deliver a notice of default before that?

MR. STANEK: Got the store open, didn't it?

A. No because we believed in September that they were in violation of the moratorium. That's why it was sent. Remember this is April 2022. Our notice of default was September of 2021, when we believe they were not even, they already had violated the moratorium provisions.

MR. JONES:

15 162. Q. Okay. And ...

A. So that's why the notice was delivered.

163. Q. Help me out exactly why you believed that they were in violation of the moratorium provisions.

A. I don't want to...

20 164. Q. I want specific details rather than just ...

A. I explained that to you. We were not getting information from Peace Bridge Duty Free on the CERS, even though we repeatedly asked them. It was only after we sent the notice that we received

everything that we had requested. Only when Mr.

Stanek sent the letter to Peace Bridge Duty Free, did we get what we had been requesting for months.

165. Q. So you're saying that before then, at no point in time, did you receive what was required under the CERS program?

A. Oh we received it, but there was a period of time where we believed we were not getting it because we couldn't -- we asked them repeatedly, "When did you apply, when did you get the funding?" We never got that information. We came to the conclusion that they had violated the CERS program and therefore they no longer had moratorium protection.

166. Q. And what is that specific period?

A. I don't recall exactly what the -- what the period of the CERS. What are we talking about?

167. Q. You said that you determined that they violated it for a period.

A. Correct.

168. Q. So when you ...

A. A period of time.

169. Q. All right. So ...

A. That they have to have -- you have to file the CERS things, we asked, we sent the notification,

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5 finally got a response from them, finally they
provided all of the information, and then we said to
them, "Okay. We can't move forward with the
termination." And we haven't since. That's all
covered in the letters that Mr. Stanek sent, we said,
"Finally you sent it to us, all of this could have
been avoided if you would have -- would have provided
the information that the Authority had been
requesting for months." And then we backed off. The
10 -- the whole default provisions, at least in so far
as that the moratorium was concerned.

170. Q. Well hold on a second, because in November
2021, you're telling the bank that you're moving
forward with exercising it.

15 MR. STANEK: Exercising remedies.

MR. JONES: Right. So what's that mean?

MR. STANEK: Whatever remedies they had.

MR. JONES: What remedies is ...

MR. STANEK: Well eviction wasn't one of them
20 as long as there was a compliance with the CERS
program. Any remedies that we had other than
that, and then -- and then RBC started their
application there and everything stayed so --.

MR. JONES: So specifically what remedy is
25 being referred to?

A. Open the ...

MR. STANEK: Sir, I explained what's in my e-mail. He asked me to send him that e-mail, described that way. It's -- they're entitled to exercise whatever remedies under the lease there were under law. Eviction wasn't one of them because of the moratorium.

MR. JONES: So what remedies ...

MR. STANEK: Which your client knew, and took full advantage of.

MR. JONES: Counsel, I just want to know -- my question's very simple. If it wasn't -- if you weren't saying that the intention was to exercise termination remedy, what remedy was being referred to?

MR. STANEK: If there was any time where Peace Bridge Duty Free was not in compliance with the CERS program before the end of the moratorium, then they would have acted on eviction. So ...

MR. JONES: So you're saying ...

MR. STANEK: And there was full intention to act on eviction after the moratorium was over, but by then RBC had started their application. So everything was stayed.

MR. JONES: So are you saying that they were

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not in compliance as of November 21st, 2021 and
that's ...

MR. STANEK: Well they weren't in compliance
with the lease.

A. Right.

MR. JONES: Well you still haven't told me
what enforcement remedies we're talking about
here other than termination.

MR. STANEK: It's a general comment because
the bank's counsel asked me to send them that e-
mail.

MR. JONES: What -- I still, so I'm going to
take it from your response that there was no
other remedy that was being enforced other than
the threat of lease termination.

MR. STANEK: The lease provided for remedies
that were not available to the Authority because
of the moratorium, and then those remedies
became unavailable because of the RBC's
application. So we are where we are. And you
know that.

MR. JONES: Okay. So I'm going to take it
from your answer that, in the notice ...

MR. STANEK: You can take it however you wish,
you don't have to put it on the record, you can

put it in your factum.

MR. JONES: Do you disagree with me that these references to enforcement of its rights under the lease is in reference to lease termination?

MR. STANEK: Yes.

A. It's more than lease termination, we could have exercised using the security deposit, we could have done -- I'll leave it at that.

MR. JONES:

171. Q. Okay. So I just want to clarify something, I don't think it's in dispute, but in paragraph nineteen (19) of your Affidavit, you say in the second sentence, "PBDF has instead, been unilaterally paying rent equal to twenty percent (20%) of its reported sales." And I think what that intended to say was that it paid, that, as well as additional rent, correct?

A. Referring to base rent. That's what that paragraph's referring to.

172. Q. Okay. So base rent.

A. Correct.

173. Q. But it -- you'd agree with me it was paying additional rent at the time.

A. Yeah, I said that before. This is referring -- paragraph nineteen (19) is referring to

base rent.

174. Q. Okay. That's fine.

A. And everything throughout, when we talk about rent default, it's referring to base rent.

5 175. Q. Okay. It just wasn't clear for me, the Affidavit, but thank you for clarifying that. And I don't think there's any dispute and I think it was as of July 20, 2023, Peace Bridge Duty Free has been paying the three hundred and thirty-three thousand, 10 three thirty-three (333,333) base rent?

A. I believe as per the court order, they've been paying since May.

176. Q. Oh was it May? Okay. Since May. And the Authority's not taking the position that the Peace 15 Bridge Duty Free has not remitted all the SERS money that it received from the government?

A. They have not submitted all the SERS. They took a portion of the SERS money and remitted it. They did not -- they did not remit one hundred 20 percent (100%) of the SERS money they received to the Authority.

177. Q. Okay. So can you provide us with what you say was not remitted, if you say it hasn't remitted the money?

25 A. They remitted a portion of the SERS money.

Some of it they retained for other elements of their operation.

178. Q. So can you particularize what you say hasn't been remitted?

A. Can't do it right now. But I ...

179. Q. I mean, in the records that I've seen, for each SERS month, it appeared to me that at least the full amount of SERS money was ...

A. Was submitted to us? That's not true. That's not true, not the full amount, absolutely not.

180. Q. Then you can provide us with what months that you say ...

A. That's every month. Every month they didn't provide one hundred percent (100%).

MR. STANEK: It's in the accountings that they provided.

MR. JONES: Well you're going to have to help me out then, because what I see is that ...

A. You're assuming that what they gave you is one hundred percent (100%) of what they received from the government. That is not correct.

MR. JONES: All right. Well you can provide us with, so you'll undertake to provide us with what you say was not submitted in terms of the SERS money?

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MR. STANEK: You just asked him. It's reflected in the monthly reports in the things that they sent.

5 A. Yeah. We can -- I can call, I can get that sent.

MR. STANEK: Okay. We'll give that undertaking. ^

A. It's easy to do. It clearly indicates that --.

10 MR. JONES:

181. Q. So what I have is that Exhibit 'D' of Mr. Pearce's November 13th, 2020 -- '22 Affidavit and it shows that in every month the amount paid ...

15 MR. STANEK: This is a spreadsheet that's been constructed.

MR. JONES: Right.

MR. STANEK: Right.

20 MR. JONES: So it shows that in every CERS period, the amount of rent paid to the Authority exceeded the amount of the CERS payment.

MR. STANEK: This is not from CERS. This is Mr. Pearce creating a spreadsheet.

MR. JONES: So you're -- are you saying that this is not accurate?

25 A. No. It indicates what they sent to us,

it does not indicate what they received from the
government for CERS.

MR. STANEK: There's no proof that that's what
they're receiving.

MR. JONES: Sorry. The max is seventy-five
thousand dollar (\$75,000.00) rent and the CERS
subsidy rate was sixty-five percent (65%)?

A. Correct. They got sixty-five percent
(65%) and of that sixty-five percent (65%), they did
not submit all of that -- all of that money to the
Authority. They submitted a portion of it to us, but
they retained some for their own purposes.

MR. JONES: For that period. Anyway, I'm not
going to argue with you about it.

MR. STANEK: In fact, that's what the -- if
you look at the chart, that's exactly what it
says. They received forty-eight (48) and they
remitted forty-three (43). They received sixty-
seven (67) and they remitted fifty-nine (59).

MR. JONES: Right, because some money had
already been paid.

MR. STANEK: No.

MR. JONES: Well that's exactly what it says
here.

MR. STANEK: No.

MR. JONES: It says ...

MR. STANEK: Not what happened.

MR. JONES: Previously paid to PDA: additional
rent, taxes, and insurance. Right?

MR. STANEK: So they deducted it, but they
paid an additional taxes and insurance from the
amount that they got through CERS, and then
remitted the balance.

MR. JONES: So ...

MR. STANEK: So they were using -- they were
using the CERS to subsidize the other portion of
the rent.

MR. JONES: Counsel, ...

MR. STANEK: That's what that says.

MR. JONES: It says what it says, but the fact
is that in each CERS period, the Authority
received the full amount -- at minimum the full
amount of the CERS.

MR. STANEK: No.

MR. JONES: Yes. That's exactly what you just
said. Whether it was paid before, and now
supplemented with the CERS ...

MR. STANEK: They paid themselves back.

MR. JONES: I'm not going to argue with you
about how you want to characterize it, but the

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fact is that the payments were made.

5 A. They did make payments. I'm just saying that they did not submit and we've -- that's covered off in a lot of the letters that we've sent, which I'm sure you've seen, that clearly indicated they received 'X' amount of dollars in CERS, and they only submitted a percentage of that.

182. Q. Because payment had already been made by them for the balance.

10 A. No I don't ...

MR. STANEK: No. We had no way ...

MR. JONES: I'm not going to argue about how to characterize it, but, let's move on.

MR. JONES:

15 183. Q. So in any event, it's fair to say that throughout, the Authority received at least twenty percent (20%) of the sales plus additional rent, and more when the subsidy money for the period was greater than the twenty percent (20%) of sales and additional rent.

20 A. We don't know exactly what they were paying, to tell you the truth.

184. Q. Okay.

25 MR. STANEK: It wasn't by agreement, it was unilaterally done.

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MR. JONES: Right. So ...

MR. STANEK: So it was completely up to them
as to what they forwarded.

MR. JONES:

5 185. Q. Right. And you'd agree with me that in
contrast, the US duty free store was just paying
sixteen percent (16%) of their gross sales?

10 A. They were open, they were paying in
accordance with their lease, with the exception of
the base rent.

186. Q. So ...

A. Their lease is totally different, theirs
is a graduated lease -- lease -- lease scenario.

187. Q. No I understand ...

15 A. Totally different.

188. Q. We've got it here.

A. Right.

20 189. Q. But during this period of time, they're
paying, after the deferral period, which was April,
May, June, they're paying sixteen percent (16%) of
gross sales.

25 A. Every year they get it to, when they start
-- the way it works, at the beginning of the year,
with the US duty free, they pay a lesser amount. As
their sales increase, it gets graduated every year,

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every -- every month. So it's an apples to oranges comparison. You can't compare the two leases.

190. Q. Well they're not paying the base rent, in any event.

5 A. They're open. They're paying. And we have an agreement with them to recover the base rent with the exception of about twenty percent (20%).

191. Q. And that agreement was only signed in December 2022, correct?

10 A. I don't exactly know when it was signed, yeah. It was near the end of 2022. I think it was, may have been signed a little earlier, I think it may have been signed a little earlier than that.

192. Q. Signed December 21st, 2022.

15 A. I think we had an approval ...

193. Q. The last page is the signature page.

A. Yeah, okay.

194. Q. So you'd agree with me that up until then, they are not in compliance with their lease?

20 A. Correct.

195. Q. And now based on the records that I saw, between the period of April 2020 and December 2020, the American Duty Free store paid the Authority two hundred and sixty-nine thousand, five hundred and
25 eighty-seven dollars and sixty-six cents

(\$269,587.66). Does that sound right to you?

A. I don't know.

196. Q. And by my math, the -- for that period, including the CERS money that's attributable for that period, the Peace Bridge Duty Free store paid two hundred and thirty-two dollars, seven hundred -- sorry, two hundred and thirty-two thousand, seven hundred and fifty-two dollars (\$232,752.00) in respect to that period. So there's a difference of about thirty-seven thousand dollars (\$37,000.00) or so in the amount that's actually paid during that time frame.

A. Yeah but you're missing the point of what we have said over and over again, they were open. They were providing a service to the travelling public. They were doing all of the things that a responsible tenant would do. That's not what was happening with Peace Bridge Duty Free.

197. Q. So the only -- the reason you're saying that the Authority acted against Peace Bridge Duty Free...

MR. STANEK: They didn't act against anybody. They enforced their rights under the lease.

MR. JONES: Against the Peace Bridge Duty Free.

67
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A. We wanted the store open.

MR. JONES:

198. Q. Right. It was because wasn't closed --
store wasn't open, that's your evidence?

MR. STANEK: Yes.

A. We repeatedly asked them, like I said,
from the beginning of, very early part of the
pandemic, they could have opened the store.

199. Q. I got you, I heard you earlier to that
point. Okay, it's eleven thirty-five (11:35) so
would now be a good time to take a little break?

MR. STANEK: Sure.

OFF THE RECORD

COURT REPORTER: On record.

MR. JONES:

200. Q. I'd like to take you to paragraph twenty-
three (23) of your Affidavit, and that's where you
talk about the second rent deferral agreement. You
can take a second to read the paragraph if you'd
like. Okay. So my first question is, after the
expiry of the term of the first rent deferral
agreement, you agree with me that the parties just,
sort of, continued on in terms of status quo that was
happening while that agreement was enforced?

A. Correct.

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201. Q. And I believe you sent the -- there's some e-mails back and forth, but I think you sent the final version of the rent relief agreement to Mr. O'Hara by e-mail on November 19th, 2020, and that's Tab C Twenty-seven (27) of your -- the Authority's disclosure brief, if you'd like to look at it.

A. I don't recall that.

202. Q. And I believe that the message to Mr. O'Hara was essentially that it had to be signed so that he could get it approved at the upcoming board meeting on November 20th.

A. Correct.

203. Q. And in fact if I'm looking at the -- your November 18th e-mail, you write to Greg and Jim, "Attached is the revised rent deferral agreement as discussed with the March 31st, 2021 deferral date and the removal of the legal expense clause. Please sign and return to us. I need to also have the PBF, PBA board approve at its meeting on November 20th." So you'd agree with me, you told them to sign, and essentially told them it would be approved at the meeting?

A. I told them I would be recommending its approval at the meeting.

204. Q. Okay. And in fact it did get approved at

the meeting on November 20th.

A. Correct.

205. Q. And we've been provided now with the copy of the minutes of the November 20th board meeting, so we can provide you with a copy. And so these are the minutes of the executive session of the November 20, 2020 board meeting?

A. Correct.

206. Q. And it says, paragraph 4A Peace Bridge Duty Free rent deferral agreement, verbal. And then the resolution is that the rent deferral agreement with Peace Bridge Duty Free be approved, correct?

A. Correct.

207. Q. And that's all the direction you required to sign the agreement and move forward with it, correct?

A. Correct.

208. Q. And did you sign the agreement?

A. No.

209. Q. Okay. So the direction was to move forward with the agreement, but the board -- but the Authority didn't move forward with the agreement?

A. Well again, what I mentioned earlier, during the discussions at the board meeting, prior to them actually approving the resolution, there was a

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lot of discussion and a lot of questions, and like I said, I recommended approval of the agreement. The board agreed with that recommendation, however, they also were very concerned about the lack of information that we were getting. So they said to me, we're approving this agreement, but we'd really like to get some greater clarity on some of the information, financial information, and we want to have some certainty that in fact we're actually going to get paid, ultimately.

210. Q. So ...

A. Let me finish.

211. Q. Sorry.

A. So immediately following the meeting, immediately following that meeting, I sent an e-mail to Peace Bridge Duty Free asking them for the information that the board was requesting. Never got anything back. A week later, sent them another e-mail. Never got anything back. Close to another week later, sent them another e-mail. So that was the context of why it was not, why I did not sign it.

212. Q. Okay. You'd agree with me that what you just told me is not reflected in the minutes of the meeting?

A. That's correct.

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MR. JONES: So I'm going to mark the minutes
as Exhibit Five.

EXHIBIT NUMBER FIVE: Minutes of
the November 20, 2020 Board meeting
- Produced and marked.

MR. JONES:

213. Q. And then I think the e-mail that you're
referring to must be this November 20th, 2020 e-mail?

A. Correct.

214. Q. And so that's an e-mail from you to Mr.
O'Hara? Why don't I mark that as Exhibit Six?

EXHIBIT NUMBER SIX: November 20,
2020 e-mail from Mr. Rienas to Mr.
O'Hara - Produced and marked.

MR. JONES:

215. Q. And at Paragraph twenty-six (26) of your
Affidavit you say that the Authority did not sign the
second rent deferral, and you say that it was advised
in writing on or about November 20th, December 2nd, and
December 9th, that the Authority was not going to sign
the second deferral, rent deferral and/or further

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defer rent unless certain conditions were satisfied by Peace Bridge Duty Free. At that time, you agree with me that that wasn't the direction given by the Board?

5 A. Like I said before, there's the actual formal resolution, and then there's the discussion related to that resolution, and the Board clearly had concerns about -- about the lack of information. So I sought to fulfil the wishes of the Board in getting more definitive information on the finance, which we expected would be a very simple matter, that they could provide this information within the next day or two and we would sign the deferral agreement. That did not happen.

10 216. Q. And so, just taking you to your Exhibit Seven in your Affidavit, it's the three e-mails you're referring to.

 A. Is that Tab Seven, or?

20 217. Q. Yes.

 MR. STANEK: It's November 20th, marked as Exhibit Six, right?

 MR. JONES: I've got it as Tab Seven.

 MR. STANEK: Right, and you also marked it as Exhibit Six.

25 MR. JONES: Oh I'm sorry, yes.

MR. STANEK: And then there's another couple
of e-mails.

MR. JONES: There's two more e-mails in your,
in Tab Seven.

MR. JONES:

218. Q. Taking you to the December 9th e-mail, you
see the last sentence of your e-mail says, "Please
see my comments in red below to your e-mail
yesterday."

A. All right.

219. Q. And then you didn't produce the balance of
the e-mail there, so that's not a complete version of
the e-mail.

A. Mhmm. Correct.

220. Q. Okay. So I think, and this was in the USB
e-mails that were disclosed in the disclosure brief,
I think this is the full version of the e-mail.

A. Yeah.

221. Q. December 9th, do you agree with me?

A. Yep. Yes.

222. Q. Okay. So let me mark that one as an
Exhibit -- is it Seven?

MR. AMAR: Seven.

EXHIBIT NUMBER SEVEN: November 20,

2020 e-mail with full responses -

Produced and marked.

MR. JONES:

5 223. Q. Exhibit number Seven. And so in the
balance of that e-mail, you'd agree with me that
Peace Bridge Duty Free did provide several responses
to the questions that you were asking for?

A. Correct.

10 224. Q. Okay. And now going back to your November
20th e-mail, you'd agree with me that the Peace Bridge
Duty Free did provide the Authority with their most
recent financial statements at that point?

15 A. We weren't asking for financial, we, I
think we had the -- where are you seeing that?

MR. STANEK: It doesn't say financial
statements, it says financial information that
requested 16.03 'A', 'B', and 'C'.

MR. JONES:

20 225. Q. All right. So in response to your e-mail
on November 23rd, Jim Pearce e-mailed you the most
recent audited financial statements.

A. I don't think the date's right.

25 226. Q. Here, I'll give you the e-mail. It's
November 23rd.

A. So those will be 2019 financial statements.

227. Q. Right. And ...

A. We're in November now, of 2020.

MR. JONES: So mark this as Exhibit Eight. It's the November 23rd, 2020 e-mail from Jim Pearce to Ron Rienas.

EXHIBIT NUMBER EIGHT: November 23rd, 2020 e-mail from Jim Pearce to Ron Rienas - Produced and marked.

MR. JONES:

228. Q. And he also says that the HST remittance that you asked for would be -- would be arriving in the Authority's bank today, or if not, tomorrow. So there's no issue that that was received, correct?

A. I'm not sure if it was received or not.

229. Q. Well you don't ask for it again, would seem to have been received. Or did you ask for it again?

A. I don't recall. I assume we received it.

230. Q. Okay. So you tell Mr. O'Hara that you're requesting financial information and the HST reimbursement. So you got the HST reimbursement and

you got the financial statement.

A. 2019 financial statement.

231. Q. 2019 financial statements, right. And so you still didn't proceed with the second rent deferral agreement?

A. Because like I said, we're in November of 2020. The Board had concerns like I mentioned in its Board meeting, so we asked for more information as we're allowed to in Article 16.03 of the lease.

232. Q. You'd agree with me that at that point in time, this request wasn't made in a context of any mortgage or refinancing purposes or anything?

A. No.

233. Q. And at that point, the Authority didn't seek to pursue any of its rights under Article Five of the lease, with respect to financial disclosure?

A. We were trying to finalize a deferral agreement and the Board just wanted some greater reassurances, some things ...

234. Q. Sorry.

A. So they were fine with the deferral agreement, but they just wanted to get some greater certainty on certain, certain elements of the finances.

235. Q. And so on your e-mail, December 2nd, which

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is the second e-mail in your Tab Seven, you ask for a copy of the winter maintenance contract and a certificate from a reputable HVAC contractor certifying the HVAC system was in working order?

5

A. Yes.

236. Q. Okay. And those -- why are those being made conditions of the deferral agreement?

A. They aren't.

10

237. Q. Well. Okay. You're saying that they're not?

A. No. Read the last paragraph, "We are awaiting additional financial information." You've gotta understand, there's lots of issues going on. This e-mail covers several issues.

15

238. Q. And then when you got the financial information in the -- going back to Exhibit Seven which was Jim Pearce's December 8th e-mail which provides you with a bunch of responses.

20

A. Yeah. He e-mails me on December 8th, and you see my response on December 9th, basically saying that it was not what we were looking for.

239. Q. And then in that e-mail you demand payment of, sorry -- that e-mail being the December 9th, 2020 e-mail, you demand payment of one million dollars (\$1,000,000) by December 31st, 2020.

25

A. Mmhmm. Right.

240. Q. But that wasn't part of the Board direction either.

A. Correct.

5 241. Q. So that was on your own initiative?

A. Correct. Because we weren't getting the information. You have to understand the circumstances, what we're dealing with at that time. We're in the pandemic, it's the end of the year, we're concerned about our year end. We want to make sure we have that service covered, ratios for our bonding. We've frozen wages, the Board has totally redone its budget to reflect the fact that we are facing financial strain. What else were we dealing with at the time? We see that they have not submitted CERS, all of these things. So we're being slow-rolled at this point. We have a year end coming up, and we wanted to make sure that we were -- we put ourselves in the best possible position. So that's why I asked what I did, and I subsequently went to the Board to formalize that.

242. Q. Sorry, best possible position for what?

A. For our financial statements.

243. Q. Okay. So ...

25 A. Because we didn't feel we should be

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subsidizing Peace Bridge Duty Free to the extent that we were. That's why we only asked for a third, we should at least be sharing the pain, and that was very clearly spelled out in subsequent letters to Mr. O'Hara in December.

244. Q. Okay. So the next Board meeting was December 17th, 2020.

A. Correct.

245. Q. Right. And I'll give you a copy of the Board minutes that we received. And in that December 17th, 2020, the minutes, the Board approves the minutes from the November 20th, 2020 meeting, and then it also -- so they're approving the resolution that -- sorry they're approving the minutes, including the resolution that approved the rent deferral agreement without any revision or conditions, and then there was another resolution in these meeting -- in these meeting minutes that says -- and it's at 4B -- that the Buffalo and Fort Erie Public Bridge Authority demanded partial rent payment from the Peace Bridge Duty Free in the amount of one million dollars (\$1,000,000.00) by December 1st, 2020. And that the rent payment schedule and associated guarantees a full payment be developed with legal counsel. Right?

A. Correct.

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246. Q. So on the one hand, they've approved the deferral agreement, on the other hand, they're demanding a million dollars (\$1,000,000.00) within the deferral period.

5 A. They never -- the deferral agreement was not executed, so at that meeting, December 17th, we shared with the Board everything that has transpired since the November board meeting. The Board meeting fully understood what was going on, we reviewed the
10 financial information that we finally did get from Duty Free, which they initially refused to provide, and said we won't be getting that information until March of 2021. So I think it was on Dec -- what's the date here? There's some e-mails that probably
15 are not included in here, but we got an e-mail from, in response to my e-mail of December 9th, I think on December 10th or 11th, I received an e-mail from Mr. Pearce apologizing for, I think his words were, "the gap in the information," that was being -- that was
20 provided. I think it was the next day or two days later, we got the information that we had requested back on November the 20th, which was basically interim financial statements. Not the audited financial statements, interim financial statements, and upon
25 careful review of that, we came to the conclusion

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that there was some -- there was sufficient
accessibility to capital that Peace Bridge Duty Free
could afford to pay us, at least something in terms
of the rent. We shared all of that with the Board on
the 17th and they passed the resolution then.

247. Q. Okay. So where's the report that was
given to the Board?

A. I think it -- I think it was all verbal.

248. Q. So they did this all based on verbal?

A. Well you gotta understand, it's time. So
we only have so much time to review everything.
Reviewing all the interim financial statements takes
time. I'm not sure if it was -- how much information
was -- was shared with the board in terms of, but all
the information related to what was going on was
shared with the Board.

249. Q. So you're telling me that the Board went
from approving a rent deferral 'til March 31st, to
demanding a million dollars (\$1,000,000.00), all
based on verbal, no, no...

A. No I think...

250. Q. Records or documents or anything to
substantiate what was verbally told to them?

A. I'd have to review exactly how that -- how
that was submitted to them, because I can't recall

exactly. It's been a couple years. So I'd have to review that.

251. Q. Okay. Well. Can we go off the record for one second?

OFF THE RECORD

COURT REPORTER: Back on record.

MR. JONES: Okay so, we're going to mark the December 17th, 2020 minutes as Exhibit nine.

EXHIBIT NUMBER NINE: The December 17th, 2020 board meeting minutes - Produced and marked.

MR. JONES: Now so you'll under -- I'm going to request for an undertaking to provide us with whatever written report or documents were provided to the board in respect of the December 17, 2028 -- 2020 meeting?

MR. STANEK: If there is a report and it's not privileged with respect to the meeting on December the 17th we'll produce it to you. If there is no such report we'll tell you that and if it's privileged we'll tell you that. Okay?

MR. JONES: Okay. And if wasn't a formal report or it's some sort of other document --?

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MR. STANEK: If there's anything in writing,
Counsel. ^

MR. JONES: Yes, anything in writing, thank
you Counsel.

MR. JONES:

252. Q. Now after the board meeting on the 17th you
wrote to the board members and it looks like -- well
I'll give you a copy of the e-mail, but it looks like
after consulting with counsel it was decided to
change the resolution that was passed to remove one
of the resolutions that in the event of default by
Peace Bridge Duty Free and subject to legal review,
staff be authorized to negotiate lease terms with a
second bidder in the June, 2016 RFP process?

A. Mmhmm. Okay.

253. Q. Okay, and so do you agree with me that
based on the information that the authority had and
based on the Duty Free store being closed and the
border being closed since March that the authority
knew that the Peace Bridge Duty Free was not going to
be able to comply with what was being demanded in
terms of payment of rent and so then it -- it would
eventually default?

A. Sorry, I was reading there I was reading
what -- what you had given to me. Can you repeat

that?

254. Q. Okay, so coming out of the -- and if you'd like I can give you another -- the letter that was sent ...

5 MR. STANEK: Are you asking the same question or no?

MR. JONES:

255. Q. Yes. I believe there was a letter sent arising out of that meeting, correct and I think it might be attached to the e-mail you -- you're looking at. There was a letter sent on December 1st, 2020?

A. December 21st, '20 correct.

256. Q. And that's demanding a million dollars (\$1,000,000.00) by December 31st, so within ten days?

15 A. Correct.

257. Q. And then it's also requiring two point one three million dollars (\$2,130,000.00) to be paid in a schedule satisfactory to the landlord and that the Tennant is obligated to pay rent as it comes due, not withstanding the payment of rent arrears. So essentially it's got to start paying full rent, the three hundred and thirty-three thousand dollars (\$333,000.00) as of January 1st I guess, that's what it's saying here?

25 A. That's what it says.

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258. Q. In addition to paying a million dollars (\$1,000,000.00) and paying back the two million dollars (\$2,000,000.00), so the Authority knew it wasn't going to get -- the Peace Bridge Duty Free wasn't going to be able to do that, right?

A. We felt they could have certainly paid the million dollars (\$1,000,000.00) related to -- or at least a good portion of the million dollars (\$1,000,000.00) related to the -- to the base rent.

259. Q. But the store's closed?

A. It could have been open.

260. Q. The -- well the borders closed?

A. No, the border's not closed.

261. Q. To -- do you agree with me the border's closed to non-essential travellers?

A. Correct.

262. Q. At that time the store is closed?

A. Correct, by their choice.

263. Q. And you're telling them that they have to pay a million dollars (\$1,000,00.00), start paying three hundred and thirty-three thousand dollars (\$333,000.00) per month?

A. Mhmm.

264. Q. And to pay back two million dollars (\$2,000,000.00)?

A. Mmhmm.

265. Q. And that -- I'm putting to you that the board knew that the Authority -- or the Peace Bridge Duty Free store could not reasonably have paid that?

5 A. Yeah, you have to understand there's a couple of reasons for saying that. One was to get the Duty Free to understand that -- that there has to be some sharing of the pain with the -- with the Peace Bridge in this thing. The other thing was to
10 get their attention to actually respond to what we're looking for. And that letter had the desired effect because two weeks later we finally got the business plan from -- from Peace Bridge Duty Free that we had been -- that we had been seeking for some time so --.

15 266. Q. But what you're asking for here isn't sharing the pain, that's paying everything?

A. Well, yeah, because what have they done up until this point? Nothing. Nothing.

20 267. Q. So I'm putting it to you that the Authority knew that it could not comply with this demand?

A. We anticipated we would get a response from them which we did.

25 268. Q. I'm putting it to you that the Authority knew that the Peace Bridge Duty Free store could not

comply with this ...

A. Well not ...

269. Q. ... demand and there would be a default?

A. ... no I wouldn't -- I wouldn't say that.

5 We know that the owners are independently wealthy,
they could have put their own personal capitol into
it, that was certainly an option for them. So they
were not availing themselves -- what -- what -- what
the interim financial statements showed us, what --
10 what our review showed us in December was they were
not availing themselves of their own personal
resources ...

270. Q. Sorry but ...

A. ... they were not ...

15 271. Q. ... but ...

MR. STANEK: No, let him finish.

MR. JONES:

272. Q. When you're saying 'they' who are you
referring to?

20 A. I'm talking the Duty Free shareholders.

273. Q. The shareholders, so not Duty Free itself?

A. Well they -- they are the sole
shareholders of the corporation, right?

274. Q. Okay.

25 A. So there's four -- four members,

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independently wealthy, have not put any money into
the business to deal with the -- to deal with the
situation, clearly ind -- and that's -- it was
clearly shown in the interim financial statements,
they were not accessing the lines of credit that they
had, did not use them, were not applying for
everything that they were eligible to apply for, at
least based on the information that they had provided
to us. So our position was they did have the means
to pay for -- for that, at lease a chunk of it.

275. Q. But you knew that they would default on
this?

MR. STANEK: Default on what?

MR. JONES: Well what's being demanded.

MR. STANEK: It's -- it's a request in a
letter.

MR. JONES: Okay.

MR. STANEK: Don't confuse it with the lease.

MR. JONES:

276. Q. So okay, going back to the December 17th e-
mail that I provided to you?

A. Right.

277. Q. So I believe it says that you're going to
take out the last resolution there because it
indicate -- it suggests that you'd already

predetermined there would be a default?

A. Right, we said that in the event of a default, we didn't say that there was going to be a default, we said that in the event ...

5 278. Q. Right.

A. ... of a default.

279. Q. But as a practical matter you knew there would be a default?

10 A. No I wouldn't say that. There would certainly be time to resolve it, they have an opportunity to respond, which they finally did in, I think it was January 15th and that's how we dealt with it. But at least it got their attention because nothing else we were doing was getting their
15 attention.

280. Q. But I'm talking about this proposal here?

A. I understand.

281. Q. And you're saying that they would not -- you didn't think that they would default on this?

20 A. Well no I'm not saying that, they -- they may have defaulted, it depended on what they were prepared to put in to the business. We didn't know -- I don't know ...

282. Q. You're talking about the shareholders?

25 A. Yes.

283. Q. But I'm talking about Peace Bridge Duty
Free?

5 A. They are the sole shareholders, they're
the -- they're the owners of the business. They
could have put some of their own personal capitol
into the business if they so chose to, they could
have used exisiting lines of credit that they did not
tap, they hadn't made application to some of the --
some of the programs that were -- that -- that were
10 available, so they had access to capitol that they
were not using.

284. Q. So you're saying ...

15 A. And what we're saying is why should we
bear one hundred percent (100%) of the pain in this
thing. And at the same time -- at the same time, at
that time they had -- there were three CERS payments
that they could have paid, they only chose to make
one in -- in -- in December of 2020. So you put all
of that together, they're not paying us, they're slow
20 rolling us, we have a situation with our end of year
financial statements, we at least wanted to get the
base rent down, or at least a portion of the base
rent, one third of what was owed, we didn't -- we
weren't asking for all of it, we're asking for one
25 third of it. And then moving forward we say you're

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not sharing information with us, we want you to pay
in accordance with the lease, that's what we said.

285. Q. And so as I understand what you've just
told me is you don't -- at this point you don't think
that Peace bridge Duty Free can comply with this, if
I ...

MR. STANEK: That's not what he said.

A. No.

MR. JONES:

286. Q. Let -- let me finish my question. But you
think that the shareholders could pay part of this
for at least some period of time is what you're
saying?

A. They could contribute something into it,
correct.

287. Q. So at that point the purpose, I guess, by
the time this letter is going out the authority is
essentially saying that they are going after the
money of the shareholders of the corporation?

MR. STANEK: That's an unfair question,
they're not going after anybody.

MR. JONES:

288. Q. Well the -- if they know -- if you know
that the corporation can't pay it and you're
expecting the shareholders to pay it, that's what's

happening, right?

5 A. Well they have access to other means, our positions is why should we be bearing one hundred percent (100%) of the burden of the covid impact, it should at least be some shared pain, and that's what this was -- this was trying to convey to them.

289. Q. Okay. All right let's mark both of these documents as the, is this December 17th -- December 21st, so it's the December 21st, 2020 e-mail chain that includes the December 17th, 2020 e-mail and the attachment is the December 21st, 2020 letter.

15 **EXHIBIT NUMBER TEN:** December 21st, 2020 e-mail chain including the December 17th, 2020 e-mail and December 21st, 2020 letter attachment - Produced and marked.

20 MR. STANEK: I assume you came with two copies of everything, right. I'm going to -- at lunch I'm going -- we're going to figure out what I got here and what I don't because you just gave us a document and took it back and marked it, so --?

25 MR. JONES: Yes, I think we have three copies

of everything.

MR. STANEK: Yeah, we'll -- I'll figure this out at lunch, it's Exhibit Ten, okay.

MR. JONES: Exhibit Ten, okay. Is there any that you're missing?

MR. STANEK: No we've got -- yeah.

MR. JONES: Okay, well ...

MR. STANEK: But we'll figure it out later.

MR. JONES: Okay and just to close the loop on -- on this exchange so that the record is complete, it looks like there was a December 23rd response to to the Authorities' letter and then a December 29th response from the Authority.

MR. STANEK: Okay.

MR. JONES: Okay, so I just won't -- I think we should mark those as Exhibits just so we have the progression there, if there's no objection?

MR. STANEK: No, no objections.

A. And I would note that this letter confirms what I just said to you, all the reason -- all the reasons why we ...

MR. STANEK: Exhibit Twelve (12)?

MR. AMAR: One's eleven (11) and that one is twelve (12).

MR. JONES: So the 20 -- the December 23rd

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letter will be the eleven (11) and December 29th
will be twelve (12).

MR. AMAR: Okay.

EXHIBIT NUMBER ELEVEN: December
23rd, 2020 response to the
Authorities' letter of December
21st, 2020 - Produced and marked.

EXHIBIT NUMBER TWELVE: December
29th, 2020 letter responding to the
Peace Bridge Duty Free's response to
the December 23rd, 2020 letter -
Produced and marked.

MR. JONES:

290. Q. So at this point at the end of December
you'd agree with me that the Authority had
essentially determined that its strategy moving
forward with the Peace Bridge Duty Free was going to
be demand that it pay all its rent and to get
personal guarantees from the shareholders?

A. And open the store, that's what we were
really demanding was open the store.

291. Q. And then the November 20th deferral

agreement didn't require the store to be open?

5 A. We had been asking for the store to be open throughout the deferral agreement related to unpaid rent, we -- we realized that even with the store open they weren't going to make all of the rent payments ...

292. Q. Now when

10 A. ... so when the deferral agreement doesn't just cover -- it does not -- does not anticipate the store staying closed, it could have stayed open, it could have been open throughout, but again the choice of closing the store was Peace Bridge Duty Free's ...

293. Q. No.

15 A. ... which we objected to repeatedly.

294. Q. Sorry, maybe my question wasn't clear, but it wasn't a condition of the deferral that the store open?

MR. STANEK: No it was in the lease.

MR. JONES: So you're saying ...

20 MR. STANEK: You have to --...

MR. JONES: ... you have ...

MR. STANEK: ... you have to understand.

MR. JONES:

295. Q. Hold on a second. So my question is on November 20th, when you're recommending the deferral

25

agreement to the board you know the store is closed?

A. Right.

296. Q. And you know that the store is not opening
the next day?

A. Correct.

297. Q. And you're recommending that they approve
the deferral order?

A. Right.

298. Q. Agreement. So the deferral agreement, I
put to you, is not conditional on the store opening?

A. No, we have been -- again there's par ...

299. Q. I under ...

A. ... there's multiple parallel tracks going
on.

300. Q. I understand, but my question is just
about the deferral agreement, I know you're saying
you asked for the store to open?

A. Right.

301. Q. But the deferral agreement was not
conditional on the store opening?

MR. STANEK: Is that a statement?

MR. JONES: It's a question, do you agree with
me?

MR. STANEK: He was trying to answer it but
you interrupted him.

5 A. Well the deferral agreement stands on its own. What also -- what also stands on its own is our desire and our repeated request to have the store open. The other thing that needs to be recognised that the deferral agreement, that deferral agreement that you're paying so much attention on would have required them to pay back one hundred percent (100%) of the rent that was referred.

10 MR. JONES:

302. Q. Isn't that what you're -- what's being demanded on December 21st?

 A. So what's the difference?

303. Q. Well it's being demanded to be paid a million dollars (\$1,000,000.00) within ten days ...

15 A. Yeah.

304. Q. ... and then three hundred and thirty-three thousand dollars (\$333,000.00) the next day ...

 A. So, so --...

305. Q. ... and then ...

20 A. ... so Duty Free was prepared to sign a deferral agreement that required them to pay back one hundred percent (100%) of what was owing, one hundred percent (100%) of what was owing but they're objecting to paying one third three months earlier
25 than the end of the deferral date?

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306. Q. Okay, I'm not sure what the point you're trying to make is but ...

A. Well I think I'm making it pretty clear, that obviously Duty Free had money to pay at the end of the deferral period 'cause that's what they said they were going to do, they signed that. We didn't, we probably helped them out by not signing it, but the fact of the matter is they were prepared to pay. We're asking for one third of it before the end of the year, that deferral agreement ends March 31st of 2021.

307. Q. So I'm sorry, is -- but the Authority's saying that deferral agreement is not valid?

MR. STANEK: Because it's not fully signed ...

MR. JONES: Okay, well I ...

MR. STANEK: ... it's part of the law ...

MR. JONES: ... I never said ...

MR. STANEK: This isn't a position, it's a point of law.

A. I'm just -- I'm just telling you what Duty Free agreed to do. Not what we agreed to do, what Duty Free agreed to do, they were prepared to pay us everything owing plus interest by the way, four percent interest if I recall correctly.

MR. JONES:

308. Q. Okay, well in fairness I think there was some e-mails that we mentioned early on about having further discussions as the -- as the situation progressed that you agreed to?

5 A. Yeah, but I'm just telling you what they had agreed to, and so all this consternation that we're asking for on third when the amount that was due at the end of the deferral was significantly more than that.

10 309. Q. Okay, so then ...

A. Almost triple.

310. Q. ... how much was demanded from the US Duty Free store at that time?

A. They were open.

15 311. Q. So the only reason that you demand ...

A. They were open.

312. Q. ... was that it was not open?

A. We had a working relationship with them, they were open when we asked them to stay open, they operated, they paid -- they paid rent, that's not the case with Peace Bridge Duty Free.

20 313. Q. Okay so, all right. Let me go to ...

A. You have to understand, we provide a service ...

25 314. Q. Okay ...

A. ... we provide a service ...

315. Q. But I've not -- I haven't asked you a question.

MR. STANEK: Don't cut him off.

5 MR. JONES: I -- I'm going to ask questions and he's going to answer questions but I didn't ask question.

MR. STANEK: Oh, is that how this works?

MR. JONES: Yes.

10 MR. STANEK: He's not answering what you asked before, oh all right whatever. You wanna -- did you want to tell him what to say?

MR. JONES: Well no I -- when I have a question ...

15 MR. STANEK: All so let the record show you just cut him off.

MR. JONES:

316. Q. All right, so I think to sum up what you were saying is the US -- there was no demand for payment from the US Duty Free store because it had remained open?

20 A. I remained open, it provides a service to the travelling public, we repeatedly asked Duty Free to stay open and provide that same service to the travelling public. We asked them to open the

25

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washrooms for the -- for the truckers, they refused
to do that, we got into a long back and forth we had
-- we had to actually send them a notice of default
in November when all of this other stuff was going on
as well with their failure to -- to reopen the --
open the washroom or maintain the washrooms. So put
all of that together, put all of that together,
that's why the board said what it did, and this is
...

5

10

317. Q. So when the demand was made though the
Peace Bridge Duty Free was operating the washrooms?

A. Yes after we said that them not doing so
was a default of the lease in November they finally I
think it was the beginning -- the first week of
December when they finally started ...

15

318. Q. Right so you agree with me ...

A. With the washrooms.

319. Q. ... that wasn't a reason for the demand
letter?

20

A. No we -- again, there's so many factors
that we in -- in play with -- the board. You have a
Tennant that's not providing information, refusing to
provide the most basic services to the travelling
public, not opening -- not opening the store, put all
of those things -- slow-rolling us on CERS, all of

25

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those types of issues were in play at the end -- end of December. Now we had a wage freeze on our employees, we totally recast the budget, we -- we stopped capitol works project, we deferred maintenance project, we did all of those things, part of that was we need to get revenue from Peace Bridge Duty Free because they could actually afford to pay us something.

320. Q. Okay, so in terms of -- and this came up earlier, in terms of the boarder restrictions as I understand the United States lifted it's final Covid-19 vaccine requirement on May 11th, 2023 do you agree with me on there?

A. Correct.

321. Q. And we talked about when the US border reopened, and I think that's at paragraph thirty (30) of your Affidavit, you say it reopened on November 8th, 2021?

A. Mmhmm.

322. Q. And so that's the border that -- that's the border crossing that Peace Bridge Duty Free serves?

A. Correct.

323. Q. And you would -- would you agree with me that this lease is premised on there being a free and

open flow of travellers across the border?

MR. STANEK: It's not premised on anything.

A. It doesn't say that, the lease doesn't say that.

MR. JONES:

324. Q. Is that a -- is that part of the -- well I'll put it to you this way, in the RFP process the Authority provided statistics or data about the traffic ...

A. Correct.

325. Q. ... travelling over the boarder, correct?

A. Correct.

326. Q. And so I put it to you that it was part of all the parties expectations that this lease was based on there being a free and open flow of travellers going across the border?

A. We provided the historical traffic information, which fluctuates from time to time, to all the potential bidders on RF -- RFP.

327. Q. Right.

A. Peace Bridge Duty Free of all the bidders knows the Peace Bridge border crossing better than anybody else, the submitted their RF -- their -- their proposal on the basis of what we provided to them and their own personal knowledge of the border,

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including the fact that they lived through SARS in 2003, which had -- also had travel -- travel restrictions.

328. Q. Okay.

A. So they knew the border better than anybody else at this location, they submitted their bid on the basis of that.

329. Q. Right, and I'm putting it to you that it was on the basis that the border crossing was open to the free traffic -- travel of traffic across the border?

MR. STANEK: That's an argument, that's not a question.

MR. JONES:

330. Q. Okay, so your -- I'm take -- I'm looking at your November 26th, 2022 Affidavit now.

A. October 26th.

331. Q. Sorry about that. And so the last sentence there or the last 'E' sub two you say that the Authority has consistently advised Peace Bridge Duty Free that payment of percentage rent only is not acceptable to the authority and so we ...

MR. STANEK: What are you referring?

MR. JONES: Paragraph four.

MR. STANEK: Okay, mmhmm.

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MR. JONES: Sub 'B' and sub two.

MR. STANEK: Okay.

MR. JONES:

5 332. Q. So my question is did the Authority tell the US Duty Free store that payment of percentage rent only was not acceptable?

A. Again, I don't -- again, the leases are so different that it was probably -- that was immaterial to us with the -- with the US Duty Free.

10 333. Q. Sorry, as I understand the base rent was about one point three million dollars (\$1,300,000.00)?

A. Right.

334. Q. And that was immaterial?

15 A. No, in terms of knowing how we were moving with the US Duty Free we were not concerned about that.

335. Q. So paragraph forty (40) of you Affidavit, and about halfway through the paragraph ...

20 A. Forty (40)?

336. Q. Yes. You say that the Authority negotiated an agreement with the operator US Duty Free that contemplated a temporary deferral of rent in 2021 similar to what was provided in their -- or in the first rent deferral, but you've already

25

confirmed for me that we have all the lease
amendments here?

A. Right.

337. Q. And so there's no agreement at that time
for rent in 2021?

A. We -- again they were open, they were
paying and we had -- we knew that they would -- that
the would be making us whole on the -- on the base
rent.

338. Q. So there was no agreement about temporary
deferral in 2021?

MR. STANEK: It turned out it was temporary
didn't it?

MR. JONES: I'm sorry, what -- what agreement
are we referring?

MR. STANEK: Well there's -- there's a
subsequent agreement so the agreement in 2021
was temporary.

MR. JONES: So -- so where is the agreement?

MR. STANEK: Didn't we just look at it
earlier?

MR. JONES: Maybe you can show it to me, I
don't -- I haven't seen one.

A. Well we had the agreement with the Duty
Free where we agreed to an abatement on the base

rent, that's the agreement that is -- is ...

MR. JONES:

339. Q. You're talking about the fifth amendment of the lease?

A. Whatever ...

340. Q. Sorry about that.

MR. STANEK: I think it's the sixth, isn't it in the final agreement ...

A. The last one?

MR. JONES:

341. Q. Just amendment to the lease, base rent due in -- under the lease for the calendar months of April, May and June 2022?

A. That's the temporary one that's referred to and then we did the subsequent agreement with respect to Duty Free where we -- which is -- which is six.

342. Q. But so this has nothing to do with deferring or any rent in 2021?

A. Right 'cause they're paying us back all of the rent.

343. Q. Your Affidavit says that the Authority negotiated an agreement with the US operator of the -- you -- with the operator of the US Duty Free that contemplated temporary deferral of rent in 2021,

similar to what was provided in the first rent
deferral?

A. I don't think there was a ...

MR. STANEK: I think it means 2020, he doesn't
mean ...

A. I think it means 2020.

MR. STANEK: Yeah.

A. That -- that -- that's a typo, it's not --
there was no agreement in 2021.

MR. JONES:

344. Q. Okay, sorry about that.

MR. STANEK: Yeah.

A. It's 2020.

MR. JONES:

345. Q. So your Affidavit's wrong on this point?

MR. STANEK: He's just corrected it, yes.

MR. JONES:

346. Q. All right. And that deferred rent in the
fifth amendment, that was going to be paid back over
one year from January 1st, 2021 to December 31st, 2021?

MR. STANEK: Can I have a look at it?

A. I don't remember the language.

MR. JONES: Count on ...

MR. STANEK: Well let's start with the fifth
amendment.

MR. JONES: Yup.

MR. STANEK: Where's the fifth amendment?

A. I think we covered this already, didn't we?

MR. STANEK: We'll cover things multiple times.

A. So what's your question?

MR. JONES:

347. Q. I was just asking you to confirm that the requirement was that if you pay -- the deferral be paid back starting January 1st, 2021 over the period of a year?

A. Right.

348. Q. And that didn't happen?

A. Correct, similar to the Peace Bridge Duty Free deferral agreement.

349. Q. Right and the US store was allowed to continue just paying the sixteen percent (16%) of sales?

A. Whatever the lease required as the percentage said, the percentage is -- is variable.

350. Q. Well the lease required base rent as well.

A. We talked about that.

351. Q. Okay, so you're just saying whatever the percentage rent, they were just required to pay their

percentage rent

A. Which is variable.

352. Q. And not just -- okay, gotcha. And so just to confirm then, from July, 2020 onward until the new agreement in December, 2022 they did not pay any base rent?

A. Correct.

353. Q. And there was no demands for a lump sum payment?

A. Right.

354. Q. And so ...

A. Because the discussions we had with them, they indicated how they were -- we were going to handle -- handle that, which was reflected in the -- in the final amendment. They were going to pay us back the base -- base rent.

355. Q. And did the Authority send any default notices like it did to the Peace bridge duty Free?

A. No.

356. Q. Did it threaten -- it didn't threaten enforcement?

A. No, because they were open.

357. Q. So even when Peace Bridge Duty Free opened the Authority refused to accept percentage rent?

A. We wanted to pay in accordance with the

lease. You also have to understand that in 2020 and 2021 when we were having the discussions with the Duty Free moving forward we were also dealing with the issue of rent arrears, which was not being addressed by Peace Bridge Duty Free.

358. Q. But the American Duty Free ...

A. And I think it was in October.

359. Q. ... store didn't pay any rent arrears back either?

A. They're paying them back right now.

360. Q. So beginning 2023?

A. Yes, January of 2023.

361. Q. And it's over a period of five years?

A. With interest, twenty (20) percent abatement.

362. Q. Yeah, so the twenty percent (20%) ...

A. You want to go through with this comparison all the time, I mean this is a joke. It really is a joke.

363. Q. The way the Authority treated one differently than the other?

A. You have two totally different leases, two totally different circumstances. If you want to be comparing lease to lease we can do that all day long and your client will end up paying significantly more

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than what he's paying right now, so it's ridiculous to go through an apple to oranges comparison. They were open so we had a working relationship with them, Peace Bridge Duty Free was not, we had zero relationship, they refused to everything that we asked them to do. It goes to the relationship, that's what this is really all about, we had a good relationship with one tenant, we had a terrible relationship with Peace Bridge Duty Free because of their lack of responsiveness, not doing anything, not responding to anything that we asked for, that's the difference.

364. Q. So when you say that there was twenty percent (20%) reduction, I think it's Exhibit One from today. The number here one point -- one million, two hundred and fifty-five thousand, four forty-seven seven - point seven four (1,255,447.74), is that before or after the twenty percent (20%) reduction?

A. I'd have to check with -- I -- I don't know, I think I'd have to check with Karen on that.

365. Q. Can you undertake to advise us that?

A. I don't know what the relevance is but fine. ^ The orders of magnitude are so much different that it doesn't make any sense to compare the two at

all.

366. Q. You mean in terms of the gross number?

5 A. Yes, yeah, so in terms of magnitude and risk to us, it's a risk assessment that we have to take. We had commitments, verbal commitments from Duty Free Americas that they were going to work with us, they stayed open, they actually delivered on that when we signed the agreement in December of 2022, they're paying with interest in accordance to that. 10 We don't have any of that with Peace Bridge -- with - - with Peace Bridge Duty Free.

367. Q. Okay.

15 A. So to do a comparison when you have totally different -- different orders of magnitude doesn't make any sense.

368. Q. My next question is about how the base rent was calculated for the 2021, 2022 years to come up with this number?

A. In accordance with the lease.

20 369. Q. Okay so the fifth abatement, or fifth amendment agreement says for the purposes of commuting base rent for the calendar year of 2021 base rent and gross sales will be the base rent and gross sales respectively from the calendar year of 25 2019?

A. Which was the peak year.

370. Q. Right so what I'm saying is for the -- is that the way it was calculated for 2020 base rent?

5 A. I'd have to check with our CFO to see how that was done.

371. Q. And for 2021 base rent and for 2022 base rent, so that's what I would like an undertaking to?

A. Whatever, I'm not sure what the relevance is, but --.

10 372. Q. Okay so ...

A. Okay.

MR. STANEK: Undertaking to -- to do what?

15 MR. JONES: To provide the calculation -- the underlying calculation of how this number was arrived at, the number in the January 5th, 2023 letter. ^

MR. JONES:

20 373. Q. And the Authority didn't demand any personal guarantees from any of the shareholders of the American Duty Free store?

A. Again, we had a relationship with them that allowed us to move forward with an agreement that we executed in December of '22.

25 374. Q. My question is whether there was any demand or request for a personal guarantee?

A. No.

375. Q. And with the sixth amendment, as I understand, the term of the American lease was extended by ten years?

A. Correct.

376. Q. And in the prior lease there was basically an option to extend it to I think it was for ten years to 2035 if they built a new store?

A. Correct.

377. Q. Otherwise it ended in 2025?

A. Correct.

378. Q. And so in the new agreement it's extended to 2035 and they don't have to build until then and then it extends for a further ten years?

A. Correct.

379. Q. So essentially the capitol investment obligation is extended for ten years?

A. Yeah, again, totally different environment. It's in a temporary store, the requirement to build a new store is incorporated in to the lease, which is not within their control, and the timing is not within their control. So again, totally irrelevant to Peace Bridge Duty Free.

380. Q. Right, but you'd agree with me that a ten year extension control right is valuable to that

tenant?

5 A. I suspect that it -- that it's important
to them because we'd lost -- because of the pandemic
the number of years that have been lost, the fact
that they don't control when a new store can be built,
that's within -- within our purview, and that's
reflected in the -- in the language of that -- in the
language of the lease.

10 381. Q. And I understand the American Duty Free
company is a significantly larger corporation,
there's at least five hundred (500) employees?

15 A. They have multiple stores, I don't know
the size of the store, but it doesn't matter, we have
a lease agreement with that particular store, not all
the other stores.

 MR. STANEK: Mr. Jones, I have a call at one
o'clock (1:00) can we stop at like five to one?

 MR. JONES: No problem.

 MR. STANEK: No, okay.

20 MR. JONES:

382. Q. Okay, so paragraph -- I'd just like to
take you to paragraph twelve (12) of that Affidavit,
your November 26th, 2022 Affidavit.

 A. Which number's that?

25 MR. STANEK: Twelve (12).

MR. JONES:

383. Q. And the last phrase there you say the lease assigns the risk of lower than anticipated sales to Peace Bridge Duty Free, but you would agree with me that the changes in government regulations were dealt with separately in paragraph eighteen point oh seven (18.07) of the lease?

A. And?

384. Q. So the risk of lower sales resulting from changes of government regulation are to be addressed by eighteen point oh seven (18.07) is what I'm putting to you?

MR. STANEK: They were.

MR. JONES:

385. Q. So it's -- what I'm putting to you is your statement about the lease assigns the risk of lower than anticipated sales is in the normal circumstances, that's what your statement addresses but in the circumstances of eighteen point (18.) -- of changes in government regulation the lease specifically addresses that in eighteen point oh seven (18.07)?

A. Right, understanding that our -- Peace Bridge Duty Free reports to be a sophisticated Duty Free operator, they submitted a proposal that was

taken exactly as they submitted and incorporated into the lease. So if they had concerns about any of those things they could have reflected that in their bid when they submitted their proposal.

5 MR. STANEK: The contract reflects the risk.

MR. JONES: So the ..

A. They signed the lease.

10 MR. STANEK: It's a -- it's a legal issue as to whether eighteen point oh seven (18.07) changes any of the risk, I don't believe that it does but, you know, this is just talking about the risk. If your client thinks it entered into a risk free lease ...

15 MR. JONES: Well of course that's not what we're saying here ...

MR. STANEK: Oh okay, well then let me put it to ...

20 MR. JONES: Counsel, I don't want to get into an argument with you on the record here, I'm simply pointing out that I was addressing the statement at paragraph twelve (12) of the Affidavit, and I think you'd agree with me that it's -- that applies in the normal course the risk, but the risk specifically with respect to
25 government regulation or changes in government

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regulation is addressed in eighteen point oh
seven (18.07) so let's move on, all right, so

...

MR. STANEK: It clearly wasn't a question, all
right.

MR. JONES:

386. Q. In -- you pointed out, you were talking
about when the lease was negotiated and you're aware
that there was some negotiations that happened after
the RFP was approved in July of 2016?

A. Correct.

387. Q. And I think you're probably -- probably
aware there was a meeting between Mr. Pearce and Ms.
Costa on July 18th, 2016?

A. Correct.

388. Q. And Ms. Costa sent an e-mail to Mr. Pearce
and copied you on July 19th, 2016?

A. Correct.

389. Q. I'm handing you a copy of that e-mail. So
you've seen that before?

A. Correct.

390. Q. And we'll mark it as Exhibit Thirteen
(13)?

MR. AMAR: Yeah.

EXHIBIT NUMBER THIRTEEN: e-mail

dated July 19th, 2016 between Ms.

Costa and Mr. Pearce - Produced and
marked.

MR. JONES:

391. Q. Now did you see this -- a draft of this e-mail before it was sent?

A. I don't recall.

392. Q. Would it be normal for -- well would you have spoken to Ms. Costa before this e-mail was sent?

A. Not necessarily.

393. Q. But you may have?

A. I may have but I don't ...

394. Q. You don't remember one way or the other?

A. You're going back seven years.

395. Q. Well do you remember or not?

A. No.

396. Q. Okay, can you check your e-mail to see if you received a draft of this e-mail or you communicated with Costa about the contents of this e-mail?

MR. STANEK: Look, Mr. Rienas has checked his e-mails, everybody has checked their e-mails, you have everything. You may assume that there

is no such e-mail.

MR. JONES: Okay, well I'm specifically asking just to ...

MR. STANEK: And I'm specifically telling you, you got everything. ^

MR. JONES: Okay, so my question was going to be to review your e-mails and search to determine whether or not you received a draft of this e-mail and provide us with copies of the draft and any responses.

MR. STANEK: You may assume that such draft does not exist.

MR. JONES:

397. Q. Now in the paragraph that's marked as number three in this e-mail.

A. Yeah?

398. Q. The last sentence she's basically saying that the issues raised by Mr. Pearce were routine events at the border crossing except she agreed that changes in government regulations can have a material impact on business and eighteen point oh seven (18.07) was responsive to Mr. Pearce's request?

MR. STANEK: And more accurately eighteen oh seven (18.07), which was already in the drafts at this time was enough to satisfy those

concerns. That's as far as the Authority was prepared to go, that's what she's telling him.

MR. JONES:

5 399. Q. Right so as I understand, and I can take you to the handout if you'd like, there was a -- the issues raised were traffic volume declines and bridge construction, so you recall those were issues raised by the Authority?

A. Mmhmm.

10 400. Q. And so what she's saying is those are routine events at the boarder crossing, those are risks that you've assumed, correct?

A. Right.

15 401. Q. And she's saying that changes in government -- in regulation can have a material impact and so in response to address your concerns that you've raised eighteen point oh seven (18.07) is -- which is already in the lease.

A. Mmhmm.

20 402. Q. Is responsive to your concerns and that addresses what you are asking for, that's what she's saying, that's what the Authority's saying?

25 MR. STANEK: The Authority's saying that's as far as they're prepared to go, Mr. Rienas didn't write the e-mail ...

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MR. JONES: Counsel, I'm asking the witness,
you didn't ...

MR. STANEK: You're asking about an e-mail he
didn't write.

MR. STANEK:

403. Q. Well you were involved in the lease
negotiations at that point in time?

A. No.

404. Q. You were copied on the e-mail?

A. Not to a great extent, I was more involved
with the RFP process than I was with the finalization
of the lease, that was being handled by Ms. Costa
with counsel.

405. Q. Do you agree with me you did attend a
meeting with the Peace Bridge Duty Free to -- in the
process of the new Lease negotiation in July of 2016?

A. I may have, I don't recall exactly but I
may -- I may have.

MR. JONES: Okay, Counsel, let's it's --.

MR. STANEK: Five to one?

MR. JONES: Yeah. Let's go off the record.

OFF THE RECORD

COURT REPORTER: Back on record.

MR. JONES:

406. Q. Okay, so I'm at paragraph fifteen (15) of

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your November 26, 2022 Affidavit, and so here it

looks like you're making statements in response to

Mr. Pearce, and we can go to his Affidavit if you'd

like to, but my question is with respect to 'B' of

that paragraph when you say asserts that the

Authority has not acted reasonable as required to by

article two point one five (2.15) of the lease and

then the next paragraph, I'm sorry at the bottom of

that paragraph you say that's not accurate and the

next paragraph you say the Authority has always dealt

in good faith and been honest with the Peace Bridge

Duty Free, et cetera. So what I'd like to put to you

is in context of the Covid-19 pandemic, where this

Duty Free store had not been operating for a year and

a half, that it's not reasonable to demand immediate

payment of an amount that the Authority knows that

the tenant was unable to pay, do you agree with me

that it's not reasonable to demand payment of

something it knows it's not possible to be paid?

A. I disagree.

407. Q. It is reasonable to demand payment?

A. Well because you're -- again, you're

focusing on the issue only of payment, there's a

whole bunch of other factors that come into -- into

play. It's reasonable for us to ask them to open the

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store, it's reasonable for us to have them have the -
- have the washrooms open, it's reasonable for us --
for -- for them subsequent to operate the store
properly, all of those things are reasonable. It's
5 also reasonable for us to request they pay something
towards it as opposed to -- as opposed to only using
the CERS payment for -- for base rent, particularly
when they had access of other sources of capital so
we believe we were acting reasonably.

10 408. Q. Okay, so paragraph sixteen (16), in the
second sentence you talk about an obligation to
consult, so I think what you're referring to the is
paragraph -- or section eighteen point oh seven
(18.07) of the lease?

15 A. Correct.

409. Q. And so I think we touched on this but
maybe didn't go -- didn't look at it, you know,
exactly word by word, but there's no dispute that
there was an unanticipated introduction or a change
20 in applicable laws that caused a material adverse
affect to the business operations of the tenant here?

A. Yeah, I'm not sure what the pandemic,
whether that was law or federal regulations or
agreement between Canada and -- I don't know what it
25 -- what it was, but the intent of eighteen oh seven

(18.07) within the context of the RFP process before the lease was ultimately finalized was related to the regulations related to Duty Free stores, that's what it really related to. Like for example, if the federal government changes the rules or the law as it pertains to the sale of alcohol, which is a big sales -- sale maker for all Duty Free store, or for example would have been back, I think it was in the early 2000s when the government changed the law on visitor GST rebates at Duty Free stores, that had an impact on the store. So those are -- that's what was meant by the contents of regulatory -- regulatory changes, that's the context.

410. Q. So if I understand you correctly, just to take an extreme example, if the government decides they're going to eliminate duty free sales in the whole duty free regime entirely that would be a change in the regulatory ...

A. Yeah.

411. Q. ... regulations, so at that point there's no duty free store?

A. Yeah.

412. Q. Like, there would be no rent pay -- like, they wouldn't be continuing to be paying four million dollars (\$4,000,000.00) a year if there's no Duty

Free Store?

5 A. Right, that's what it was designed for,
for applicable law as it applied directly to the Duty
Free store, and as you know there was no applicable
law that said that Duty Free had to be closed, it
could have remained open, there was nothing that it -
- it changed the way the border operated but it
didn't change any Duty Free regulations whatsoever.

413. Q. Okay, so going back to my question, when
10 we look at eighteen oh seven (18.07) of the lease so
I guess I'm putting to you the closure of the border
for non-essential travellers, that's a change in
applicable laws?

15 A. Not within what -- how we envisioned
eighteen oh seven (18.07) when it was put into the
lease, no.

414. Q. Well in fairness the -- so it's an
unanticipated introduction, right?

MR. STANEK: It says what it says, Counsel.

20 MR. JONES:

415. Q. Okay. Well I don't -- so moving on then I
don't think you would disagree with me that the
closure of the border for non-essential travellers
had an adverse effect on the business operations of
25 the Peace Bridge Duty Free store?

5 A. We clearly said that before, it had an impact on us, it had an impact on the Duty Free, had an impact on everybody. Let me say that and so far as eighteen oh seven (18.07) is concerned, whether that was in the lease or not we would have been talking to Duty Free, just like we have been. It's not that we -- that we are talking to Duty Free because of eighteen oh seven (18.07).

10 416. Q. Okay, and so I put it in -- I put it to you then that the obligation under eighteen oh seven (18.07) is to enter into good faith discussions upon the actual impact to the lease and the change and the applicable laws, do you agree with me?

15 MR. STANEK: It says the impact of such introduction of or change in the applicable laws, discuss the impact ...

 MR. JONES: Right.

 MR. STANEK: ... of the introduction of or change in applicable laws.

20 MR. JONES: My question to the witness.

 MR. STANEK: Mmhmm.

 MR. JONES:

25 417. Q. Is that I'm putting it to you that eighteen point oh seven (18.07) requires the authority to enter into good faith discussions on the

actual impact to the lease of the applicable -- of
the changes in the applicable laws?

5 A. And like I said to you before, applicable
law refers to laws as it applies to the Duty Free
store, that's what the context of eighteen oh seven
(18.07) was when we -- when it was included into the
-- into the lease. And like I said before, whether
eighteen oh seven (18.07) is in the lease, whether
the -- whether it's in the lease or not -- whether
10 it's in the lease or not we did not engage with --.
I'll give the perfect example, we engaged in
discussion with Duty Free Americas, we don't have an
eighteen oh seven (18.07) clause with -- with Duty
Free Americas, likewise here, regardless of eighteen
15 oh seven (18.07) we would have had discussions with
Peace Bridge Duty Free, that's what a prudent
landlord and a tenant do.

418. Q. So as it stands, the only impact to the
lease as far as the Authority's concerned resulting
20 from the changes in laws and regulations arising from
Covid-19 is that the base rent from April to June
2020 as deferred until July 1st, 2020, that's the only
impact to the lease?

 A. No we didn't say that.

25 419. Q. Well what -- what other impact has there

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been, how has the lease been impacted?

5 A. Well as we've stated before and as was
included in our offer to Duty Free in October of
2021, we recognized that there's an impact, we
offered a significant rent abatement, not only for
past rent but future rent moving forward, clearly
indicates that we recognize that there was an impact
as a result of -- of -- of covid. In fact, when you
add it all up, when you add it all up the rent
10 deferral that we were offering in October of 2021
amounts to about two point something million dollars
(\$2,000,000.00), two point seven, two point eight
million dollars (\$2,800,000.00). The rent reduction
moving forward through 'til '26 amounts to about six
15 million dollars (\$6,000,000.00), so that's a total of
eight million dollars (\$8,000,000.00) in rent
abatement that we offered to Duty Free, that -- the
Duty Free store was closed for eighteen (18) months,
eight million dollars (\$8,000,000.00) is two years
20 worth of rent that we're -- we offered to Duty Free
to write off.

420. Q. And so the Peace Bridge Duty Free had a
different view of what the impact was to the lease?

MR. STANEK: We don't know what their idea is.

25 A. I don't know.

MR. JONES:

421. Q. Well there was some discussions and they -- they put forward to you what they thought the impact to the lease ought to be?

5 MR. STANEK: No they put forward a negotiating position and we don't know what it was based upon.

MR. JONES: Okay, in any event.

MR. STANEK: I'm not aware ...

10 MR. JONES:

422. Q. Your evidence Mr. Rienas, is what with respect to my question?

A. What's your question?

423. Q. So you agree with me that the Peace Bridge
15 Duty Free put forward their position of what the impact to the lease ought to be?

A. Mmhmm.

424. Q. Yes?

A. Yes.

20 425. Q. And so as I understand the parties just haven't come to an agreement on -- on what the ...

A. Correct.

426. Q. ... appropriate amount is?

25 A. But to say that it was limited only to the deferral agreement as you stated before is absolutely

wrong.

427. Q. Okay. So at paragraph seventeen (17) of
your Affidavit you talk about there being various
engagements concerning the impact of Covid-19 and the
direction for any amendments to the lease would come
be resolution from the board of directors?

A. Correct.

428. Q. So were there any other resolutions passed
by the board of directors giving effect to eighteen
point oh seven (18.07) other than what we've
reviewed?

A. Eighteen oh seven (18.07), no not
specifically, but the board has certainly been
involved in the offers that we have made since that
time and the board has approved all of those offers
which have been conveyed to Peace Bridge Duty Free.

429. Q. So is that ...

A. Including in October of 2021 and
subsequent offers during the mediation, there may
have been other times then ...

MR. STANEK: Okay, don't mention what's
happened during the mediation.

MR. JONES:

430. Q. So I think that's -- what I'm handing you
is the resolution from October 2021.

A. Mmhmm.

431. Q. So this is the minutes of the October 25,
2021 board meeting.

A. Mmhmm.

5 432. Q. And so that's what you were referring to?

A. Correct.

433. Q. Okay, are there any other resolutions from
the board of directors giving effect to eighteen oh
seven (18.07)?

10 MR. STANEK: Wait a second, where's eighteen
oh seven (18.07) that you're looking at?

MR. JONES: Well I'm sorry, I understood from
your Affidavit that there were engagements ...

15 MR. STANEK: There's no mention of eighteen oh
seven (18.07) in paragraph seventeen (17)
either.

20 MR. JONES: Okay, well paragraph eighteen
(18), "Well I do not propose to detail all of
the various dealings between Peace Bridge Duty
Free and the Authority I will provide a high
level over view of some of the engagements that
took place as contemplated by article eighteen
oh seven (18.07) of the lease."

MR. STANEK: Okay.

25 MR. JONES: So that's what we're talking about

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to orient you. And so as I understand that any proposed amendment to the lease would be done by way of resolution from the Board of Directors, we've gone through some resolutions to -- that have been made and you referred me to October 2021 so we can make this an Exhibit of your -- the next Exhibit?

MR. STANEK: Sure.

EXHIBIT NUMBER FOURTEEN: Board minutes from the October 25th, 2021 board meeting - Produced and marked.

MR. JONES:

434. Q. And my question was ...

MR. AMAR: Fourteen (14)?

MR. STANEK: Fourteen (14) yeah.

MR. JONES:

435. Q. ... whether there were any other resolutions?

MR. STANEK: And that's the board minutes dated October 25, 2021.

A. I'm not aware of the resolution, I can't speak to the canvassing of the board after the mediation and after that was submitted because that

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was a board -- that was a board approved situation as well.

MR. STANEK: Well the mediation is without prejudice, right?

MR. JONES: I'm just saying there was other -- the board was involved in that as well?

MR. STANEK: There were other offers -- offers made during mediation.

MR. JONES: I'm not asking about offers made during mediation, I'm asking you about resolutions of the Board.

MR. STANEK: Well he said that there was resolution of the Board with respect to an offer made at mediation.

A. Yeah, it was a telephone call of the Board because the -- the mediator wanted a response from us by the next day, so the Board was canvassed, a proposal was submitted by ...

MR. JONES: I'm sorry I think -- I don't mean to interrupt but ...

MR. STANEK: No we're not going to tell you what the -- what the actual proposal was ...

MR. JONES: This is discussing, like, the actual ...

MR. STANEK: No.

MR. JONES:

436. Q. ... in the context of the conduct of mediation.

5 A. My -- but my point is the Board was involved in that process to ...

437. Q. Okay.

A. ... was there an actual resolution, there was not but there was a telephone poll ...

438. Q. Okay.

10 A. ... done of the Board.

439. Q. Okay.

A. I'm just trying to recall every instance of the Board acting on.

440. Q. Yeah.

15 MR. STANEK: Because that's what you asked.

MR. JONES: So I -- no I -- so the answer to my question of whether you were aware of any other resolutions.

MR. STANEK: And he gave you the answer.

20 MR. JONES: So no, good thank you, that's what we're here for. Okay we -- I want to take you to the December 20 -- I think it was the 21st e-mail that was made an Exhibit.

25 MR. AMAR: It looks to be Exhibit Ten. It's Exhibit Ten.

MR. JONES:

441. Q. Right so on the second page is an e-mail
that you sent on December 17th, 2020 and it gives a
summary of the resolution that the Board approved at
the December 17th meeting?

A. Mmhmm.

442. Q. And the fourth line there that says that
the -- in the event of a default that staff would be
authorized to negotiate lease terms with the second
bidder of the RFP, so did you speak to the second
place RFP bidder?

A. At that time, no, because I did not have
authority to do so.

443. Q. When -- so okay, when did you speak with
the second place bidder?

A. In I believe it was December of 2021.

444. Q. My recollection, and you can correct me if
I'm wrong, is that there was an answer to undertaking
that it was in August of 2021 from Mr. Clutterbuck.

A. I'm trying to remember what, because there
was a -- I'm trying to remember when, I think it was
in 2021, I'm pretty sure it was. That was when -- I
can't recall.

445. Q. Okay, so you did ...

A. But I did ...

446. Q. ... did speak to them?

A. ... I did speak to them, I just can't recall exactly when I spoke to them.

447. Q. So was there a -- it says -- you said something about not being authorized at the time, was there another resolution authorizing you to speak with them?

A. I think there was, I can't remember where it was, but there was when we had, I can't remember exactly when it was but there was a motion that spoke to -- I can't remember but I can find -- I can find that. ^

448. Q. Okay, will you undertake to provide us ...

A. Yeah, yeah.

449. Q. ... with the minutes where the resolution to ...

A. It's on ...

450. Q. ... speak with the second place RFP bidder?

A. And on the basis of that I did -- I did call them, it was verbal only and it was simply if in fact the Peace Bridge Duty Free was no longer the tenant our concern was the -- making sure that the -- that we had -- and this was while the store was still closed, so it may have been August of '21, I'm just

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trying to think when we -- no, I can't remember exactly, but anyway it was when we were concerned about the store being -- being dark and we wanted to make sure that we -- and this was at the time when Duty Free was not -- was not open. So we wanted to make sure we had an operator that would in fact open the store as Peace Bridge Duty Free was refusing to do so.

451. Q. So this was around -- just before the time that the notice of default was sent?

A. I -- I can't recall exactly when it -- when it was, but I'll -- I'll try and track that down.

452. Q. And who was the second place bidder that you contacted?

A. It was a company that operates in Quebec, I believe, the crossings -- border crossings in Quebec.

MR. JONES: Can you please undertake to provide us with any written communication ...

A. There was none.

MR. JONES: ... to or from the --...

A. There was none.

MR. JONES: ... the second place RFP provider?

A. There was none, it was one phone call.

MR. JONES:

453. Q. Okay. And ...

A. That was just to -- just to determine interest, if they would in fact be interested in -- in taking over the lease if Peace Bridge Duty Free did not open the store.

454. Q. And would that be based on the bid that they made?

A. No.

455. Q. What would it be based on?

A. It will be on the assumption of the lease.

MR. STANEK: He just said "taking over the lease," ...

MR. JONES: Well, I would like to clari -...

A. That's what I said.

MR. JONES: ... I would like to --.

MR. JONES:

456. Q. So you contacted them and asked them whether --. Did you provide them with a copy of the lease?

A. No, I did not provide them with a copy of the lease.

457. Q. So how did you convey the provisions of the lease to them?

A. I talked about the major things, the major

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things that they were interested in was, 'What's the minimum base rent?' and 'What would be the requirement to get the concession?'

458. Q. And what was the response?

5 A. The minimum base rent is four million dollars (\$4,000,000.00).

459. Q. But what was the response when you asked them whether they were interested?

10 A. They were interested in -- in exploring it and they felt they could open the store quickly if they were asked to. And they were, they were able to negotiate terms that were acceptable to the parties.

460. Q. So they were going to negotiate the base rent.

15 A. I told them what the base rent was, ...

461. Q. Sorry, was it put to them that, "You can open this if you pay four million dollars (\$4,000,000.00) a year," day one?

20 A. No, it was put to them, "Here's what the terms on the lease are, this is what we expect it to be." Now remember, this was in the middle of covid, so they would probably -- we did not get into any detail, we -- they indicated that we would have to negotiate the terms of a lease with the conditions
25 that are on -- on the ground, similar to what the

proposals we'd been making to Peace Bridge Duty Free.

Just like we weren't insisting that Peace Bridge Duty Free pay all of the back rent or that they pay four million (4,000,000) in 2022, or 2023, or 2024 or 2025.

462. Q. Sorry, didn't the Authority send a notice of default demanding all the back rent within a month of that conversation?

A. We sent that in twenty (20) -- in 2020 originally, December of 2020. And then we sent a notice of -- of default in September, and I believe we -- they -- Peace Bridge Duty Free came back with an offer as a result --. You have to understand the only time Peace Bridge Duty Free responds to anything is when we moved forward with the default notice. That's what happened in December of 2020, that's what happened in September, they came in with a proposal, we gave an offer of October 2021, which is what has already been inter -- entered as an exhibit as that -- as per that resolution.

463. Q. Well, I'm looking at a September 8th, 2021 notice of default, so ...

A. Right.

464. Q. ... this is within a month of your conversation with the second place RFP that are ...

A. I need to confirm when that happened

'cause I did not say it happened in August.

MR. JONES: Okay, well you'll confirm with us,
by undertaking, if it was something other than
August 2021?

A. Mmhmm.

MR. STANEK: Yeah, an undertaking to produce
the minutes for the resolution to speak with the
second place bidder, that's what I wrote down.

MR. JONES: Okay. Well -- and I would like
confirmation if the conversation took place
sometime other than August 2021, you'll let us
know. My recollection is that was the response
from an undertaking given during Mr.
Clutterbuck's Examination, but if that's not the
case ...

MR. STANEK: So that we can move on, you have
the undertaking. ^

MR. JONES: Thank you, Counsel.

MR. JONES:

465. Q. So now I'm looking at the notice of
default and it says that "The landlord requires
payment of five million, nine hundred and thirty-one
thousand, three hundred and eighty-nine dollars
(\$5,931,389.00) in full by certified funds by four

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p.m. (4:00) on September 17th, 2021," so the demand was for the full payment of rent.

5 A. Right because we had asked for their -- well, I think back in May hadn't gotten anything, we're being slow-rolled on CERS, all the way through September. We send this notice, miraculously we get all of the CERS payments within a time frame of -- of -- of two weeks, we get a proposal, they reopen the store. Everything happens in September, lots of things happened in September/October of 2021, including our offer, which I just -- just described to you.

10 466. Q. Paragraph thirty (30) of your Affidavit, I'd like to take you to, and you refer to Tab Ten of your Exhibits. So this is a August 2nd, 2022 letter, and you've pointed the court to this letter to show that the Authority is willing to give Peace Bridge Duty Free a fifty percent (50%) rent abatement for the period that it closed?

15 A. Correct.

20 467. Q. Subject to there being an acceptable agreement to pay the remaining rent owing. So in the second paragraph of this letter it says, "Any such proposal must provide for ...

25 MR. STANEK: Let's get the letter there, just

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a second. What exhibit is it again?

MR. JONES: Ten, the last one.

MR. STANEK: Have a copy of it?

MR. JONES: I have my own copy.

MR. STANEK: You can just read it into the record, if you want.

MR. JONES: Sure. Well, halfway through the second paragraph ...

MR. STANEK: Who's the letter from? Who to who?

MR. JONES: Here it is.

MR. STANEK: Oh, Patrick Shea, okay. So you're going to read which paragraph?

MR. JONES: Well, I'll read the section that I want to draw your attention to.

MR. JONES:

468. Q. It's the second sentence of the second paragraph, "Any such proposal must provide for regular monthly payments against the arrears over a maximum of twenty-four (24) months and must include either a third party guarantee from a solvent guarantor or security." So at this point any rent abatement comes with a string attached of having to have a guarantor.

A. It's not my letter, so I'm not sure what -

--.

469. Q. Well, it's the Authorities letter and it's attached to your Affidavit.

MR. STANEK: It's counsel for the Authority.

MR. JONES: Sorry, sent by the Authority's counsel ...

MR. STANEK: Yeah.

MR. JONES: ... on behalf of the Authority. And it's attached to your Affidavit.

MR. STANEK: Right.

MR. JONES:

470. Q. And so you say, "The Authority has confirmed that it's willing to give Peace Bridge Duty Free a fifty percent (50%) rent abatement and -- but subject to there being acceptable agreement to pay any rent owed." So I'm putting to you that that acceptable agreement requires third party guarantees.

A. Well, we wanted to get paid.

471. Q. So I'm putting it to you that you, the Authority, was requiring third party guarantees for rent abatement.

MR. STANEK: And he answered that question, right? So --.

MR. JONES: The answer was yes?

MR. STANEK: No, he said 'cause they wanted to

get paid.

MR. JONES: They wanted to get paid, well ...

A. How we get paid, ...

MR. JONES: ... in fairness, ...

A. ... it didn't really ...

MR. JONES: ... that's not exactly an answer.

A. It's -- it didn't really matter to us what form they -- what form they used, but clearly they -- . I'll give an example, I believe -- I'm not sure which one it was because it went back and forth so many times, they wanted to have rent abatement paid over the remaining fifteen (15) years of the lease with no interest, for example, we said that doesn't work. So just as an example, there's all kinds of discussions going back and forth. So we wanted to get paid by whatever means, if -- if --. And the legal advice that we received was ...

MR. STANEK: You don't have to tell him the legal advice.

MR. JONES:

472. Q. So in any event, my question was at this point, any rent abatement or deferral comes with a string attached that there has to be a guarantee.

MR. STANEK: You know you've asked that question a couple times, it's really not a

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question, it's a statement. You've gotten the answer twice, you can -- you can take out of those answers whatever you wish.

MR. JONES: I don't think I did get an answer, so I would like ...

MR. STANEK: Okay, well waste your time, then.

MR. JONES: ... a yes or no answer to my question.

A. Yeah, I'm not sure what you want me to say.

MR. JONES:

473. Q. Well in this letter it's -- you're saying in your Affidavit that ...

A. Let me see the letter so I can read it in context, just so I can understand the whole thing. I'll take a minute to read it. So my answer to that is, it starts off, the letter, by saying, "Our client has yet to see a detailed proposal with respect to the payment of the rent arrears accumulated during the period --." So in the absence of that it's totally -- totally reasonable to us to make sure that we wanna get paid, and that's what the rest of the letter -- rest of the letter describes. And you're looking for payment terms of twenty-four (24) months, if you go to the bank and -- and you wanna get a

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mortgage for a couple years, you gotta put up security. So we're simply saying we wanted some security of how we were gonna get paid for the amount of money over the -- over that period of time.

5 474. Q. So that was a guarantee. So I mean --.

 A. So it could've been a bank, it could've been a letter of credit, it could've been personal guarantees, it could've been whatever -- whatever you -- we didn't have anything from them so we're asking for something to be submitted. So a guarantee could be a letter of credit, it could be whatever you want it to be.

10 475. Q. And so there was nothing -- there was going to be no rent abatement or deferral, except for rent relief, without that.

 A. That's pretty normal, yeah.

15 476. Q. Okay. And in the absence of providing that guarantee or security, all rent owing, you're demand -- the Authority's demanding all rent owing within ten business days of the letter.

20 A. Right. So we gave the option, come up with some way of guaranteeing it, through a bank, through credit institution, through whatever -- whatever means you want, if you're not prepared to do that we want the cash because that's a guarantee, to

25

get the cash, obviously.

477. Q. And there's -- in the last sentence of the second paragraph it says, "We wish to be clear that our client is not prepared to grant an abatement of more than fifty percent (50%) and is not required to justify that business decision to Peace Bridge Duty Free." So essentially there the Authority is saying, 'We're not going to have any further discussions with you about ...

A. Because we --...

478. Q. ... your request.'

A. ... because we believe our proposal, as I indicated to you before, which was amounting to eight million dollars (\$8,000,000.00) of rent relief over the -- over this period of time, we feel is more than generous. So no, we are not prepared to give more than fifty percent (50%).

479. Q. Okay, you'll agree with me that the deferral agreements that were put in place with Peace Bridge Duty Free and with the US store, they both contemplated deferred rent to be paid over a period of time, a year or more than a year?

A. Correct.

480. Q. And then at the end of 2022 the Authority allowed the US store to pay its deferred rent over

five years?

A. With interest.

481. Q. And the October 2021 minutes that we referred to a couple minutes ago, the resolution there is to pay back fifty percent (50%) of the deferred rent immediately upon execution of the amendment, right?

A. Right. And I think we were trying to get this done for November the 1st. So no -- November 1st was the date that they were anticipating that this would be -- that this would be done, correct.

482. Q. So a year and a half of -- it's roughly over -- something over three million dollars (\$3,000,000.00) is being demanded paid immediately upon execution.

A. Whatever the amount is over the time frame.

483. Q. Okay. And you've -- your view is it's reasonable to be demanding something that three million dollars (\$3,000,000.00) that the Authority knew that the Peace Bridge Duty Free didn't have and to demand it to be paid immediately upon execution when all the other rent deferral agreements called for payment over a period of time?

A. Right. And this was a counter proposal

that Duty Free could've -- could've responded to in whatever way they see fit. And probably what you're referring to, from the letters from Patrick Shea months -- months later, that's what it was getting into, this was a counter proposal.

484. Q. In paragraph thirty-three (33) you're talking about the factors that the Authority took into consideration and at 'A' you say that "The Duty Free store closed, but other operators did not." I think we talked about who the other operators were, but I think you're referring to the American Duty Free store?

A. No, we're referring to Canadian Duty Free stores at other locations.

485. Q. The Windsor and the Sarnia?

A. At least those two, perhaps others.

486. Q. Well it's your Affidavit, sir.

A. Yeah, I -- at least those two, perhaps others.

487. Q. Well when you said, "Other operators" here who are you referring to?

MR. STANEK: At least those two, perhaps others. How many times ...

MR. JONES:

488. Q. Well were there ...

MR. STANEK: ... do you want to say it?

MR. JONES:

489. Q. ... others or not?

A. There could've been. I believe, for example, that the -- one of the Niagara Falls Duty Frees did, in fact, open for trucks for a period of time, I understand that that happened. I did not -- was not aware of that at the time that this Affidavit was -- was done, but clearly --.

490. Q. So I'm asking you about when you wrote this Affidavit, swore this Affidavit. You were just referring to Sarnia and Windsor?

MR. STANEK: Now you're just being argumentative, Counsel.

A. You talked -- you said I was referring to the Duty Free Americas, I said no, I'm referring to the Canadian Duty Free stores.

MR. JONES:

491. Q. Okay, and ...

A. Whatever number that is.

492. Q. And you'd agree with me that the number is two.

MR. STANEK: No, he didn't agree with you that the number is two ...

MR. JONES: Okay, then what's ...

MR. STANEK: ... for the reasons that he ...

MR. JONES: ... the number?

MR. STANEK: ... stated. He said he's aware of two, there may be more, he said it three times.

MR. JONES:

493. Q. Okay. And so the purpose of this paragraph are you saying that had the Peace Bridge Duty Free remained opened it would've been offered more rent abatement, is that what you're trying to convey to the court?

A. More rent, would've been offered more rent abatement?

494. Q. It would -- you're saying that the -- among the factors considered for rent abatement that was offered were that it voluntarily closed.

A. Right.

495. Q. So do I understand from that that had it remained open its offer would have been better?

A. I don't think that's what that paragraph said. If you read it in its entirety, the sentence before that, it says, "The fifty percent (50%) was subject to a plan acceptable to the Authority being put in place to repay the remaining arrears." The Authority also considered among other factors, so the

rent is the rent dealing with that, and then the other factors are as -- are as listed.

496. Q. Sorry, I'm not sure I understand what you're saying. The factors -- what --?

5 A. What you're saying is -- you're trying to put words in my mouth by saying that because the -- this -- there was a voluntary to close, that that would've changed the fifty percent (50%) rent abatement. I don't know if that's -- if that would've been the case. What I'm saying is that we offered a fifty percent (50%) rent abatement because we felt that was reasonable given all the -- all the circumstances. We also considered, among other factors, that the -- that they were closed, that their -- PBDF shareholders need -- needed to play a part, and also based on what other arrangements were made by other duty free operators that gave much less than fifty percent (50%).

15 497. Q. Right, so ...

20 A. So what we're saying is our fifty percent (50%) is -- is a very reasonable -- is a very reasonable offer. Just -- just pick and choose one item is not fair.

25 498. Q. No, I'm not picking and choosing. I'm saying as I understand -- I'm trying to understand

what your evidence is here in the Affidavit. You're
saying the Authority considered, among other factors
-- what you're saying is, these are some of the
factors that the Authority considered in coming to
what it was prepared to provide Peace Bridge Duty
Free in terms of a rent abatement, is that --? I'm
just trying to understand what you're saying in the
Affidavit.

A. I mean, I'm reading it to be that it's a
whole host of factors that that's the basis upon
which we are giving a fifty percent (50%) rent
abatement.

499. Q. Right, so ...

A. Read the whole paragraph.

500. Q. And I'm trying to isolate why -- what
impact this factor had. And so all this being equal,
the fact -- you're saying that the fact that they
closed was a reason that the rent abatement was where
it was. In other words, if they had opened that
would've been a factor in favour of more rent
abatement, because they're closed it's a factor -- is
that what you're saying?

MR. STANEK: He says these are things they
considered, is what the paragraph says, they
considered these things. I mean, you're asking

hypothetical questions, Counsel.

MR. JONES: Well, I'm asking how it was considered. Like, was it considered a good thing or a bad thing?

MR. STANEK: That they closed the duty free while other operators did not? You need to -- you need to ask whether that's a good thing or a bad thing?

MR. JONES: Well that's why I don't understand why I'm having a lot of resistance with the question.

MR. STANEK: Because ...

A. I don't understand the question, 'cause I do not understand what -- what the question's trying to achieve here, I don't get it. Like, read -- read the whole paragraph, "[Inaudible] assert continue to expect that the Authority would take into consideration the fact that border restrictions impacted the ability PBDF had to generate sales." We agreed, we took those factors into account for providing fifty percent (50%). We also have the other factors that come into play, which -- which we listed before. But did we assign a ten percent weight to one thing and a thirty percent (30%) weight to something else? No.

MR. JONES:

501. Q. No, it was some weight.

A. It's a combination of factors, all of these factors came -- came into -- into place.

5 502. Q. Fine. And paragraph 'C' here, the arrangements made with the other duty free operators. Are you talking about the US Duty Free store?

10 A. No, no, we're talking about other Canadian Duty Free stores. There was much less rent abatement given to those other -- or no rent abatement given to those others -- other stores.

503. Q. And you've provided the particulars in here or is there more particulars?

15 A. No, I just know that I think we actually put that in one of my Affidavits where he talked about the Niagara Falls Bridge Commission, that they did not, in fact, give a rent abatement and the owners are paying -- paying back the rent over a period of time. That's included in one of my
20 Affidavits, so it's there some place. The whole point of me saying that is that the fifty percent (50%) -- we're trying to make the point here that the fifty percent (50%) is very generous when you take
25 into account all of these other factors. Given what other stores -- given that they were closed, fifty

percent (50%) is exceedingly generous especially when you look and when you keep trying to compare to fairness with the Duty Free America stores, they had a twenty percent (20%) rent abatement and they stayed open.

504. Q. So the paragraph thirty-eight (38) is I think what you're referring to, that they confirmed with the Niagara Falls Commission that the operators of the duty frees at the Rainbow Bridge and the Lewiston Bridge paid less than minimum rent required by the applicable leases, but they were not given an abatement.

A. Right.

505. Q. Right. You'd agree with me that even those ones were paid over time, paid back over time?

A. Yeah, I think there was some over time with -- I believe with interest. Yeah, it did say with -- with interest, right?

506. Q. And you'd agree with me that both of those are significantly lower base rent components?

A. They're also much smaller stores.

507. Q. So you'd agree with me that they're significantly lower base rent component?

A. I don't know what the exact base rent component is of those stores, I can't speak to that.

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508. Q. Would you agree with me that it's lower?

A. I don't know, I didn't speak to them about that. I can't speak to something I don't know about.

509. Q. Okay.

5 MR. JONES: So we have the rent that was paid by the US store versus the Canadian store for April to December 2020. And I'm going to ask for an undertaking to provide us with the rent that was paid monthly by the US tenant from 10 April 2020 to May 2023 when the last border restriction was lifted.

MR. STANEK: No, I'm not giving you anything more. You -- you've fished down that hole enough. ^

15 MR. JONES:

510. Q. So as I understand, the US lease is structured so the base rent payable is based on the prior year's sales?

A. Correct.

20 511. Q. And so when we go into a subsequent year, after the first year of the pandemic, there's essentially a built-in reduction so there's less requirement for assistance, you'd agree with me?

A. I don't -- I think we're using 2019 as the 25 base year when we look at the subsequent.

512. Q. For every year?

A. Right.

513. Q. Okay. And you'll confirm that with us, I think there's already an undertaking ...

A. Right.

514. Q. ... for that.

MR. STANEK: Undertaking for what?

A. Well, I don't know if that was included in any --.

MR. STANEK: Undertaking for what?

MR. JONES: To confirm how the unpaid rent in Exhibit One is calculated.

A. You just asked

MR. STANEK: Yeah, I got that. That's -- that's an undertaking you -- that's the first two undertakings.

MR. JONES: Yes.

MR. STANEK: Okay.

MR. JONES: And so my question here is whether the base rent in 2021 and 2022 is based on 2019 sales or whether it's based ...

MR. STANEK: It's in the agreement, isn't it? It's in the agreement that we looked at?

MR. JONES: It is for 2020 and 2021, I'm asking about 2022. And so I want to make sure

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that I understand how that number is calculated
and whether it's always using 2019 for the base
rent reference year or whether it's using the
covid years because obviously there would be a
substantial difference.

A. It's a different lease, I don't know what
the relevance is.

MR. JONES: So anyway, you'll provide us with
an undertaking to advise how -- the way -- to
advise us how base rent was calculated and
whether it was using 2019 as the reference here
or ...

MR. STANEK: I'm not going to do that. ^

MR. JONES: Well in fairness, Counsel, if you
don't provide us with that information there's
no way of us to understand how the number in
Exhibit One is calculated.

MR. STANEK: I cannot -- I do not have any
control over whether or not you want to be
deliberately obtuse.

MR. JONES: Well you've got our question ...

MR. STANEK: You've got --...

MR. JONES: ... and we'll take it as a
refusal.

MR. STANEK: ... you've got all of this, the

documentation ...

MR. JONES: So Counsel, ...

MR. STANEK: ... on the --...

MR. JONES: ... we've got ...

5 MR. STANEK: ... on the US lease.

MR. JONES: ... your --. Counsel, I don't
need your evidence, I'm just going to continue
with my questions. We've got your refusal.

MR. STANEK: All right.

10 MR. JONES:

515. Q. So do you agree with me that the base rent
component in the Peace Bridge Duty Free is the
highest base rent for a Canadian land border duty
free store?

15 A. I don't know, I don't know what the base
rent, I have not reviewed all the other base rents.

516. Q. Are you aware of any that are higher?

20 A. I'm not aware of any that are higher and
I'm not aware of any that are lower, I don't know.
Like I said, we did not establish the base rent, that
was established by the Peace Bridge Duty Free when
they submitted their proposal.

517. Q. I'm going to take ...

A. By the way --...

25 518. Q. ... you to ...

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A. ... by the way, I want to talk about -- I want to answer this question more fully. So we talked about the four million dollars (\$400,000,000.00) in base rent, so the four million dollars (\$400,000,000.00) in base rent was established in 2016 by their proposal. There's no escalation clause in that -- in that -- in that rent, so in reality, in real terms every year the rent payment goes down. So the actual value of four million dollars (\$400,000,000.00) in 2016 is today three point two million dollars (\$3,200,000.00). So just to give you some -- some sense, there's no escalation clause in -- in -- like, normal lease would have an escalation clause, there is no escalator clause in this lease, so every year in real terms the rent goes down. So that's -- that's why it's important to understand how base rent works.

519. Q. So paragraph forty-four (44) of your Affidavit, you've given a quote from the unavoidable delay language in the lease, it looks like. So what are you trying to tell the court with ...

A. You have to read -- you have to read forty-five (45) to understand what that means. Where it talks about the unavoidable delay.

520. Q. So paragraph forty-five (45) is a quote

from eighteen point oh eight (18.08) of the lease?

Unavoidable delay?

MR. STANEK: Yes.

MR. JONES:

5 521. Q. And so what is it that you're trying to convey to the court here in these paragraphs?

MR. STANEK: I would think it might be the old

...

MR. JONES: Counsel, I'm asking the witness.

10 A. It's exactly what I'm just saying.

MR. STANEK: Could it be the old [inaudible]?

A. Made pretty clear to me.

MR. JONES:

15 522. Q. So what are you trying to convey to the court here?

A. The provisions of section eighteen oh six (18.06), which is, "Do not operate to excuse the tenant from the prompt payment or rent and other payments required by the lease."

20 523. Q. So I think -- well eighteen point oh six (18.06) is -- refers to landlords' cooperation and access, but I think you've added a 'sic' in your reproduction here, so I think, when it says, "The provisions of this section eighteen point oh six (18.06)," you're indicating to the court that there's

25

a typo? Or are you not?

A. I'm -- I don't know. I'm not sure exactly what you're asking, to tell you the truth.

524. Q. I'm asking you what you intended to convey to the court with this paragraph of your Affidavit.

MR. STANEK: We intend to give the court evidence, all right. You understand this, right? Lawyers make arguments, clients give evidence. He's an Affiant. I recognize that 'sic' does not appear in the actual clause of eighteen oh eight (18.08), you can make of that what you will.

MR. JONES: Well, I'm asking the witness, whose Affidavit it is, what we should make of that.

A. You can read it and make of it what you want, you know. Like, I'm not understanding the question at all.

MR. JONES:

525. Q. But why is it there, why is it in your Affidavit?

A. There's no excuse for not paying rent, that's what the intent is.

526. Q. Okay. And so is this referring to eighteen point oh eight (18.08) or eighteen point oh

six (18.06)?

MR. STANEK: It may be referring to eighteen
oh seven (1807), I think that there's a
suggestion [inaudible].

MR. JONES: Where does it say eighteen point
oh seven (18.07)?

MR. STANEK: It doesn't, that's why it says,
'sic'.

MR. JONES:

527. Q. So is that what you intended to convey,
Mr. Rienas, is that what you ...

A. I can't ...

528. Q. ... were talking ...

A. ... recall.

529. Q. So when it says, "This ...

MR. STANEK: Could be.

A. I don't know.

MR. JONES: Counsel.

A. I can't remember, I can't recall.

MR. JONES:

530. Q. So this -- it says, "However, the
provisions of this section sixteen point oh six
(16.06) do not operate to excuse the tenant for the
prompt payment of rent and any other payment ...

MR. STANEK: Okay, look ...

MR. JONES:

531. Q. So I'm going ...

MR. STANEK: It's --...

MR. JONES:

5 532. Q. ... to put it to you, ...

MR. STANEK: ... look, look, look, this is
what ...

MR. JONES:

533. Q. ... Mr. Rienas, ...

10 MR. STANEK: It's in eighteen oh eight (1808),
...

MR. JONES:

534. Q. Mr. Rienas

15 MR. STANEK: ... this is a provision of
eighteen oh eight (1808) and it says, "This
section eighteen point oh six (18.06)." So it's
obviously an error, so that's why it says 'sic'
because it's in eighteen oh eight (1808) and it
20 says, "Provisions of this section eighteen oh
six (1806)." So it should say eighteen oh eight
(1808).

MR. JONES:

535. Q. Okay, so Mr. Rienas, the reason that this
is here, what you're telling the court is that while
25 there may have been an unavoidable delay, the

unavoidable delay does not excuse the prompt payment
of rent, that's what your lawyer's telling me.

A. That's what it says.

MR. STANEK: That's what the clause says, yes.

MR. JONES:

536. Q. Okay, so there's no question, then, that
there was an unavoidable delay, but it's excused by
this provision of the lease. And that does not mean
that the tenant does not have to pay rent, that's why
you put this in your Affidavit.

MR. STANEK: No. To the extent you're
claiming an unavoidable delay doesn't excuse you
from not paying rent.

MR. JONES: Okay. Well is there any question
...

MR. STANEK: It doesn't admit that there is an
unavoidable delay, there certainly was an
avoidable delay in paying rent. But if there's
an unavoidable delay, as described in this
clause, you still have to pay the rent.

MR. JONES:

537. Q. Okay, so Mr. Rienas, was there an
unavoidable delay?

A. It doesn't matter.

538. Q. That's not my question. I was trying to

understand, you put this in your Affidavit ...

MR. STANEK: An unavoidable delay, as it says
-- it says here, "If any party is bonafide to
later hinder or prevent it from performance of
any term covenant or act required hereunder by
reason of unavoidable delay," as defined. And
the definition is in the Affidavit as well.

MR. JONES:

539. Q. Okay. So for example, when we're -- go
back to eighteen point oh six (18.06) it talks about
"The landlord shall cooperate in order to allow
vehicular traffic including cars, trucks and motor
coaches free and open access to the duty free shop
operated by the -- at the lease premises." So --.

MR. STANEK: Eighteen point oh six (18.06) is
a typographical error, you're looking at
eighteen point oh eight (18.08).

MR. JONES: Right.

MR. STANEK: Because it says, "This eighteen
oh six (1806), this section eighteen oh six
(1806)," we discussed this.

MR. JONES: I heard you and I've asked Mr.
Rienas a question about eighteen point oh six
(18.06), which deals with the landlord providing
-- or, allowing vehicular traffic including

cars, trucks and motor coaches free and open
access to the duty free shop operated by the
leased premises.

MR. STANEK: What relevance does that have?
Are you saying that the landlord prevented
traffic?

MR. JONES: Well it was --...

A. We clearly did not.

MR. JONES: ... it was delayed in providing
free ...

A. Not by us.

MR. JONES: ... open acc ...

A. Not by us.

MR. JONES:

540. Q. I'm not saying ...

A. That's what you --.

541. Q. I'm not saying ...

A. You said, "The landlord," that's what you
just said.

542. Q. I'm saying the landlord shall cooperate in
order to allow vehicular traffic including cars,
trucks and motor coaches free and open access to the
duty free shop operated ...

MR. STANEK: I didn't know that was an issue
in this proceeding.

MR. JONES:

543. Q. So my question to you is, in light of the border closure for non-essential vehicle traffic that there was a delay, during that period of time, ...

5 A. But if I don't ...

544. Q. ... providing free and open access to traffic to use the duty free shop.

MR. STANEK: No, by the landlord there was not. Eighteen oh six (1806) does not apply.

10 MR. JONES:

545. Q. Okay, so ...

MR. STANEK: You haven't even alleged that it applies.

MR. JONES:

15 546. Q. Mr. Rienas, why is this in your Affidavit, then? There must be a reason that you ...

A. I believe it ...

547. Q. ... put eighteen (18) point ...

20 A. ... was raised -- I believe it was raised by Mr. Pearce.

MR. STANEK: Eighteen oh eight (1808) is in there not eighteen oh six (1806).

MR. JONES: And I'm asking why, so what's the unavoidable delay?

25 MR. STANEK: Mr. Pearce raised it.

MR. JONES: Where did Mr. Pearce raise it?

MR. STANEK: I don't know, maybe --.

A. All's that we're saying is exactly what it says.

MR. STANEK: You gotta pay the rent. Even if you're delayed or hindered by some sort of -- some reason, ...

A. You still have to pay the rent.

MR. STANEK: ... you still have to pay the rent.

MR. JONES:

548. Q. So what's the unavoidable delay, then, that you're referring to here?

MR. STANEK: You heard me before, to the extent the Peace Bridge Duty Free is claiming an unavoidable delay they still have to pay the rent. If Peace Bridge Duty Free is saying, "We could've paid the rent at all material times," then obviously eighteen point oh eight (18.08) doesn't apply. But if you're saying that there was an unavoidable delay and you want to rely upon the clause, the clause says you have to pay the rent anyway.

MR. JONES:

549. Q. Okay, so if there's a delay in providing

quiet enjoyment to operate the duty free store to
travellers crossing the border does the landlord say
that's an unavoidable delay?

MR. STANEK: The landlord never restricted
your quiet enjoyment at any time. Where's your
evidence that they did?

MR. JONES:

550. Q. So Mr. Rienas, would you agree with me
that there -- Peace Bridge Duty Free store was not
able to operate its store in a manner that it
bargained for under -- at the time of the lease,
taking into account the restrictions on non-essential
travellers across the border?

A. No, they could've opened like the other
stores did. They could've operated.

551. Q. Okay, so your position, as I understand
it, you're saying that this unavoidable delay clause
is not engaged?

MR. STANEK: It's not our position whether
it's been engaged or hasn't been engaged. The
position is, even if there was an unavoidable
delay they still have to pay their rent, it's
what it says.

MR. JONES:

552. Q. So paragraph forty-six (46) of your

Affidavit, you're pointing out that the Authority operates at arm's length from the Canadian and New York State governments, neither government provides any -- provides the Authority with any direct or indirect financial support.

A. Correct.

553. Q. You'd agree with me that the governments granted the Authority the land which is the main asset that it owns?

A. Actually no.

554. Q. It wasn't ...

A. It was a private operation in -- it was a private operation in 1927 when it opened, it got into financial difficulties and the board cre - and both governments created the Authority to take over the lands from the private sector operator.

555. Q. So the government --.

A. Created -- it's a Public Authority.

556. Q. The Public Authority and put it in charge of the land.

A. Both governments, Canadian government and the US government created the Authority to take over the land.

557. Q. Right, so it gave the Authority the land.

A. Some of the land, we've acquired land

since that time on our own with no government involvement. In fact, the land that the Peace Bridge Duty Free sits upon was not part of the original conveyance of land from the private operator, that was done solely out of Peace Bridge, no government involvement.

558. Q. My question was simply, initially it was given land by the government?

A. No. Like I said, it was private property.

559. Q. Okay?

A. The government created a new entity, the government created an entity, the entity took over the property. So the government didn't give the land to the Authority, it's the reverse.

560. Q. I'm missing the significance that you're -

A. You made a statement that the government gave us land, I said no.

561. Q. So the significance, you're saying, is that title didn't transfer directly from the government, ...

A. Correct.

562. Q. ... that the government effective ...

A. Created the Authority.

563. Q. Thank you. And caused the Authority to

receive the land? Is -- is there a better way for --
to describe?

A. I don't know how else I can ex -- describe
it. Maybe you can do a better job.

5 MR. STANEK: I'm sort of missing the point of
all of this. Who cares?

MR. JONES: Well it's simply --. Anyway. The
point is that the government established the
Authority, provided it with the land and ...

10 MR. STANEK: No, it didn't provide it with the
land. The land was in private hand -- this is
what I'm hearing, I'm hearing that the land was
in private hands, the owner ran into financial
difficulties which meant that somebody had to
15 have the land out of some -- probably some sort
of insolvency procedure like this one, perhaps.
And then so somebody's got to own the land
otherwise the bridge closes.

MR. JONES: And so the government caused it --
20 the owner of the land to be ...

MR. STANEK: No.

MR. JONES: Okay, who did?

MR. STANEK: It created the Authority, the
land went from the owner, or the trustee or the
25 receiver to the Authority. Am I missing

something here? Is that what happened?

A. I'm just responding to your statement ...

MR. JONES:

564. Q. Okay, so ...

A. ... that you said that the government ...

565. Q. ... I don't ...

A. ... granted us land, and the answer is no, they didn't.

MR. STANEK: No.

MR. JONES:

566. Q. Okay, so I'm not understanding maybe, and it's probably my fault that I'm not appreciating the significance. But it was through an act of government that the land came to be owned by the Authority.

MR. STANEK: No!

MR. JONES: No it's not?

MR. STANEK: No!

MR. JONES:

567. Q. So who acted to make the land become the Authority's land?

MR. STANEK: You're in an insolvency proceeding, you understand how insolvency works.

MR. JONES: Counsel, I appreciate your responses, but I'm asking Mr. Rienas because ...

A. I thought I answered your question. The -
 - the -- the governments created the Public
 Authority, Buffalo and Fort Erie Public Bridge
 Authority, that's what they did. The Authority took
 5 over the private land and operated it since 1933/34
 when that was -- when that was done.

MR. STANEK: I imagine there was some court
 supervision on this, too. I don't know, I'm
 just guessing.

10 A. I'm not sure what the point is, so I -- we
 can --.

MR. JONES:

568. Q. In any event ...

A. Is there any significance? Is the federal
 15 government involved with us? Yes.

569. Q. Right.

A. Is that what you're trying to get at?
 'Cause yes, we are a -- a -- a ...

570. Q. And the Authority was ...

20 A. ... public auth ...

571. Q. ... created to manage this land.

A. Yes, by the government.

572. Q. Yes, I don't --.

A. Yes.

25 573. Q. Yes, it's not difficult.

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A. That's not how you portrayed it, though.

574. Q. Well if I --...

MR. STANEK: "How come they ...

MR. JONES:

5 575. Q. ... if I --.

MR. STANEK: ... gave you the land?" you said
it about five times.

MR. JONES:

10 576. Q. If I misstated the manner in which that
came about, I apologize. But the simple point is
that the Authority was created by ...

A. The Authority is a creation of the
government, ...

577. Q. I understand.

15 A. ... does that help?

578. Q. That's helpful, Mr. Rienas. And so the
Authority created -- the government created the
Authority to manage this land. There's no -- I think
we're saying the same thing. And so as I understand
20 the Authority's by-laws that we were provided with
allow for the New York State government and the
Canadian government to have access to the books and
accounts of the Authority at their request,
essentially. You'd agree with me?

25 A. Yes.

579. Q. And that's section six, and that section deals with the secretary treasurer and general manager, so that's you?

A. Correct.

580. Q. And so it says, "The secretary treasurer shall keep minutes of the meetings of the board and committees thereof." So you're personally responsible for keeping the minutes ...

A. Correct.

581. Q. ... of the board meetings?

A. Correct.

582. Q. And you're responsible for the accuracy of the meeting --...

A. Correct.

583. Q. ... the board meeting minutes?

A. Correct?

584. Q. And I can provide you with a copy of the by-laws if you want, but ...

A. I don't need the by-laws.

585. Q. No. I'm referring to section six of the by-laws.

MR. JONES: And I'll make these an exhibit.

EXHIBIT NUMBER FIFTEEN: A copy of
the by-laws - Produced and marked.

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MR. STANEK: Okay, then I do want a copy if
you're making them an exhibit.

EXHIBIT NUMBER FIFTEEN: A copy of
the by-laws - Produced and marked.

MR. JONES:

586. Q. In paragraph sixty-two (62) of your
Affidavit, when you say, "Peace Bridge Duty Free
never presented the Authority with a proposal that
satisfied the Authority's requirements as outlined by
Mr. Stanek on December 30th, 2022, and never provided
the Authority with a business plan." In terms of the
requirements are you referring to personal
guarantees?

A. I don't -- I'd have to see the letter from
Mr. Stanek, the 30th of December.

MR. STANEK: It's quoted above.

A. What was the question again?

MR. JONES:

587. Q. Well, when you're referring to
requirements are you referring to personal
guarantees?

A. I don't think so, I think that the
Authority's requirements were related to business

plan, financial information, all of those other things. It may have included that, I'm not sure, but I think our requirements would've been more than just a single item. And it -- I think if you read it in context, "The Authority -- as outlined by Mr. Stanek," so we were looking for a proposal designed to deal with your client's default and we didn't get a proposal. So actually, really I think our -- our requirement was primarily the proposal, the way I read that.

588. Q. Paragraph sixty-three (63), and I think this may just be simply an oversight, you say that "For the period of time the duty free was closed it did not provide washrooms to travellers," you told us earlier that it started providing washrooms in or around December 2020?

A. Correct.

589. Q. And it reopened, I think it was in September 2021, correct?

A. The store reopened in September of 2021, correct.

590. Q. And in paragraph seventy-one (71) you say that the Author -- that "The Peace Bridge Duty Free shareholders cannot sit on the sidelines." So what you're saying here is essentially that there has to

be a guarantee from the shareholders?

A. We're -- we didn't say that, we said we're looking for the shareholders to have some skin in the game.

5 591. Q. What does that mean?

10 A. That we're not prepared to subsidize Peace Bridge Duty Free store on their own and give one hundred percent (100%) rent abatement and rent abatement moving forward. Like I said, there had to be some -- has to be some shared -- some shared payments.

592. Q. From the sharehold - like, you -- you want the shareholders to pay.

15 A. Something, correct. Or whatever other means of capital they can access, bank financing or whatever other things. Or bring in more partners into it, doesn't matter to us how that happens. But -- but we -- the whole point of this is we're not bearing one hundred percent (100%) of the covid impacts.

20 593. Q. Okay, I'm going to take you to paragraph sixty-four (64).

MR. STANEK: You've already asked him about these questions.

25 A. Yeah, we covered all that.

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MR. STANEK: You've already asked him about
the -- the issuance of the notices of default
[inaudible] moratorium [inaudible].

MR. JONES:

5 594. Q. Right, so in early 2021, in the spring of
2021 at least, the Authority is monitoring the CERS
applications and looking for an opportunity to
terminate the lease when it thinks that the Peace
Bridge Duty Free ...

10 MR. STANEK: Where do you --...

MR. JONES:

595. Q. ... might not be ...

MR. STANEK: ... where do you get that ...

MR. JONES:

15 596. Q. ... protected.

MR. STANEK: ... out of paragraph sixty-four
(64)?

A. And that's absolutely not what happened?

MR. JONES:

20 597. Q. No?

A. No.

598. Q. So you're telling me that in the spring of
2021 the Authority hadn't decided they wanted to
terminate the lease?

25 A. What we wanted the duty free to do was to

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open the store, that's what we wanted to do. We met,
I think it was in May, with Mr. O'Hara and Jim Pearce
at our offices, we had a lengthy discussion, duty
free made it very clear to us that they were not
gonna pay rent, that they were not going to agree to
move -- go back to operating under the existing lease
under any circumstances. They made it very clear how
they wanted to move forward in our -- in our
discussion.

599. Q. Well, I'm going to show you two e-mails
from Ms. Costa to you on March 31st, 2021.

A. Right.

600. Q. And the first one is forwarding an e-mail
from Mr. Pearce on February 9th where he provided a
CERS report, and I'll give that one to you. And the
second e-mail, March 31st, says, "From what I read,
the moratorium eviction is only attributable to
default by non-payment of rent, if not, for another
de -- default. Perhaps the store not being open is
an [inaudible] default we can claim under the lease
section nine point oh two (9.02) and as listed in
seventeen point oh one (17.01)."

A. Right.

601. Q. So you would agree with me that those two
e-mails is essentially a discussion of ways around

the eviction moratorium?

5 A. No, not ways around the eviction
moratorium. We have a responsibility, she as the CFO
has a responsibility to ensure that we're paid the
rent in accordance with the lease, that's what she's
been trying to do. The fact that we're getting slow
rolled on -- on the CERS all the time, the fact that
they're refusing to open the store, she's looking at
avenues to how can we maximize our revenue. So what
10 she's saying to me is, "They haven't paid in
accordance with the CERS -- with the CERS
requirements," and when they don't pay in accordance
with the CERS requirement, if we wanna get a tenant
in that's actually gonna run the store, open the
15 store and operate, then we have an oppor - we have an
opportunity to evict.

602. Q. Right, so as I understand, she's looking
for an opportunity to evict and she's identified a
couple of strategies.

20 A. She's looking for an opportunity to get an
operator that will open the store. If duty free
store would be open we wouldn't be having this
discussion. You have to understand, that's what --
everyone keeps coming back to this being an issue of
25 rent, it's not just an issue of rent, it's an issue

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of the store being opened, providing the services that we expect it to have provided.

603. Q. Well at this point they're providing the washroom services, correct?

5 A. After we had to -- after we threatened them.

604. Q. No, no, but I'm saying by the time that you're -- you're considering ...

A. Yeah, in December of --...

10 605. Q. ... eviction here.

A. ... in December of 2020 they're finally providing a washroom service, but they're not providing store services, there's no restaurant services, and that's fine, the restaurant with covid is -- is one thing. But they could've been operating the store similar to the other duty free stores, both Canadian and American. And what she's saying is, "We're getting nothing in -- we're getting nothing in base rent, they're slow rolling us on CERS. The rules are very clear that the moratorium doesn't apply." So she's doing her job, she's saying, "Hey Ron, the moratorium is no longer in place because they're not paying, we should look at getting an operator that's gonna -- that's gonna operate the store. If that means evicting the current one,

15

20

25

that's an option."

MR. JONES: Okay, so I'm going to mark the
March 31st, 2021 e-mail about the CERS summary as
Exhibit Sixteen and the other March 31st, 2021 e-
mail titled 'Interest and comments about non-
rent defaults and our rights' as Exhibit
Seventeen.

EXHIBIT NUMBER SIXTEEN: The March
31st, 2021 e-mail regarding the CERS
summary - Produced and marked.

EXHIBIT NUMBER SEVENTEEN: The March
31st, 2021 e-mail entitled 'Interest
and comments about non-rent defaults
and our rights' - Produced and
marked.

MR. STANEK: Can I have copies of those?

MR. JONES: Yeah, we'll give you a copy of
them, Counsel.

MR. AMAR: Here's Exhibit Sixteen (16).

MR. STANEK: Thank you.

MR. JONES: So I'm going to take you to
paragraph four of your March 1st, 2023 Affidavit.

MR. STANEK: Paragraph four?

A. March 4 or March 1st?

MR. STANEK: March 1st, paragraph four.

A. Okay.

MR. JONES: So in this paragraph you're talking about that "If it were not for minimum rent the Authority might've chosen a different duty free operator and the other responses to RFP offer lease terms comparable to those offered by Peach Bridge Duty Free." So I'm going to ask you for an undertaking to provide copies of those RFP responses that are referred to in this paragraph of your Affidavit.

MR. STANEK: No, they're competitors of your client. No. ^

A. Would also mention that Peace Bridge Duty Free made it very clear in their RFP response that their submissions were highly confidential, not to be circulated or shared with anybody else. So I think that what applies to the goose should apply to the gander here.

MR. JONES:

606. Q. So paragraph five you talk about negotiations that took place in the summer of 2016. And you were involved in discussions in at least one

meeting in July of 2016, weren't you?

A. Like I said, it's seven years ago, I don't recall if I was in a meeting or not.

5 607. Q. During those discussions do you recall discussing Peace Bridge Duty Free's concerns about revenue declines that were caused by issues outside of its control?

A. Like I said, I don't even recall the meeting, so I don't recall -- I don't recall that.

10 608. Q. You don't recall having those discussion?

A. No, I'm sure there were discussions, but I can't recall them.

15 609. Q. Okay. So paragraph seven of your Affidavit you're saying that the signing the first rent deferral agreement was in furtherance of the Authority's obligations in eighteen point oh seven (18.07)?

A. In part. We had more discussions than that.

20 610. Q. So that was just the first part of its compliance?

A. Well, I ...

MR. STANEK: There's other parts that are set out in paragraph seven.

25 MR. JONES:

611. Q. So what you're saying, though, in your answer that you gave me was that the first rent deferral agreement was in part of the Authority's actions to comply ...

5 A. Consultation?

612. Q. ... with its ...

A. You can use --...

613. Q. ... obliga -.

A. ... you can use the word consultation.

10 614. Q. ... in part was in com -- in order to comply with its obligations under eighteen oh seven (1807).

A. To consult.

15 615. Q. So signing the rent abatement agreement was consulting?

A. That was part of it. We were trying to come to grips with the -- with the situation, we were working with them to do that. We were going back and forth, we were consulting how best we can make this work. That continues -- continued throughout the last couple of years, we're still having those discussions.

20 616. Q. So paragraph six, the second sentence you say that, "The Authority did not agree on article
25 eighteen oh seven (1807), or anywhere else in the

lease, to provide the Peace Bridge Duty Free with a rent abatement or to adjust the minimum rent payable under the lease based on any change in applicable laws." You'd agree with me that eighteen point oh seven (18.07) was a vehicle by which the parties would reduce base rent payable in the appropriate circumstances?

A. No.

617. Q. Well isn't that exactly what the Authority sought to do through the further negotiations?

A. In this case we did, but that's not what eighteen oh seven (1807) says.

618. Q. Right, so it's in the appropriate circumstances where it's reasonably -- where it's reasonable that's what would happen.

A. No. I mean, we could've disagreed, we could've said something totally different. I mean, eighteen oh seven (1807) says that we have to consult, it does not predetermine the outcome of those consultations, eighteen oh seven (1807) does not predetermine that.

619. Q. Right, it depends on the ...

A. Depends ...

620. Q. ... factual circumstances and the factual matrix that existed at the time and how the impact of

the change in laws affects the business, right?

5 A. Yeah, and at the end of the day the board
has to approve any amendment to the lease. The lease
is as it is until it gets amended, and there's
nothing in eighteen oh seven (1807) that, in any way,
stipulates that there will be a rent abatement given
certain circumstances, that's not what it says.

621. Q. No, it's more flexible than that?

10 A. The point is, we could've consulted
throughout and there could've -- we could've said
there's not gonna be an rent abatement, nothing for
the past rent, nothing for the future, we would still
have complied with eighteen oh seven (1807).

622. Q. That's your position? That's your view?

15 A. Because if we consulted and we come to the
conclusion that's what it would've been. We've
complied with article eighteen oh seven (1807).

623. Q. So there's no obligation to
reasonableness?

20 A. Depends again, depends on the
circumstances. In this particular case we made it
very clear that we believe it is reasonable, given
the circumstances, to give a rent abatement. But it
was not presupposed by eighteen oh seven (1807) that
25 we must give a rent abatement.

624. Q. So in the circumstances where it's
reasonable and appropriate there can be a rent
abatement ...

A. There can be.

5 625. Q. ... resulting from eighteen point oh seven
(18.07).

A. There can be, but it did not say there
must be.

10 626. Q. But it's not your view of this clause that
it allows the landlord to unilaterally amend the
lease as it sees fit.

A. The lease has to be executed by two
parties.

15 627. Q. Right.

A. So we don't have, just like Peace Bridge
Authority did not have, the authority to arbitrarily
pay twenty percent (20%) rent, that's a violation of
the lease. They made that arbitrary decision, we
have never done that.

20 MR. JONES: Let's go off the record.

OFF THE RECORD

MR. JONES:

25 628. Q. Okay, I just want to bring you back to the
first rent deferral agreement, which is the Tab Two
of your first Affidavit.

A. Okay.

629. Q. And I understand that this agreement was prepared by the Authority's lawyers with no input from Peace Bridge Duty Free?

5 A. I can't recall how it was prepared, I don't know.

630. Q. Okay, well if I suggest that to you, that it was prepared with no input from Peace Bridge Duty Free, would you disagree with me?

10 A. I don't know how it was prepared. I think it was prepared by us, but I don't know if there would be any input from Peace Bridge Duty Free in the drafting of it.

631. Q. Okay, you recall that earlier on we looked at some e-mails around this time, and you advised that the board considered their comments but was going to go ahead with the agreement in its original form?

20 MR. STANEK: I don't recall that evidence. I think the evidence is what the evidence is. Make of it what you want. If you want to go back to something you covered before, like you're doing now, you may get completely different answers the next time.

25 MR. JONES: I don't want to go back and ask

the same questions, I'm just putting it to the witness that this was prepared by the Authority's lawyers with no input. He doesn't remember, that's fine, he has no reason to believe that that's incorrect, fine.

MR. STANEK: What? He didn't say that.

MR. JONES:

632. Q. Well do you have any reason to believe that's incorrect?

A. I don't know. Like, that's what I said to you, I -- I says, I believe it was prepared by the Authority's lawyers, whether it was prepared with input from Peace Bridge Duty Free and/or its lawyers, I don't know.

633. Q. Okay. It's not complicated, so --.

MR. STANEK: It's also not fair. You can't put -- say, "Oh well, you don't have any evidence that it isn't," that's not his answer.

MR. JONES:

634. Q. Okay, well there's no issue, in any event, that the Authority agreed to all the terms of the first rent deferral agreement.

MR. STANEK: Everybody agreed to the terms of the first rent deferral agreement, they both signed it.

MR. JONES:

635. Q. That's your evidence, Mr. Rienas?

A. I didn't hear a question.

636. Q. There's no question -- or, you agree with
5 me that the Authority agreed to all the terms of the
first rent deferral agreement.

A. I assume that Peace Bridge Duty Free
agreed with it as well, they signed it.

637. Q. So that's a yes?

10 A. They both agreed to it.

638. Q. Okay. And you personally signed it on
behalf of the Authority.

A. Correct.

639. Q. Okay, so I want to take you to paragraph
15 two point one 'A' (2.1 (a)) of the agreement. And so
this paragraph says, "The tenant temporarily closed
its business at the premises on or about March 21st,
2020 and will fully reopen its business at the
premises as soon as the restrictions on non-essential
20 travel between Canada and the United States of
America are lifted."

A. That's what it says.

640. Q. So you agree with me that by this
agreement the Authority acknowledged that Peace
25 Bridge Duty Free would not be conducting its business

while the restrictions of non-essential travel
between Canada and the US were in place?

5 A. For three months. The life of the -- the
life of the deferral agreement, the deferral
agreement ended July 20 -- whatever it was, July 31st.

641. Q. So your evidence is that despite saying
that it won't -- it will reopen when the restrictions
on non-essential travel between Canada and the United
States of America are lifted ...

10 A. You have to understand, at the time that
this was done people were talking about, you know,
quarantine for fourteen (14) days, we'll be back to
normal, that's what we were talking about at the
time. No one knew what this was going to be, that's
15 why this deferral agreement ended in July 31st, 2020
and didn't go on for two years, 'cause nobody knew.

642. Q. I'm talking about the part about when the
store will reopen.

20 A. Yeah, 'cause we expected the store to be
opened by July 21st, 2020.

643. Q. Well that's not what the agreement says.

 A. The agreement ...

MR. STANEK: Sure it does 'cause it's got a
term.

25 A. It ends on July 31st, 2020. So all the

clauses are -- after July 31st, 2020 mean nothing.

MR. JONES:

644. Q. Where does it say that?

A. It ...

MR. STANEK: That's for the law.

MR. JONES:

645. Q. Maybe you can explain to me why the provision doesn't mean what it says.

MR. STANEK: No, it means what it says for the term of the agreement.

A. Again, understand the context of what was going on at the time. We all expected this to be a relatively short issue, turned out not to be that way. Unfortunate for everybody, but this rent deferral agreement contemplated a very short closure.

MR. JONES:

646. Q. It contemplated a closure until ...

A. For the life of the lease.

647. Q. ... the non-essential travel between Canada and the United States of America were lifted.

A. Which was anticipated to be no later than July 31st, 2020 'cause that's the term of the agreement.

648. Q. But where does it say that?

A. It ends July 31st.

MR. STANEK: You're being obtuse, deliberately so. You know that the agreement has a term, we discussed this a number of times.

MR. JONES: I'm sorry, where -- where does that ...

A. If that -- if that's your -- if that's your case, why were -- why were we doing a second deferral agreement of we didn't need one?

MR. JONES:

649. Q. Paragraph eighteen (18) of your March 2023 Affidavit.

A. Sorry, which paragraph?

MR. STANEK: Eighteen (18).

A. Eighteen (18).

MR. JONES:

650. Q. You talk about the Authority tracking traffic over the Peace Bridge in real time. And the volume of traffic over the Peace Bridge in January and February was about eighty-six percent (86%) of the volume for the same months, 2019 and '20. When you track the traffic it's broken down into cars, buses and commercial trucks?

A. Mmhmm.

MR. JONES: Can you provide us with copies of the real time traffic data that you're referring

to here, please?

A. From what day to what day? For those --
for those two months?

MR. JONES:

5 651. Q. Well is it easy enough to provide it for
the ...

A. I think it's actually online.

652. Q. ... 2019 to 2023?

MR. STANEK: Is it online?

10 A. Well it wouldn't be -- the comparison
wouldn't be online.

MR. STANEK: Okay.

A. So you want the comparison?

MR. JONES:

15 653. Q. Yeah, whatever you're referring to here.
So you're not saying that bus traffic and private car
traffic has returned to eighty-six percent (86%) of -
-?

20 A. Yeah, yeah, pretty much because the truck
traffic didn't deviate much. So car traffic is
pretty well back to eighty-five (85), eighty-six
percent (86%) of regular car volumes.

654. Q. And bus traffic?

25 A. Bus traffic would be -- I don't know if we
account for -- I think --. I'll look at the bus --

bus traffic. ^

655. Q. And -- and you'll provide us with the records? In paragraph twenty (20) you talk about leasing the space to another duty free store operator, what steps has the Authority taken to lease the premises to another duty free store operator?

A. None other than that one call to ascertain where there was interest in doing so.

656. Q. And there was no communication afterwards despite them expressing their interest?

A. Nope.

657. Q. Do you live in New York State or in Ontario?

A. Ontario.

658. Q. Okay. So would you agree with me that the laws in Ontario, the Covid-19 health restrictions were more restrictive in Ontario than they were in New York during covid?

A. Actually I don't think so, New York State was one of the most restrictive states.

659. Q. Well, you'd agree with me that New York State wasn't subject to the stay-at-home orders like Ontario was?

A. I -- to tell you the truth, I can't recall. They did have some stay-at-home orders. If

I recall correctly, yes, there were some. Certainly more restrictive than Florida.

660. Q. I don't think anybody would argue with you about that.

MR. JONES: Okay, just let me look at my notes. Go off the record for a second.

OFF THE RECORD

COURT REPORTER: On record.

MR. JONES:

661. Q. There's just one exhibit that I'd like to -- or, one e-mail I'd like to put to you so we can mark it as an exhibit, and we talked about this before. But it's a November 19, 2020 e-mail that you sent to the board of directors, and I'll show it to you now. It's essentially -- and you mentioned this to me in your Examination, that you had recommended the rent deferral agreement be approved, and I think this is your e-mail to the board doing that. I just want to make sure that we've got what you were referring to.

A. Yeah, correct, mmhmm.

MR. JONES: Okay. And so just make that an exhibit to the Examination. So it's eighteen (18), so it's the November 19th, 2020 e-mail from Mr. Rienas to the Board.

EXHIBIT NUMBER EIGHTEEN: The

November 19th, 2020 e-mail from Mr.
Rienas to the board of directors
recommending the rent deferral
agreement be approved - Produced and
marked.

MR. JONES: Okay, so subject to the responses
to undertakings and ...

MR. STANEK: No, subject to nothing.

MR. JONES: ... under ...

MR. STANEK: Your Cross-Examination is done,
okay? It's not subject to anything.

MR. JONES: Subject to responses ...

MR. STANEK: I -- I'll answer the undertaking
-- we'll answer the undertakings, we'll consider
the refusals, we're not coming back, this is
over.

MR. JONES: All right, thank you, Mr. Rienas.

CROSS-EXAMINATION CONCLUDED AT 3:30 P.M.

* * * * *

5 **THIS IS TO CERTIFY** that the foregoing is a
true and accurate transcription from the
recordings made by sound recording apparatus
to the best of my skill and ability.

E. M. McKee

10 -----
Penfound's Inc.

Transcript Ordered: August 28, 2023

Transcript Completed: September 1, 2023

Parties Notified: September 1, 2023

15 *The signature in coloured ink appearing at the end of this
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TAB 9

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

ONTARIO
SUPERIOR COURT OF JUSTICE

BL/sp

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

This is the Cross-Examination of JIM PEARCE on his Affidavits sworn the 12th day of December, 2021, the 13th day of November, 2022, the 2nd day of December, 2022 and the 13th day of February, 2023, taken at the offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, 222 Bay Street, Toronto-Dominion Centre, Toronto, Ontario, in person and via videoconference, on the 31st day of August, 2023.

A P P E A R A N C E S:

E. PATRICK SHEA, KC

--- for the Buffalo and
Fort Erie Public
Bridge Authority

BRENDAN JONES
DAVID T. ULLMANN

--- for the Respondent

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1 --- upon convening at 10:00 a.m.

2 --- upon commencing at 10:06 a.m.

3
4 JIM PEARCE, affirmed

5 CROSS-EXAMINATION BY MR. SHEA:

6
7 1. Q. So good morning, Mr. Pearce. How
8 are you?

9 A. Very good, thank you.

10 2. Q. We're here today to cross-examine
11 you on a few affidavits that you have signed. Do
12 you have those affidavits with you today?

13 A. We do.

14 3. Q. And have you reviewed the affidavits
15 in preparation for this cross-examination?

16 A. Yes.

17 4. Q. Are there any changes you would like
18 to make to the evidence in your affidavits?

19 A. No.

20 5. Q. No. You have no additional
21 documents with you today, other than the ones that
22 have already been disclosed?

23 A. That's correct.

24 6. Q. Thank you. So I'm going to ask you
25 a series of questions. I'm going to ask you to just

1 pause for an instant after I ask the question, to
2 ensure that your counsel doesn't have an objection,
3 and if your counsel raises an objection, please
4 don't answer the question until we resolve the
5 objection. Do you understand that?

6 A. Yes.

7 7. Q. And if you need a break during the
8 proceeding or during the examination, please let me
9 know, and we'll accommodate that.

10 A. Thank you.

11 8. Q. So we're going to begin and
12 hopefully make this as painless as possible. So do
13 you recall a letter that your counsel sent on 21st
14 of August, 2023? Do you remember that letter? Did
15 you see a copy of that letter?

16 MR. JONES: Can you direct him to it? I
17 have...

18 9. MR. SHEA: It's not in the...this is a
19 letter that was sent indicating that
20 privilege was being claimed over
21 communications with Peace Bridge's auditors
22 on April 19th and May 2 through 5 of 2023.
23 Were you aware of that letter?

24 THE DEPONENT: I have seen it.
25

1 BY MR. SHEA:

2 10. Q. No, is a perfectly acceptable
3 answer, or you don't know. That's perfectly
4 acceptable.

5 A. I would assume I would have seen it,
6 but I just can't recall.

7 11. MR. SHEA: Will you undertake to provide
8 redacted copies of those communications,
9 showing to whom they were addressed?

10 MR. JONES: Let me take that under
11 advisement, because I would have to go back
12 and look at it.

U/A

13 12. MR. SHEA: Okay.

14 MR. JONES: So what is your...

15 13. MR. SHEA: This is your letter dated 21
16 August, 2023. You indicated that privilege
17 was being claimed over communications with
18 the auditor on April 19th.

19 MR. JONES: Okay. What is your
20 question?

21 14. MR. SHEA: I would like to see redacted
22 copies of those communications showing only
23 to whom they were addressed.

24 MR. JONES: Okay, under advisement.
25

1 BY MR. SHEA:

2 15. Q. Mr. Pearce, are you aware of any
3 other communications between Peace Bridge Duty Free
4 and its auditors with respect to the rent payable
5 between the period March of 2020 and December of
6 2021?

7 MR. JONES: Other than the ones that
8 were referred to...

9 16. MR. SHEA: 2023.

10 MR. JONES: Our letter was from 2023,
11 but the communications were not, right. So
12 your question is whether there is any other
13 communications about rent with the auditor
14 at that...

15 17. MR. SHEA: Yes.

16 MR. JONES: ...in...I don't want to give
17 evidence, but I think...

18
19 BY MR. SHEA:

20 18. Q. That's why I'm asking for...are you
21 aware of any other communications with the auditor?

22 A. No, that's...

23 19. MR. SHEA: Would you undertake to review
24 your communications to determine if there
25 are any other communications with the

J. Pearce - 7

1 auditor over which you don't claim
2 privilege?

3 MR. JONES: Well, that was already done,
4 and that's why we identified...that's how
5 we identified those that were referred to.
6

7 BY MR. SHEA:

8 20. Q. So who undertook the search? Who
9 undertook the search that revealed just the
10 communications, April 19th and April...and May 2
11 through 5? Were you asked to undertake that search?

12 A. I probably most likely would have
13 been, because I deal with the auditors.

14 21. Q. It was less than 10 days ago and you
15 don't remember?

16 A. Oh, last 10 days, no, I haven't
17 talked to the auditors in the last 10 days. That
18 was the question? I'm sorry.

19 MR. JONES: I don't think you're
20 understanding the question.

21 THE DEPONENT: No.

22 MR. JONES: Anyway, do you want us to
23 redo the search again and advise if there
24 are any others?

25 22. MR. SHEA: Yes.

1 MR. JONES: Okay, so...

2 23. MR. SHEA: So I'm looking for any
3 communications between PBF...Peace Bridge
4 and its auditors with respect to the rent
5 owing.

6 MR. JONES: Okay. So let me take that
7 under advisement.

U/A

8 I think we have provided you with a
9 response to that question already, but it
10 sounds like you want us to review again.
11 So let me take that under advisement.

12
13 BY MR. SHEA:

14 24. Q. Okay. Next question, at tab 24 and
15 39 of your disclosures...are you familiar with those
16 disclosures?

17 A. Can I look?

18 25. Q. Do you have a copy of your
19 disclosures?

20 MR. JONES: I have got them
21 electronically.

22 26. MR. SHEA: So it's a fairly
23 straightforward question. At tab 24 and 39
24 of your disclosures you have redacted
25 portions of the documents. Will you

1 produce redacted copies of those documents
2 or explain why they are redacted? Sorry,
3 will you produce unredacted copies of those
4 documents or explain why they are redacted?

5 MR. JONES: Let me review the index.

6 27. MR. SHEA: Tab 24 and 39.

7 MR. JONES: This is of schedule B, I
8 assume, is it, or schedule A?

9 28. MR. SHEA: Schedule A.

10 MR. JONES: Okay, 24, that's July 29th,
11 2016. I don't know that we...

12 29. MR. SHEA: I'm just asking for an
13 undertaking that you either produce
14 unredacted copies or explain why they're
15 redacted.

16 MR. JONES: Yes. That's fine. We can
17 explain.

U/T

18 So what is the other one? Twenty-
19 four I have looked at.

20 30. MR. SHEA: And 39. So you're going to
21 explain why they're redacted?

22 MR. JONES: I believe it's for...

23 31. MR. SHEA: I would prefer not to have
24 your evidence on belief.

25 MR. JONES: Yes, that's fine.

1 32. MR. SHEA: Okay, so you'll explain why
2 they're redacted or produce unredacted
3 copies if there is no basis for the
4 redaction.

5
6 BY MR. SHEA:

7 33. Q. So now into a little bit of the meat
8 of it. So I'm correct that you're the general
9 manager and secretary treasurer of Peace Bridge Duty
10 Free, the corporation?

11 A. Yes.

12 34. Q. And are you also a director?

13 A. No.

14 35. Q. And who are the directors of Peace
15 Bridge Duty Free?

16 A. The directors are Barb Slipp, John
17 Marsh.

18 36. Q. Sorry, Barb Slipp, John Marsh?

19 A. Yes. Greg O'Hara and Harvey
20 Rossman.

21 37. Q. Marsh, Greg O'Hara and sorry?

22 A. Harvey Rossman.

23 38. Q. Harvey Rossman. So I take it you're
24 not a shareholder of the company?

25 A. Correct, I'm not.

1 39. Q. And are you connected to any of the
2 shareholders?

3 A. No.

4 40. Q. Are you aware of who the
5 shareholders are?

6 A. Yes.

7 41. Q. And who are the shareholders?

8 A. There are four holding companies,
9 and each of the directors has a holding company.

10 42. Q. Okay.

11 A. Do you want those names?

12 43. Q. No.

13 A. Okay.

14 44. Q. So just to clarify, so there are
15 four holding companies controlled by each of the
16 directors and those are the shareholders?

17 A. Right, and some have, like, two
18 family members within the holding company.

19 45. Q. But the holding company owns the
20 shares is what you're...

21 A. Correct, yes.

22 46. Q. Okay. I take it...I could be wrong
23 here, but you were primarily responsible for
24 negotiating the lease with the Authority in 2016?

25 A. Yes, heavily involved.

1 47. Q. Heavily involved or primarily
2 responsible?

3 A. Everything I would have done would
4 have been...need to be approved by the CEO.

5 48. Q. So everything you did in 2016 would
6 have been approved by Mr. O'Hara?

7 A. Yes.

8 49. Q. And would you have also sought
9 approval from the board?

10 A. He...that's his role, not mine. I
11 don't...very seldom deal with the board.

12 50. Q. Okay, and Mr. O'Hara is the
13 president and CEO as well as being a director?

14 A. Correct.

15 51. Q. And indirect shareholder?

16 A. Yes.

17 52. Q. Okay. So Mr. O'Hara's role in the
18 negotiation of the lease in 2016 was to approve what
19 you had done, or was he involved in the
20 negotiations?

21 A. He was involved in negotiations.

22 53. Q. And he also approved or was required
23 to approve everything that happened?

24 A. Yes, that's...yes, beyond my...

25 54. Q. And I take it, then, you were in

1 regular contact with Mr. O'Hara concerning the lease
2 negotiations?

3 A. Yes.

4 55. Q. And did Mr. O'Hara play a similar
5 role in the negotiations with the Authority during
6 Covid?

7 A. Yes.

8 56. Q. So Mr. O'Hara was required to
9 approve the offers and...offers made?

10 A. Yes.

11 57. Q. And Mr. O'Hara would have dealt with
12 the board?

13 A. Yes.

14 58. Q. And you were in regular contact with
15 Mr. O'Hara concerning the dealings with the
16 Authority during Covid?

17 A. Yes.

18 59. Q. And he would have informed you...am
19 I correct that he would have informed you of any
20 direct dealings he had with the Authority concerning
21 article 18.07?

22 A. Yes.

23 60. Q. And would you have interacted with
24 Mr. O'Hara by e-mail?

25 A. Both e-mail and in person.

1 61. Q. Okay. By text?

2 A. No, no.

3 62. Q. I assume not via fax?

4 A. No.

5 63. Q. And definitely in person and by
6 phone?

7 A. Very seldom. I can't remember
8 calling him very often.

9 64. Q. So how often would you say you
10 communicate with Mr. O'Hara, daily?

11 A. Daily, yes.

12 65. Q. And would you keep notes of any of
13 your communications with Mr. O'Hara?

14 A. Yes, I would say yes.

15 66. Q. Yes, so you did keep notes of your
16 engagements?

17 A. Not all of them, but some were just
18 verbal, but it would be an ongoing process.

19 67. Q. Are you aware whether Mr. O'Hara
20 would have kept notes?

21 A. I'm not aware.

22 68. Q. And are you aware of how often the
23 directors meet? I mean, I assume as the secretary,
24 that you're involved in the meetings of the
25 directors.

1 A. Yes, there was...I would say one
2 annual meeting of the corporation.

3 69. Q. Did they have any other interim
4 meetings?

5 A. I do not believe there was any
6 called. I have no minutes of any other meetings.

7 70. Q. So how would the directors have
8 approved...

9 A. Well, that would have been
10 communication between Greg and the directors.

11 71. Q. And would that communication have
12 been via e-mail?

13 A. I'm not sure. I would...I can make
14 assumption, but...

15 72. Q. No, I don't want you to assume.

16 A. No.

17 73. MR. SHEA: Will you undertake to inquire
18 of Mr. O'Hara how he communicated with the
19 directors during 2016 and during 2020 and
20 2021?

21 MR. JONES: You're asking...

22 74. MR. SHEA: The evidence was that Mr.
23 O'Hara would have obtained approval for the
24 various steps taken, and there were no
25 formal board meetings called. So I'm

J. Pearce - 16

1 asking for an undertaking to inquire as to
2 how Mr. O'Hara would have communicated with
3 the directors during 2016, while the lease
4 was being negotiated, and 2020 to 2021.

5 MR. JONES: Well, I think you can assume
6 that what was done was approved by the
7 board.

8 75. MR. SHEA: I'm not asking...no. I'm
9 asking for an undertaking. I don't know
10 that I can assume anything.

11 MR. JONES: Okay, so I think I'm going
12 to refuse to ask Mr. O'Hara how he
13 communicated with the board. /R

14 76. MR. SHEA: And on what basis is that
15 refusal?

16 MR. JONES: Well, I don't think it's an
17 appropriate question for Mr. Pearce's
18 cross-examination today.

19 77. MR. SHEA: To inquire...just to be
20 clear, his evidence was that he was aware
21 that Mr. O'Hara sought approval for these
22 matters, and I'm asking him to ask Mr.
23 O'Hara how he sought approval.

24 MR. JONES: Like, whether it was...no, I
25 think that gets a little beyond.

1 78. MR. SHEA: Okay, we can raise that.

2
3 BY MR. SHEA:

4 79. Q. So just to clarify, you're not aware
5 of any meetings of the board that were called, aside
6 from the annual meeting, to seek approval for any of
7 these...for the 2016 lease for the
8 proposal...response to the proposal or anything that
9 happened in 2020 and 2021?

10 A. No, I'm not aware of any meeting
11 called.

12 80. Q. Are you aware of any approvals given
13 for any of those things?

14 A. What things?

15 81. Q. Are you aware...okay, let's go
16 through them. Are you aware of board approval being
17 given for the Peace Bridge's response to the RFP?

18 A. I don't want to say "assume", but
19 that's...

20 82. Q. Are you aware?

21 A. I'm aware the process would have
22 been that there would have been approval by the
23 shareholder directors.

24 83. Q. So are you aware of an actual
25 approval? Have you seen an actual approval?

J. Pearce - 18

1 A. No.

2 84. MR. SHEA: Will you undertake to
3 determine if there was a formal approval
4 given for the submission of the response to
5 the RFP?

6 MR. JONES: So you want undertaking to
7 advise if the board formally approved the
8 submission of the RFP?

9 85. MR. SHEA: And to deliver a copy of the
10 resolution approving it.

11 MR. JONES: I'll undertake to advise
12 whether the board formally approved the
13 RFP.

U/T

14 I'll take under advisement providing
15 a copy of the resolution...

U/A

16 86. MR. SHEA: Okay.

17 MR. JONES: ...if it exists.

18
19 BY MR. SHEA:

20 87. Q. Are you aware of the board approving
21 the final version of the lease?

22 A. I'm not aware.

23 88. Q. You're the secretary of the board.
24 So you would have been aware of any resolutions
25 approving anything, correct?

1 A. Yes.

2 89. Q. Okay. Are you aware of any
3 resolution of the board approving the first rent
4 deferral?

5 A. No.

6 90. Q. Are you aware of any resolution of
7 the board approving the second rent deferral?

8 A. No.

9 91. Q. Are you aware of any resolution of
10 the board approving the offer made or proposal made
11 to the Authority in January of 2021?

12 MR. JONES: Can you repeat the question,
13 please?

14
15 BY MR. SHEA:

16 92. Q. Are you aware of any resolution of
17 the board approving the proposal that was made to
18 the Authority in January of 2021?

19 A. Resolution, no.

20 93. Q. So the board didn't approve...are
21 you aware of the board approving the proposal that
22 Peace Bridge made to the Authority in January of
23 2021?

24 A. I understand the board would
25 have...its process would have approved it, but I

1 didn't see any resolution or...

2 94. Q. So what is the basis for your
3 understanding of what they would have done?

4 A. As the process, the CEO contacts the
5 board.

6 95. Q. But you're the secretary of the
7 board, are you not?

8 A. I am.

9 96. Q. And you're not aware of a resolution
10 actually being passed?

11 A. The actual resolution, no.

12 97. Q. Are you aware of any communications
13 with the board that would have taken place between
14 Mr. O'Hara and the rest of the directors?

15 A. Again, I believe the communication
16 did occur between Greg and the board.

17 98. MR. SHEA: Will you undertake to make
18 inquiries with respect to whether that
19 communication took place, and produce
20 copies of any written communications?

21 MR. JONES: Okay, so let me get it down.
22 Undertake to advise if Mr. O'Hara
23 communicated with the board with copies of
24 the written communication.

U/T

25 99. MR. SHEA: And that's for the January...

J. Pearce - 21

1 MR. JONES: January offer.

2 100. MR. SHEA: And the same undertaking for
3 March, for the March offer, and the March
4 proposal and the August proposal.

5 MR. JONES: Can you refer us to the
6 documents?

7 101. MR. SHEA: Okay, let's make this easier,
8 because I am going to talk about those
9 specifically. So we can get into that. If
10 you want to defer, we can get into the
11 specifics. I don't want to slow things
12 down here.

13 MR. JONES: Right, and so just so we're
14 clear, all these are subject to claims of
15 privilege, of course.

16 102. MR. SHEA: Yes, assuming that...assuming
17 that counsel was involved, of course they
18 are.

19
20 BY MR. SHEA:

21 103. Q. Are there notes...are you aware of
22 notes or briefing documents prepared for the
23 directors?

24 A. Yes, I would have sent some to the
25 CEO from the financial end of it.

1 104. Q. No, I'm more interested in...let me
2 clarify. In connection with the submission of the
3 response to the RFP...

4 A. Right.

5 105. Q. ...are you aware of any notes or
6 briefing materials delivered to the board?

7 A. No, not...no.

8 106. Q. In connection with the lease, so the
9 negotiation of the lease, are you aware of any notes
10 or briefing materials prepared by the
11 board...prepared for the board, sorry?

12 A. Just like from me to the board, from
13 me to the CEO? So you're talking from the CEO to
14 the board?

15 107. Q. Any briefing notes...let's break
16 that down.

17 A. Yes.

18 108. Q. Any briefing notes from you to the
19 CEO.

20 A. There would have been communication
21 between me and the CEO in that.

22 109. Q. Okay, and that's in connection with
23 the submission of the response to the RFP?

24 110. MR. SHEA: Will you produce those?

25 MR. JONES: Those have already been

1 provided in the...

2 111. MR. SHEA: There is nothing.

3 MR. JONES: There is...I know there are
4 e-mails between Mr. Pearce and Mr. O'Hara.

5 112. MR. SHEA: Not briefing notes. So if
6 you can point me to where those are in
7 2016...

8 MR. JONES: Sorry, Jim, did you say that
9 there are...

10 113. MR. SHEA: So I'm going to show you the
11 index to...

12 MR. JONES: Counsel, just hold on,
13 because I think there may be some
14 confusion, and we need to get this sorted
15 out for the record.

16 Did you say that there were briefing
17 notes beyond the e-mails that have been
18 provided so far?

19 THE DEPONENT: No, no, I'm not sure
20 briefing notes versus solely communication.

21
22
23 BY MR. SHEA:

24 114. Q. Okay. I'm going to hand to
25 you...this is a copy of the index. Do you recognize

1 that document?

2 A. This document or some of these?

3 115. Q. Whether you recognize this index.

4 Did you see this index?

5 A. I don't...

6 MR. JONES: So Jim, this is an index of
7 the Peace Bridge Duty Free Inc.'s
8 disclosure documents that were ordered in
9 the context of this litigation.

10 THE DEPONENT: Okay.

11 MR. JONES: So this is an index of the
12 documents that were provided.

13 THE DEPONENT: Okay, so this was asked
14 for by...

15
16 BY MR. SHEA:

17 116. Q. So you indicated to me that there
18 were communications, notes, between you and Mr.
19 O'Hara or from you to Mr. O'Hara...

20 A. M'hm.

21 117. Q. ...concerning the response to...or
22 response to the RFP, and that those had already been
23 disclosed, and I believe your counsel indicated that
24 they were already listed.

25 A. Okay.

1 118. Q. Can you identify those on this
2 document, please?

3 MR. JONES: So you want us to go through
4 and list every communication between Mr.
5 Pearce and Mr. O'Hara?

6 119. MR. SHEA: I want you to identify them
7 on the listing. I mean, I'm going to ask
8 that this index be introduced as Exhibit 3.

9 MR. JONES: Okay, and we can review by
10 reference to the actual documents, I
11 assume.

12 120. MR. SHEA: Certainly you can review by
13 reference to the documents. Perhaps you
14 can give an undertaking to identify where
15 on this document there are identified
16 communications between Mr. Pearce and Mr.
17 O'Hara concerning the response to the RFP.

18 MR. JONES: We're not going to undertake
19 to do that.

/R

20 I mean, you have the documents. So
21 you can review them and determine that
22 your...

23 121. MR. SHEA: They're not there. There are
24 none.

25 MR. JONES: So you're saying that there

1 are no e-mails...

2 122. MR. SHEA: There are no e-mails between
3 Mr. O'Hara and Mr. Pearce identified here
4 prior to...prior to...I'm going through
5 them, and you can see for yourself there
6 are none.

7 MR. JONES: What do you mean, "There are
8 none"?

9 123. MR. SHEA: During the relevant period,
10 there are no...

11 MR. JONES: So what relevant period are
12 you talking about?

13 124. MR. SHEA: The submission of the
14 response to the proposal. So that would be
15 prior to June of 2016. There are none.

16 So would you like to revise your
17 answer, sir, as to whether they are
18 actually identified on the index?

19 MR. JONES: Well, we provided you with
20 this index. We provided you with the
21 supplementary index of the recovered e-
22 mails that you will recall. So between
23 those two documents, we have provided
24 whatever e-mails could be identified.
25

1 BY MR. SHEA:

2 125. Q. So Mr. Pearce, is your evidence that
3 if an e-mail has not been listed here or a
4 communication has not been listed here, and is not
5 found in the additional 18 e-mails that were
6 delivered from 2016, it just doesn't exist?

7 MR. JONES: If it did exist, it hasn't
8 been able to be recovered. You recall
9 there was an issue with e-mails from that
10 period of time.

11 126. MR. SHEA: 2016, okay.

12
13 BY MR. SHEA:

14 127. Q. So you are not aware of any e-mails
15 or other communications with respect to the
16 submission of the response to the RFP that have not
17 already been disclosed?

18 A. Correct. That's my recollection.

19 128. Q. And what about with respect to the
20 negotiation of the lease, are you aware of any e-
21 mails or other communications between you and Mr.
22 O'Hara with respect to the negotiation of the lease
23 that have not already been disclosed?

24 A. No.

25 129. Q. Are you aware of any e-mails or

1 communications between you and Mr. O'Hara with
2 respect to the impact of Covid on your business and
3 the lease that have not already been disclosed?

4 MR. JONES: Well, that's pretty broad,
5 Counsel.

6
7 BY MR. SHEA:

8 130. Q. Okay, are you aware of any e-mails
9 between you or any communications between you and
10 Mr. O'Hara concerning offers made or proposals made
11 to the Authority in reliance on 18.07 that have not
12 been disclosed?

13 A. Is this the list of ones we
14 disclosed?

15 131. Q. You tell me.

16 A. Oh, I see.

17 MR. JONES: No, that is the list, and
18 there is also the supplementary...

19 132. MR. SHEA: The supplementary list for
20 2016 only.

21 MR. JONES: Oh, because...right, those
22 were the missing e-mails.

23 THE DEPONENT: Yes.

24 MR. JONES: Right.

1 BY MR. SHEA:

2 133. Q. So let me maybe ask...so did you
3 conduct a search of your e-mail system to locate e-
4 mails or other communications between you and Mr.
5 O'Hara relating to article 18.07 and the request for
6 concessions from the Authority under that section of
7 the Act? Did you conduct that search?

8 A. If it was requested.

9 134. Q. Do you remember conducting that
10 search?

11 A. I do not recollect.

12 135. Q. So you don't recall?

13 A. I don't recall.

14 136. MR. SHEA: Will you undertake to
15 determine if you conducted that search and
16 when you conducted that search?

17 MR. JONES: That's fine.

U/T

18 137. MR. SHEA: And will you identify any
19 search terms used?

20 MR. JONES: I'm not sure that's going to
21 be possible at this point, but...

22 138. MR. SHEA: Why would it not be possible
23 for 2020 and 2021?

24 MR. JONES: Sorry, you are asking him if
25 he conducted a search several months ago

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that he doesn't have specific recollection,
to remember what search terms he used for
that search?

139. MR. SHEA: Certainly when he
conducted...maybe I'm wrong.

MR. JONES: I don't think there is a record. Anyway...

140. MR. SHEA: Okay, so if there is no
record, if he doesn't recall...if he
doesn't recall...

MR. JONES: We're getting a little bit into the weeds here, Counsel. We're undertaking to...

141. MR. SHEA: It's the same questions you asked us.

MR. JONES: No, it's not, in fairness. So we're undertaking to advise you if he conducted the search for these e-mails and when.

$$/\mathbb{R}$$

142. MR. SHEA: When, and you're refusing to
identify what search words were used, okay.

BY MR. SHEA:

143. Q. Okay. So now, last question, are you aware of how the directors communicate among

1 themselves?

2 A. No, I'm not aware.

3 144. Q. They don't have Peace Bridge e-mail
4 accounts?

5 A. No.

6 145. Q. Do they have...is there a Peace
7 Bridge Dropbox for the directors?

8 A. No, there is not.

9 146. Q. Is there a Peace Bridge common
10 server for the directors?

11 A. No, there is not.

12 147. Q. Is there any other external common
13 storage site where information for the directors is
14 uploaded?

15 A. No, there is not.

16 148. Q. So now we're going to discuss the
17 lease. So I'm going to ask you...what we have done
18 is we have identified three volumes as Exhibit 1,
19 and the index to those volumes as Exhibit 2. It
20 will not be necessary, I don't think, for you to
21 look at the exhibit at this point.

22 I would like to turn your attention to tab
23 1.

24 MR. JONES: Counsel, I'm just looking at
25 our version. It's marked as 1.2.

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1 149. MR. SHEA: That should be volume 2.

2 MR. JONES: Sorry, you're right.

3 150. MR. SHEA: So Exhibit 1.1 is volume 1 of
4 the documents. So the lease is at tab 1.
5 Can you please turn that up?

6 THE DEPONENT: Okay.

7
8 --- EXHIBIT NO. 1.1: Exhibits for cross-examination of
9 Jim Pearce

10
11 --- EXHIBIT NO. 1.2: Exhibits for cross-examination of
12 Jim Pearce

13
14 --- EXHIBIT NO. 1.3: Exhibits for cross-examination of
15 Jim Pearce

16
17 --- EXHIBIT NO. 2: Index to exhibits

18
19 BY MR. SHEA:

20 151. Q. And you recall this lease was signed
21 on 28 July, 2016? Do you recall that?

22 A. Yes, I see the date here, yes.

23 152. Q. In the negotiation of this lease,
24 Peace Bridge Duty Free was represented by a lawyer.
25 Am I correct?

1 A. Yes.

2 153. Q. And that's Mr. Ben Mills?

3 A. Yes, I believe it was Conlin Bedard.

4 MR. JONES: That's the law firm.

5 THE DEPONENT: Yes.

6 MR. JONES: Ben Mills.

7 THE DEPONENT: Ben Mills, yes, I believe
8 so.

9
10 BY MR. SHEA:

11 154. Q. Did Peace Bridge Duty Free engage
12 the services of any other consultants or advisors in
13 connection with the negotiation of the lease?

14 A. The negotiation, no.

15 155. Q. So who is Mr. John Menchella?

16 A. Oh, we...he is a consultant, and he
17 helped us with the RFP, assisted us in putting the
18 RFP together.

19 156. Q. Okay, so he assisted you with the
20 RFP. Was he also involved in the lease?

21 A. I believe he...yes, I believe he
22 would have reviewed that with us also.

23 157. Q. Okay, and how would you have
24 communicated with Mr. Menchella? Would it have been
25 by e-mail?

1 A. Yes.

2 158. Q. By text message?

3 A. No.

4 159. Q. I assume not by fax?

5 A. No.

6 160. Q. And would you have met with him in
7 person?

8 A. Yes.

9 161. Q. And would you have had
10 communications with him via telephone?

11 A. Yes.

12 162. Q. Okay. I'm going to ask you to turn
13 up article 4.02 of the lease. It's at page 45, at
14 the top right.

15 A. M'hm.

16 163. Q. You'll agree with me that the lease,
17 at paragraph 4.02, contemplates base rate of four
18 million dollars per year?

19 A. Correct.

20 164. Q. And you'll agree that 4.03 of the
21 lease contemplates percentage rent being paid
22 separate from base rent?

23 A. Well, it's the greater of percentage
24 or base.

25 165. Q. But it contemplates that

1 percent...there will be base rent paid, and then to
2 the extent that there is...that percentage rent...
3 effectively you deduct from the percentage rent that
4 is payable, the base rent paid?

5 A. Correct.

6 MR. JONES: So they're not independent.

7 166. MR. SHEA: I didn't...sir, I'm not
8 interested in your evidence, or requested
9 it, frankly.

10
11 BY MR. SHEA:

12 167. Q. Then you will agree at 4.05...that
13 is over on page 47, you'll agree that the lease
14 contemplates that:

15 "...rent will be paid when due without any
16 prior demand therefor and without any
17 abatement, setoff, compensation or
18 deduction whatsoever, except as otherwise
19 specifically provided for in the lease..."

20 You'll agree that is what it says?

21 A. I agree, yes.

22 168. Q. Okay. I'm going to ask you to turn
23 back to 2.04 of the lease.

24 A. 4.02?

25 169. Q. 2.04, please. We're going to find

1 that at page 41.

2 A. Okay.

3 170. Q. And you'll agree that paragraph 2.04
4 is called "An entire agreement clause", and it
5 specifies:

6 "...There are no covenants,
7 representations, warranties, agreements or
8 other conditions expressed or implied or
9 otherwise forming part of or in any way
10 affecting or relating to this lease..."

11 You will agree that is what it says?

12 MR. JONES: Well, it goes on.

13 171. MR. SHEA: Okay, well, it goes on to
14 say...

15 MR. JONES: It says what it says. We're
16 not disputing the language of the lease.

17
18 BY MR. SHEA:

19 172. Q. Yes. Article 2.17 of the lease,
20 that's at page 43. Do you see 2.17 there?

21 A. Yes.

22 173. Q. Page 43.

23 A. Yes.

24 174. Q. You'll agree that this clause
25 indicates:

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1 "...No supplement, modification, amendment,
2 waiver, discharge or termination of this
3 lease is binding unless it is executed in
4 writing by the party to be bound..."

5 You will agree it also says:

6 "...No waiver of failure to exercise or
7 delay in exercising any provision of this
8 lease constitutes a waiver of any other
9 provision..."

10 You'll agree with that?

11 A. Well, the wording is right there. I
12 agree with the wording.

13 MR. JONES: It continues on from where
14 you have stopped, but...

15
16 BY MR. SHEA:

17 175. Q. Okay, well, let's finish it off:

18 "...whether or not similar, nor does any
19 waiver constitute a continuing waiver
20 unless otherwise expressly provided..."

21 So Peace Bridge Duty Free was aware of these
22 provisions when it signed the lease?

23 A. It was aware of the whole lease.

24 176. Q. Okay. You will agree with me that
25 the only fully signed amendment to the lease is the

1 first rent deferral agreement dated 27 April, 2020,
2 correct?

3 A. Correct.

4 177. Q. So you're not aware of any other
5 fully executed amendments to this lease?

6 A. I do not believe we had any other
7 communication about the lease after.

8 MR. JONES: Sorry, the question was
9 about signed amendments, and you said
10 "communications".

11 THE DEPONENT: Oh, okay.

12 MR. JONES: Maybe you misspoke.

13 THE DEPONENT: Yes.

14
15 BY MR. SHEA:

16 178. Q. Okay. So we have the lease. Now
17 we're going to talk a little bit about the RFP
18 process.

19 A. Okay.

20 179. Q. So prior to signing the lease, Peace
21 Bridge Duty Free operated a duty free at the Peace
22 Bridge under a different lease with the Authority.
23 Is that correct?

24 A. Correct.

25 180. Q. And what year did you start to

1 operate?

2 A. Under that lease?

3 181. Q. Yes.

4 A. 1998.

5 182. Q. Okay. That lease did not include a
6 minimum rent clause, correct, strictly percentage
7 rent?

8 A. No, there was minimum rent.

9 183. Q. Okay, what was the minimum rent
10 under that lease?

11 A. I believe...I don't have it in front
12 of me, 75 percent of the previous year's rent...

13 184. Q. Okay.

14 A. ...was the base rent.

15 185. Q. Okay, so 75 percent of the previous
16 year's, but no...

17 A. I believe so.

18 186. Q. ...fixed base rent?

19 A. I would have to look at that.

20 187. Q. Are you aware of it including a
21 fixed base rent? Do you recall...

22 A. I do not recall.

23 188. Q. Okay. You will agree with me that
24 in the years leading up to the RFP being put out in
25 2016, which would have been the expiry of your

1 existing lease, the duty free concession was very
2 profitable for Peace Bridge Duty Free and its
3 shareholders?

4 A. Well, that's a word I don't want to
5 comment...

6 189. Q. Okay, let's sort of...so if you will
7 turn to tab 6, what you will find is...do you
8 recognize this document? It's the technical
9 proposal.

10 A. Yes.

11 190. Q. And attached to that technical
12 proposal are financial statements, correct?

13 A. Correct.

14 191. Q. And those financial statements are
15 for...I believe 2013, '14, '15 and the first quarter
16 of '16. Does that make sense?

17 A. I see the '13, '14, oh, '16, yes,
18 yes, '15, yes.

19 192. Q. So you will agree with me that,
20 based on these financials, in 2012 1.9...sorry, in
21 2012 dividends of about four million were paid out
22 to the shareholders?

23 A. 2012?

24 MR. JONES: Sorry, what page are you
25 looking at?

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1 193. MR. SHEA: It is the...the easiest way
2 to find it is...tab 4 is where you're going
3 to find these, and if you...

4 THE DEPONENT: 2012 is 1.9?

5
6 BY MR. SHEA:

7 194. Q. 2012, 1.9.

8 A. Yes.

9 195. Q. And then you pay the capital
10 dividend?

11 A. Right.

12 196. Q. Of 2.2...

13 A. Right.

14 197. Q. ...which was roughly four million,
15 correct?

16 A. Right.

17 198. Q. Okay, 2013 is right beside.

18 A. That...okay, yes.

19 199. Q. 2013 the dividend was 3.6 million,
20 3.64 million actually.

21 A. Correct.

22 200. Q. And then if you move further on,
23 you'll have the 2014 financials. I'm sorry, I
24 didn't add numbers to these pages because they
25 weren't already numbered. So I did not want to

1 alter the exhibit. 2014, you go on in roughly the
2 same spot.

3 A. Okay.

4 201. Q. You'll agree they took 2.4 million
5 in dividends?

6 A. Correct.

7 202. Q. And do you agree in 2015 they took
8 another 2.4 million?

9 A. Correct.

10 203. Q. And then in the first three months
11 of 2016 they took 600,000?

12 A. Correct.

13 204. Q. Okay, and to your recollection in
14 the years prior to this, were dividends of a similar
15 quantum?

16 A. I do not recollect the magnitude.

17 205. Q. Do you recollect dividends being
18 taken out annually?

19 A. Yes.

20 206. Q. Okay. Now, if you go back to volume
21 1...I apologize for jumping around a little bit
22 here. Tab 3...

23 A. M'hm.

24 207. Q. ...is a letter from the Frontier
25 Duty Free Association. Do you have any recollection

1 of this letter?

2 A. Yes, I have seen this letter.

3 208. Q. And you will agree with me that when
4 the Authority was contemplating going to an RFP for
5 the concession rights, Peace Bridge Duty Free
6 objected?

7 A. Correct.

8 209. Q. Okay. You will recall that
9 notwithstanding the objection, the Authority went
10 ahead with the RFP?

11 A. They did.

12 210. Q. And Peace Bridge Duty Free decided
13 to submit a proposal?

14 A. They did.

15 211. Q. And the RFP that was put out
16 contemplated minimum rent.

17 A. The RFP included...

18 212. Q. Yes, and I believe that minimum rent
19 was 2.5 million?

20 A. I believe so.

21 213. Q. And you will agree with me that
22 Peace Bridge Duty Free knew that it had to submit a
23 proposal into that process that involved minimum
24 rent?

25 A. That was a requirement, yes.

1 214. Q. So you couldn't play unless you
2 offered minimum rent?

3 A. I believe that was a requirement.

4 215. Q. Yes. The RFP included a form of
5 lease, correct?

6 A. Correct.

7 216. Q. And that form of lease did not
8 contemplate any adjustment to minimum rent, correct?

9 A. I don't recollect without seeing it.

10 217. Q. Okay. Now, you have disclosed a
11 number of your prior...the drafts of your proposals.

12 A. Okay.

13 218. Q. If you'll turn to tab 4...

14 A. Okay.

15 219. Q. ...do you recognize this as being
16 one of your proposals?

17 MR. JONES: Is this a draft?

18
19 BY MR. SHEA:

20 220. Q. This is a draft, yes. I'm going to
21 specifically turn you to page...this is a draft
22 provided by you?

23 MR. JONES: Yes.

24
25 BY MR. SHEA:

1 221. Q. To page 11.

2 A. Okay.

3 222. Q. You will agree that you originally
4 proposed a minimum base rent of 2.5 million? You
5 were originally contemplating a minimum draft rent
6 of 2.5 million, which would be in accordance with
7 the...sorry, page 11 of tab...at the bottom, bottom
8 right, your page 11. Got it? You'll see "Minimum
9 annual guaranteed rent". Tab 4, right?

10 A. Yes.

11 223. Q. Minimum base rent originally
12 contemplated 2.5 million.

13 MR. JONES: Are you saying that this was
14 the original draft?

15 224. MR. SHEA: This was the draft you
16 provided.

17 MR. JONES: Well, there were several
18 drafts.

19 225. MR. SHEA: Of the drafts you provided,
20 this is the earliest one.

21 MR. JONES: How do we know that?

22
23 BY MR. SHEA:

24 226. Q. Let's just...I'm not sure it's
25 entirely relevant what number this is, but you will

1 agree that in this draft you contemplated minimum
2 rent of 2.5 million, with an additional base rent of
3 2.5, so a total of five?

4 A. I'm not sure who all contemplated
5 this, this draft, at that time.

6 227. Q. Who would have prepared the draft?

7 A. This...I'm not sure who all worked
8 on this draft, to be honest.

9 228. Q. But you will...

10 A. [inaudible] went or who...yes.

11 229. Q. You will agree you ultimately
12 decided to submit a proposal with four million base
13 rent?

14 A. We did.

15 230. Q. And the proposal of four million
16 base rent would have been approved by the directors?

17 A. I can't assume, but I would feel
18 that the offer...the whole RFP would have been.

19 231. Q. Are you aware of the resolution?
20 You have not produced a copy of a resolution
21 approving the RFP. Will you undertake to determine
22 if there is such a resolution and produce it?

23 MR. JONES: Let me take that under
24 advisement.

U/A

1 BY MR. SHEA:

2 232. Q. And you'll agree with me that the
3 response that you did submit did not include any
4 mandatory amendment to the lease in terms of the
5 rent payable?

6 MR. JONES: You're asking about the...

7
8 BY MR. SHEA:

9 233. Q. Let's go to the actual RFP, tab 5.

10 A. Yes.

11 MR. JONES: I don't think...the RFP
12 response that was submitted says what it
13 says, if you want to take him to that.

14 234. MR. SHEA: Yes. So the RFP is at tab 5.

15 THE DEPONENT: Yes.

16
17 BY MR. SHEA:

18 235. Q. Do you recognize this document?

19 A. Is this the actual proposal?

20 236. Q. This is part of your response.

21 A. Yes.

22 237. Q. It is the technical component of
23 financial. This is the financial.

24 A. Right.

25 MR. JONES: So this isn't a draft. This

1 is the one that was submitted?

2 238. MR. SHEA: Well, we can actually go to
3 the...if you want to be sure about that, we
4 can go to the actual lease. Maybe that's
5 easier. Let's go to the lease, tab 1. Tab
6 1 attached to the lease is the actual
7 proposal.

8 THE DEPONENT: Okay.
9

10 BY MR. SHEA:

11 239. Q. That may be easier for everyone.

12 A. Yes.

13 240. Q. And tab 1, at the top right hand,
14 119. So the small numbers in the top right hand,
15 119, or D418, whichever.

16 A. Okay.

17 241. Q. So this is the actual proposal
18 attached to the lease and there is no provision here
19 which contemplates a mandatory abatement or
20 reduction in the minimum rent. You'll agree with me
21 on that?

22 A. But that's not the lease.

23 242. Q. Sorry, this is your proposal.

24 A. Right.

25 243. Q. So you weren't proposing that there

1 be any requirement to reduce the minimum rent?

2 MR. JONES: In this page?

3
4 BY MR. SHEA:

5 244. Q. In your proposal. Is there anything
6 in your proposal, response to the proposal, that
7 contemplates minimum rent being reduced under any
8 circumstance?

9 A. This was not the...this was our
10 proposal, not the lease.

11 245. Q. No.

12 A. So the lease had to be...

13 246. Q. And you knew the lease...you have
14 already said the lease contains no mandatory
15 minimum, no reduction in mandatory minimum, correct?

16 A. Right.

17 MR. JONES: When did he say that?

18 247. MR. SHEA: Previously when I asked him
19 questions.

20 MR. JONES: No, no, Counsel, you're
21 putting words in his mouth because he
22 absolutely didn't say that.

23
24 BY MR. SHEA:

25 248. Q. Okay. Sir, are you aware of any

1 provision in the lease that contemplates that rent
2 will be...that the Authority is required to reduce
3 the rent under any circumstances?

4 A. The 18...

5 249. Q. So that's what you rely on, 18.07?

6 A. Is that the one?

7 250. Q. And you are correct. What he said
8 was that the form of lease that was attached to the
9 RFP didn't include any requirements that the minimum
10 rent be reduced. That's what he answered.

11 So let me turn over the page to 220 of that
12 document...of the document I had you on.

13 MR. JONES: Sorry, we're going back to
14 tab 1?

15 251. MR. SHEA: Tab 1, 220 at the top. I
16 don't think we ever left tab 1.

17 THE DEPONENT: I have got...

18
19 BY MR. SHEA:

20 252. Q. 120.

21 A. 120, okay.

22 253. Q. The last line. Is it not correct
23 that Peace Bridge Duty Free confirmed that it was
24 not proposing any changes to the form of lease
25 attached to the RFP?

1 A. That's what that says.

2 254. Q. Okay, and you will agree with me
3 that the form of lease attached to the RFP did not
4 include 18.07?

5 A. Again, if it's here.

6 MR. JONES: I think that's correct,
7 Counsel.

8
9 BY MR. SHEA:

10 255. Q. There were no other provisions in
11 the draft...you can't identify any other provisions
12 in the lease attached to the RFP that contemplated a
13 mandatory reduction in minimum rent?

14 A. Is that here? Is that draft here?

15 256. Q. No.

16 A. I don't recollect.

17 257. Q. You don't recollect. Okay, you
18 can't recall. Okay, so you were successful. Your
19 offer was the highest or the best, shall we say, and
20 in making that offer and including minimum rent, you
21 were aware you needed to have a high minimum rent to
22 ensure you were the best offer. Is that a fair
23 statement? Everyone is bidding on the same lease.

24 A. There was many different criteria.
25 We were under the belief that it wasn't one

1 criteria, many criteria as set out in the RFP.

2 258. Q. But you were aware that a high
3 minimum rent would assist your bid?

4 A. Our feeling was that to meet the
5 criteria, all the criteria that was laid out in the
6 RFP, would help us be successful.

7 259. Q. Yes, but you did better than meet
8 the 2.5. You bid four?

9 A. We put a lot of things in our RFP,
10 which all relate to the criteria set out in the RFP.

11 260. Q. So why choose four as the minimum
12 instead of 2.5?

13 A. It was based on the sales
14 projections and based on percentage rent we were
15 going to offer as part of the criteria. That was
16 what really drove this, was the 20 percent. We felt
17 20 percent was going to be better than...hopefully
18 better than what other people are submitting, and
19 that was the key for us.

20 261. Q. So your assertion is that you
21 offered 1.5 million more in base rent for no
22 particular reason?

23 A. No, we offered 20 percent, and we
24 have consistently achieved sales of 20 million
25 dollars and more in our history.

1 262. Q. Please identify where in your
2 proposal, in your...

3 MR. JONES: Well, Counsel, let him
4 finish his answer.

5
6 BY MR. SHEA:

7 263. Q. Okay. Are you finished?

8 A. Well, our submission, and based on
9 the criteria, and to be hopefully the successful
10 bidder, 20 percent we feel was the key, besides the
11 other factors we bring to, over the experience of
12 being in the business for so long, and operating at
13 that location for so long, we felt 20 percent...we
14 assumed it was higher than anybody else was paying
15 at the time, and we hoped that would be enough to
16 win the bid, and it was. So 20 percent was the
17 magic number.

18 264. Q. How do you know 20 percent was the
19 magic number, and it was not based on your minimum?

20 A. It was a key criteria. In our
21 minds, it was a key criteria, giving them more
22 growth down the road, because we had exceeded 20
23 million dollars consistently.

24 So the key for them making more money was a
25 percentage rent, and that's why we added even more

1 percentage rent on top of that, so the bridge
2 authority would make more money down the road as the
3 company got better.

4 265. Q. That's really not responsive. How
5 do you know that it was the 20 percent that was the
6 deciding factor for the bridge authority, and not
7 the four million?

8 MR. JONES: Well, I think he said
9 that...sorry, I don't want to give
10 evidence.

11
12 BY MR. SHEA:

13 266. Q. Let him answer the question, please.

14 A. We don't know...like, we don't know
15 how they...what the bridge authority was thinking
16 when they made the decision that we were the
17 successful bidder. We don't know that.

18 267. Q. Okay, and please identify for me
19 where...this is on page 119, tab 1, you said
20 that...please show me where there is a link between
21 your minimum rent offer and your percentage rent
22 offer. You had indicated that your minimum rent of
23 four million was somehow based on sales...

24 A. Yes.

25 268. Q. ...being 20 percent. So show me

1 where in that document, in those two paragraphs, you
2 link the two.

3 MR. JONES: Just those two paragraphs?

4
5 BY MR. SHEA:

6 269. Q. Well, where anywhere in your
7 document do you link the four million to 20 percent?

8 A. Well, the bridge authority is aware
9 of our sales, and I believe...

10 270. Q. I said where in the document, sir.
11 I'm not interested in what you think. I want to
12 know where in the document.

13 MR. JONES: Can I assist, Counsel?
14 Because if you...

15 271. MR. SHEA: No, you can't assist.

16 MR. JONES: Well, you're telling him
17 where in the document, but you're directing
18 him only to two paragraphs.

19
20 BY MR. SHEA:

21 272. Q. I'm asking him to...so is there any
22 place in this document where you...not you
23 personally...where Peace Bridge Duty Free links the
24 four million dollars to 20 percent sales?

25 A. Well, we have always achieved...

1 273. Q. I'm asking in the document.

2 A. Right. Well, the calculation is
3 there.

4 274. Q. The calculation of what?

5 A. Twenty percent of 20 million, 22
6 percent of the 25 million and the 24 percent over 25
7 million would be the...what the bridge authority
8 would read from our efforts.

9 275. Q. But where is...

10 MR. JONES: Counsel, if I can just
11 direct you to the...

12 276. MR. SHEA: Sir, I'm not interested in
13 your answers. I'm interested in the
14 witness' answers.

15 MR. JONES: Well, you're asking about
16 what in the document...

17 277. MR. SHEA: I'm interested in the
18 witness' answers, not your answers.

19 MR. JONES: But I'm saying if you want
20 us to sit down and review the document...

21 278. MR. SHEA: We'll move on. I'm not
22 interested in your answers. We'll move on.

23 MR. JONES: But you can't...

24 279. MR. SHEA: Sir, sir, we will move on.

1 BY MR. SHEA:

2 280. Q. So you produced...now we're going to
3 talk about negotiation of the lease. You produced,
4 I believe, e-mails from you to Mr. Menchella and
5 from Mr. Menchella to you and Mr. O'Hara from July
6 4, 2016, and this was disclosed as part of your most
7 recent disclosures.

8 I assume...you'll tell me, did you ask Mr.
9 Menchella if he had any other communications? I
10 appreciate your evidence is you're not able to
11 locate on your system any other...did you ask Mr.
12 Menchella if he was able to identify any
13 communications?

14 A. I do not believe, no.

15 281. Q. No. Would you ask Mr. Menchella if
16 he is able to identify any communications with
17 respect to the negotiation of the lease at 18.07 in
18 particular or the subject of 18.07?

19 MR. JONES: I'll take that under
20 advisement. So the question is if Mr...ask
21 Mr. Menchella if he has any more e-mails?

22 282. MR. SHEA: E-mails or other
23 communications. My next question is...

24 MR. JONES: About the...sorry, the
25 negotiation of the lease?

1 283. MR. SHEA: The negotiation of 18.07 or
2 the topic, the subject of 18.07.

3
4 BY MR. SHEA:

5 284. Q. Did Mr. Menchella produce any
6 reports or other documents for you in connection
7 with the lease?

8 A. I do not recollect any other
9 documents concerning the lease.

10 285. MR. SHEA: Will you undertake to inquire
11 of Mr. Menchella whether he produced any
12 documents or reports with respect to the
13 lease?

14 MR. JONES: Under advisement.

U/A

15
16 BY MR. SHEA:

17 286. Q. When he was cross-examined on 17 of
18 August, 2023, Mr. Mills indicated that he thought
19 that Peace Bridge Duty Free's approach was always to
20 put in a bid and then see if there were any
21 additional concessions that could happen subsequent
22 to them being identified as the top proponent. Do
23 you agree with that assessment, that that was your
24 strategy?

25 A. I don't recollect. I'm sorry, can

1 you repeat that?

2 MR. JONES: I don't specifically
3 remember that. So if you want to take us
4 to the point in the transcript?

5
6 BY MR. SHEA:

7 287. Q. Okay, let me ask you this, rather
8 than delay things. Do you agree that Peace Bridge
9 Duty Free's strategy was to put in a bid agreeing to
10 accept the lease in the form attached to the RFP,
11 and then once it was selected as the top proponent,
12 to try and negotiate amendments to that lease?

13 A. I don't have any recollection about
14 this particular strategy. We knew that the lease
15 would have to be negotiated. It was just...

16 288. Q. You said you knew the lease had to
17 be negotiated. Is it not true...you say that you
18 knew the lease had to be negotiated, but is it not
19 true that in your response to the RFP you confirmed
20 that you were not proposing any changes?

21 A. That's what...the RFP does say that.

22 289. Q. Your response to the RFP says that?

23 A. I'm sorry?

24 290. Q. Your response to the RFP says that
25 you're not proposing any changes?

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1 A. In the format of the lease I believe
2 that's what it says.

3 291. Q. Does not propose any changes to the
4 form of the lease?

5 A. Right.

6 292. Q. So you were not proposing any
7 changes to the form of the lease?

8 A. Yes, the structure of the lease.

9 293. Q. You took that to mean structure, not
10 contents?

11 A. Yes, and the lease wasn't signed.
12 We knew we had to finalize it.

13 294. Q. And you knew, though, that if you
14 didn't negotiate a lease that was acceptable to the
15 Authority, the Authority would move on to the next
16 bidder. Is that correct?

17 A. I'm not aware of their process.

18 295. Q. So let me turn up tab 7 of volume 2.

19 A. Yes.

20 296. Q. Is this letter familiar to you?

21 A. Yes.

22 297. Q. Okay. You will agree that in this
23 letter...

24 A. From Ron?

25 298. Q. From Ron that you acknowledged, that

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1 it's indicated that if the negotiations are not
2 successful, that the Authority will move on to the
3 next bidder?

4 MR. JONES: Well, it says:

5 "...The authority reserves the right
6 to cease negotiations with Peace
7 Bridge Duty Free and move on to the
8 next [inaudible] lease
9 negotiations..."

10
11 BY MR. SHEA:

12 299. Q. So is that what it says? You
13 acknowledge that you were aware that if terms could
14 not be reached, the Authority would have the right
15 to move on to the next bidder?

16 A. That was in the RFP, correct.

17 300. Q. It was in this letter that you
18 specifically signed?

19 MR. JONES: So Counsel, just to put it
20 clear to you, it was signed by Mr. O'Hara.

21 301. MR. SHEA: Well, okay, Peace Bridge Duty
22 Free I was speaking of, not specifically...

23
24 BY MR. SHEA:

25 302. Q. So you are familiar with this

1 letter?

2 A. Yes.

3 303. Q. And Mr. O'Hara signed it on behalf
4 of Peace Bridge Duty Free?

5 A. Yes.

6 304. Q. Do you have any suggestion that he
7 didn't have authority to sign this letter as the
8 president?

9 A. No.

10 MR. JONES: I wasn't suggesting that,
11 Counsel. I was just pointing out that it
12 was Mr. O'Hara, not Mr. Pearce personally.
13

14 BY MR. SHEA:

15 305. Q. So the next document I'm going to
16 ask you to turn over...now we're going to try and go
17 sequentially through these documents. So I'm going
18 to ask you to turn over to the next page.

19 A. Yes.

20 306. Q. Do you recognize this document?

21 A. Yes.

22 307. Q. This is an exchange between you and
23 Mr. Menchella...

24 A. Right.

25 308. Q. ...from July 4th of 2016.

1 A. Okay.

2 309. Q. And this is after you have been
3 selected as the proponent during the negotiations,
4 correct?

5 A. Correct.

6 310. Q. Okay. You indicate to Mr. Menchella
7 that you're identifying to him the discussion points
8 from the meeting with Ron, and I assume you meant
9 Mr. Rienas?

10 A. Correct.

11 311. Q. So can you identify where I might
12 find in this form the concept of a mandatory rent
13 abatement based on decreased sales or business?
14 Take a moment to review.

15 A. This particular document?

16 312. Q. Yes.

17 A. I did not see that in this
18 particular document.

19 313. Q. Okay, thank you. So I'm going to
20 ask you to turn the page to tab 9. This is a
21 document from Mr. Menchella to you and Mr. O'Hara.
22 Do you recognize this document?

23 A. Yes, I do.

24 314. Q. And you'll turn the page. Mr.
25 Menchella suggests specific language, the language

1 he was suggesting that you request be added to the
2 lease?

3 A. Correct.

4 315. Q. Was that language ever put to the
5 Authority?

6 A. I believe so.

7 316. Q. Okay. So this language was put to
8 the Authority and they expressly rejected it,
9 correct?

10 A. No, was it...I'm trying to think
11 whether it was sent to them or part...no, I don't
12 believe...

13 317. Q. Well, don't look further in the
14 documents. That's not going to help you. I'm
15 asking about this document.

16 A. This document.

17 318. Q. So was that language ever put to
18 the...

19 MR. JONES: Sorry, Counsel, you can't
20 tell him not to refer to other documents.

21 319. MR. SHEA: What I'm telling him is I'm
22 asking about this document. I'm asking him
23 was this language put to the Authority.

24 THE DEPONENT: Was this particular
25 document sent to the Authority?

1 BY MR. SHEA:

2 320. Q. No, that language.

3 A. I don't recall what the particular
4 language that was put to the Authority.

5 321. Q. But this language...

6 A. In 2006, I don't recall.

7 322. Q. This concept, was this concept put
8 to the Authority, that you wanted something along
9 this line?

10 A. There was discussions with the
11 Authority about if something dramatic happened, and
12 we listed those ones to the Authority, that would
13 affect it.

14 323. Q. And the Authority rejected the
15 concept of a mandatory...

16 MR. JONES: Well, Counsel...

17 THE DEPONENT: No, no. No, we had good
18 discussions with them.

19
20 BY MR. SHEA:

21 324. Q. Sorry, sorry, let's step back. Was
22 this language ever put to the Authority, yes or no?

23 A. I do not recollect that that
24 particular letter was put to the Authority.

25 325. Q. And you're not aware of any e-mail

1 where you sent this language to the Authority? You
2 disclosed all your e-mails to the Authority?

3 A. Yes, I don't...

4 326. Q. So you're not aware of any e-mail
5 where you put this to the Authority?

6 MR. JONES: Well, is there an e-mail in
7 the productions?

8 327. MR. SHEA: No, no, but that doesn't mean
9 it doesn't exist.

10 MR. JONES: Well, I'm saying there is
11 one, I think you need to put it to him.

12
13 BY MR. SHEA:

14 328. Q. There isn't one. So you're not
15 aware of any e-mail...

16 A. I don't recall.

17 329. Q. If an e-mail existed, putting this
18 to the Authority, you would have disclosed it?

19 A. Yes, we did what we had to...the
20 disclosure, yes.

21 330. Q. I'm going to ask you to turn the
22 page to the next document. Do you recall this e-
23 mail?

24 A. Yes.

25 331. Q. This is an e-mail exchange between

1 you and Mr. O'Hara, and...

2 A. I'm sorry, Karen, with Karen or...

3 332. Q. Tab 10.

4 A. Oh, I'm sorry, yes.

5 333. Q. And Mr. Pearce, you suggest to Mr.

6 O'Hara that you should add the concept of a

7 mandatory abatement if the bridge was closed...

8 A. Yes.

9 334. Q. ...based on your four million dollar

10 minimum rent. Was that concept put to the

11 Authority?

12 A. That was...again, that...I'm not

13 sure about the exact wording, but that was my

14 discussions with Karen. That's what we had

15 discussed.

16 335. Q. And the Authority didn't agree with

17 this?

18 A. Well, they did. They said we want

19 to...

20 336. Q. Where...show me where the Authority

21 agreed or identify for me where the Authority agreed

22 to a mandatory per diem abatement in the rents based

23 on a closure of the bridge?

24 A. As a concept.

25 337. Q. I asked where will I find that

1 document.

2 A. The concept of something happened to
3 traffic which would affect the business was a
4 concept we discussed with Karen.

5 338. Q. But the Authority never agreed to
6 that, did they?

7 A. Yes, yes, they did.

8 339. Q. Show me where. Identify for me
9 where you say the Authority agreed to a mandatory
10 abatement of the rent based on a reduction in
11 business.

12 A. The concept of we needed to discuss
13 the impact on lease if anything catastrophic
14 happened. They were well with...in agreement with
15 that.

16 340. Q. Sorry. Did the Authority ever agree
17 to a mandatory abatement of rent based on a
18 reduction in business?

19 A. The authority was really good and
20 upfront in saying, "We need to discuss if there is
21 something that would cause traffic and something
22 major to happen."

23 341. Q. So the answer is no?

24 MR. JONES: That's not what he said,
25 Counsel.

1 BY MR. SHEA:

2 342. Q. Okay, can you identify for me in any
3 document where the Authority agrees to a mandatory
4 abatement of rent based on anything, a reduction in
5 your business, a closure of the bridge, anything?
6 Can you point me to a written document where the
7 Authority agrees to a mandatory abatement of rent?

8 A. The authority agreed to we would
9 have...

10 343. Q. That's not my question. Can you
11 point me to a written document?

12 A. I cannot point you to a document
13 you're looking for.

14 344. Q. Thank you. You'll agree with me
15 that the language at 18.07 of the lease was
16 introduced by the Authority as opposed to Peace
17 Bridge Duty Free?

18 A. Peace Bridge Duty Free initiated
19 that because they wouldn't...because that's
20 something we initiated with them.

21 345. Q. That's not my question, sir.

22 A. Yes.

23 346. Q. Was the language added by the
24 Authority or was the language added by Peace Bridge
25 Duty Free?

1 A. Well, it's their lease, right. Is
2 that the question?

3 347. Q. No.

4 MR. JONES: Who drafted it?

5
6 BY MR. SHEA:

7 348. Q. Who drafted 18.07, the Authority or
8 Peace Bridge Duty Free?

9 A. Well, their lawyers did all the
10 work. We didn't do the legal work. Is that what
11 you mean?

12 349. Q. So you made no comments on the
13 lease?

14 MR. JONES: Well, Counsel, you have got
15 to clarify your question, because if you're
16 asking him who...

17 THE DEPONENT: Who wrote the lease.

18 350. MR. SHEA: I asked him who drafted the
19 provision. Who drafted 18.07? Who added
20 18.07 to the lease, your lawyer?

21 MR. JONES: I guess you need to clarify
22 whether who initiated the...

23 351. MR. SHEA: Sorry, sir, please let me
24 continue with my questions.

25 MR. JONES: But I'm trying to clarify

1 the question so the witness understands.

2 352. MR. SHEA: The question is clear. Who
3 added the provision to the lease? Who had
4 the pen and wrote that...

5 MR. JONES: So who drafted it?

6 353. MR. SHEA: Who...he is going to
7 understand the word "drafting" any better
8 than "wrote"?

9 MR. JONES: No, you said "who added".

10
11 BY MR. SHEA:

12 354. Q. Who wrote 18.07 and added it to the
13 lease?

14 A. The authority's lawyers did all the
15 paperwork on that.

16 355. Q. Okay. Did you propose...did Peace
17 Bridge Duty Free propose any changes to that
18 language?

19 A. Yes, we had discussions on that.

20 356. Q. Did you propose any changes to that
21 language?

22 A. Yes, we included all the different
23 elements that we believed could have
24 been...triggered that.

25 357. Q. And those...let me step back. Did

1 you...in writing, did you mark up, did you propose
2 changes to that language?

3 A. I believe we would have put...did
4 that, I believe, because that's part of the
5 discussions that we had with the Authority.

6 358. Q. Can you identify a document where
7 you proposed in writing changes to the drafting of
8 18.07?

9 A. Can I go through everything and...
10 359. MR. SHEA: Will you undertake to review
11 your documents to determine if you proposed
12 changes to article 18.07, to the wording of
13 article 18.07?

14 MR. JONES: Okay, so you're asking for
15 an undertaking to review all the documents
16 that have been produced?

17 360. MR. SHEA: I'm asking for an undertaking
18 to review the drafts of the lease that were
19 sent back by Peace Bridge Duty Free and
20 determine whether any of those drafts after
21 18.07 was introduced, including changes to
22 18.07?

23 MR. JONES: Okay. I don't know that we
24 have copies of all the drafts that went
25 back and forth, but...

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1 361. MR. SHEA: Mr. Mills will.

2 MR. JONES: Okay. So I guess what I can
3 say is we'll take it under advisement.

U/A

4
5 BY MR. SHEA:

6 362. Q. You will agree with me that 18.07,
7 in the version of the lease that was signed, is
8 identical in wording to the version that was
9 introduced into the lease by the Authority?

10 MR. JONES: So your question is once
11 that provision was added, it wasn't changed
12 after?

13
14 BY MR. SHEA:

15 363. Q. It wasn't changed afterwards.

16 A. Well, we just had the final lease,
17 right. We signed the final lease and that wording
18 was 18.07.

19 MR. JONES: Perhaps you can show him the
20 document where it was introduced and
21 compare it, because I don't think it's fair
22 to ask him to remember that. If it hasn't
23 been changed in the document, then, like,
24 that's all that he would be able to answer.
25 He has got to review it.

1 BY MR. SHEA:

2 364. Q. Okay. So we are going to go to the
3 index...we'll identify it, just so we're all clear.
4 The index, it will be at tab 2 of this volume. So
5 tab 2...sorry, tab 1...no, sorry. Volume 1, tab 2.

6 MR. JONES: And Counsel, I think your
7 question is going to be whether the
8 underlying clause is the same as the clause
9 in the final version of the lease.

10 365. MR. SHEA: Yes.

11 MR. JONES: And I think the answer is
12 simply going to be if it is, it is.

13
14 BY MR. SHEA:

15 366. Q. Well, I want to know whether you
16 agree it is or it isn't. So 18.07 at top right,
17 501, in that document, and 18.07 in the original
18 lease, are they the same wording? So there were no
19 changes? You will agree...

20 A. In the original lease?

21 367. Q. Yes.

22 A. Yes, I believe that's the exact same
23 wording.

24 368. Q. So to the extent that you requested
25 amendments, the Authority didn't agree to those

1 amendments?

2 A. In our discussions with Karen I
3 had...

4 369. Q. I didn't ask you that, sir. I asked
5 you...

6 MR. JONES: Well, let him answer the
7 question.

8 370. MR. SHEA: I want him to answer the
9 question that's asked, not the question he
10 wants to answer.

11
12 BY MR. SHEA:

13 371. Q. So please, sir, the question is to
14 the extent that you requested amendments, the
15 Authority didn't agree to those amendments?

16 MR. JONES: And he was answering your
17 question, and you interrupted him.

18 THE DEPONENT: I don't agree to that.
19

20 BY MR. SHEA:

21 372. Q. Okay. So...

22 A. I have to find where...

23 373. Q. So where did they agree to amend
24 18.07?

25 A. No, they put 18.07 in. In our

1 discussions that we had, they told us 18.07 would
2 cover the language we wanted to put in there.

3 374. Q. And you had...I'm not asking for
4 your advice, but you were represented by counsel
5 throughout this process?

6 A. Yes. We would have counsel, yes.

7 375. Q. Okay, and you will agree...do you
8 dispute that 18.07 was introduced to the lease prior
9 to your meeting with Ms. Costa on July 18th, 2016?

10 MR. JONES: I think that has been
11 established.

12 376. MR. SHEA: I'm asking him to agree to
13 that, please, sir.

14 THE DEPONENT: I believe so.
15

16 BY MR. SHEA:

17 377. Q. And I'm going to ask you to turn in
18 your 13th February...not in this book, in your 13th
19 February, 2023 affidavit...

20 A. Okay.

21 MR. JONES: Sorry, which affidavit?

22 378. MR. SHEA: I believe it is 13 February,
23 2023.
24

25 BY MR. SHEA:

1 379. Q. I'm going to ask you to...sorry, let
2 me find it here. I'm going to ask you to turn up
3 tab A or Exhibit A. So these are your notes from
4 the meeting with Ms. Costa, correct?

5 A. I think it says that Exhibit A is a
6 copy of a handout provided.

7 380. Q. But I'm asking about the handwritten
8 notes. These are your handwritten notes, correct?

9 A. Yes.

10 381. Q. So these are the notes that you
11 handed out at the meeting?

12 A. Yes.

13 382. Q. You gave these to Ms. Costa?

14 A. Yes.

15 383. Q. So everyone had them in front of
16 them at the meeting, and these are your notes down
17 the side?

18 A. Yes.

19 384. Q. Okay. So turn the page, please.

20 A. Yes.

21 385. Q. I want you to note that down the
22 side you have either "Yes", "Okay", or tick marks
23 beside various points. I'm going to suggest to you
24 that those are the points to which the Authority
25 agreed. Would that be a correct assessment?

1 A. I can't make that...I can't agree to
2 that.

3 386. Q. So why would you have ticked some
4 and put "Okay" beside some...

5 A. I don't recall from that time
6 period...

7 387. Q. You don't recall.

8 A. ...why some were ticked and...it may
9 have been said "Yes", some said ticks. I don't know
10 whether it's...I don't know whether I...

11 388. Q. Okay. So turn the page to the next
12 page.

13 A. Yes, 13.

14 389. Q. You'll note that...the 6.04, 15.04
15 don't really concern us, 15.05, and then there is:

16 "...Business disruption due to bridge
17 closure..."

18 A. Yes.

19 390. Q. And that's the language that Mr.
20 Menchella suggested that...

21 A. Yes.

22 391. Q. And there is no "Okay", no tick
23 mark, nothing beside that. You'll agree that the
24 Authority never agreed to add language like this to
25 the lease, or let me put it this way...

1 A. Yes.

2 392. Q. ...you'll agree that no language
3 parallel to this was put into the lease?

4 A. No, this language that we wanted,
5 the Authority said it is in there under 18.07. That
6 was what 18.07 would mean. So they didn't put in...

7 393. Q. Your position is that the Authority
8 told you verbally that this language is covered off
9 by 18.07?

10 A. Yes, so we had nothing to worry
11 about.

12 394. Q. Did you ever confirm that in writing
13 with the Authority? Sir?

14 A. I'm thinking. I can't recall
15 whether...

16 395. Q. You haven't produced any documents
17 where you say to the Authority, "We confirm 18.07
18 includes a mandatory abatement"?

19 A. I have nothing from the Authority
20 after our discussions...I can't recall anything that
21 says 18.07 in writing would address these
22 situations. I don't..

23 396. Q. Okay. Now, further on down...

24 A. Yes.

25 397. Q. ...you indicate that you were

1 looking for a side letter.

2 A. Yes.

3 398. Q. I call it a side letter. You
4 would...not part of the lease...agree not part of
5 the lease, but would have a letter?

6 A. Yes.

7 399. Q. So the last of your documents has
8 the notation "18.07" beside it.

9 A. Yes.

10 400. Q. And "Okay".

11 A. Yes.

12 401. Q. And that contemplates negotiation or
13 discussions of the lease, but that language isn't
14 exactly what is in 18.07, is it?

15 A. That's the language that the bridge
16 authority told us 18.07 would address.

17 402. Q. So they told you it would address
18 that, and they also told you it would address the
19 business disruption above, or are you mistaken in
20 that and they only said this?

21 A. They only said what? I'm sorry.

22 403. Q. Well, you previously indicated...

23 A. Yes.

24 404. Q. ...that the language above:

25 "...Business disruption due to bridge

1 closure..."

2 A. Right.

3 405. Q. ...would be covered by...they told
4 you that would be covered by 18.07. Now you're
5 saying...

6 A. They're the same concept, was we
7 need...we want something, and they said, "18.07 is
8 what you guys want." We said, "Okay."

9 406. Q. Okay, but so...

10 A. Between the two, I don't recall.

11 407. Q. Okay, but you'll agree with me that
12 the language below that contemplates discussions
13 relates to catastrophic events, correct?

14 A. Yes.

15 408. Q. Okay.

16 A. Beyond our control.

17 409. Q. And that impacts sales?

18 A. Traffic, yes, the traffic volume,
19 which would impact sales.

20 410. Q. And that contemplates discussions,
21 not a mandatory amendment or mandatory abatement?

22 A. Well, again, 18.07 was...what they
23 said was the...

24 411. Q. I didn't ask you that, sir. I asked
25 you...your ask was that catastrophic events beyond

1 your control, like vehicle traffic volumes, et
2 cetera, would lead to discussions, correct?

3 A. Acting in good faith to the impact
4 upon the lease.

5 412. Q. Would lead to discussions. A
6 closure of the bridge would lead to...your request
7 was that a closure of the bridge would lead to a
8 mandatory abatement, correct?

9 A. Well, it was covering a lot of
10 different issues that would affect the business. Is
11 a closure of the bridge one of the things that would
12 affect it?

13 413. Q. Let me finish. Let me clarify here.

14 A. Sure.

15 414. Q. Your language above that relates
16 to...that provides for a mandatory abatement, that
17 was based on a closure of the bridge, correct?

18 A. The key on that one was a time.
19 Now, if it was less than 24 hours, it was fine. We
20 weren't going to...

21 415. Q. But a closure?

22 A. Yes, a shutdown, anything that
23 caused the bridge...you know, that's not covered by
24 insurance.

25 416. Q. So a closure that wasn't covered by

1 insurance, you would get a mandatory abatement?

2 A. Well, here, again, I repeat myself.
3 I don't recall the flow of...between these two of
4 the conversation. All I do recall is them telling
5 us 18.07 would...but...

6 417. Q. What I'm trying to understand, sir,
7 is you divided this into two concepts. These are
8 your notes.

9 A. Yes.

10 418. Q. So you divided it into the concept
11 of a mandatory abatement based on a closure, and the
12 concept of discussion based on something
13 catastrophic. You must have meant something
14 different between the two, didn't you?

15 A. The same concept we wanted
16 addressed, and that's two different ways, and this
17 is...18.07 is what we...the bridge gave us to
18 address it.

19 419. Q. But the Authority agreed to engage
20 in consultation, correct?

21 A. Correct.

22 420. Q. They never agreed to a mandatory
23 abatement?

24 A. It's not in the lease.

25 421. Q. And you'll also agree with me that

1 the bridge never closed? During Covid the bridge
2 never closed. The Peace Bridge never closed.

3 A. Yes.

4 422. Q. Okay, so the Peace Bridge stayed
5 open.

6 A. Yes.

7 423. Q. Your original proposition or your
8 initial request that there be a mandatory abatement
9 if the bridge closed wouldn't apply during Covid.
10 The bridge never closed.

11 A. 18.07 wasn't...the purpose of that
12 is to address the impact of anything major, and that
13 was the purpose of 18.07, that we would have fair,
14 reasonable consultations to address that.

15 424. Q. So address a catastrophic event
16 beyond your control?

17 A. Yes.

18 425. Q. And that you would have discussions?

19 A. And work towards a reasonable
20 solution.

21 426. Q. But there was no fixed abatement.
22 So your concept originally for a closure was a per
23 diem rent abatement?

24 A. We threw up ideas, but they
25 couldn't...

1 427. Q. The authority didn't...

2 MR. JONES: Counsel, he is trying
3 to...you have cut him off a number of times
4 now. Just I would ask that you let him
5 finish his answer before interrupting.

6 428. MR. SHEA: Just to be clear, I
7 appreciate that he wants to speak, but this
8 is going to go into tomorrow the way we're
9 going now. Are we clear on that?

10 MR. JONES: Well, Counsel, I still say
11 you have to let him answer your question.

12 429. MR. SHEA: Okay, listen, I will let him
13 answer...spend as long as he wants, as long
14 as we recognize that we may be here again
15 tomorrow at 10 o'clock if I can't finish
16 today.

17
18 BY MR. SHEA:

19 430. Q. You're available tomorrow at 10?

20 A. Yes, I am.

21 431. Q. Okay, good, okay, that's fine. So
22 keep going. By all means, keep going.

23 MR. JONES: I don't want to interrupt
24 the flow here, but are we at a stage where
25 it's appropriate to take a break?

1 432. MR. SHEA: Sure, I mean, that's fine,
2 sure, absolutely fine. So you recognize
3 that you can have no discussions with your
4 client during that?

5 MR. JONES: Of course, Counsel.

6 433. MR. SHEA: So you can't
7 discuss...because you're under cross-
8 examination, you're not allowed to talk to
9 him about...or talk to anyone else.

10 THE DEPONENT: Okay, fair enough.

11 434. MR. SHEA: So we'll take a break now
12 until 12.

13
14 --- upon recessing at 11:40 a.m.

15 --- A BRIEF RECESS

16 --- upon resuming at 12:03 p.m.

17
18 JIM PEARCE, resumed

19 CONTINUED CROSS-EXAMINATION BY MR. SHEA:

20
21 435. Q. Sir, I just want to take you back.
22 I just want to clarify one point. So we were
23 looking at the document at Exhibit A, and I just
24 want to make sure I understand your evidence
25 correctly.

1 Your assertion is that your understanding
2 was that 18.07 addressed your concerns with respect
3 to complete closure of the bridge or catastrophic
4 event. So your understanding was that 18.07
5 addressed that, those two concerns?

6 A. Any event that would affect the
7 business.

8 436. Q. Okay, but I want to be clear.

9 A. Yes.

10 437. Q. Your understanding was 18.07 would
11 address that?

12 A. That is what we were told.

13 438. Q. And you'll agree that 18.07
14 contemplates consultation and not a mandatory
15 abatement?

16 A. 18.07 reads consultation and 18.07
17 reads...

18 MR. JONES: Counsel, do you want to take
19 him to the language of 18.07 again?

20 439. MR. SHEA: He was looking through it, so
21 I thought he was going to it.

22 THE DEPONENT: Yes, I found it here.

23 MR. JONES: Nobody is disputing the
24 language in 18.07.

1 BY MR. SHEA:

2 440. Q. And that addressed all your
3 concerns, the concept of consultation?

4 A. The concept, yes, and discussing the
5 impact on the lease and in good faith coming to
6 something, a resolution.

7 441. Q. But you agreed to 18.07 which says
8 "consultation"?

9 A. I agree that the wording is what the
10 wording is.

11 442. Q. Okay, and you...

12 A. It discussed the impact of such...

13 443. Q. You can't point to any documents...

14 A. ...a change to the lease.

15 444. Q. You can't contemplate...you can't
16 point me to any written document where the Authority
17 agrees to a mandatory abatement of the rent or a
18 mandatory amendment to the lease?

19 MR. JONES: Under what circumstances?
20

21 BY MR. SHEA:

22 445. Q. Under any circumstance. Is there
23 any provision that you are pointing to in your...any
24 written document?

25 A. It was verbal, the discussion we had

1 with the Authority.

2 446. Q. Thank you, verbal, thank you. So
3 you'll agree with me...well, maybe you won't agree
4 with me. Let's take the document. So the Authority
5 has been consistent, has it not, that there is no
6 provision in the lease that entitles Peace Bridge to
7 a mandatory abatement?

8 MR. JONES: What does that mean,
9 Counsel?

10 THE DEPONENT: I don't know.

11 MR. JONES: Like...

12
13 BY MR. SHEA:

14 447. Q. Sorry, there is no provision in the
15 lease that obliges the Authority to agree to abate
16 the rent, to a fixed abatement?

17 MR. JONES: Counsel, you have asked him
18 that question 10 times.

19 448. MR. SHEA: And I might ask him 10 times
20 again. Sir, sir, I asked him whether the
21 Authority has been consistent in its
22 position that the lease does not require
23 that it give Peace Bridge Duty Free an
24 abatement.

25 MR. JONES: From what time period are

1 you referencing because I don't...

2 449. MR. SHEA: Sir, you can interrupt and
3 make this as difficult and long as
4 possible. It's okay with me. So let's
5 move on.

6 MR. JONES: Counsel, no...

7 450. MR. SHEA: Let's move on to tab 12.

8 MR. JONES: ...you have got to be fair
9 to the witness.

10 451. MR. SHEA: Let's move on to tab 12,
11 please, in volume 2. So do you...sorry,
12 please turn up that document.

13 THE DEPONENT: Yes.

14
15 --- EXHIBIT NO. 3: Index to Peace Bridge Duty Free
16 disclosures

17
18 BY MR. SHEA:

19 452. Q. So do you recognize this e-mail
20 exchange?

21 A. Yes.

22 MR. JONES: Take your time to review it.

23 THE DEPONENT: Okay.

24 MR. JONES: This is October 17, 2016.

1 BY MR. SHEA:

2 453. Q. You will agree with me this
3 document, this e-mail, was not included in your
4 disclosures?

5 MR. JONES: This is after the lease is
6 signed.

7 454. MR. SHEA: I just asked whether it was
8 included in the disclosures.

9 THE DEPONENT: I don't know.

10
11 BY MR. SHEA:

12 455. Q. It was not.

13 A. Okay.

14 MR. JONES: Sorry, where would...

15 THE DEPONENT: Yes.

16
17 BY MR. SHEA:

18 456. Q. You'll agree that this e-mail
19 exchange involves you sending a template to Ms.
20 Costa with respect to how rent is to be calculated
21 under the lease?

22 A. Correct.

23 457. Q. And Ms. Costa responded to you,
24 saying clearly:

25 "...There is no provision in the lease to

1 reduce the minimum rent due for any
2 reason..."

3 A. The lease always has been not very
4 clear, we thought, in how it is...to live with it
5 and to actually live within it. So we wanted to be
6 clear on our payment schedule from a cashflow
7 standpoint, of course, and so I sent im to Karen,
8 and is this how the rent...we thought...I don't know
9 how correctly.

10 We thought the rent...the lease meant that
11 we would make the extra payment on a monthly basis.
12 So if we were over the threshold, we would make the
13 difference up. That's...

14 458. Q. You're not answering my question,
15 sir. My question was did she not tell you, "There
16 is no provision in the lease to reduce the minimum
17 rent due for any reason"? Did she not tell you
18 that?

19 A. We didn't ask her that.

20 459. Q. Did she not tell you that? I'm not
21 asking you what she asked you.

22 A. In the context of...

23 MR. JONES: Counsel, if you're just
24 asking him to read the e-mail...

25 460. MR. SHEA: I'm asking whether he agrees

1 that she told him that, "There is no
2 provision in the lease to..."

3 MR. JONES: And I think he is trying to
4 provide you the context.

5 THE DEPONENT: The context of this,
6 we're going to pay more as we went along,
7 and that's...you know, not less. We're
8 going to pay more, and that's what Karen
9 and I were going back and forth on the
10 model because it was different than the
11 previous lease, we believed, and we wanted
12 to make sure, and she came back and said,
13 "Basically it's how the previous lease..."

14
15 BY MR. SHEA:

16 461. Q. Where does she that in this?

17 A. That's the whole concept or...

18 462. Q. Where does she say that? What you
19 just said, where does she say that in this e-mail?

20 MR. JONES: He is providing you with the
21 context of what was going on.

22 THE DEPONENT: That's why...this is all
23 about how we pay them, and when we pay
24 them, to make sure we're all in agreement.
25 That is what this is about. It wasn't

1 about us not wanting to pay rent. We
2 thought we had to pay more upfront, and we
3 were going to do that, and then she changed
4 it that we don't have.

5
6 BY MR. SHEA:

7 463. Q. The question is simple, sir. Did
8 she or did she not tell you there were no provisions
9 in the lease to reduce the minimum rent due for any
10 reason? Did she not tell you that?

11 MR. JONES: No, Counsel, you're...

12 THE DEPONENT: She didn't tell me that.

13 MR. JONES: We're not answering that
14 question.

15 464. MR. SHEA: Okay. Refuse it. Sorry,
16 sir...

17 MR. JONES: Listen...

18 465. MR. SHEA: Sir, refuse questions if you
19 don't want to answer questions.

20 MR. JONES: He has answered the
21 question.

22 466. MR. SHEA: So you're refusing to answer
23 the question, thank you.

24 MR. JONES: No, we did not refuse the
25 answer...

467. MR. SHEA: You just said you were going
to refuse.

MR. JONES: He answered the question.

468. MR. SHEA: You just said...no, he did
not answer.

MR. JONES: I don't want to get into a
dispute with you.

THE DEPONENT: It's a clarification on how we want to pay them.

MR. JONES: He has answered the question on clarification. I don't see any need to get...

BY MR. SHEA:

469. Q. Sir, do you acknowledge that she told you, "There is no provision in the lease to reduce rent for any reason"?

A. I acknowledge she sent me an e-mail.

470. Q. Thank you.

A. She sent me an e-mail.

471. Q. That said that?

MR. JONES: Counsel, he...

472. MR. SHEA: Sir, sir, I appreciate that
you like to get into disputes with those
examined. I don't. I would like to just

1 proceed with my questions. If you want to
2 refuse, please feel free to do that. So
3 let's move on, please.

4 MR. JONES: Because you interrupted the
5 witness' answer and did not let him finish
6 his answer.

7 473. MR. SHEA: I interrupted an answer that
8 was not responsive to my question.

9 MR. JONES: No.

10 474. MR. SHEA: Yes.

11 MR. JONES: His last answer, you
12 interrupted him. You have interrupted him
13 a number of times.

14 475. MR. SHEA: Sir, I interrupt when he is
15 not responsive.

16 MR. JONES: That's not acceptable.

17 476. MR. SHEA: Sir, if you want to terminate
18 these examinations now, please do so.
19 Otherwise, let me proceed.

20
21 BY MR. SHEA:

22 477. Q. So next, you will agree that prior
23 to 2016 your sales numbers were dropping at the duty
24 free?

25 A. I...

1 MR. JONES: Do you want to take him to a
2 document?
3

4 BY MR. SHEA:

5 478. Q. Certainly we'll take him to a
6 document.

7 A. Yes, it should be in there
8 somewhere.

9 479. Q. Sure, but you'll agree they were
10 dropping?

11 A. Let's take a look.

12 480. Q. Okay. So I'm going to take you to
13 tab 6, and we have the 2012 numbers for sales in
14 your 2013 financials.

15 A. For a note, these sales are the
16 sales...include sales at Hamilton Airport.

17 481. Q. How big were the sales...but all of
18 them include sales at Hamilton Airport?

19 A. Right, and they're depending on
20 traffic and different things at the airport. So we
21 would have to look at sales for Peace Bridge Duty
22 Free.

23 482. Q. So I'm just asking whether you agree
24 that your sales declined from 24 million in 2012 to
25 21.7 million in 2015.

J. Pearce - 98

1 A. I'm not agreeing to that because I
2 don't have the Peace Bridge Duty Free sales in front
3 of me.

4 483. Q. Are you agreeing that, based on your
5 financial documents, Peace Bridge Duty Free, as an
6 enterprise, revenues dropped or sales dropped from
7 24 million to 21.7 million between 2012 and 2015?

8 MR. JONES: So Counsel, can you take us
9 to the page that you're referring to?

10 484. MR. SHEA: The 2013 audited financials,
11 sales under the statement of income, and...

12 MR. JONES: Okay, so I have got the...so
13 these are December 31, 2013?

14 485. MR. SHEA: Yes, sales, statement of
15 income.

16 MR. JONES: Are you looking at the third
17 page?

18 THE DEPONENT: 2013 you said? Yes, I'm
19 looking at 2013. 2015, is that you want me
20 to look at?

21
22 BY MR. SHEA:

23 486. Q. I'm asking you to look at...

24 A. Yes, audited...

25 487. Q. ...the audited financial sales

1 numbers for 2012.

2 A. 2012, okay.

3 488. Q. Well, 2013, it's a comparative.

4 A. Yes, they're still there.

5 489. Q. 24.1 million.

6 A. Yes, that is what the financial
7 statements say, including Hamilton Airport.

8 490. Q. And what percentage of your sales
9 typically include Hamilton Airport?

10 A. It's not typical. I would need to
11 have the numbers in front of me.

12 491. Q. Do you generate a million dollars a
13 year from Hamilton?

14 A. We have.

15 492. Q. Okay.

16 A. But I don't have that number in
17 front of me.

18 493. Q. Okay, but overall your sales
19 declined...

20 A. Including Hamilton Airport.

21 494. Q. ...including Hamilton Airport, but
22 your sales declined?

23 A. Yes.

24 495. Q. And 21.7 million in 2015.

25 MR. JONES: So where are you getting

1 that number?

2 496. MR. SHEA: The audited financials for
3 2015, which are in that document package,
4 again, page 2 of the audited financials for
5 2015.

6 MR. JONES: So sales of 21,728,000, is
7 that what you're looking at?

8 497. MR. SHEA: 21,728,000, that's correct.

9
10 BY MR. SHEA:

11 498. Q. Do you agree with that, that your
12 sales in 2015 were 21.7, including Hamilton?

13 A. The sales in...yes, sales in
14 Hamilton...including Hamilton for 2012 are 24.1.
15 Gross margin was 10,500,000.

16 499. Q. I didn't ask you that, sir. I asked
17 you whether you agreed what the sales were,
18 including Hamilton.

19 A. The sales are per the financial
20 audited statements and the gross margins were very
21 similar.

22 500. Q. And I'm going to show you your
23 December 2020...I'll give you another
24 copy...December, 2020 financial statements.

25 A. Yes.

1 501. Q. And 2019 was a full year of
2 operations unimpacted by Covid, correct?

3 A. It was impacted by renovations.

4 502. Q. Okay. Renovations and you will
5 agree that your sales in 2019 were 21.3 million?

6 A. Including Hamilton.

7 503. Q. Including Hamilton.

8 A. I agree to the audited financial
9 statements.

10 504. Q. Okay, and you also agree with me
11 that when you submitted the response to the RFP in
12 2016, you recognized that traffic over the bridge
13 had been declining, correct?

14 MR. JONES: Is there a document that you
15 want to put him?

16
17 BY MR. SHEA:

18 505. Q. I'll put a document to him. So in
19 your...in tab 1, which is your...the lease, your RFP
20 response, on the top it is page 109, identified at
21 the top.

22 A. Yes.

23 506. Q. One of the areas that you identify
24 as a concern is vehicle traffic issues, including a
25 steady decline in volumes.

1 A. Correct.

2 507. Q. So you will agree that there had
3 been a 38 percent decline in traffic since 2000?

4 A. I don't have that number.

5 508. Q. It's in your document.

6 A. Okay.

7 MR. JONES: Sorry, take a minute
8 to...Mr. Pearce, take a minute to read the
9 page.

10 THE DEPONENT: Okay.

11 MR. JONES: So you're at page 109.

12 THE DEPONENT: Okay. I believe that to
13 be correct, because we did have that.

14

15 BY MR. SHEA:

16 509. Q. And your own sales had declined 12
17 percent. Sales declined 12 percent related to
18 passenger vehicle traffic...passenger vehicles,
19 correct?

20 A. I don't have that number.

21 510. Q. That's also right there.

22 A. Okay.

23 MR. JONES: So Jim, read the whole
24 paragraph.

25 THE DEPONENT: Okay.

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1 MR. JONES: Take a minute.

2 511. MR. SHEA: If you don't mind, while
3 you're reading that, we'll have the 2020
4 audited financials...I believe we're at
5 Exhibit 4.

6 THE DEPONENT: Okay.

7
8 --- EXHIBIT NO. 4: 2020 audited financials for Peace
9 Bridge Duty Free

10
11 BY MR. SHEA:

12 512. Q. Do you see that?

13 A. Yes.

14 513. Q. So you agree that your own sales
15 declined 12 percent relating to passenger vehicles?

16 A. I would believe that would be
17 correct.

18 514. Q. Okay. I'm going to ask you to turn
19 to 122 of that document. I'm going to refer you to
20 forecasted sales, which is the title, and the sixth
21 paragraph down, the one...the two paragraphs above
22 the forecasted sales, and it says:

23 "...PBDF's estimated spend per customer
24 segment..."

25 MR. JONES: So Jim, take a minute to

1 read the page.

2 THE DEPONENT: Okay. Okay.

3
4 BY MR. SHEA:

5 515. Q. And you'll agree that you identified
6 a number of factors that drove or impacted your
7 sales and traffic over the bridge was only one of
8 them?

9 A. In any operation, traffic in all
10 parts of retail, the marketing, all go into it.

11 516. Q. And you had a plan to address the
12 steady decline in traffic through increasing per
13 vehicle sales. Is that correct?

14 MR. JONES: So take a minute to read the
15 page, Jim.

16 THE DEPONENT: I don't believe we...I
17 don't recall we believed bridge traffic was
18 continuing to decline. We believed with
19 the new operation...

20
21 BY MR. SHEA:

22 517. Q. So you didn't...let me clarify. You
23 didn't think bridge traffic was declining?

24 A. No, we knew it was declining, but we
25 didn't believe it would always, forever, decline.

1 518. Q. Where am I going to find that in
2 this document?

3 A. Well, you don't.

4 519. Q. In fact, doesn't what your document
5 talk about is that you were going to use your
6 innovative strategies to...including marketing et
7 cetera, to address that, by increasing per vehicle
8 sales?

9 A. It would address the business in
10 general by these...by doing this. Is that the
11 question?

12 520. Q. No, I'm saying that you acknowledge
13 at page 109...

14 A. So these things would drive our
15 forecasted sales in a retail environment.

16 521. Q. You indicate in 109...

17 A. Yes.

18 522. Q. ...that there has been a decline in
19 sales.

20 A. Yes.

21 523. Q. You have acknowledged that?

22 A. Yes.

23 524. Q. And you, do you not, indicate, or do
24 you not intend to indicate that you will be able to
25 address any declining sales by way of various

1 strategies that you have employed or will employ?

2 MR. JONES: Where does it...

3 THE DEPONENT: No, we're going to drive
4 sales by all these things we're going to
5 employ, these...

6
7 BY MR. SHEA:

8 525. Q. Sales to individuals?

9 A. Sales to the business.

10 526. Q. Okay, okay, let's move on. So my
11 next question is back at page 122, you identify a
12 projection, do you not?

13 A. At the bottom?

14 527. Q. Yes.

15 A. Yes.

16 528. Q. And that projection indicates that
17 notwithstanding that your sales were...your sales
18 including Hamilton were considerably less than 26.3.
19 So you indicated that the sales as set out in your
20 financial statements included Hamilton. So not all
21 of them were Peace Bridge Duty Free at the Peace
22 Bridge.

23 I'm assuming that these numbers are just
24 Peace Bridge and do not include Hamilton?

25 A. Correct.

1 529. Q. Okay, so you were projecting that
2 your sales...you would be able to grow sales from 26.3
3 in year 1, and year 1 would have been 2017?

4 A. Yes, 20-year lease, yes.

5 530. Q. Okay. So isn't that an immediate
6 jump right away in year 1?

7 MR. JONES: But just I think these
8 numbers...Counsel, it says they include
9 currency exchange and subtenant revenues.

10 531. MR. SHEA: Sure, and...

11 MR. JONES: Is that different?

12 THE DEPONENT: Yes, that adds to it.

13
14 BY MR. SHEA:

15 532. Q. Well, it adds to it, but I'm
16 saying...that's not really the question. The
17 question is you were projecting from 26.3 all the
18 way up in year 20 to 46.4.

19 A. Correct.

20 533. Q. Year 1 was 2016. I'm going to put
21 it you never hit any of these targets, did you?

22 A. We never reached 26.3, no.

23 534. Q. You never hit 26.3, no, correct.
24 You never hit 26.3?

25 A. In the new lease, no.

1 535. Q. Thank you. So I'm wondering you
2 can't discount, can you, that the level of sales
3 you're now experiencing, right now, is based in part
4 on the continuation of pre-Covid trends of declining
5 traffic?

6 A. I'm sorry?

7 536. Q. Can you discount that the
8 decline...that the sales you're now experiencing,
9 that the decline is based, at least in part, on a
10 continuation of pre-Covid trends in reductions in
11 traffic over the bridge?

12 A. I don't agree, no. The decline in
13 traffic is related to the pandemic.

14 537. Q. How do you know that?

15 A. It's...

16 538. Q. Just your guess?

17 A. My guess and in communication with
18 the Frontier Duty Free Association also, which has
19 the same conclusion Canada-wide.

20 539. Q. Will you undertake to disclose your
21 communications with the Frontier Duty Free
22 Association, indicating trends in sales Canada-wide
23 and traffic Canada-wide?

24 A. I believe it's...

25 540. Q. You just referenced it.

1 A. I believe it's...the association
2 sent a letter to the Authority.

3 541. Q. I didn't ask you that. I asked your
4 communications with Frontier Duty Free Association
5 with respect to traffic and sales trends.

6 MR. JONES: We'll take that under
7 advisement.

U/A

8 542. MR. SHEA: How do you take under
9 advisement disclosure of a document he
10 asserts?

11 MR. JONES: You haven't actually
12 established any of that, but you're asking
13 him...anyway, I have taken it under
14 advisement. You have my answer.

15 543. MR. SHEA: Okay.

16
17 BY MR. SHEA:

18 544. Q. You will agree with me that if this
19 trend is not related to Covid...so if your current
20 sales levels are not related to Covid, 18.07 doesn't
21 apply?

22 MR. JONES: Sorry?

23 545. MR. SHEA: You will agree that if this
24 current lack in traffic is not related
25 to...

1 MR. JONES: You're asking hypothetically
2 if traffic declined...

3 546. MR. SHEA: No, I'm asking him whether he
4 takes the position that 18.07 applies to
5 anything other than changes in legislation.

6 MR. JONES: You're asking him to
7 interpret 18.07.

8 547. MR. SHEA: I'm asking what his position
9 is on 18.07.

10 MR. JONES: No. Counsel, so you're...

11 548. MR. SHEA: Refuse the question or answer
12 it, please.

13 MR. JONES: Okay, well, I'm trying to
14 understand the question.

15 549. MR. SHEA: No, just...you understand the
16 question perfectly. You're trying to
17 stall. Refuse the question or answer it,
18 please.

19 MR. JONES: I'm not trying to stall.
20 I'm trying to understand what you're
21 getting at.

22 550. MR. SHEA: I'll ask the question. Then
23 either refuse it or allow him to answer it,
24 please. Will you undertake to produce your
25 communications...

1 MR. JONES: No, the...

2 551. MR. SHEA: I'm asking the question.

3 MR. JONES: But that's not the question
4 we were talking about. You were talking
5 about 18.07.

6 552. MR. SHEA: Sorry, that is the question.
7 I'm asking him whether he will produce the
8 documents. You said under advisement.

9 MR. JONES: Yes.

10 553. MR. SHEA: Now, I'm going on to the next
11 question, and that is do you agree that
12 article 18.07 does not...I'm trying to
13 rephrase this...does not apply to general
14 trends in reduced traffic? So 18.07 has
15 a...

16 THE DEPONENT: I don't agree.

17

18 BY MR. SHEA:

19 554. Q. Okay. Why? What do you think...do
20 you think 18.07 applies every time your traffic
21 declines?

22 A. It applies to what is said in the
23 notes of the discussions with the Authority, and we
24 just went through that, in the event of any
25 catastrophic event.

1 555. Q. But not generalized declines in
2 traffic?

3 MR. JONES: Counsel, you're asking him
4 really what would be a court's decision. /R

5 556. MR. SHEA: Okay, so you're refusing the
6 question. Just refuse then, please.

7
8 BY MR. SHEA:

9 557. Q. So on to the next issue. So remind
10 me when Peace Bridge closed their doors. When did
11 the duty close its doors?

12 A. March 20th, 21st.

13 558. Q. 2020, right?

14 A. Yes.

15 559. Q. And you opened up again November...

16 A. September 19th, 2021.

17 560. Q. So Peace Bridge Duty Free didn't
18 discuss closing the store with the Authority, did
19 it?

20 A. No.

21 561. Q. No, and when did Peace Bridge Duty
22 Free inform the Authority that the store was being
23 closed?

24 A. I don't have that date.

25 562. MR. SHEA: Can you undertake to find

1 that date?

2 MR. JONES: Wouldn't your client know?

3 563. MR. SHEA: I'm asking a question.

4 Refuse it or answer it, please. Will you
5 undertake to provide the date when you
6 assert Peace Bridge Duty Free informed the
7 Authority that the store was being closed?

8 MR. JONES: Okay, when advised the store
9 was closed?

10 564. MR. SHEA: Was being closed.

11 MR. JONES: I think it was closed at
12 that time. I don't want to argue with you
13 about it.

14
15 BY MR. SHEA:

16 565. Q. So maybe that's the answer, the
17 answer to did you ever tell them you were going to
18 close the store, or did you just close it and tell
19 them afterwards?

20 A. We closed the store.

21 566. Q. And told them afterwards, okay.

22 MR. JONES: So you're fine with it, it
23 was after the store was closed?

24 567. MR. SHEA: Yes, that's fine.

25

1 BY MR. SHEA:

2 568. Q. So you never told them in advance
3 you were closing the store. You just closed it, and
4 they found out about it.

5 So you will agree that by April 3rd, Peace
6 Bridge had not paid rent for April, 2020?

7 A. Correct.

8 569. Q. And I'm going to ask you to turn up
9 tab 13. So Ms. Costa sent this to letter Mr. O'Hara
10 and to you?

11 A. Yes.

12 570. Q. And the letter says what it says,
13 but Ms. Costa asserts that:

14 "...The lease does not provide for any rent
15 abatement due to decline in sales..."

16 Correct?

17 A. Her letter says that.

18 571. Q. And your response...or Greg's
19 response, Mr. O'Hara's response, is over at the next
20 tab.

21 A. Correct.

22 572. Q. And in this letter Mr. O'Hara
23 triggers...

24 MR. JONES: I don't think that's a fair
25 characterization, because isn't Mr.

1 O'Hara's response in reply to Mr. Rienas'
2 e-mail?

3 573. MR. SHEA: You're correct.

4
5 BY MR. SHEA:

6 574. Q. So did Mr. Rienas send you an e-mail
7 indicating that they would...the rent was due?

8 A. I don't recall.

9 575. Q. Okay. So what was this e-mail in
10 response to, do you know?

11 MR. JONES: Read the whole thing.

12 THE DEPONENT: Sorry, the question?

13
14 BY MR. SHEA:

15 576. Q. What was this e-mail sent in
16 response to?

17 A. I do not know. I'm trying to just
18 read it, like you are. I don't know.

19 577. Q. I have read it already, many times.

20 MR. JONES: Take your time, Jim. So
21 you're asking what Greg's April 3rd e-mail
22 is in response to?

23 578. MR. SHEA: Yes.

24 THE DEPONENT: To Ron's April 1st, which
25 is a response to Greg's April 1st. Is that

1 correct?

2
3 BY MR. SHEA:

4 579. Q. I don't know. You tell me.

5 A. I don't...

6 580. Q. Was it made in response to a request
7 to delay rent?

8 A. I don't know.

9 MR. JONES: Do you want to take him to
10 some documents to provide some context?

11
12 BY MR. SHEA:

13 581. Q. I'm looking at the next page. You
14 asked him to read the whole...the next page says:
15 "...Further to our telephone conversation
16 last Thursday, March 26th, have you made a
17 decision regarding my request to delay our
18 rent?..."

19 And the next...the response above it is:

20 "...There is no provision for delay or
21 abatement of rent. So we require payment
22 in accordance with the terms of the
23 lease..."

24 And then am I correct that Mr. O'Hara then comes
25 back and indicates that he is disappointed and

1 triggers 18.07? Correct?

2 A. Yes, I'm reading this. Is that a
3 question for me?

4 582. Q. Yes.

5 A. Okay.

6 583. Q. You were copied on it?

7 A. Yes.

8 584. Q. So Peace Bridge Duty Free, at this
9 point in time, is triggering its rights under 18.07?

10 MR. JONES: I don't know if he
11 characterized it as "triggering", but the
12 e-mail says what it says.

13 585. MR. SHEA: I asked him a question.
14 Please let him answer. If he wants to say
15 he doesn't know, he can say he doesn't
16 know.

17 THE DEPONENT: Okay.

18
19 BY MR. SHEA:

20 586. Q. So were you intending to rely on
21 your rights under 18.07 in sending this?

22 A. I do not know.

23 587. Q. Okay, fair enough. If you turn the
24 page to the next document, this is a...

25 MR. JONES: For clarity, Counsel, he

1 didn't send the e-mail.

2 588. MR. SHEA: He said he didn't know.

3
4 BY MR. SHEA:

5 589. Q. Please turn the page, sir. So this
6 is an April 3rd letter from Peace Bridge Duty Free
7 signed by Mr. O'Hara. Were you aware of this
8 letter? Are you familiar with this letter?

9 A. Yes.

10 590. Q. So in this letter you'll agree that
11 Peace Bridge Duty Free is asking for a meeting?

12 MR. JONES: Take a minute to read the
13 whole letter, Jim.

14 THE DEPONENT: Okay. Okay.

15
16 BY MR. SHEA:

17 591. Q. So you're asking for a meeting to
18 discuss the situation that has developed as a result
19 of Covid and the government measures, correct?

20 A. And the impact of 18.07.

21 592. Q. And triggering 18.07. Turn the page
22 over to tab 16, please.

23 A. Okay.

24 593. Q. Are you familiar with this letter?
25 Have you seen it before?

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1 A. Yes, I have seen this letter before.

2 594. Q. And this is an acknowledgement April
3 6th of your letter of April 3rd, correct?

4 A. Yes, it is an acknowledgement.

5 595. Q. An acknowledgement of the situation
6 that you're encountering?

7 A. It's a response to the request to
8 the Board of Directors for a meeting.

9 596. Q. And do they agree to a meeting?

10 A. They suggest we have a discussion
11 with the management.

12 597. Q. And you will agree with me that a
13 meeting was arranged?

14 A. I believe it's...

15 598. Q. If you turn the page over...

16 A. Yes, yes, yes.

17 599. Q. So a meeting was arranged between
18 Peace Bridge Duty Free and the Authority?

19 A. Correct.

20 600. Q. Okay. Turn the page over to the
21 next page, please, 18. So were you at the meeting
22 that took place?

23 A. Yes.

24 601. Q. And that meeting took place on April
25 11th, did it?

1 A. I'm not 100 percent sure of the
2 date, but in that time frame.

3 602. Q. Around April 11th, April, 12th,
4 April 13th.

5 MR. JONES: I think the 11, Counsel,
6 just reading it, it's in reference to a
7 time.

8 603. MR. SHEA: Well, no, I'm just asking
9 whether it took place on the 11th.

10 THE DEPONENT: I couldn't verify the
11 date, but it's in that time frame.

12
13 BY MR. SHEA:

14 604. Q. Okay, and did you keep any notes
15 from that meeting?

16 A. I don't recall having any notes from
17 that.

18 605. Q. You and Mr. O'Hara didn't exchange
19 any e-mails after that meeting or before that
20 meeting?

21 A. I don't recall us exchanging that
22 when we were going in there.

23 606. Q. But on April 16th...

24 A. Yes.

25 607. Q. ...Mr. Rienas sends to Mr. O'Hara a

1 rent deferral, a draft rent deferral agreement?

2 A. Okay.

3 608. Q. Are you familiar with this?

4 A. The agreement, yes, I have seen it.

5 609. Q. And you saw the agreement?

6 A. I have seen it, yes, I have seen the
7 agreement.

8 610. Q. The draft?

9 A. Yes, I would have seen the draft.

10 611. Q. Okay. Turn the page over, please.

11 This is the next day. Were you familiar with this
12 e-mail? Have you seen this e-mail before?

13 A. Yes, I have seen this before.

14 612. Q. So Mr. O'Hara responds,
15 acknowledging receipt of the rent deferral
16 agreement, and indicates they'll get back the next
17 week?

18 A. Correct.

19 613. Q. Okay. Turn the page then to 28.

20 A. Okay.

21 614. Q. This is a...it appears to be an e-
22 mail from Mr. O'Hara to individuals?

23 A. M'hm.

24 615. Q. A John Marsh?

25 A. Yes.

1 616. Q. A Ben Mills, we know who Ben Mills
2 is.

3 A. Yes.

4 617. Q. And copied to you.

5 A. Correct.

6 618. Q. And he is looking for comments on
7 a...

8 MR. JONES: Counsel, I don't know...this
9 looks like an e-mail to counsel. I don't
10 know how it ended up in here.

11 619. MR. SHEA: It's copied to Mr. Marsh.
12 Mr. Marsh isn't counsel.

13 MR. JONES: Mr. Bedard is.

14 620. MR. SHEA: Yes, but...

15 MR. JONES: Oh, sorry, Mr. Mills.

16 621. MR. SHEA: So it's disclosed.

17 MR. JONES: It may been disclosed
18 inadvertently, but we're not going to get
19 into what discussions were with counsel.

20 622. MR. SHEA: I'm not asking you to get
21 into what discussions were with counsel.

22
23 BY MR. SHEA:

24 623. Q. So Mr. O'Hara sends to you and Mr.
25 Marsh a draft of what he proposes to send to Mr.

1 Rienas in response, dealing with the rent deferral.
2 Is that accurate?

3 A. Well, I'm making the assumption that
4 this hasn't been sent to Ron as of yet.

5 624. Q. Well, I think if you turn the page,
6 you'll see what was sent to Ron.

7 A. Okay, on the 21st. So it's a good
8 assumption, then.

9 625. Q. Yes.

10 A. Yes.

11 MR. JONES: So why don't we just review
12 that...

13 626. MR. SHEA: Because I don't have any
14 questions on this e-mail, please.

15 MR. JONES: The one that they sent to
16 counsel.

17 627. MR. SHEA: So did you receive...

18 MR. JONES: Counsel...

19 628. MR. SHEA: Sorry, sir...

20 MR. JONES: You're reviewing the e-mail
21 that was sent to counsel?

22 629. MR. SHEA: I'm reviewing an e-mail that
23 was sent to Mr. Pearce and Mr. Marsh, and
24 my question does not relate to anything to
25 do with counsel. So please let me proceed.

1 MR. JONES: Well...

2
3 BY MR. SHEA:

4 630. Q. Did you respond to this e-mail,
5 providing any comments on this document? Did you
6 respond?

7 A. No.

8 631. Q. No. Did Mr. Marsh respond?

9 A. I do not know.

10 632. Q. Okay. Who is Mr. Marsh?

11 A. He is one of the directors.

12 633. Q. Okay.

13 MR. JONES: So this is an internal e-
14 mail to counsel that you're referring to,
15 that we have said is privileged.

16 634. MR. SHEA: Sorry, I note that on a
17 number of occasions there were e-mails
18 included. Now...

19 MR. JONES: You can move on, and...

20 635. MR. SHEA: We will move on when I wish
21 to move on, please.

22
23 BY MR. SHEA:

24 636. Q. So you're not aware of Mr. Marsh
25 responding and you don't recall responding?

1 A. I'm not aware.

2 637. Q. Okay. So on to the next document.
3 This is the response that Mr. O'Hara provided to Mr.
4 Rienas, and you're aware of that?

5 MR. JONES: Take a minute to read it.

6 THE DEPONENT: Yes. I'm not...I don't
7 recall if I have actually seen this e-mail,
8 but I am aware of the information in there,
9 if that makes sense.

10
11 BY MR. SHEA:

12 638. Q. So it doesn't actually make sense.

13 A. Okay. I might have seen this...I
14 must...I have probably seen this e-mail or this
15 note, but...

16 639. Q. But you'll recall that the document
17 that was sent by the Authority to Peace Bridge...

18 A. Right.

19 640. Q. ...was a rent abatement agreement?

20 A. Yes.

21 641. Q. And it contemplated that the
22 Authority would...sorry, rent deferral agreement,
23 not abatement agreement, rent deferral agreement,
24 would defer rent for a period of time?

25 A. Right.

1 642. Q. And then the rent that had been
2 deferred would be repaid by Peace Bridge over a
3 period?

4 A. There was...yes, I believe that was
5 the concept or what is in the rent deferral
6 agreement.

7 643. Q. Yes, and in this e-mail you will
8 agree that Mr. O'Hara indicates that Peace Bridge
9 Duty Free is in agreement with virtually all of the
10 terms in the proposal, except for the repayment
11 terms or the payment terms? What he proposes is 20
12 percent...percentage rent and deferral or payment of
13 the deferred rent over two years. He never asked
14 for an abatement at this point in time?

15 A. I'm just reading it like you.

16 644. Q. Do you recall asking for an
17 abatement at this point in time?

18 A. I do not recall.

19 645. Q. Okay. Then I'm going to ask you to
20 turn to...are you finished reading that? There is
21 no reference in that letter to an abatement.

22 So the next is...have you seen this e-
23 mail? This is Mr. Rienas' response to Mr. O'Hara.
24 Do you recall...if you haven't seen it, do you
25 recall having any discussions with Mr. O'Hara about

1 this?

2 A. I believe I have seen this before.

3 646. Q. So you will agree that Mr. Rienas
4 explains that a...the accrual of unpaid rent for up
5 to a year and then convert that to a two-year loan
6 is not acceptable to the Authority and explains why?
7 It says that:

8 "...It will likely result in violating the
9 bond covenants and the Authority is not a
10 bank..."

11 A. I can't dispute what Ron said here.

12 647. Q. On to the next document. This is
13 further communications between Mr. Rienas and Mr.
14 O'Hara. So this is at 23. This is Mr. O'Hara
15 acknowledging the concern with respect to the bond
16 covenants, and requesting that the directors look at
17 the proposal, and also attaching the 2018 audited
18 financials to assist the directors, I assume. Is
19 that how you read that?

20 A. Not necessarily.

21 648. Q. Okay, how do you read that?

22 A. The audited financial statements
23 were requested, so we sent those through, and then
24 looking for input from the...I'm trying to interpret
25 the wording here, but...

1 649. Q. Did you talk to Mr. O'Hara about
2 this?

3 A. The request is for the directors
4 to...

5 650. Q. To look at it?

6 A. Yes.

7 651. Q. And then I'm going to ask you to
8 turn to the next one, 24.

9 A. Okay.

10 652. Q. And are you familiar with this e-
11 mail? Have you seen it before?

12 A. I believe I have.

13 653. Q. And in this one Mr. Rienas indicates
14 that the board considered the request, and explained
15 why it was not going to agree to the requested
16 changes.

17 A. That's what the e-mail says.

18 654. Q. Turn the page over to the next page,
19 please. So are you aware of Mr. O'Hara responding
20 to Mr. Rienas' e-mail of April 24th, 2020?

21 A. Sorry, what...

22 655. Q. Are you aware of...

23 A. April 24, oh, this one here?

24 656. Q. Yes.

25 MR. JONES: Do you want to take him to a

1 document?

2 657. MR. SHEA: There is no document in your
3 disclosures of him responding. So I'm
4 asking him is he aware of any response.

5 THE DEPONENT: No.

6
7 BY MR. SHEA:

8 658. Q. No. You never responded?

9 A. No.

10 659. Q. No. So if you turn the page over to
11 25...

12 A. I'm sorry, that's where I'm at.

13 660. Q. I apologize, 25. If you go to 25,
14 so this is a...

15 A. That is what I was answering. I'm
16 sorry, I was on 25.

17 661. Q. Okay. Do you want to go back
18 to...sorry, 24.

19 A. Right.

20 662. Q. This is Mr. Rienas' e-mail to Mr.
21 O'Hara...

22 A. Right.

23 663. Q. ...indicating that the board had
24 considered and rejected Peace Bridge's proposals for
25 changes to the first rent deferral and explaining

1 why, and I'm asking are you aware of any response
2 from Mr. O'Hara to that e-mail?

3 A. No.

4 664. Q. And you did not respond to that e-
5 mail?

6 A. And I did not.

7 665. Q. Over to the next document is a copy
8 of an e-mail from Mr. Rienas to Mr. O'Hara again.

9 A. M'hm.

10 666. Q. A series of e-mails actually, and
11 the first one is down April 27. So the second one
12 on that page.

13 A. Okay.

14 667. Q. And Mr. Rienas attaches the rent
15 deferral agreement. Do you see that?

16 A. Yes.

17 668. Q. Are you aware of any response from
18 Mr. O'Hara to that e-mail?

19 A. I believe...I think he sent the
20 signed agreement.

21 669. Q. No, I'm asking to this specific e-
22 mail, because the next one above is on May 4th.

23 A. Oh, right, for the April 27th. No,
24 I'm not aware of anything.

25 670. Q. Then so Mr. Rienas reminds Mr.

1 O'Hara that he sent the agreement and asks for it
2 back, and turn the page over again to 26. This e-
3 mail was copied to you.

4 A. M'hm.

5 671. Q. Do you recall this e-mail?

6 A. Yes.

7 672. Q. And this is May 5. So in
8 between...obviously overnight there had been no
9 response from Mr. O'Hara, I take it?

10 A. Overnight?

11 673. Q. Well, on the 4th there is the
12 inquiry as to whether Peace Bridge Duty Free still
13 wants the rent deferral agreement, and this is...

14 A. Yes, I don't know when that was...

15 674. Q. Well, I showed you.

16 A. Yes, I know. Dates and times, I
17 can't answer when Greg...

18 675. Q. But in response to this, what
19 happened?

20 MR. JONES: You're referring to the one
21 where they are...the default proceedings?

22
23 BY MR. SHEA:

24 676. Q. No, the May 5, 2020.

25 A. Right.

1 MR. JONES: Right.

2 677. MR. SHEA: In response to that...

3 MR. JONES: That's the one where they're
4 saying they're going to...

5 678. MR. SHEA: I didn't ask that, sir.

6 MR. JONES: Okay, well, just make sure
7 I'm reading the right e-mail.

8 THE DEPONENT: Yes.

9
10 BY MR. SHEA:

11 679. Q. So in response to that outreach with
12 respect to...

13 A. The May 5?

14 680. Q. Yes. You signed back or Peace
15 Bridge Duty Free signed back the first rent
16 deferral, correct?

17 A. That would be on May 6th, yes. It
18 was actually on May 6th that it got sent back.

19 681. Q. May 6th it gets sent back, and
20 turning over to the next page, anticipating, so the
21 next page, and after getting it back...

22 A. The 27th, the 27th?

23 682. Q. May 6th, 27, yes. After getting it
24 back, Mr. Rienas agrees that there will need to be
25 more discussions. Do you recall that, that there

1 was...you referred in one of your affidavits that
2 there was an agreement. After getting the first
3 rent deferral back, there was an agreement that
4 there would be more discussions?

5 A. Yes. Yes, I remember this e-mail.

6 683. Q. Okay. So what I'm interested in
7 understanding with respect to the e-mail at tab 26
8 and 27, they weren't included in your disclosures.
9 Is there a reason for that?

10 MR. JONES: You have our disclosure.

11 684. MR. SHEA: I asked...I just asked is
12 there a reason they weren't included?

13 THE DEPONENT: I do not know.

14 685. MR. SHEA: You just couldn't find them?

15 THE DEPONENT: I do not know.

16 MR. JONES: They may have been in the...

17 686. MR. SHEA: I asked your witness, please,
18 sir.

19
20 BY MR. SHEA:

21 687. Q. You didn't find them?

22 A. I did not, no.

23 688. Q. Okay, you didn't know these e-mails
24 existed?

25 A. I did not know...

1 MR. JONES: I think they're actually in
2 his affidavit.

3 689. MR. SHEA: The e-mail we spoke about, so
4 point to me where they're in the affidavit
5 then. While your counsel is looking for
6 that, perhaps we can move on, because I
7 want to get a couple of more questions in.
8 At least I want to close out...

9 MR. JONES: I'm not going to look for it
10 while you're asking questions but...

11 690. MR. SHEA: Okay, well, then we'll
12 just...

13 MR. JONES: You have whatever the
14 disclosure was and you have whatever was in
15 the affidavit.

16
17 BY MR. SHEA:

18 691. Q. Okay, so let's move on to tab 28
19 before we close this out. So tab 28 is the rent
20 deferral agreement. Do you see that?

21 A. Yes, I do.

22 692. Q. This is the version that was signed
23 by both parties.

24 A. Yes.

25 693. Q. So this is the signed agreement.

1 A. Correct.

2 694. Q. You'll agree with me that what Peace
3 Bridge Duty Free agreed to was a deferral of rent
4 until the earlier of July 31st, 2020 or the last day
5 of the month following the day the tenant has fully
6 reopened the duty free?

7 MR. JONES: "...Free shop for the
8 business after the restrictions on non-
9 essential travel between Canada and the
10 United States are lifted..."

11 695. MR. SHEA: Yes, the earlier of, and
12 you'll...

13 MR. JONES: "...For greater certainty of
14 partial reopening to accommodate essential
15 travel does not constitute full
16 reopening..."

17
18 BY MR. SHEA:

19 696. Q. Yes. So you'll agree that it's the
20 earlier of those two, and the second never happened?

21 MR. JONES: Well, it eventually
22 happened.

23 697. MR. SHEA: Sorry, sir, I'm asking your
24 witness...

25 MR. JONES: But you're putting a false

1 statement to him.

2 698. MR. SHEA: I'm not putting a false
3 statement to him. If you want me to
4 clarify, it never happened before this
5 agreement expired, I'll do that. It's the
6 earlier of.

7
8 BY MR. SHEA:

9 699. Q. The second event never happened
10 before July 31st, 2020, correct?

11 A. The question is number 2 didn't
12 happen...

13 700. Q. Yes.

14 A. ...before July 31st?

15 701. Q. That's correct.

16 A. Correct.

17 702. Q. So under the terms of this
18 agreement, Peace Bridge Duty Free was required to
19 begin to repay the deferred rent on July...beginning
20 August 1st, 2020, correct?

21 A. I believe that's correct.

22 703. Q. And you'll agree with me that Peace
23 Bridge Duty Free has never repaid any of the
24 deferred rent?

25 A. That's correct.

Is it your position that you had no discussions or no e-mail exchanges with you and Mr. O'Hara during this period?

705. MR. SHEA: I asked him if...so I just want to confirm that you did a search and there were no undisclosed e-mails between or communications, written communications, between you and Mr. O'Hara during this period?

BY MR. SHEA:

A. I have no knowledge of that.

1 707. Q. You have no knowledge of any
2 communications with the board?

3 A. With the board.

4 708. Q. So you're not aware of any board
5 meeting called to discuss this?

6 A. No.

7 709. Q. You're not aware of any
8 communications to the board with respect to this
9 issue or the first rent deferral?

10 A. I don't recall.

11 710. Q. And you're not aware of any...the
12 board even being told that you had entered into the
13 first rent deferral?

14 A. I don't know. I don't know.

15 711. MR. SHEA: So now is a good time to
16 break for lunch and then we will pick up
17 at...it's now 1:05.

18
19 --- upon recessing at 1:04 p.m.

20 --- A BRIEF RECESS

21 --- upon resuming at 1:59 p.m.

22
23 JIM PEARCE, resumed

24 CONTINUED CROSS-EXAMINATION BY MR. SHEA:

1 712. Q. We had left off, and I had just
2 finished asking you about the what we called the
3 first rent deferral, and I want to start asking you
4 some questions about the second rent deferral.

5 So the first rent deferral expired on 31
6 July, 2020, correct?

7 A. Well, the earlier of...

8 MR. JONES: I think if you go to the
9 document...

10 THE DEPONENT: Earlier of?

11
12 BY MR. SHEA:

13 713. Q. Well, okay, but we agree the second
14 event didn't happen before 31 July, 2020. So that
15 means...

16 MR. JONES: Yes, I think what...the rent
17 deferral period ended on July 31st.

18 714. MR. SHEA: Yes, the rent deferral period
19 ended July 31st.

20
21 BY MR. SHEA:

22 715. Q. So Peace Bridge Duty Free was going
23 to have to start paying rent on August 1st or
24 negotiate a new arrangement. Is that an accurate
25 assessment of the situation?

1 A. I believe the Authority acknowledged
2 that we would have to redo the agreement. I think
3 that was Ron's one e-mail. He says, "Obviously..."

4 716. Q. Did he agree to that or did he agree
5 that there had to be further discussions?

6 A. I'm not sure about his exact words.
7 He acknowledged that...

8 717. Q. "...I don't disagree with you that
9 recognizing that we will be...and recognize
10 that we will in all likelihood have
11 additional discussions..."

12 A. Yes, okay.

13 718. Q. Did you take that to be a commitment
14 from the Authority to extend the rent deferral
15 period?

16 A. To do something. From a legal
17 standpoint, I don't know, but do something to
18 address the situation.

19 719. Q. But you recognized that absent an
20 agreement, the rent deferral period ended on July
21 31st, 2020, and rent would be payable on August 1st?

22 A. From a legal standpoint, possibly,
23 right.

24 720. Q. I'm asking from a business
25 perspective what did you understand.

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1 A. A business perspective, we would be
2 back in discussions and doing something with that.

3 721. Q. Okay. So but Peace Bridge Duty Free
4 didn't reach out proactively to the Authority prior
5 to July 1st, 2020 about the future, did it?

6 A. I do not know about that, unless we
7 review the documents.

8 722. Q. Well, did you reach out to...

9 A. I did not.

10 723. Q. Do you recall Mr. O'Hara reaching
11 out?

12 A. In July of 2020, I do not recall.

13 724. Q. Okay. So turn the page. Look up
14 29. Do you recall this e-mail?

15 A. Yes.

16 725. Q. So it was the Authority that reached
17 out to Peace Bridge after the rent deferral had
18 expired. There had been no discussions, reachout
19 that you're aware of. So August 6th they reach out
20 and say the rent deferral period expired, and the
21 restart date was August 1. Turn the page, you'll
22 see the response.

23 A. From the 30?

24 726. Q. Yes. Well, no, I think it was 18.
25 Yes, number 30.

1 A. Yes.

2 727. Q. But I think there were, I guess,
3 some attempts by Mr. O'Hara to reach out, and
4 ultimately Mr. O'Hara, on August 18th, indicates
5 that the Peace Bridge Duty didn't see any other
6 option but to extend the restart date until the
7 month after the border is fully reopened.

8 So you'll agree with me that what Peace
9 Bridge Duty Free wanted is an extension of the rent
10 deferral...I'm going to call it indefinite, in the
11 sense that it was until the month after the border
12 is fully reopened. So that's what you were looking
13 for?

14 A. That's what Greg sent to Ron.

15 728. Q. And you didn't agree with that?

16 A. Me, personally?

17 729. Q. No, I mean, this...I assume Mr.
18 O'Hara was sending it on behalf of Peace Bridge Duty
19 Free?

20 A. Peace Bridge Duty Free.

21 730. Q. So that's the position that Peace
22 Bridge Duty Free was taking?

23 A. Yes.

24 731. Q. If you turn the page, this is
25 October 29th.

1 A. Okay.

2 732. Q. So during that interim period, Peace
3 Bridge Duty Free didn't reach out at all to the
4 Authority, did it? So from...

5 A. Is that a question or...

6 733. Q. Yes, I mean, I can't find in your
7 disclosures any communications or engagement to...

8 A. Either side, from the Authority to
9 us?

10 734. Q. Yes. But you will agree with me
11 that shortly after...so this is in August. There
12 have been no...there is no outreach from either
13 side. So you're not reaching out, saying, "We need
14 to do something about this. We need to get..."

15 A. I guess that's your conclusion.

16 735. Q. Well, I don't know. I'm asking is
17 there...that's what I'm asking. Are there documents
18 that are not in your disclosure during this time
19 period?

20 A. Not that I know of.

21 736. Q. No, and there were no internal
22 discussions at Peace Bridge Duty Free during this
23 time period. You and Mr. O'Hara were not exchanging
24 communications during this time period?

25 A. I don't recall.

1 737. Q. You weren't exchanging
2 communications with the board during this period
3 about these issues?

4 A. I did not send anything to the
5 board, and...

6 738. Q. There were no board meetings during
7 these issues...during this period dealing with these
8 issues. So from the time...

9 A. Our board or their board, both
10 boards?

11 739. Q. Your board.

12 A. Yes.

13 740. Q. I don't know about...our board
14 is...this isn't an examination of me.

15 A. Okay.

16 741. Q. So on October 29th you have got
17 the...Mr. Rienas reaches out.

18 A. Right.

19 742. Q. And says, "Here is the draft
20 agreement."

21 A. Okay.

22 743. Q. And attaches the agreement and then
23 identifies a few issues. Do you see that?

24 A. Yes.

25 744. Q. Okay. So October 29th reaches out,

1 identifies a few issues. So the next tab is tab 32,
2 and this is an e-mail that you're copied on from
3 November 13th, so two weeks later.

4 A. Right.

5 745. Q. And he indicates there has been no
6 response to the questions raised by the Authority.
7 Are you aware of a response during that period?

8 A. No.

9 746. Q. No. So there has been no response
10 for two weeks to the draft second rent deferral and
11 there are further questions or the same questions
12 repeated.

13 This e-mail does not appear to be in your
14 disclosures. Do you know why that may be? You just
15 couldn't find it?

16 A. I do not know why it...

17 747. Q. Okay. So over on to 33, it's the
18 same document. I just want to point out in mine
19 it's the same document. So I just eliminated it
20 from theirs. That's a blank page.

21 A. Okay.

22 748. Q. So that's a blank page. So the tabs
23 that I sent you had two of the same page. I don't
24 know why. So I just left it out. There is nothing
25 at tab 33. It is blank.

1 So over on to 34, so Peace Bridge Duty
2 Free, on November 16th, ultimately responds, and you
3 are again copied on this e-mail. Do you recall this
4 e-mail, and indicates that there wasn't...that from
5 Peace Bridge Duty Free's perspective, they didn't
6 think there was an urgency there, or didn't see an
7 urgency to this, or didn't realize there was an
8 urgency to complete the second deferral because it
9 took the Authority three months to deliver it.

10 So they don't really see any urgency here,
11 and he raises one issue about the rent deferral.
12 The only issue that is raised by Mr. O'Hara is that
13 the expiry shouldn't be December 31st, and wants it
14 March 31st. That's the only issue he raises.

15 He doesn't raise an issue about the fact
16 that it's a rent...or you don't raise an issue about
17 the fact that it is a rent deferral instead of an
18 abatement, do you?

19 A. There is one question here about the
20 timing of it.

21 749. Q. Yes, the timing of it, that's the
22 only issue you raise. Then we go on...let me ask
23 you this, though. At this point in time, had the
24 provincial termination moratorium taken effect? It
25 took effect May 1st, didn't it?

1 A. Yes.

2 750. Q. Okay. So that's not something that
3 you considered. The moratorium was not something
4 that was in your mind when you were dealing with the
5 Authority?

6 A. I can't...I don't know the legal
7 part of the moratorium. So I don't know.

8 751. Q. No, sorry, the fact that...

9 A. Yes.

10 752. Q. ...the Authority could not kick you
11 out, could not evict you, based on non-payment of
12 rent, was that something that was in your mind at
13 this point in time?

14 A. I don't recall.

15 753. Q. You don't recall?

16 A. Yes.

17 754. Q. Then we go over on to tab 35.
18 You're copied on all these.

19 A. Yes.

20 755. Q. And Mr. Rienas agrees to the changes
21 made. So it's now March 31st, 2021, exactly as you
22 have requested, Peace Bridge Duty Free has
23 requested.

24 A. M'hm.

25 756. Q. They provide some information to you

1 on CERS and asks for the HST reimbursement, okay?

2 A. M'hm.

3 757. Q. Then we go on to tab 36. At tab
4 36...sorry, and also just to be clear, at tab 35,
5 going back to just make sure we close that off, he
6 does indicate the board was going to have to approve
7 the agreement, correct? So you were aware that the
8 Authority board approval was required?

9 A. Yes.

10 758. Q. So November 20th...that is over on
11 36, he indicates to you and Mr. O'Hara that the
12 Authority board tentatively approved the rent
13 deferral subject to...conditional on greater
14 assurances as to receiving unpaid rent, and
15 expresses the concern that zero rent had been paid
16 since April of 2020.

17 MR. JONES: Well, the e-mail says what
18 it says.

19 759. MR. SHEA: I'm just confirming. I'm
20 going through the document.

21
22 BY MR. SHEA:

23 760. Q. So you were aware on November 20th
24 that the board had tentatively approved it, correct?
25 Sir, let your client answer the question.

1 MR. JONES: How can he know what the
2 board did? All he can know is that this e-
3 mail was sent.

4
5 BY MR. SHEA:

6 761. Q. Okay. So you were aware...

7 A. I acknowledge the e-mail from Ron.

8 762. Q. You received an e-mail from Ron...

9 A. Yes.

10 763. Q. ...telling you that the board

11 approval was tentative, correct?

12 A. I agree I got the e-mail from Ron.

13 MR. JONES: Right, but that's not what
14 the resolution says.

15 764. MR. SHEA: Sorry, sir...

16 MR. JONES: He can't give evidence about
17 what the board actually did.

18 765. MR. SHEA: Sir, stop interrupting, and
19 stop providing evidence, please.

20 MR. JONES: Well, I just want to make
21 sure that the question is being put to the
22 witness in proper context.

23 766. MR. SHEA: Sir, let's take a break. Off
24 the record.

1 --- upon recessing at 2:13 p.m.

2 --- A BRIEF RECESS

3 --- upon resuming at 2:14 p.m.

4
5 JIM PEARSON, resumed

6 CONTINUED CROSS-EXAMINATION BY MR. SHEA:

7
8 767. Q. Go to the next document, please. So
9 the next document is over at 37. Thirty-seven is a
10 copy of the November, 2020 rent deferral agreement.
11 Do you recognize this document?

12 A. Yes, I do.

13 768. Q. And you'll agree that the Authority
14 never signed this document?

15 A. It's not signed. It was only signed
16 by Peace Bridge.

17 769. Q. So the Authority never signed this
18 document?

19 MR. JONES: Well, again, Counsel, he...

20 770. MR. SHEA: I asked whether...

21 MR. JONES: You can ask him whether he
22 received a signed version back, but I don't
23 think he is in a position to say what they
24 did.

1 BY MR. SHEA:

2 771. Q. Okay. Did you receive a signed
3 version of this back? Let me ask do you have any
4 knowledge of the Authority signing this document?

5 A. I have no knowledge of that.

6 772. Q. And you never received a signed copy
7 of this document?

8 A. I do not believe we did.

9 773. Q. Turn to the next page, please, 38.
10 So you'll agree that you have seen this e-mail
11 before?

12 A. Yes.

13 774. Q. And so you'll agree that in December
14 there were exchanges between you and Mr. Rienas
15 concerning financial...the audited financial
16 statements and other information. Is that correct?
17 You'll agree with that?

18 A. Yes.

19 775. Q. December 9th, which is the next one,
20 39, you'll agree that on December 9th Mr. Rienas
21 took the position that "we", the Authority, didn't
22 believe that Peace Bridge Duty Free was being
23 forthcoming in providing information and was
24 delaying.

25 I'm not asking you to agree that he

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1 believed that, but that's what he told you. That's
2 the position the Authority took?

3 A. That's what Ron said in this letter.

4 776. Q. And then turning the page over to
5 40, on 40 you provided further information to Mr.
6 Rienas concerning the financial position of Peace
7 Bridge Duty Free. Is that correct?

8 A. I responded to the questions I
9 believe Ron and Karen had sent over.

10 777. Q. And the answers to those questions
11 included providing financial information, correct?

12 A. More information, yes.

13 778. Q. So at point 4 you indicate that as
14 at November 30th you had drawn down 115,000 of a
15 900,000 line of credit. That line of credit is with
16 RBC?

17 A. All our credit is with RBC.

18 779. Q. Okay. Over on to 41 this is a
19 letter from the Authority demanding a million dollar
20 payment. Is that how you interpreted this?

21 MR. JONES: Take a moment to review it.

22 THE DEPONENT: Sure. Pretty
23 much...well, the letter says what the
24 letter says, 3.1 million dollars.

1 BY MR. SHEA:

2 780. Q. They said that's...3.1 million was
3 the arrears?

4 A. Right.

5 781. Q. And they're looking for a million?

6 A. Right.

7 MR. JONES: They are also looking for
8 some other...

9 THE DEPONENT: Another 2.1.

10
11 BY MR. SHEA:

12 782. Q. They were looking for payment terms,
13 a schedule for the 2.1. They're looking for the
14 million payment and looking for schedule...for
15 payment terms for the 2.1.

16 MR. JONES: And they also want...I don't
17 want to give evidence, but I'm just reading
18 the letter.

19
20 BY MR. SHEA:

21 783. Q. And in response to that letter at
22 tab 42 you write back and you don't agree to pay the
23 million or come up with a schedule. Is that a fair
24 summary of your letter?

25 A. There's a lot to it. I wouldn't say

1 that's the only point to it. I think the letter,
2 again, speaks for itself, but...

3 784. Q. So what point were you trying to get
4 across in this letter?

5 MR. JONES: Just to be clear, it's Mr.
6 O'Hara's letter.

7
8 BY MR. SHEA:

9 785. Q. So what point was Peace Bridge Duty
10 Free trying to get across in the letter? Do you
11 know? Let me ask you another question. Did you
12 speak to Mr. O'Hara about this letter?

13 A. I'm just reading it. One second.
14 This letter is about a plan, I recall, of going
15 forward, how we can work together and help the
16 bridge authority and the duty free.

17 786. Q. But in this letter were you agreeing
18 to pay the million?

19 A. In this letter?

20 787. Q. Did you ever agree to pay the
21 million?

22 A. I think everything we did was more
23 of a bigger picture.

24 788. Q. So let me ask did you pay the
25 million?

1 A. No, we did not pay the million.

2 789. Q. Okay. In response...

3 A. Forty-three?

4 790. Q. Yes. Did you see this or did you
5 discuss this with Mr. O'Hara, this e-mail...this
6 letter, sorry?

7 MR. JONES: You're talking about tab 43
8 now?

9 791. MR. SHEA: Yes. Sorry, are you looking
10 at tab 43? Yes.

11 THE DEPONENT: Yes.

12

13 BY MR. SHEA:

14 792. Q. Okay, so did you...

15 A. Yes, I have seen this letter.

16 793. Q. Okay. So without getting into the
17 specifics, Peace Bridge Duty Free did respond to Mr.
18 O'Hara's letter. He acknowledged the letter of
19 December 23rd and he responded?

20 A. Correct.

21 794. Q. And turning the page to the next
22 page, 44?

23 A. Yes.

24 795. Q. The duty free then responded back to
25 Mr. O'Hara...Mr. Rienas, correct?

1 A. M'hm.

2 796. Q. So the parties were engaged in a
3 discussion?

4 MR. JONES: Well...

5 797. MR. SHEA: I asked him a question. He
6 can deny it if he wants, sir.

7 THE DEPONENT: Well, you define as...
8

9 BY MR. SHEA:

10 798. Q. Well, they were engaged in an e-mail
11 exchange.

12 A. We were trying to work towards a
13 bigger solution for the Authority and the duty free.

14 799. Q. But in this e-mail, in this letter,
15 do you not indicate a) that you're not in a position
16 to meet the demand for a million dollars. You can't
17 pay a million dollars based on the financial
18 statements and the assertion that you don't have a
19 million dollars on hand. You make that assertion in
20 the second-last paragraph on this page. Am I
21 correct that you indicate you can't pay the million
22 dollars because you don't have the money?

23 A. I agree we weren't in the
24 position...the letter says we weren't in a position
25 to pay the million dollars.

1 800. Q. It also says you started the BCAP
2 process. Did, in fact, you start the BCAP process?

3 A. Yes, we did.

4 801. Q. And...

5 A. And that went on.

6 802. Q. When did you file that application?

7 A. I can't recall.

8 803. MR. SHEA: Would you undertake to
9 determine when you filed that application?

10 THE DEPONENT: I can undertake to...

11 804. MR. SHEA: No, no, only your lawyer
12 gives undertakings.

13 MR. JONES: To advise when they applied
14 for the...

15 805. MR. SHEA: The BCAP.

16 THE DEPONENT: The process.

17
18 BY MR. SHEA:

19 806. Q. When you made the application,
20 when...

21 A. I didn't say that. We started the
22 process.

23 807. Q. Okay, when did you start the
24 process?

25 A. That's the question.

1 808. Q. Okay, when did you start the process
2 and what were the results? Did you...you indicate
3 in this letter that you will keep the Authority
4 updated on your progress through BCAP. Did you ever
5 do that?

6 A. I'm trying to find correspondence to
7 that.

8 809. Q. There is no correspondence...I can
9 tell you there is no correspondence in this file to
10 that. So it's correct that you did not keep them
11 updated?

12 A. I don't recall.

13 810. Q. You don't recall keeping them
14 updated as to the process?

15 A. BCAP.

16 811. Q. And you finally indicate that you're
17 in the process of finalizing a business plan setting
18 out your going forward plan, and you're going to get
19 that by January the 15th, 2021, correct?

20 A. That was the target goal.

21 812. Q. Okay. So I want to address, first
22 of all, with you the assertion that you did not have
23 a million on hand to make the million dollar
24 payment. Is it not correct that you had 889,000
25 available on your line of credit with RBC?

1 A. That, I'm not sure. I'm honestly
2 not sure. We would have to check with...I know we
3 had that line of credit. I wasn't sure about
4 the...we had access to that or not.

5 813. Q. I refer you back to your response...

6 A. Yes.

7 814. Q. ...to Mr. Pearce (sic) at tab 40.

8 A. Right.

9 815. Q. Where you indicate that you have an
10 operating facility, and as of November 30th the
11 balance drawn on the facility was 115, with a limit
12 of 900.

13 A. Right.

14 816. Q. So certainly you will agree with me
15 that Mr. Rienas would not be incorrect in assuming
16 that you had this money available?

17 A. I can't make that determination with
18 Ron.

19 817. Q. Okay, but you told...in response to
20 a question you say...

21 A. The question is what...I believe he
22 had the credit facility and questioned what the
23 credit facilities were and I explained the different
24 ones.

25 818. Q. Okay.

1 A. There are three different ones. I
2 explained those to him, so...

3 819. Q. And then in your 2020, which is
4 Exhibit 4...

5 A. Okay.

6 820. Q. In your 2020...but this is at
7 December 31st, 2020...do you have those handy?

8 A. I have seen them around here
9 somewhere.

10 821. Q. I will give you another copy if you
11 would like. I have other copies here.

12 A. It's in here somewhere.

13 822. Q. It's okay. Here is another copy.

14 A. Okay.

15 823. Q. So in the 2020 financials, if you
16 turn to...these are your audited financials as at
17 December 31.

18 A. Right.

19 824. Q. If you turn to the asset listing, so
20 the balance sheet?

21 A. Yes.

22 825. Q. So you have got...you list as your
23 assets 734,000 in receivables, and note 6...I think
24 if you'll turn to note 6, it refers to an excise tax
25 credit of 427,000 as being included in that, sales

1 and excise tax, 420,000.

2 A. Right.

3 826. Q. So you had that coming.

4 A. These were...note that these
5 probably were completed on December 31st before the
6 end of March, 2021.

7 827. Q. Those were on your balance sheet?

8 A. Yes.

9 828. Q. And then you had a tax refund of 1.2
10 million coming.

11 A. So on April 21st, that's when we got
12 that.

13 829. Q. Yes. So you have 1.2 million that
14 you got April 21st.

15 A. We didn't get it, but that's when
16 the statements came out.

17 830. Q. So as at December the 30th...

18 A. Right.

19 831. Q. ...you got a line of credit that has
20 889,000 available?

21 A. I can't confirm that, but anyways.

22 832. Q. Okay.

23 A. That's your assumption. I can't
24 confirm that.

25 833. Q. You advised the Authority that...

1 A. I explained our letters of credit to
2 Ron.

3 834. Q. Not letters of...that was your
4 credit line.

5 A. Credit line, yes, but they're all in
6 our credit facility. I explained that, what the
7 three different parts were, but again, it would be
8 up to the Royal Bank whether that money was actually
9 available or not.

10 835. Q. And you had 427,000 coming in HST, I
11 assume HST?

12 A. Correct.

13 836. Q. HST input tax credits, and 1.2
14 million in tax...

15 A. Correct.

16 837. Q. ...refunds?

17 A. Correct.

18 838. Q. And you will also agree with me that
19 based on this in...

20 A. But note on that HST receivable, we
21 probably owed a lot of that to the bridge authority.
22 That flows through to them. I'm not sure of the
23 exact breakout of that at December 31st.

24 839. Q. HST, why would you owe HST to us?

25 MR. JONES: That was paid...that was

1 part of what Ron Rienas was asking for.

2 THE DEPONENT: One of the demands that
3 he...

4
5 BY MR. SHEA:

6 840. Q. No, that's the input tax...the HST
7 there is input tax credit, right. So you had
8 already...

9 A. No, we might have accrued some of
10 that, knowing we owed that to the Authority.

11 841. Q. So where is the...

12 A. So of that...

13 842. Q. Sorry, note 6...okay, let's...can
14 you undertake to determine whether the sales and
15 excise tax...

16 A. Right.

17 843. Q. ...receivable owing back to you...

18 A. That 400,000 was all to us or some
19 to the Authority?

20 844. Q. Yes.

21 A. Yes.

22 845. Q. And now I want to get to...so and in
23 2020, the same financial statements...

24 A. Okay.

25 MR. JONES: Sorry, hold on. You're

1 asking for an undertaking to advise...

2 846. MR. SHEA: As to what, if any portion,
3 of the...

4 THE DEPONENT: Four hundred and twenty-
5 four thousand?

6 847. MR. SHEA: ...427,000 was payable to the
7 Authority.

8 MR. JONES: Okay.

9
10 BY MR. SHEA:

11 848. Q. Okay. So I also want to confirm
12 with you that in 2020 dividends of 160,000 were paid
13 to the shareholders.

14 A. Is that what it says?

15 849. Q. That's over on the statement of cash
16 flows.

17 A. That is correct.

18 850. Q. And in the...

19 A. That was paid in months of January
20 and February of 2020 before the pandemic hit.

21 851. Q. And in the year before, in 2019,
22 1.36 million in dividends had been paid.

23 A. Correct, before the pandemic hit.

24 852. Q. So how did Peace Bridge Duty Free
25 use the 1.2 million in taxes it got back?

1 A. Great question. I can't...I don't
2 have that answer right now, but it was just to
3 maintain the building and maintain our costs we were
4 incurring.

5 853. Q. So to pay other obligations, aside
6 from the Authority?

7 A. And the Authority. We paid them.

8 854. Q. What portion of the...

9 A. Well, to maintain the building...

10 855. Q. What portion of the...

11 A. ...which the Authority owns.

12 856. Q. What portion of the 1.2 million was
13 paid to the Authority?

14 A. I don't have a detailed answer.

15 857. Q. Will you undertake to advise...to
16 make inquiries and advise as to what portion of the
17 1.2 million dollar tax return was paid to the
18 Authority? You are going to make inquiries on the
19 427.

20 A. M'hm.

U/T

21 858. Q. Did Peace Bridge Duty Free reach out
22 to its shareholders and ask if they would return a
23 portion of their dividends?

24 A. I would have no knowledge of that.

25 859. Q. So you're not aware of...you

1 certainly didn't reach out to them and ask them to
2 return the dividends?

3 A. I did not.

4 860. Q. And you're not aware of Mr. O'Hara
5 reaching out to them and asking them to return their
6 dividends?

7 A. I have no knowledge either way.

8 861. Q. So let me take a moment here see if
9 we have portions we can cut down. You can keep
10 that. We have a second marked copy here.

11 Okay, so we're now edging into 2021. So
12 on December 30th...

13 A. What number?

14 862. Q. I'm setting the framework here. So
15 December 30th you indicated that you would have
16 a...or not you personally, but Peace Bridge
17 indicated you would have a business plan by January
18 15th, correct?

19 A. That was the goal, to try to get
20 something done.

21 863. Q. Well, you met the goal, well, that
22 one. So January 6th, so if you turn to...

23 A. I'm sorry?

24 864. Q. ...that one. So if you turn to
25 45...open up tab 45.

1 MR. JONES: I think it's 46.

2 865. MR. SHEA: No, I'm at 45.

3
4 BY MR. SHEA:

5 866. Q. Forty-five is...so Mr. Rienas
6 reminds Mr. O'Hara...first of all, have you seen
7 this letter before?

8 A. I believe, yes.

9 867. Q. Reminds him that the business plan
10 is due on January 15th, and confirms...

11 A. Again, our best intentions were
12 January 15th.

13 868. Q. But again, you made it. So if you
14 turn the page, the next page is 46.

15 A. Hey, we made it.

16 869. Q. So 46...did you see this...you're
17 aware of this letter, this business plan?

18 A. Yes.

19 870. Q. Okay, and did...was there back and
20 forth on this business plan before it was sent?

21 A. To the Authority?

22 871. Q. Yes.

23 A. To the Authority, no, I don't
24 believe it was.

25 872. Q. No, back and forth, internal back

1 and forth?

2 A. I would say there would have been
3 discussions as this gets all created in any business
4 plan.

5 873. Q. Would there have been written
6 exchanges between you and Mr. O'Hara about this?

7 A. It's hard to say. Just there
8 is...there is a lot of work in this. So there would
9 have been discussions of the concepts and build up
10 of the business plan and certain...

11 874. Q. But you don't recall if there were
12 e-mail communications or drafts of this
13 between...internal communications with drafts of
14 this?

15 A. Communicate back and forth, no, I
16 don't...

17 875. Q. Would the board have seen this
18 before it was sent?

19 A. That I do not know.

20 876. Q. Can you inquire as to if the board
21 saw this document before it was sent and approved
22 it?

23 A. Is that an undertaking or...

24 877. MR. SHEA: Yes, that's what I'm asking
25 for.

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1 MR. JONES: Well, you can assume it was
2 approved if it went out.

3 878. MR. SHEA: I would like to see the
4 documents. I would like to see, for
5 example, if there was a report to the board
6 about this, and whether the board actually
7 passed a resolution approving it.

8 MR. JONES: Well, you have our
9 disclosure about...

10 879. MR. SHEA: If that's a refusal, then,
11 please give the refusal.

12 MR. JONES: Okay. Well, I'm telling you
13 if there was, it would be in the
14 disclosure. You have our disclosure.

15
16 BY MR. SHEA:

17 880. Q. So I'm going to take it there was
18 none. There was no internal communications. This
19 thing just came out of whole cloth like this, no
20 drafts, no nothing.

21 This is how it came out, fine. That's
22 your position? It came out of whole cloth just like
23 this. You sat down one day. You drafted this.
24 This is what came out. It got sent?

25 A. The question is...

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1 881. Q. That's my question.

2 A. Was there work to build these up?

3 Yes.

4 882. Q. Yes. Is that work in writing?

5 A. I can give an undertaking. Well...
6 there might have been.

7 883. Q. There might have been?

8 A. Discussions.

9 MR. JONES: You said there were
10 discussions to develop this?

11 THE DEPONENT: Yes.

12

13 BY MR. SHEA:

14 884. Q. I'm asking him...

15 A. Yes.

16 885. Q. ...is his position that none of them
17 were in writing. So this document was produced in
18 one sitting. This document came out. There were no
19 previous drafts, no exchanges of drafts between
20 anyone, just this?

21 A. You said in writing. I sent out a
22 draft business plan out to...

23 886. Q. To Mr. O'Hara, did you send a draft
24 business plan out to Mr. O'Hara?

25 A. Not in its entirety, I don't...no.

1 I don't believe I did.

2 887. Q. Well, did you send parts of a draft
3 business plan out to Mr. O'Hara, asking for
4 feedback?

5 A. No, again, I'm not sure if I sent
6 them out or we had discussions on...the buildup to
7 this, there might have been discussions with him,
8 but that I would send them out? I'm not...I don't
9 know.

10 888. Q. Can you undertake to look at your
11 records to determine...

12 A. Sure.

13 889. Q. ...if there were exchanges between
14 you...if your position is that if it's not here...

15 MR. JONES: That's the exact same
16 position we got from Mr. Stanek.

17 890. MR. SHEA: I'm sorry. I didn't...what
18 you got from Mr. Stanek is what you got
19 from Mr. Stanek. I'm asking you for
20 the...you can give the refusal. That's
21 your right.

22 MR. JONES: Sure.

/R

23 891. MR. SHEA: So that's your right, to give
24 the refusal. I have no objection. I told
25 you that before. If you want to refuse,

1 refuse. So it's a refusal?

2 MR. JONES: Yes.

3 892. MR. SHEA: Okay. Just to be clear, the
4 request for an undertaking was to...

5 MR. JONES: Well, to be clear, my answer
6 is if there was, it's in the documents.
7 It's in the disclosure. That's my answer.

8 893. MR. SHEA: That's his answer you mean.
9 So your...that's his answer, okay. That's
10 why I asked. So the position, then, is
11 this came out of whole cloth. There were
12 no previous exchanges of this, and his
13 answer was he wasn't sure, just so we're
14 clear on that. Okay.

15 MR. JONES: Yes.

16
17 BY MR. SHEA:

18 894. Q. So did you hire a consultant to
19 assist in preparation of a business plan?

20 A. I do not believe so.

21 895. Q. Did you engage with your accountants
22 with respect to the preparation of your business
23 plan or your projections?

24 A. I do not believe so.

25 896. Q. So no consultants, did not engage

1 with anyone. You did this yourself?

2 A. Yes.

3 897. Q. And you didn't engage with anyone
4 else on the staff, just you?

5 A. Correct, yes.

6 898. Q. So the assumptions on which these
7 are based are purely yours, and there is no
8 underlying documents to support the assumptions?

9 MR. JONES: Do you want to take him to
10 something in particular that you're
11 referring to?

12
13 BY MR. SHEA:

14 899. Q. One fifty-three you raise various
15 assumptions with respect to automobile traffic.

16 A. M'hm.

17 900. Q. So your bus traffic based rounded
18 averages. There is no basis for that, other than
19 your own opinion?

20 A. Yes, it would have been mine.

21 901. Q. Automobile traffic based on rounded
22 average is just your opinion as to where they're
23 going to go?

24 A. Yes.

25 902. Q. No basis for this, no experts, no

1 consultants, didn't even look at a website?

2 A. I don't believe there is a website
3 that is going to give you traffic projections.

4 903. Q. My wife tells me Wikipedia does
5 everything. So truck traffic projections, just your
6 numbers, just your guesses?

7 A. My projections, yes.

8 904. Q. So then we go on to page 47. So did
9 you see this letter from Mr. Rienas?

10 MR. JONES: Well, take a minute to read
11 it.

12 THE DEPONENT: Yes, I have seen this
13 letter, yes.

14
15 BY MR. SHEA:

16 905. Q. So you will agree with me that in
17 this letter Mr. Rienas makes it clear that it's the
18 position of the Authority that percentage only rent
19 is not acceptable?

20 A. Where does he say that?

21 906. Q. "...In response to your letter of
22 January 15..."

23 A. Okay.

24 907. Q. "...Peace Bridge Duty Free's
25 proposed financial business plan of

1 eliminating base rent and moving to only
2 percentage rent is unacceptable..."

3 Do you see that?

4 A. That's Ron's letter, yes.

5 908. Q. And you'll appreciate that further
6 down, Mr. Rienas, on behalf of the Authority,
7 indicates:

8 "...Your rent proposal was the key element
9 in Peace Bridge Duty Free winning the
10 concession, and was included unamended in
11 the lease between Peace Bridge Duty Free
12 and the Authority, and the Authority is not
13 prepared to alter the basis upon which the
14 concession was awarded..."

15 Do you see that? That's the position.

16 A. Okay.

17 909. Q. Okay, so you're aware that that was
18 the position being taken?

19 A. I acknowledge that's his letter.

20 910. Q. Okay. January 19th, this letter, he
21 also makes an inquiry and indicates that the plan is
22 silent on accessing government relief programs like
23 the BCAP and the HASCAP. You indicated that you
24 were going to give me some information on the BCAP,
25 but what about the HASCAP? Did the bridge...did the

1 Peace Bridge ever apply...sorry, did Peace Bridge
2 Duty Free apply for that?

3 A. Yes, we did.

4 911. Q. And what was the result?

5 A. Again, a million dollar loan.

6 912. Q. Okay, and when did you receive that
7 million dollar loan?

8 A. I have to get back to you with the
9 exact date.

10 913. Q. Okay. So I'm going to ask you to
11 give me an undertaking as to when you got the
12 million dollar loan and how those funds were spent.

13 A. Yes.

14 914. Q. So the undertaking is when the
15 HASCAP million dollars was received and how it was
16 spent. Okay.

17 MR. JONES: I'm going to take that one
18 under advisement.

U/A

19 915. MR. SHEA: Okay.

20
21 BY MR. SHEA:

22 916. Q. So you were aware on...or Peace
23 Bridge Duty Free was aware on January 19th that the
24 Authority was not going to agree to a move to
25 percentage only rent. They found that to be

1 unacceptable?

2 A. On January 19th, right.

3 917. Q. January 19th, and did that ever
4 change? Did they ever take a different position on
5 whether they were prepared to accept percentage only
6 rent?

7 A. We had always hoped through
8 discussions that would be the...part of the plan to
9 go forward.

10 918. Q. The next document is March 25th. So
11 I take it that between January 19th, when the plan
12 for percentage only rent was rejected, and March
13 25th, there were no new proposals from Peace Bridge
14 Duty Free?

15 A. If they're not in your file...

16 919. Q. If they're not in the documents,
17 they don't exist. They're not in the documents. So
18 they don't exist.

19 So the next proposal is March 25th. Do
20 you recall that proposal?

21 A. Yes.

22 920. Q. And why don't you read this
23 document?

24 A. Sure. Okay.

25 921. Q. So you'll agree with me that this

1 proposal doesn't differ significantly from your
2 January 19th proposal?

3 A. Okay.

4 922. Q. The documents are the same, aren't
5 they, the attachments?

6 A. Are they?

7 923. Q. It refers to, "As previously
8 indicated." Sorry, I don't want to interrupt you,
9 but isn't the gist of this letter, the third
10 paragraph, where you ask for a meeting? Isn't that
11 the purpose of this letter, to ask for a meeting?

12 A. Yes.

13 924. Q. Okay. So you're putting forward the
14 proposal again and you're asking for a meeting. Is
15 that fair?

16 A. Again...

17 925. Q. Go back and check to see if they
18 differ significantly.

19 A. Yes.

20 MR. JONES: So Counsel, are you telling
21 the witness that these documents are the
22 same?

23 926. MR. SHEA: I'm not. I'm suggesting
24 they're the same, and I'm asking him to
25 tell me if he thinks they're different.

1 MR. JONES: The numbers look at least
2 different in some spots.
3

4 BY MR. SHEA:

5 927. Q. So what is the basis for the
6 difference, like, why the change? What changed
7 between January 19th...January 15th, sorry, and
8 March 25th?

9 MR. JONES: Is your question to identify
10 what's different?
11

12 BY MR. SHEA:

13 928. Q. No, what changed. Not the numbers.
14 What changed from you...from a basis for your
15 assumptions? So what facts changed for you that
16 caused you to change these numbers? Because as
17 I...I could be wrong, but previous evidence was that
18 there is no document...if there is no underlying
19 documents in your disclosures, they don't exist.

20 There are similarly no underlying
21 documents for this in your disclosure. So I assume
22 you also created this, but something must have
23 changed to cause the numbers to change.

24 MR. JONES: While we're looking at this,
25 can we go off the record for just a moment?

1 929. MR. SHEA: Sure.

2
3 --- upon recessing at 2:54 p.m.

4 --- A BRIEF RECESS

5 --- upon resuming at 3:13 p.m.

6
7 JIM PEARCE, resumed

8 CONTINUED CROSS-EXAMINATION BY MR. SHEA:

9
10 930. Q. We were at the point where we took
11 the break so you could compare the 15th January and
12 the 25 March proposals.

13 A. Right. I must say they are very
14 similar. There might have been some rounding on
15 some sales and expenses, but they're very similar in
16 concept, and it looked like the March 25th was,
17 again, trying to engage the Authority to come up
18 with this...work together on a plan going forward.
19 That's...again, percentage rent was a key to that.

20 931. Q. Okay. So from your perspective,
21 you're saying that the purpose of the March
22 25...there were no purpose for the changes. So the
23 changes are inconsequential, from your perspective?

24 A. Yes, yes, it looked like there was
25 some rounding on the sales, instead of make an easy

1 million. It went to 18,360.

2 932. Q. What you were trying to do is
3 convince the Authority to agree to percentage only
4 rent?

5 A. To engage in...

6 933. Q. In a discussion of percentage only
7 rent?

8 MR. JONES: Let him answer the question.
9

10 BY MR. SHEA:

11 934. Q. So?

12 A. Thank you, yes. To show them that
13 percentage rent was the viable way, going forward,
14 until traffic returned. As we said in the letter,
15 paying full rent with no traffic, and I wanted to
16 highlight to them the difference, and the percentage
17 rent over time, business is viable until traffic
18 comes back.

19 So that was the whole idea, get them to
20 engage in the numbers, not just a blanket, "No."
21 "Let's discuss this, these scenarios."

22 935. Q. Okay, but at this point in time,
23 you're not paying any rent?

24 A. We weren't open.

25 936. Q. No, but so you're saying that you

1 would get them to discuss...

2 A. We're paying...

3 937. Q. Let me finish, please.

4 A. Okay.

5 938. Q. Get them to agree to percentage
6 rent.

7 MR. JONES: You didn't let him finish
8 his answer.

9 THE DEPONENT: You said we weren't
10 paying rent. We were paying additional
11 rent and services.

12
13 BY MR. SHEA:

14 939. Q. Okay, but you're not paying rent
15 base...you're not paying the base rent and you're
16 not paying percentage rent?

17 A. Correct, because it was zero for
18 percentage rent.

19 940. Q. So you were asking them to agree to
20 accept percentage rent only going forward?

21 A. Yes, to the...yes.

22 941. Q. Okay, thank you. So the next letter
23 is...or the next correspondence is at tab...

24 A. Percentage rent, and the idea
25 was...I'm sorry to interrupt again, but percentage

1 rent until the business comes back.

2 942. Q. Show me where you were saying that
3 you would go back to paying minimum rent.

4 A. Well, that wasn't part of the
5 discussion.

6 943. Q. But your proposal was to pay
7 minimum...to pay percentage rent only?

8 A. And as soon as sales came back, I
9 assume we would have reached over the four million.

10 944. Q. But just to be clear...

11 A. Yes.

12 945. Q. ...percentage rent only, and your
13 position is if sales got to a certain point...

14 A. Right.

15 946. Q. ...that percentage rent would equal
16 the base rent?

17 A. Correct.

18 947. Q. So you were proposing to amend the
19 lease to remove base rent?

20 A. The idea was to have a discussion
21 with the Authority, sit down and work this out to
22 what is best going forward.

23 948. Q. But what did you want?

24 A. We wanted to meet with them and
25 discuss, using numbers, to get a plan going forward.

1 949. Q. Okay.

2 A. Yes.

3 950. Q. So on tab 49 is an April 12th letter
4 from Peace Bridge Duty Free to the Authority.

5 A. M'hm.

6 951. Q. Are you familiar with this letter?

7 A. Yes.

8 952. Q. Okay, and in this letter, at the
9 very last line...

10 A. Yes.

11 953. Q. ...Mr. O'Hara says:

12 "...If the Peace Bridge authority is going
13 to decline our request to engage in good
14 faith discussions, we kindly request that
15 you explain why you refuse to do so..."

16 A. Right.

17 954. Q. The next day the Authority wrote
18 back, did they not?

19 A. Okay.

20 955. Q. That's the fifth (sic).

21 A. That is dated April 13th, correct.

22 956. Q. And did they not indicate that they
23 continued to be prepared to have discussions when
24 Peace Bridge Duty Free has provided its 2020 audited
25 financial statements? They assert that you

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1 previously indicated that they would be available by
2 the end of March at the latest. Did you indicate
3 that?

4 A. That is, I think, in the lease, if I
5 remember the lease right, and normally we have those
6 done. Do I have that somewhere? Did I say that
7 somewhere?

8 957. Q. Do you recall saying that...

9 A. March 31st?

10 958. Q. ...the financials would be available
11 by the end of March at the latest?

12 MR. JONES: Do you have that letter to
13 direct him to or...

14
15 BY MR. SHEA:

16 959. Q. No, I'm just saying this is what Mr.
17 Rienas asserts. Do you have any basis to say he is
18 wrong?

19 A. I can't fairly...I would have to go
20 back into the...

21 960. Q. Let me put it another way.

22 A. Sure.

23 961. Q. Did someone reach out to Mr. Rienas
24 and say, "No, we never said that"?

25 A. I believe that was our belief, that

1 they would be finished by the end of March.

2 962. Q. But they weren't, were they?

3 A. We'll see the dates on there. I
4 think it is...I think we just had those, right, and
5 they said an April date or whatever.

6 963. Q. Yes. So you will agree that you
7 provided the financials in the middle of April?

8 MR. JONES: Do you have a document to
9 refer him to?

10
11 BY MR. SHEA:

12 964. Q. I'm asking when he...well, let me
13 ask this. So the financials are dated April 21st,
14 2021.

15 A. Correct.

16 965. Q. So you could not have provided them
17 before April 21st, 2021?

18 A. They were not...yes, we couldn't
19 have provided them by end of March.

20 966. Q. Yes. So but you also could not have
21 provided them to the Authority before you received
22 them, and you got...they're dated April 21st, 2021.
23 So you could not have given them to the Authority
24 before that?

25 A. I don't want to agree with that,

1 because I'm not exactly sure when I sent them to the
2 Authority, but...

3 967. Q. Would you have sent them to the
4 Authority before they were given to you?

5 A. Well, no, no, you're referring to
6 the date, and I'm not sure if this date is the...

7 968. Q. Okay.

8 A. ...the date that is...

9 969. Q. Can you give me an undertaking as to
10 when you gave the 2020 financials to the Authority?

11 A. M'hm.

12 MR. JONES: Well...

13 970. MR. SHEA: Refuse or give it.

14 MR. JONES: I think...

15 971. MR. SHEA: I have tried to...

16 MR. JONES: It's not before...

17 972. MR. SHEA: I asked that question and he
18 said no.

19 THE DEPONENT: Well, I don't know the
20 exact date. That's all. I want to be
21 accurate.

22 MR. JONES: I think what he asked you is
23 it's...you didn't give it to them before
24 the financials are dated. We can agree
25 on...

1 973. MR. SHEA: Okay, that's what I asked.

2 MR. JONES: You don't...

3 THE DEPONENT: Yes.

4 MR. JONES: I assume you don't...there
5 is no issue about that?

6 THE DEPONENT: Yes.

7
8 BY MR. SHEA:

9 974. Q. Okay.

10 A. Okay.

11 975. Q. So you gave them to him on some time
12 after the 21st, and you will agree that the
13 Authority asked some questions about the financial
14 statements?

15 MR. JONES: Can you refer us to what
16 you're talking about?

17
18 BY MR. SHEA:

19 976. Q. I didn't think I was going to have
20 to put this many documents in, but so on...it is in
21 our disclosures at D19, but I'm just asking...I
22 didn't want to put all these documents in, but on
23 May 6th, 2021 you responded to inquiries, correct?
24 Do you know that?

25 A. I don't know that. I don't...show

1 me...is it here?

2 977. MR. SHEA: Let's go off the record for a
3 second.
4

5 --- DISCUSSION OFF THE RECORD
6

7 BY MR. SHEA:

8 978. Q. I'm showing you a document. Do you
9 recognize that document?

10 A. Yes.

11 979. Q. Can I have that one back so I can
12 mark it then as an exhibit?

13 A. Do you want me to go through it or
14 no? No, no.

15 980. MR. SHEA: I'm just asking you responded
16 to their inquiries on...this will be
17 Exhibit 5.
18

19 --- EXHIBIT NO. 5: Letter dated May 6, 2021 from Mr.
20 Pearce to Peace Bridge Authority
21

22 BY MR. SHEA:

23 981. Q. So you responded based on this
24 letter? There was a request to you of April 28th.
25 So within days of receiving the financials, and you

1 responded on May 6th. Sound about right?

2 A. I responded on May 6th to this April
3 28th, yes.

4 982. Q. Yes.

5 A. Yes.

6 983. Q. Okay. So May 6th you responded. Is
7 it not correct that the Authority arranged an in-
8 person meeting with you for the 13th?

9 A. Me and Greg?

10 984. Q. I don't know. I think so. Let's
11 turn up a document.

12 A. Yes.

13 985. Q. Let's turn up document 51.

14 A. Okay. Oh, yes, okay, yes.

15 986. Q. Yes, so the 13th.

16 A. Yes.

17 987. Q. And again, I'm going to ask the
18 question is there a reason this document wasn't in
19 your disclosures? Did you just not find it?

20 A. I do not know the answer.

21 988. Q. Okay, so you just didn't find this
22 in your disclosures? Is that what...I'm guessing,
23 because it's not in your disclosures.

24 So there was a meeting, and this was on
25 the 13th. So you responded on...delivered the

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1 financials some time after the 21st. They made
2 inquiries of you on the 28th. You responded on the
3 6th. They arranged a meeting on the 13th.

4 After that meeting, you indicated you were
5 going to provide a proposal, did you not?

6 A. Greg mentions in his letter to Ron a
7 proposal, yes, will be coming.

8 989. Q. And you said you were going to start
9 to work on it the next week?

10 A. Yes, yes.

11 990. Q. Okay. So 52, the next set of
12 documents, again, 52 doesn't appear to be in your
13 disclosure. So I assume you just couldn't find 52.

14 A. I don't know.

15 991. Q. Okay. Fifty-two, on we see May
16 14th...so the day after the meeting.

17 A. Okay.

18 992. Q. The authority asks for the proposal
19 June 1st.

20 A. Right.

21 993. Q. Because you needed to sort some
22 stuff out with RBC. Don't know what, but Greg
23 O'Hara...you're not copied on this, but were you
24 aware of this e-mail?

25 A. Yes.

1 994. Q. Okay. Greg indicated to the
2 Authority that...this is on the 26th of May...

3 A. Right.

4 995. Q. ...that they hadn't got things
5 sorted out with RBC on the credit request renewal
6 yet, so proposal won't be completed as soon as they
7 hoped. As soon as we hear anything definitive from
8 the bank, you'll get back to the Authority. So
9 that's May 26th.

10 A. Okay.

11 996. Q. And there was no communications
12 concerning a proposal from May 26th until August
13 21st, was there?

14 A. I can't say that is factual.

15 997. Q. But if it is not in your
16 disclosures, it didn't happen?

17 A. Okay.

18 998. Q. I'm just asking.

19 A. I don't know, yes.

20 999. Q. So do you recall anything being sent
21 to the Authority between the 26th of May and August
22 21st?

23 A. I do not recall.

24 1000. Q. But on August 21st, if you turn the
25 tab over to 53, on August 21st you delivered this

1 proposal, did you not?

2 A. Correct. Is there a date in there?
3 I believe...we did submit this. I believe that was
4 the same time frame.

5 1001. Q. Did you want to check whether it was
6 August 21st or do you agree it was August 21st?

7 A. I'll go with August 21st.

8 1002. Q. Okay. So this is the proposal that
9 you had promised in June?

10 A. Okay.

11 1003. Q. Or that we had requested in June,
12 and it's in August. So this proposal...I'm going to
13 take you to page...it's 290 at the top. It's page
14 5, bottom right, page 5 of the proposal. Okay?

15 A. Yes.

16 1004. Q. This is your proposal?

17 A. Yes.

18 1005. Q. You're only going to pay 20 percent
19 of revenue received?

20 A. Yes.

21 1006. Q. You'll agree that that has been
22 rejected twice now by...at this point in time, it
23 had been rejected...that concept had been rejected
24 twice by the Authority. You'll agree with that,
25 that they already told you twice?

1 A. At certain times, they disagreed
2 with that. We had hoped...

3 1007. Q. You hoped they would change their
4 mind?

5 A. Based on our proposal, our plan.

6 1008. Q. You also indicated that you were
7 looking for 100 percent waiver of all of the rent
8 that had accrued and move to a percentage rent only
9 basis going forward. So you're looking for an
10 amendment to the lease to remove minimum rent and
11 you're looking for a waiver of 100 percent of the
12 accrued deferral, and that would have been the
13 deferral under the first and what you assert is the
14 second rent deferral agreements, correct?

15 A. Yes, all base rent that has been
16 accrued be waived by the bridge authority.

17 1009. Q. So 100 percent forgiveness of
18 rent...

19 A. Yes.

20 1010. Q. ...and amendment of the lease to
21 remove minimum rent in perpetuity, for the rest of
22 the term, yes?

23 A. That's the way it reads.

24 1011. Q. Okay. So why would you make a
25 proposal that you knew was unacceptable to the

1 Authority?

2 A. We didn't know that.

3 1012. Q. Well, they had previously told you
4 that percentage rent was not acceptable to them.

5 A. You said two different times, two
6 different dates. They said no. We think this plan
7 showed...hopefully convinced them the best way for
8 them and us going forward would be this proposal.

9 1013. Q. But they didn't agree?

10 A. Ultimately, I do not believe they
11 did.

12 1014. Q. Well, it's not in here. They didn't
13 accept that. There is no...

14 A. Okay.

15 1015. Q. I didn't put it in here. They
16 didn't accept this.

17 A. Okay.

18 1016. Q. Do you recall them accepting this?

19 A. No.

20 1017. Q. No, okay. So and you never retained
21 a consultant or external advisor. You confirmed
22 that already.

23 A. Right.

24 1018. Q. And then numbers that you put
25 together were just your numbers, based on your own

1 knowledge?

2 A. Yes.

3 1019. Q. And do you have any reason to
4 suggest that the Authority didn't look at your
5 documents and consider them?

6 A. I would hope they would have read
7 the whole proposal every time we sent it through,
8 and...

9 1020. Q. They asked questions?

10 A. ...review it.

11 1021. Q. They asked questions, didn't they?

12 A. Some did.

13 1022. Q. So they asked questions about your
14 financials. They asked questions about your
15 proposals?

16 A. Yes, questions about, yes, financial
17 statements. I don't know if they asked questions
18 about our proposal.

19 1023. Q. Did they not ask questions about
20 your projections?

21 A. I don't...they always...

22 MR. JONES: Do you have a document in
23 which they did ask...

24 THE DEPONENT: Yes.

25 MR. JONES: ...that you can put to the

1 witness?

2 THE DEPONENT: So they always seemed
3 to...

4
5 BY MR. SHEA:

6 1024. Q. I'll make sure is the right one.
7 I'm going to show you a document from January 28th.

8 A. Okay.

9 1025. Q. And then once you confirm it, I'll
10 give you the non-official version.

11 A. Okay.

12 1026. Q. Do you recall that document?

13 A. Oh, this is for the financial
14 statements, right?

15 1027. Q. No, this is after your
16 January...have a look at the second page.

17 A. This is...but I think...if I'm
18 misinterpreting your question...

19 1028. Q. The second page "Financial
20 forecast".

21 A. Okay.

22 1029. Q. These are questions on the forecast
23 you delivered to them on January 19th, are they not?

24 MR. JONES: Take a minute to read...

25 1030. MR. SHEA: Give me back that one so I

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1 can mark it while you look at it, sorry.

2
3 --- EXHIBIT NO. 6: E-mail re financial forecast, dated
4 January 28, 2021
5

6 BY MR. SHEA:

7 1031. Q. Just while you're looking at it, did
8 you give them any other forecasts between January
9 9th...January 15th, sorry, and January 28th?

10 A. In January?

11 1032. Q. Well, sorry, you gave them forecasts
12 on the 15th attached to your plan. This inquiry
13 relates to forecasts. Were there any other
14 forecasts between January 15th and January 28th?

15 A. I don't recall. If they're not in
16 there, I don't recall. So I'm trying...do you have
17 Ron's e-mail to me?

18 1033. Q. I don't.

19 A. Okay, yes, I get...the questions I
20 can see coming from Ron, yes. We asked him if he
21 had traffic projections, which they didn't, wouldn't
22 share.

23 1034. Q. My question is not what the contents
24 were. My question is they asked you...they engaged.
25 They asked you questions about your proposals?

1 MR. JONES: So this is dated after the
2 letter that you put to him in January,
3 where they rejected the proposal?

4 1035.

MR. SHEA: Well, those were his
5 responses. I'm just saying that...so
6 January 15th.

7 MR. JONES: And then January 19th they
8 flat rejected it.

9 1036.

MR. SHEA: And then this is dated the
10 28th, the response.

11 MR. JONES: I think you have skipped
12 something.

13 THE DEPONENT: No, I haven't skipped
14 anything. I'm saying that he says on his
15 19th that percentage rent is not something
16 that they're prepared to consider, but he
17 also made inquiries after that, and it's
18 interesting that you say that, but your
19 documents have nothing in between. We
20 don't have Ron's e-mail to him. I don't
21 have that. All I have is his response.

22 MR. JONES: Well, why isn't it in your
23 productions?

24 1037.

MR. SHEA: Because we couldn't find it.

25 MR. JONES: Well, then what's the

1 problem?

2 THE DEPONENT: I'm kind of guessing what
3 Ron's e-mail was and the context it was
4 sent to him.
5

6 BY MR. SHEA:

7 1038. Q. You can have that. So my question
8 was whether you'll agree that the Authority
9 considered your proposal.

10 MR. JONES: After they rejected it?

11 1039. MR. SHEA: Please let him answer the
12 question. I'm asking him whether...

13 MR. JONES: You're putting this document
14 from the end of January.

15 1040. MR. SHEA: He...that is also before the
16 25th, the next one.
17

18 BY MR. SHEA:

19 1041. Q. I'm asking whether you will agree
20 that the Authority considered your proposals and
21 asked questions about your projections during the
22 course of this.

23 A. Well, again...

24 1042. Q. Shake your head all you want.

25 A. No, I'm not shaking...

1 1043. Q. No, him.

2 A. So they rejected it.

3 1044. Q. Yes.

4 A. On the 19th.

5 1045. Q. They rejected the concept of
6 percentage rent on the 19th, that's for sure.

7 A. Right, and then end of the month,
8 they asked questions...

9 1046. Q. Yes.

10 A. ...after they rejected it.

11 1047. Q. But we don't know when they asked
12 these questions but they asked the questions.

13 A. We don't know.

14 1048. Q. You responded at the end of the
15 month, but they asked the questions. If you can
16 help me identify the date that he sent it, I would
17 be grateful but...

18 A. Yes.

19 1049. Q. Let's move on. So on September 8th,
20 you'll recall that...

21 A. What number?

22 1050. Q. This is 54...that notices of default
23 were delivered by the Peace Bridge. Have a look at
24 these. I just have one question that relates to
25 these and...

1 A. Okay.

2 1051. Q. You'll agree with me that the lease
3 was never terminated by the Authority?

4 A. Is that legal? Like...

5 1052. Q. Well, these are notices of default.
6 Did they ever change the locks?

7 A. Is that what...the legal thing of
8 termination?

9 1053. Q. I'm not going to ask you for a
10 legal...did they ever change the locks?

11 A. I don't believe there is any locks.

12 1054. Q. Okay.

13 A. Yes.

14 1055. Q. There are no locks on the front
15 doors of the duty free?

16 A. I don't believe so. We never close.
17 Yes, there is a door lock.

18 1056. Q. So they never changed those locks.
19 They never...

20 A. No.

21 1057. Q. Did they take possession of the
22 leased premises?

23 A. That's the question, no.

24 1058. Q. No. In this document do you see
25 anywhere the words, "The lease is terminated"?

1059. Q. Yes. It may be easier. Are these notices not titled "Notice of default"?

1060. Q. Did you receive notice of termination?

1061. Q. Did you receive a document marked
"Notice of termination"?

1062. Q. So we're going to now go on to deal with some of the specific allegations in the affidavits, and we're going to deal with those in order of date. So we're going to start with the 12th of December, 2021 affidavit, please. So if you can turn that document up?

MR. JONES: Okay. Is there a specific paragraph you want to go to?

1063. Q. I'll take you to the paragraph. So
paragraph 16.

MR. JONES: This is your affidavit of

December...what was it, December...

1064. MR. SHEA: This is the December 12th,
2021 affidavit.

MR. JONES: Okay.

BY MR. SHEA:

1065. Q. So paragraph 16, do you see that
paragraph?

A. Yes.

1066. Q. So of the six million dollars that
was spent, 4.2 million was borrowed from RBC and 1.8
was used from cash reserves, correct?

A. Correct.

1067. Q. So the shareholders contributed no
funds for these renovations?

A. Sorry, I don't know if that...

1068. Q. So the shareholders contributed no
money to the company for these renovations?

MR. JONES: Do you mean, like...

1069. MR. SHEA: It's a simple question. Did
the shareholders contribute any money...

THE DEPONENT: Did they send a cheque
in?

MR. JONES: Did the corporation...

1070. MR. SHEA: Sorry, sir, I can ask the

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1 questions I would like to ask. If you want
2 to say "Refuse", you can say "Refuse". We
3 have been through this.

4 MR. JONES: I just don't understand the
5 question. You're asking...

6 1071. MR. SHEA: Like, the question is simple.

7 THE DEPONENT: They have a balance sheet
8 of assets.

9 1072. MR. SHEA: You can refuse or you can
10 answer the question.

11 THE DEPONENT: So anything that comes
12 from that balance sheet, the shareholders
13 own, correct?

14 MR. JONES: Did the shareholders add
15 parties to the lease?

16 1073. MR. SHEA: I didn't...sorry, I didn't
17 ask that.

18
19 BY MR. SHEA:

20 1074. Q. The question is simple. Did the
21 shareholders contribute money? Did they lend money
22 to the company for them to make these renovations?
23 Did they lend money to the company?

24 A. The monies that came out of the
25 corporation, the shareholders own, right, correct?

1 1075. Q. No.

2 A. Well, the corporation is...they own
3 the corporation.

4 MR. JONES: What are you getting at with
5 your question?
6

7 BY MR. SHEA:

8 1076. Q. I just want the answer. I want to
9 know did the shareholders...

10 MR. JONES: Are you asking did they
11 specifically write the cheque that...
12

13 BY MR. SHEA:

14 1077. Q. Did they lend...no. did they lend
15 money to the company to make the renovations?

16 A. In a roundabout way, 1.8 million of
17 that, plus the 4.2 million, end of the day is the
18 corporation, correct?

19 1078. Q. Sorry, I asked the question did the
20 shareholders lend money to the company to fund these
21 renovations.

22 A. I know your question isn't as simple
23 as it sounds, because there is...has got to be angle
24 to it.

25 1079. Q. No, don't think of...sorry, sorry.

1 MR. JONES: Is there a document you want
2 to put to him?

3 1080. MR. SHEA: No, I don't want to put a
4 document. I want my question answered.
5

6 BY MR. SHEA:

7 1081. Q. Did the shareholders make a loan to
8 the...or make loans to the company to fund the
9 renovation?

10 A. The money came from the corporation
11 for the renovations.

12 1082. Q. Is the answer yes or is the answer
13 no?

14 MR. JONES: Well, I think he just said
15 it came from the corporation.
16

17 BY MR. SHEA:

18 1083. Q. So it didn't come from the
19 shareholders?

20 A. It came from the corporation.

21 1084. Q. Okay. Did the shareholders
22 guarantee the RBC loan?

23 A. I do...you guys got that. I would
24 have to pull that up.

25 MR. JONES: Do you know?

1 THE DEPONENT: I don't...you guys have
2 that document, and so we...

3 1085. MR. SHEA: I don't have the document.

4 MR. JONES: If you know, you know. If
5 you don't know, you don't know.

6 THE DEPONENT: Yes, yes. There is
7 no...I don't believe there is any
8 guarantees.

9
10 BY MR. SHEA:

11 1086. Q. Have the shareholders made any
12 shareholder loans to this company?

13 A. No, I do not believe that any
14 loans...

15 1087. Q. Have the shareholders made any
16 equity contributions to the company in...

17 A. No.

18 1088. Q. No.

19 A. Oh, in what time period?

20 1089. Q. Since 2016.

21 A. No.

22 1090. Q. Thank you.

23 A. Okay.

24 1091. Q. Paragraph 31, please.

25 A. Okay, yes.

1 1092. Q. Do you see that paragraph?

2 A. Yes.

3 1093. Q. You assert that:

4 "...The underlying principle of the
5 deferral agreements was that the duty free
6 would not be required to pay rent until
7 after traffic across the bridge returned to
8 normal levels and the duty free was able to
9 reopen its store to the public..."

10 A. Yes.

11 1094. Q. That's not what the agreements say,
12 is it?

13 A. Our belief that we have to open in
14 order to...and get traffic back, too.

15 1095. Q. Do the agreements not say that the
16 deferral period expires on the earlier of a fixed
17 date and an event that is related to reopening the
18 stores?

19 A. Well, there is only one, correct?

20 1096. Q. There is only one.

21 A. Yes, and that's with the July...

22 1097. Q. There is only one and that's the
23 July.

24 A. Yes.

25 1098. Q. And it says July. So you'll agree

1 with me that the underlying principle of the
2 agreements is the deferral period ends on a fixed
3 date or the reopening of the store?

4 A. During the discussions about that,
5 we knew until the border came back, there would be
6 further...we hoped for discussions and agreements
7 but they never materialized.

8 1099. Q. No, I agree. You hoped there would
9 be further discussions and agreements.

10 MR. JONES: There was another agreement.

11 THE DEPONENT: We had one there, and
12 another one after that, hopefully, and
13 another one after that, hopefully.

14
15 BY MR. SHEA:

16 1100. Q. So that was your hope?

17 A. It made sense until the...as a
18 principle and everything of getting us through to
19 the bridge traffic returns and restrictions down.

20 1101. Q. Okay. I'm going to now turn to
21 paragraphs 64 and 65.

22 A. Okay.

23 1102. Q. These relate to the termination and
24 the forbearance agreement. So I'm kind of going to
25 ask you to do a little bit of double dipping here.

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1 I'm going to ask you to also turn up in volume 3,
2 tab 55, please.

3 A. Okay.

4 1103. Q. This is the forbearance agreement.
5 Have a look at it. This is the forbearance
6 agreement that you entered into with RBC, or that
7 Peace Bridge Duty Free entered into, correct?

8 A. Yes.

9 1104. Q. We're not a party to this agreement,
10 but is not a condition of this agreement that by
11 November the 15th Peace Bridge Duty Free have
12 reached an agreement with the Authority?

13 MR. JONES: Is there a paragraph you
14 want to take us to?

15 1105. MR. SHEA: Sure. So let's go
16 through...I just want to make sure you're
17 comfortable that this is the full
18 agreement. You read it. You understand
19 it. So we don't have any issues there?

20 MR. JONES: Have you read it?

21
22 BY MR. SHEA:

23 1106. Q. So page 9. If you finish reading it
24 and you're comfortable with it, page 9.

25 MR. JONES: Well, Jim, have you read the

1 whole agreement?

2 THE DEPONENT: Right now, no.

3 MR. JONES: Do you want him to read the
4 whole agreement?

5 1107. MR. SHEA: If he wants to read it or if
6 he just...previously you had asked him to
7 read the entire document before you
8 permitted him to answer a question. So I
9 want to make sure that...I have one
10 question...two questions, and they relate
11 to a...

12 THE DEPONENT: I believe this is the
13 forbearance agreement.

14 MR. JONES: So what paragraph are you
15 referring to?

16 1108. MR. SHEA: 6.4(b) on paragraph 9.

17 THE DEPONENT: Okay.

18
19 BY MR. SHEA:

20 1109. Q. Have you read that?

21 A. Okay.

22 1110. Q. You'll agree that that requires that
23 the borrower, Peace Bridge Duty Free, deliver to the
24 lender evidence that an arrangement satisfactory to
25 the lender has been reached with the landlord.

1 That's us, and that's by November 15th of 2021. You
2 agree to that, that's what that says? I think you
3 have to be verbal. You can't...

4 A. Okay.

5 MR. JONES: It says...I mean, do you
6 want him to read (b)?

7 1111. MR. SHEA: Sorry, I'm going to take him
8 to what the bank asserted next. I'm
9 not...whatever arrangements are with the
10 bank...

11 MR. JONES: So they want to ensure that
12 the landlord will not terminate the lease
13 before the end of its current term.

14 1112. MR. SHEA: That's what...who?

15 MR. JONES: That's what this...

16 1113. MR. SHEA: So now you're providing
17 evidence.

18 MR. JONES: No, I'm reading the
19 paragraph that you just directed us to.

20 1114. MR. SHEA: "...No later than
21 November..."

22 MR. JONES: Right.

23
24 BY MR. SHEA:

25 1115. Q. "...shall deliver to the lender

1 arrangements satisfactory in its sole
2 discretion has been entered into between
3 the borrower and the lender with respect to
4 the lease and the defaults thereunder to
5 ensure that the landlord will not terminate
6 the lease before the end of its current
7 term. By November..."

8 MR. JONES: That's exactly what I was
9 reading.

10
11 BY MR. SHEA:

12 1116. Q. My question is by November 15th you
13 had to deliver something to the lender, correct?

14 A. Some evidence that they're happy
15 that things are progressing.

16 1117. Q. Not that they're progressing, that
17 arrangements satisfactory have been entered into.

18 A. Yes, not to you, and not to us, to
19 them, correct.

20 1118. Q. But also that arrangements have been
21 entered into between the two of us?

22 A. That they're happy, that their
23 evidence...they are satisfactory. So whatever it
24 is, doesn't have to a signed thing, whatever they're
25 happy with. That's what...I agree that...

1 1119. Q. It says...

2 A. Evidence that is satisfactory to
3 them and only them, correct?

4 1120. Q. That:

5 "...[An arrangement] has been entered into
6 between the borrower and the lender with
7 respect to the lease...thereunder to ensure
8 that the landlord will not terminate..."

9 A. I agree, more evidence to them that
10 is satisfactory to them, not to us.

11 1121. Q. So you're saying that you did not
12 have to deliver...you did not have to establish to
13 the bank that you had an arrangement with us under
14 the lease. You do not read it that way?

15 A. No, we have to...as long as they're
16 happy that we're not going to be terminated, that's
17 what it is.

18 1122. Q. Okay.

19 A. As long as they're happy.

20 1123. Q. Okay. Later on in (d)...

21 A. Okay.

22 1124. Q. ...you agree that that...that you
23 authorized the lender to speak directly, so RBC to
24 speak directly with our client regarding the status
25 of the release and the resolution of any defaults?

1 A. That's correct.

2 1125. Q. Okay. Turn over to page 59, please?

3 A. Back here?

4 1126. Q. Yes. So by the 15th...

5 A. This is the Gowlings letter?

6 1127. Q. No, 56, 56, sorry.

7 A. Is it Aird's letter?

8 1128. Q. Yes. So are you familiar with this

9 letter?

10 A. Yes, I have seen this letter.

11 1129. Q. What document did you deliver to the

12 bank...if any, did you deliver to the bank by

13 November 15th in fulfilment of the clause that you

14 read?

15 A. So the question is what evidence we

16 sent to the bank?

17 1130. Q. What document did you send to the

18 bank?

19 A. What evidence we sent to the bank?

20 I can't recall what evidence, if any, we sent to the

21 bank.

22 1131. Q. So did you send any evidence to the

23 bank?

24 A. I can't recall.

25 1132. Q. Will you undertake to make inquiries

1 to determine if you sent any evidence to the bank?

2 MR. JONES: Okay.

U/T

3
4
5 BY MR. SHEA:

6 1133. Q. But you'll agree that to the extent
7 you did send evidence, the bank deemed it to be
8 unsatisfactory?

9 A. I have seen a few different things
10 at the bank.

11 MR. JONES: Counsel, I think you have
12 to...there are some intervening things that
13 you would have to put to him.

14
15 BY MR. SHEA:

16 1134. Q. Does the bank not say that there is
17 failure of the borrower to...

18 A. One or more, right?

19 1135. Q. Sorry, sorry:

20 "...One or more, without limiting..."

21 A. Yes.

22 1136. Q. "...One or more intervening events
23 has occurred, including without limitation
24 the failure of the borrower under section
25 6.4(b) of the agreement to deliver to the

1 lender no later than November 15th

2 evidence..."

3 So you will agree that whatever you sent, if you
4 sent anything, the bank did not agree was
5 satisfactory to the lender?

6 A. I think that might be a little too
7 narrow. It may not be wrong, but it may be a little
8 too narrow, because there may be more than one
9 event, even though they meant in that one. There
10 might be other events.

11 1137. Q. But they mentioned this one. So are
12 there any other events that were raised with you?

13 A. I don't know.

14 1138. Q. Are there any other events,
15 intervening events, that were raised by the bank?

16 MR. JONES: I think it's in the
17 material.

18 THE DEPONENT: Yes. I don't know. If
19 it's in the...I don't know.

20
21 BY MR. SHEA:

22 1139. Q. So you're not aware of any other
23 intervening events?

24 MR. JONES: It's in his affidavits.

25 1140. MR. SHEA: What is in his affidavit,

1 what other intervening events? There
2 aren't any other intervening events.

3 MR. JONES: Well, there was an e-mail
4 from...

5 1141. MR. SHEA: Where is this? I'm asking
6 the question, but if you want to provide
7 evidence...answers for your client, then go
8 ahead.

9 MR. JONES: As I recall, there was an e-
10 mail from Gowlings to the lender, telling
11 them that they intended to enforce the
12 lease.

13 1142. MR. SHEA: Telling them that they had
14 failed to reach an agreement, that's
15 correct. Was there an agreement in...let
16 me ask you this. On November...

17 MR. JONES: On November 21st there is an
18 e-mail that says:

19 "...Our client intends to exercise
20 its remedies under the default
21 provision of the lease..."

22 1143. MR. SHEA: Yes.

23 MR. JONES: But that's in his
24 affidavits.

25 1144. MR. SHEA: Sorry, but is that another

1 intervening event? He just said there may
2 be other intervening events.

3 THE DEPONENT: They said that, and I'm
4 not...

5
6 BY MR. SHEA:

7 1145. Q. So what are the other intervening
8 events, aside from the failure of our clients to
9 reach an agreement?

10 A. That's for the...

11 MR. JONES: Well, I think beyond what I
12 have just referred you to, the landlord's
13 lawyer saying they intend to
14 exercise...they intend to enforce the
15 lease. You have the landlord...

16 1146. MR. SHEA: How is that different from
17 the...

18 MR. JONES: You have the landlord
19 telling the bank they're going to terminate
20 the lease.

21 1147. MR. SHEA: "...We're going to exercise
22 our remedies under the lease." I don't
23 understand how that is responsive to my
24 question, but you may think it is.

1 BY MR. SHEA:

2 1148. Q. So let's move on then. Was there by
3 the 15th of November any arrangement between our
4 clients with respect to the lease? Was there a
5 resolution?

6 A. Was there an amending lease or
7 anything?

8 1149. Q. No, was there a resolution reached
9 between our clients with respect to the lease that
10 would preserve the lease?

11 A. Maybe from a non-legal standpoint.
12 We are still there. So is that kind of a...

13 1150. Q. I'm not asking.

14 A. You didn't lock the doors. You
15 didn't take it over, so...

16 1151. Q. But isn't the only reason we didn't
17 take it over and lock the doors is because you had
18 the benefit of the provincial moratorium?

19 A. I don't know.

20 MR. JONES: Is that the only reason?

21 1152. MR. SHEA: I'm asking him if he things
22 that's the only reason. I'm not asking
23 your question, sir.

24 THE DEPONENT: I don't know.
25

1 BY MR. SHEA:

2 1153. Q. So let me ask you this, then. Let's
3 go to document 57. Document 57 is a proposal to the
4 Authority from the duty free, correct?

5 A. Yes.

6 1154. Q. And this proposal...you're familiar
7 with this proposal?

8 A. Yes.

9 1155. Q. And this proposal contemplates a
10 base rent ramp-up. So the base rent will ramp back
11 up to four million. This is the first time you have
12 ever proposed this, correct? Previously your
13 proposals we were all, "We want the lease amended to
14 20 percent base rent going forward."

15 A. I think there is back...one of those
16 ones we just went through, there was a...

17 1156. Q. Which one?

18 A. I thought we had offered up two
19 million dollars at one time.

20 1157. Q. No, this is...

21 A. This is the first time?

22 1158. Q. "...Covenantor agrees to pay to the
23 landlord from the amendment date annual
24 base rent in 12 monthly installments on the
25 1st day of the month..."

1 This is the annual base rent. You're agreeing to
2 keep the annual...you keep the base rent. You don't
3 want an amendment to remove base rent. Paragraph
4 (b), you're going to ramp up the base rent beginning
5 at two million and back up to four million. Do you
6 see that?

7 A. Yes.

8 1159. Q. (c) relates to how you're going to
9 pay it. The next page over, you propose to pay back
10 two million in back rent. So this is the first time
11 you agree to pay back back rent, two million, but
12 you want it to be a non-interest bearing loan
13 amortized over the term of the lease, and you want a
14 five-year lease extension, correct? That's what
15 you're asking for?

16 A. Yes.

17 1160. Q. Turn the page, please.

18 A. Okay.

19 1161. Q. November 26th.

20 A. Fifty-eight?

21 1162. Q. Fifty-eight, yes. This is the
22 response to that. You have seen this letter before?

23 A. Yes.

24 1163. Q. So the Authority proposed 50 percent
25 of the back rent being paid back instead of a fixed

1 two million. Then future rent...

2 MR. JONES: It has also got a clause
3 about HST credits.

4 1164. MR. SHEA: Yes.

5
6 BY MR. SHEA:

7 1165. Q. I mean, I'm not...I'm worried about
8 comparing apples to apples. The 50 percent and then
9 the base rent ramp up, so they are both in accord
10 with each other. You're both talking about
11 something along those lines.

12 A. Okay.

13 1166. Q. And then my friend is right. There
14 is an application of HST credits to the old rent,
15 and food services tenant rents at market rates,
16 approved and payable to our client, the Authority.
17 So that was an offer made on October 26th.

18 Then if you go over to the next page, on
19 November 10th there is a follow-up, because we
20 haven't received a response yet.

21 A. Okay.

22 1167. Q. Do you recall that letter?

23 A. Yes.

24 1168. Q. Okay. Then over on to 60.

25 A. Okay.

1 1169. Q. This is your November 16th, and
2 you'll agree that this offer is coming a day after
3 the deadline to provide...sorry, the deadline in the
4 forbearance agreement, which is November 15th.

5 So your proposal to us is coming the day
6 after the deadline in the forbearance agreement.

7 A. Yes, they talked to the bank that
8 they were satisfactory that our negotiations, which
9 we believed were going with you guys, was content to
10 them to get things done.

11 1170. Q. Did you communicate that to them?

12 A. You have to ask them. I don't know.

13 1171. Q. I have to ask them whether you
14 communicated that to them, but you were having
15 ongoing negotiations?

16 A. We'll have to check if there is a
17 communication, but...

18 1172. Q. So sorry, stop for a...

19 A. When did the forbearance
20 thing...when did that kick in?

21 1173. Q. Your forbearance agreement was
22 October of 2021.

23 A. No, when did it end?

24 MR. JONES: When was it terminated?

25 THE DEPONENT: Yes.

1 MR. JONES: November 23rd.

2
3 BY MR. SHEA:

4 1174. Q. So what I'm interested in...I want
5 to step back. So you said I would have to ask the
6 bank whether you communicated with them to explain
7 to them where you were at with us. I'm going to ask
8 for an undertaking for your communications, if any,
9 with the bank prior to November 15th, advising them
10 as to where matters were at in the negotiation with
11 our client, the Authority. Will you give that
12 undertaking?

13 MR. JONES: I'll take that under
14 advisement...

U/A

15 1175. MR. SHEA: Okay.

16 MR. JONES: ...communications with RBC.

17 1176. MR. SHEA: As long as we're clear that
18 he said I have to ask RBC, and...

19 MR. JONES: Who said what?

20 1177. MR. SHEA: Your client said I had to ask
21 RBC what communications were had between...

22 MR. JONES: No, I think you
23 misunderstood. There was a
24 miscommunication there. I don't think that
25 is what he was saying.

1 BY MR. SHEA:

2 1178. Q. Okay, so but you'll agree that
3 November 16th you make a counteroffer to us, and
4 that counteroffer is made November 16th, is one day
5 after the deadline in the forbearance agreement,
6 okay, great.

7 You'll agree that this offer is not
8 substantially different from your October 26th,
9 except...I'm going to point out on the second page
10 you now want two five-year extensions. So you want
11 10 extra years on the lease. You will agree that
12 that offer...

13 A. It's pretty consistent with two
14 million dollars back rent, and then we...yes, asked
15 for two...

16 1179. Q. Up from one five-year in your
17 initial offer that was rejected.

18 A. We don't know the reasons why it got
19 rejected. We thought that was a fair ask.

20 1180. Q. When did you...where is the document
21 where you asked why it was rejected?

22 A. We don't have it.

23 1181. Q. Okay. So and you'll agree that the
24 offer you made on November 16th was rejected? Well,
25 put it this way. Was it accepted?

1 A. Communication.

2 1182. Q. Either he's aware of it being
3 accepted or not.

4 MR. JONES: Well, I think the way it was
5 rejected was that the landlord
6 contacted...e-mailed RBC and told them that
7 they were enforcing the lease within a few
8 days.

9 1183. MR. SHEA: Is that your evidence, sir?

10 MR. JONES: Well, I'm just...unless...

11 THE DEPONENT: I don't see a letter from
12 Ron.

13 MR. JONES: Those are the documents that
14 we're working with. Do you have something
15 else?

16 1184. MR. SHEA: Those are not the...well,
17 sorry. If you would have given me a moment
18 instead of providing an answer, which was
19 wrong...are you familiar with this document
20 from November 29th, from Ron to
21 Greg...sorry, November 26th, I apologize.

22 THE DEPONENT: Right, right.

23 MR. JONES: So it's after the...

24 THE DEPONENT: Okay. So your question
25 was did they reject it?

1 BY MR. SHEA:

2 1185. Q. "...In response to your letter of
3 November 16th, the board has reviewed and
4 discussed it in detail and does not accept
5 the counterproposal..."

6 A. Okay.

7 MR. JONES: But that's after...

8 1186. MR. SHEA: Sir, I'm not interested in
9 your evidence.

10 MR. JONES: I mean, it's after they told
11 RBC that they intend to exercise their
12 remedies under the default clause of the
13 lease.

14 1187. MR. SHEA: And that was in response to
15 an inquiry from RBC as to what our
16 intentions were, and we provided them with
17 our intentions, as we were permitted to do
18 by the terms of the forbearance agreement.
19 So this one is...no, you can keep that. So
20 mark that as Exhibit 7.

21
22 --- EXHIBIT NO. 7: E-mail dated November 26, 2021, from
23 Mr. Rienas to Mr. O'Hara
24

25 BY MR. SHEA:

1 1188. Q. So back over to the affidavits. So
2 we're now going to ask some questions on the 13th
3 November, 2022 affidavit. The first question is
4 paragraph 11, if that assists.

5 So paragraph 11...this also...you assert
6 that the Peace Bridge Duty Free closed the store in
7 response to, I believe...let me get the exact
8 wording here:

9 "...in response to government emergency
10 mandated closures due to Covid-19..."

11 What government mandated closures required you to
12 close the store?

13 A. I don't have an answer for that.

14 1189. Q. Will you undertake to identify the
15 mandated closures that required that you close the
16 store?

17 MR. JONES: I think there is a list of
18 some of the restrictions in the next
19 paragraph.

20 1190. MR. SHEA: I didn't ask that. I asked
21 him to...he said he couldn't, and I'm
22 asking him to identify what government
23 emergency mandated closures...

24 MR. JONES: Okay.

U/T

1 BY MR. SHEA:

2 1191. Q. You also operate a duty free store
3 at the Hamilton airport, do you not?

4 A. Correct.

5 1192. Q. And that duty free did not close,
6 did it?

7 A. No, it did not.

8 1193. Q. So what is the difference between
9 the Hamilton...the duty free in the Peace Bridge and
10 the duty free in Hamilton that permitted that one to
11 operate in the face of government emergency mandated
12 closures, but did not permit the duty free at the
13 Peace Bridge to operate?

14 A. I have to check that out.

15 1194. Q. Okay, so you...

16 A. I don't have the answer to that.

17 1195. Q. So will you undertake to provide me
18 with the reason the Hamilton duty free could remain
19 open while the Peace Bridge Duty Free could not
20 legally remain open? To clarify, why the Hamilton
21 Duty Free could legally remain open, while the Peace
22 Bridge Duty Free could not legally remain open.

23 MR. JONES: Okay.

U/T

24
25 BY MR. SHEA:

1 1196. Q. Okay, paragraph 13. You identify
2 what you call a "non-exclusive summary of border
3 restrictions" stretching from March 17th, and that
4 was the day you closed the duty free, correct?

5 A. I would have to check.

6 MR. JONES: The 21st.

7
8 BY MR. SHEA:

9 1197. Q. The 21st, you closed it on the 21st.
10 So that was the 2nd...or the border was closed,
11 through to October 1st of 2022, and you say...

12 A. Sorry, what is the October?

13 1198. Q. That's the last.

14 A. Okay.

15 1199. Q. And you assert or you did...you
16 reopened the duty free for business on September
17 7th?

18 A. 21st.

19 1200. Q. September 21st?

20 A. I believe so.

21 1201. Q. Okay. So can you explain to me how
22 any restrictions put into place...let me back up a
23 second. So from March 21st Peace Bridge Duty Free
24 was closed. They weren't carrying on any business.
25 Their sales dropped to zero. Is that correct?

1 A. From...yes, no sales.

2 1202. Q. No sales, sales dropped to zero.

3 Can you explain to me how any border restrictions,
4 either increasing them or decreasing them, from
5 March 21st to September 7th, could have had a
6 material adverse effect on your business?

7 MR. JONES: I don't understand the
8 question.

9 THE DEPONENT: Once again, please.

10 1203. MR. SHEA: Sorry, the assertion...

11 MR. JONES: Like, are you asking how the
12 border closure could affect their business?

13
14 BY MR. SHEA:

15 1204. Q. No. So the border closure closed
16 the business. The business was closed. There was
17 zero sales. How could anything that happened from a
18 legislative perspective during a time when this
19 company was generating zero sales have resulted in
20 your situation being any worse?

21 MR. JONES: So if I can understand, is
22 the Authority suggesting that this clause
23 is not in effect after the initial period
24 of the border closure?

25 1205. MR. SHEA: This clause is triggered by a

1 change in applicable laws that results in a
2 material adverse impact. There is a link
3 between applicable...change in applicable
4 laws and material adverse impact. If there
5 is zero sales, how can a change in
6 applicable laws have a negative impact?

7 MR. JONES: I think I understand what
8 you're saying is that...you're suggesting
9 that the Authority's position is they don't
10 have to do anything after the initial
11 closure because it didn't get any worse for
12 you by the border remaining closed?

13 1206. MR. SHEA: No, no. Please
14 don't...sir...

15 MR. JONES: No, I'm trying to ask is
16 that...

17 1207. MR. SHEA: I am asking a question. I
18 don't have to state the legal argument upon
19 which I'm basing it. I'm asking a legal
20 question. You are asserting that there
21 were various border restrictions that
22 caused a material adverse impact on the
23 business, correct? Are you not asserting
24 that? Are you asserting...

25 MR. JONES: Of course.

1 1208. MR. SHEA: Okay.

2 MR. JONES: The closure of the border
3 adversely affects them.
4

5 BY MR. SHEA:

6 1209. Q. But then how does...once the effect
7 has happened and there is an obligation to consult,
8 how does anything else give rise to a new obligation
9 to consult, unless it results in a material adverse
10 impact?

11 MR. JONES: You don't think extending
12 the border closure would have a material
13 adverse impact?

14 1210. MR. SHEA: Their sales are already zero.
15 How much worse are they going to get?

16 MR. JONES: Okay, that's the Authority's
17 position.

18 1211. MR. SHEA: And I'm asking a question.
19 So now that you understand the Authority's
20 position...

21 THE DEPONENT: I don't have an answer.
22 That's a legal...I don't have an answer.
23

24 BY MR. SHEA:

25 1212. Q. Sorry, was your business...so after

1 the 21st...so on April 15th did your sales drop
2 further?

3 A. April 15th, 2020?

4 MR. JONES: Below zero?

5
6 BY MR. SHEA:

7 1213. Q. Yes. Did you have to spend any
8 money? Did you have to incur any costs?

9 A. Oh, yes, yes.

10 1214. Q. As a result of the enhanced border
11 measures and quarantine plan for 14 days, did you
12 have to spend any money?

13 A. Well, we spent money throughout
14 the...

15 1215. Q. No, as a result of that.

16 A. I would have to...we would have to
17 read that.

18 1216. Q. Okay. Well, we don't have a lot of
19 time, so let's do it this way. I'm going to ask for
20 an undertaking...

21 MR. JONES: No, ask him the question if
22 you want.

23 1217. MR. SHEA: I'm not going to go through
24 each of these while he says, "I have to do
25 this. I have to do that." I asked the

1 question.

2 THE DEPONENT: Right.

3
4 BY MR. SHEA:

5 1218. Q. On April 15th, as a result of the
6 enhanced federal border measures and quarantine
7 plan...

8 A. Our sales were still zero.

9 1219. Q. Your sales were still zero. You
10 didn't have to spend any money as a result of that?

11 A. No, it's that part. Our sales were
12 still zero.

13 1220. Q. Okay, (d), April 22nd, 2020:
14 "...Extension of restrictions on non-
15 essential travel..."

16 A. Zero sales.

17 1221. Q. (e)?

18 A. Zero sales.

19 1222. Q. (f)?

20 A. Zero sales.

21 1223. Q. (g)?

22 A. Zero sales.

23 1224. Q. (h)?

24 A. Zero sales.

25 1225. Q. Do you want me to go through them

1 all or do you just want...

2 MR. JONES: Well, what is the question?

3 Like, did sales go below zero?

4 1226. MR. SHEA: Sir...

5 THE DEPONENT: Up until (u).

6
7 BY MR. SHEA:

8 1227. Q. Up until (u)?

9 A. Yes.

10 1228. Q. And then...

11 A. Zero, zero, zero, zero.

12 1229. Q. So after (u), so after that, is it
13 not the case that sales began to increase? Once the
14 border opened, your sales increased?

15 A. Once we opened, the sales...

16 1230. Q. Once you opened, the sales
17 increased?

18 A. Yes.

19 1231. Q. And is it not the case that sales
20 increased from about 200,000 a month? I can get you
21 the exact numbers, but they increased significantly
22 up to...ramped up to about 1.2 million?

23 A. That's not...

24 MR. JONES: Do you have a document to
25 put to him?

1 THE DEPONENT: That's not significant.

2
3 BY MR. SHEA:

4 1232. Q. Yes, I will.

5 A. You have our sales numbers.

6 1233. Q. So you agree with your sales
7 numbers, that you did ramp...your sales did increase
8 month over month after the border opened, after you
9 opened?

10 A. After we opened, yes.

11 1234. Q. So as these things happened from
12 October through to...October, 2021 through October
13 of 2022, your sales increased month over month?

14 A. Yes.

15 1235. Q. Yes, okay, thank you. So...

16 A. But still below...

17 1236. Q. Still below your other, but your
18 sales increased month over month.

19 A. Yes.

20 1237. Q. And I believe if you want an exact
21 document, your 2 December, 2022 affidavit, Exhibit
22 B, identifies your sales increasing from 266,000 per
23 month to 1.2 million per month.

24 MR. JONES: Do you want him to go to
25 those documents?

1 1238. MR. SHEA: He just said that he agreed
2 that increased month over month. That was
3 for you.
4

5 BY MR. SHEA:

6 1239. Q. So we're going to go on to paragraph
7 18, please, of that affidavit. So this is an
8 affidavit that you swore 13 November, 2022, and you
9 appear...you assert in the last part, the foot of
10 that clause, that:

11 "...The authority appears to be taking the
12 position that full base rent under the
13 lease is payable from July 31st..."

14 MR. JONES: What part of that?

15 1240. MR. SHEA: The foot, on page...

16 MR. JONES: I see, yes.
17

18 BY MR. SHEA:

19 1241. Q. You'll agree with me...we just went
20 through the documents, that the Authority has
21 offered to grant a 50 percent abatement. Is that
22 not correct?

23 MR. JONES: Sorry, are you asking about
24 this paragraph or are you asking about the
25 abatement?

1 BY MR. SHEA:

2 1242. Q. No, it says:
3 "...The authority appears to be taking the
4 position [appears to be taking the
5 position] that full base rent under the
6 lease is payable from July 31st, 2020
7 onwards..."

8 But you will agree that we have offered to give you
9 a 50 percent abatement on that same rent?

10 MR. JONES: Well, you're asking him two
11 different things. Like...

12 1243. MR. SHEA: I'm challenging his
13 statements.

14 MR. JONES: Well, what did the notice of
15 default say?

16 1244. MR. SHEA: That's not what he says.

17 MR. JONES: That's exactly what he says.

18 1245. MR. SHEA: No, he says...

19 MR. JONES: They demanded the rent.

20 1246. MR. SHEA: That's not what he said.

21 MR. JONES: They threatened to terminate
22 the lease unless...

23 1247. MR. SHEA: Sir, sir...

24 MR. JONES: ...they paid the full rent.

25 1248. MR. SHEA: The authority appears to take

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1 the position in the affidavit of Ron Rienas
2 that the full base rent under the lease is
3 payable, notwithstanding these. He never
4 references the default notice, because
5 that's not...

6 MR. JONES: That's wrong. You're wrong.
7 It's in his affidavit.

8 1249. MR. SHEA: Sir, I am asking a question.
9 Did we not agree to give a 50 percent rent
10 abatement?

11 MR. JONES: No. Where has rent been
12 abated 50 percent?

13 1250. MR. SHEA: Did we not agree to give you
14 a 50 percent rent abatement?

15 MR. JONES: Where? Put the statement of
16 account where rent has been abated 50
17 percent.

18 1251. MR. SHEA: I said offer. Sir, did we
19 not offer to give a 50 percent rent
20 abatement, yes or no?

21 MR. JONES: On what terms?

22 THE DEPONENT: I believe also you want
23 the full rent.

24
25 BY MR. SHEA:

1 1252. Q. We offered to give you a 50 percent
2 rent abatement, did we not?

3 A. Didn't you sometime also demand all
4 the money, like 5.9 million or something?

5 1253. Q. And sir, you won't pay any of it.
6 I'm just saying did we or did we not offer a 50
7 percent rent abatement?

8 MR. JONES: Rent has either been abated
9 or it hasn't.

10
11 BY MR. SHEA:

12 1254. Q. Sir, did we offer a 50 percent rent
13 abatement, yes or no?

14 A. Along with demanding the full rent.

15 1255. Q. Okay, but we did offer a 50 percent
16 rent abatement and you demanded more?

17 A. But we...

18 MR. JONES: We have gone through these
19 documents. Like, what are you trying to
20 get him to say?

21 1256. MR. SHEA: I'm trying to get him to
22 agree what he already agreed to, that we
23 offered a 50 percent rent abatement.
24 Again, I'm going to ask you to please not
25 interrupt.

1 THE DEPONENT: There are a few things
2 you guys put out there, and one of them was
3 we had to pay the full 5.9 million dollars,
4 or whatever it was.

5
6 BY MR. SHEA:

7 1257. Q. Yes.

8 A. Yes.

9 1258. Q. Keep going, keep going. Go ahead.

10 Keep talking, sir.

11 MR. JONES: Right, so the Authority sent
12 a notice of default demanding full rent or
13 the lease would be terminated during the
14 eviction moratorium.

15 1259. MR. SHEA: Keep going. Is there
16 something else you want to say?

17 MR. JONES: No.

18
19 BY MR. SHEA:

20 1260. Q. Okay, let's keep going then. Okay,
21 so in the offer made by the Authority to Peace
22 Bridge Duty Free, does it not include a 50 percent
23 rent abatement?

24 MR. JONES: Which offer are you
25 referring to?

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1 1261. MR. SHEA: I will refer to the specific
2 offer.

3 THE DEPONENT: After...
4

5 BY MR. SHEA:

6 1262. Q. The offer made on October 26th,
7 2021, did we not offer a 50 percent rent abatement?

8 MR. JONES: What document are you
9 referring to?

10 1263. MR. SHEA: Document 58, October 26th,
11 2021.

12 THE DEPONENT: Followed up by the full
13 rent, and then after you wanted the 5.9.
14 Is that what it...
15

16 BY MR. SHEA:

17 1264. Q. We made demand when you didn't
18 accept our offer, yes. My question is whether we
19 made the offer or not.

20 MR. JONES: So it's not exactly correct.
21

22 BY MR. SHEA:

23 1265. Q. What does it say:
24 "...Fifty percent of the back rent due and
25 owing shall be paid upon execution of the

1 amendment of the lease..."

2 What part of that is not a 50 percent abatement?

3 MR. JONES: Then:

4 "...and will apply HST credits
5 received to the remaining
6 outstanding rent..."

7 1266. MR. SHEA: How much are the HST credits?

8 THE DEPONENT: Maybe \$40,000 a month, a
9 month.

10
11 BY MR. SHEA:

12 1267. Q. Forty thousand a month, and so the
13 back rent...

14 MR. JONES: Like, a million dollars.

15 1268. MR. SHEA: How if \$40,000 a month a
16 million dollars?

17 THE DEPONENT: Like, over the time.

18 MR. JONES: Over 18 months it's close to
19 a million dollars.

20
21 BY MR. SHEA:

22 1269. Q. And the interest on the unpaid rent
23 at 24 percent?

24 MR. JONES: Counsel, what is the point
25 you're trying to make?

1 1270. MR. SHEA: I asked the question. You
2 don't want...

3 MR. JONES: You're trying to tell him
4 that they have offered to abate 50 percent
5 rent. Here is the offer.

6 1271. MR. SHEA: Okay.

7 THE DEPONENT: But then you guys...

8 MR. JONES: But it's not exactly a 50
9 percent rent abatement, and it's demanding
10 immediate payment of monies that the
11 Authority knew was not possible. It's a
12 non-offer.

13 1272. MR. SHEA: Yes, sir, I'm sure you think
14 that. Okay, let's keep going.

15
16 BY MR. SHEA:

17 1273. Q. So on paragraph 37...do you see
18 paragraph 37 there?

19 A. Yes.

20 1274. Q. Sorry, I have got to find my
21 document again. I apologize. I may have to...

22 A. No rush.

23 1275. Q. Sorry. I apologize, that was the
24 wrong...I need to refer you to...we'll just skip
25 over that. I was going to refer you to your 12th

1 December, 2021 affidavit. So let's go to that one,
2 please. So December 1...sorry, December 12, 2021.

3 So paragraph 37 says that we demanded the
4 5.9...sorry, are you there yet?

5 A. Yes.

6 1276. Q. It says that we demanded the 5.9
7 million, which is correct.

8 A. Okay.

9 1277. Q. And you say that you don't owe the
10 5.9 million, or you say that:

11 "...The notice was issued despite the fact
12 that deferred rent was to be payable in
13 equal instalments over two years..."

14 But you'll agree that those instalment payments were
15 to start in the case of the first rent deferral
16 agreement in July of 2020, correct?

17 A. Okay. Walk me through this again.

18 1278. Q. So you say...

19 A. Yes.

20 1279. Q. ...that...well, not say. You
21 challenge the fact that we made a 5.9 million dollar
22 demand.

23 A. Right.

24 1280. Q. And you say we did that wrongly,
25 despite the fact that the rent deferral...the

1 deferred rent was to be payable in equal instalments
2 over a two-year period, but...

3 A. That's the November deferral
4 agreement.

5 1281. Q. But the November deferral agreement
6 was never signed. You will agree that you never
7 even started to make the payments under either
8 deferral agreement. You have never made any
9 payments under either deferral agreement, have you?

10 A. Correct.

11 1282. Q. Let's go to the 2 December...no,
12 stop, stop. That's 110, the 13 November. I
13 apologize.

14 MR. JONES: Sorry, what are you on?

15 1283. MR. SHEA: 110 and 111 of the 13
16 November.

17
18 BY MR. SHEA:

19 1284. Q. You raised the business interruption
20 insurance that you assert the Authority was to have
21 access to. Is it not correct that Peace Bridge Duty
22 Free was also required to have business interruption
23 insurance?

24 So let's go to the lease, which is volume
25 1, tab 1. Have you got that in front of you? Page

1 61, 11.01 under "Insurance and indemnity".

2 MR. JONES: That's page 60?

3 1285. MR. SHEA: Sixty-one is the operative
4 part.

5
6 BY MR. SHEA:

7 1286. Q. So 11.01 requires that the tenant
8 obtain and maintain insurance.

9 A. Okay.

10 1287. Q. Correct?

11 A. Correct.

12 1288. Q. And (c) requires that you :
13 "...obtain and retain business interruption
14 insurance for a minimum period of 24 months
15 or such longer period that will reimburse
16 the tenant for direct and indirect loss of
17 earnings and profit attributable to damage
18 caused by the perils insured against
19 under...and other perils insured by prudent
20 tenants or attributable to prevention of
21 access to the leased premises by civil
22 authorities..."

23 Did you ever make a claim under that policy?

24 A. We didn't...it wasn't...it wasn't
25 allowed, and then we sued. It was a class action

1 suit that we joined.

2 1289. Q. So will you undertake to provide the
3 documents related to that, the claim made and the
4 response, please?

5 MR. JONES: No. I mean, for our
6 purposes there was no insurance recovery. /R

7 1290. MR. SHEA: Yet. So you're refusing to
8 provide documents relating to the claim
9 made under your business interruption
10 policy and the response?

11 MR. JONES: Well, ask...do you want to
12 ask questions about the outcome?

13 THE DEPONENT: Aviva turned us down.
14

15 BY MR. SHEA:

16 1291. Q. So I want to see the documents
17 relating to the insurance claim, which would be the
18 claim and the refusal, and then the class action
19 lawsuit that you have joined to try to recover under
20 the policy.

21 MR. JONES: I'll take that under
22 advisement. U/A

23
24 BY MR. SHEA:

25 1292. Q. 2 December, 2022 affidavit, please.

1 So 2 December, 2022, the reply affidavit of Jim
2 Pearce. Did you find that document?

3 A. Yes.

4 1293. Q. So in paragraph 8 you assert that:
5 "...Every authority proposal demands
6 payment of alleged arrears, monies that any
7 cursory analysis of gross sales would
8 obviously cannot and never could have been
9 funded through duty free's operations. As
10 such, the Authority's proposal can only
11 result if the duty free agree to them, of
12 the business failure of duty free and the
13 loss of shareholders' family assets..."

14 That assertion is based on the assumption that the
15 shareholders are not willing to contribute to the
16 company. Is that correct?

17 So let me put it, if the shareholders were
18 to contribute money to Peace Bridge Duty Free, you
19 would be able to satisfy...to meet...

20 A. I don't have that answer.

21 1294. Q. Sorry. If the shareholders were to
22 contribute money...I'm not asking would they. If
23 they were to contribute money...

24 A. If anybody would give in the 5.9
25 million? Is that what you mean?

1 MR. JONES: If anybody gave them the
2 money.
3

4 BY MR. SHEA:

5 1295. Q. But I'm not asking if anybody. Have
6 you asked the shareholders to contribute money to
7 this enterprise?

8 A. Me, personally, no.

9 1296. Q. Has Mr. O'Hara asked the
10 shareholders to contribute money?

11 A. I don't know.

12 1297. Q. Sorry?

13 A. I don't know.

14 1298. Q. Will you inquire as to whether Mr.
15 O'Hara has asked the shareholders to contribute
16 money to this enterprise?

17 MR. JONES: No.

/R

18 1299. MR. SHEA: So you're refusing to ask
19 whether the shareholders have been asked to
20 contribute. Isn't it the shareholders who
21 are going to benefit if this company
22 survives and profits?

23 THE DEPONENT: Is that a question?

24 MR. JONES: Is that a question?
25

1 BY MR. SHEA:

2 1300. Q. Yes, isn't it the shareholders that
3 are going to benefit?

4 MR. JONES: Well, it depends.

5 1301. MR. SHEA: I would like him to answer
6 the question, sir.

7 MR. JONES: Can you give him a more
8 specific question? Like, if they accept
9 the offer that has been given where the
10 shareholders give a guarantee? I don't
11 think so.

12 THE DEPONENT: If it's six million
13 dollars...

14
15 BY MR. SHEA:

16 1302. Q. Do your projections in terms of go
17 forward business not project that this company will
18 be profitable in the future?

19 A. Depending on the agreement made with
20 the Authority.

21 1303. Q. Have you projected out whether this
22 company will be profitable based on...sorry, have
23 you projected out what capital infusion will be
24 necessary to be made into this company to comply
25 with or to accept Peace Bridge's offer? I'm sorry,

1 the Authority's offer?

2 A. The 5.9 million.

3 1304. Q. No, the offer that we made.

4 MR. JONES: Which offer are you
5 referring to?

6
7 BY MR. SHEA:

8 1305. Q. So let's go to...maybe we can cut
9 this down. So do you recall a letter that Mr. Wolf
10 sent to Gowling on January 14th, 2022? Do you
11 recall that letter?

12 A. No.

13 1306. Q. Okay, it's attached to your
14 affidavit.

15 A. Okay.

16 1307. Q. It's 13 November, 2022, tab A.

17 A. Tab A?

18 1308. Q. Yes. So...

19 A. The same one, December 2?

20 1309. Q. January 14th.

21 A. Which affidavit?

22 1310. Q. November...

23 A. The November one?

24 1311. Q. November 13th, 2022.

25 A. And tab A?

1 1312. Q. Tab A.

2 A. Okay, yes, John Wolf to you guys.

3 1313. Q. So paragraph...do you recall this
4 letter?

5 A. Yes, I have seen this letter.

6 1314. Q. Okay. So on page 2...

7 MR. JONES: Do you want him to read it?

8 1315. MR. SHEA: He can read the whole letter,
9 but I'm asking about a specific paragraph
10 of it, or two specific paragraphs of it.

11 THE DEPONENT: Go ahead.
12

13 BY MR. SHEA:

14 1316. Q. So page 2, you will note that Mr.
15 Wolf asserts that:

16 "...From the exchanges to date, it appears
17 that prior to Omicron, when it was
18 anticipated that the pandemic was moving
19 behind the parties and a gradual return to
20 normal bridge traffic could be reasonably
21 contemplated, the parties indicated in
22 without prejudice proposals in general
23 agreement as follows..."

24 So he asserts that we had reached agreement on the
25 material points. Would you read through those and

1 see if you agree with that?

2 A. Number 1:

3 "...Security deposit, \$50,000, to be
4 replenished..."

5 It's done. HST was paid by duty free on rent. Yes,
6 we submit HST to you guys. Food tenant be sought
7 for full market. It's underway. Lease to be
8 amended. So that's the offer.

9 1317. Q. No, these are the...sorry. He
10 asserts that these are the areas where we have
11 already reached agreement.

12 A. I think a lot of this, yes, we
13 were...it's in your offers and ours, too, right.

14 1318. Q. Yes, so these are areas we have
15 reached agreements.

16 A. Okay, existing lease.

17 MR. JONES: Do you want to compare the
18 two?

19
20 BY MR. SHEA:

21 1319. Q. No, I want to ask him a question.
22 So I'm asking him...

23 A. To read this.

24 1320. Q. So the second...there is a
25 paragraph, "Obviously, given developments..."

1 A. Okay.

2 1321. Q. And then he indicates where the
3 parties are apart. Do you agree that that is where
4 we're apart?

5 MR. JONES: Do you want him to review
6 the...

7 THE DEPONENT: Like, I think this is in
8 reference to other documents.

9
10 BY MR. SHEA:

11 1322. Q. So this is what your lawyer has...

12 A. Stated.

13 1323. Q. ...put in a letter, attached to an
14 affidavit you swore, and delivered to the court,
15 saying, "This is where the parties are apart."

16 A. Right.

17 1324. Q. Do you agree...

18 MR. JONES: Do you know that there is
19 something out there that suggests that's
20 inaccurate?

21 1325. MR. SHEA: No, I think it's accurate.

22 THE DEPONENT: Okay.

23
24 BY MR. SHEA:

25 1326. Q. But that's my issue. I'm asking do

1 you agree it's accurate. I think it's accurate.

2 MR. JONES: I think, in fairness, you
3 have got to have him review the documents
4 and form an opinion before putting that to
5 him.

6 1327. MR. SHEA: I'm not sure I need to. It's
7 his evidence that this letter was sent. I
8 assume he had discussions with Mr. Wolf
9 about this letter, and confirmed this...Mr.
10 Wolf didn't get this information himself.

11 MR. JONES: Okay, so you're saying that
12 this is accurate?

13 1328. MR. SHEA: I think that this is
14 accurate.

15 MR. JONES: Okay.

16 1329. MR. SHEA: But I could be wrong. Our
17 client thinks this is accurate, that this
18 is where we're apart.

19 MR. JONES: Okay. Then what is the
20 issue?

21
22 BY MR. SHEA:

23 1330. Q. My ask is have you run projections
24 to determine how much capital this company needs
25 based on these disputes? So you say your proposal

1 is two million dollars of rent arrears. We say 50
2 percent. Have you run projections to determine how
3 much capital you would need to meet our demand or to
4 accept our proposal?

5 A. This is your...what, our proposal of
6 October something? Which one?

7 1331. Q. You asked...you suggested two
8 million...

9 A. Right.

10 1332. Q. ...payable over infinity.

11 A. Right.

12 1333. Q. We suggested 50 percent payable on a
13 fixed period of time. Did you run proposals?

14 A. We don't know what that 50 percent
15 is, right, because it...

16 1334. Q. Okay, but...

17 A. What is that 50 percent?

18 1335. Q. Sir, maybe we'll get into this now
19 then. In...

20 A. Is it 5.9?

21 1336. Q. ...your disclosures...

22 A. Or this number 3, how to address
23 rent arrears?

24 1337. Q. How to address rent arrears.

25 A. I'm trying to figure dates out here.

1 We have got October 24th to December, 2021. So
2 we're...

3 1338. Q. Did you not provide this information
4 to Mr. Wolf?

5 A. Yes, how do we address rent arrears,
6 I guess that's the...

7 1339. Q. Partial forgiveness and balance
8 abatement over future...

9 A. Do up a cash flow? Is that...

10 1340. Q. What I am asking is did you do any
11 analysis to determine what it would take to accept
12 our proposal?

13 A. I believe not.

14 1341. Q. Okay. So you did not do any
15 analysis to determine what would it take to accept
16 our proposal?

17 A. Your October proposal?

18 1342. Q. Yes.

19 MR. JONES: It would take...isn't it...

20 1343. MR. SHEA: I asked him if he did the
21 analysis. I assume you didn't do the
22 analysis either?

23 MR. JONES: No, but, like, it says 50
24 percent payable immediately, right. So
25 isn't that what would be required?

1 1344. MR. SHEA: No, because there are other
2 differences in terms of basic rent for
3 certain periods. I'm asking whether he did
4 an analysis to determine what it would take
5 in terms of a capital injection...

6 THE DEPONENT: No.

7
8 BY MR. SHEA:

9 1345. Q. No, you did not.

10 A. Because I don't think we agreed on
11 that 50 percent number. I don't think we're still
12 in agreement on that.

13 1346. Q. Okay, but you are aware of the
14 amount of rent that is being claimed as owing, are
15 you not?

16 MR. JONES: As of when?

17 THE DEPONENT: Yes.

18
19 BY MR. SHEA:

20 1347. Q. Were you not given documents...

21 A. Is it the nine million? 5.9
22 million, sorry.

23 1348. Q. I'm going to show you a...this is...

24 A. The latest one?

25 1349. Q. Well, this is a document. So it's

1 57.

2 MR. JONES: So this is as of when,
3 March, 2021?

4 THE DEPONENT: That's really early on in
5 the...
6

7 BY MR. SHEA:

8 1350. Q. Sorry, did you not get...let me
9 finish my question.

10 A. Yes.

11 1351. Q. So you recognize that document?

12 A. Yes, I remember that.

13 1352. Q. So did you not get statements like
14 this from the Authority on a regular basis?

15 A. We had printouts, but we could never
16 reconcile to the number. Like, there is...I don't
17 know where the 5.9 million came from.

18 1353. Q. Well, is it not...I'm sorry, can you
19 turn up the document? Do you have...

20 A. 5.9 from your legal thing.

21 1354. Q. No, but that would be...is it not
22 attached? Is there not an analysis of the rent
23 owing attached? I'm just trying to understand...so
24 your position is you can't run the analysis of what
25 capital it would take to accept the offer because

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1 you don't know what 50 percent of the rent would be.

2
3 A. Yes.

4 1355. Q. Did you ever ask us for that number
5 so you could run the analysis?

6 A. I don't recall.

7 1356. MR. SHEA: Okay, give me a moment here.
8 Just go off the record for a second while I
9 go through these notes here.

10
11 --- upon recessing at 4:48 p.m.

12 --- A BRIEF RECESS

13 --- upon resuming at 4:53 p.m.

14
15 JIM PEARCE, resumed

16 CONTINUED CROSS-EXAMINATION BY MR. SHEA:

17
18 1357. Q. So you indicated that you hadn't
19 asked the Authority how they calculated what they
20 thought was owing. How did you...

21 A. No, I wasn't sure.

22 1358. Q. You weren't sure how. Have you ever
23 asked them?

24 A. I'm not sure.

25 1359. Q. You're not sure if you asked them?

1 A. Yes.

2 1360. Q. Okay. Will you undertake to make
3 inquiries to determine if you asked them how the
4 rent was calculated?

5 A. Which one? Like, we have got lots
6 of...

7 1361. Q. How the document...you said that you
8 didn't understand...

9 A. Well, no, they sent a bunch of
10 documents on a regular basis, as you commented. So
11 which...

12 1362. Q. Okay, so on the one I gave you. The
13 one I gave you.

14 A. The March one?

15 1363. Q. It's right here.

16 A. March, 2021.

17 1364. Q. So this one, you do not agree with
18 the calculation of rent, I take it?

19 A. Like, we could never reconcile it
20 from our end.

21 1365. Q. But I want to just understand
22 whether you ever asked them. You said you can't
23 recall whether you ever asked them...

24 A. Correct.

25 1366. Q. ...to reconcile for you or assist

1 you to reconcile.

2 A. Correct.

3 1367. Q. Will you agree...

4 MR. JONES: Just so I can get my notes
5 correctly, what are you showing me, though?

6 1368. MR. SHEA: Exhibit 8 which is the rent
7 document from us from March 26th, 2021.

8 MR. JONES: So whether they ever asked
9 about that specific one?

10 1369. MR. SHEA: Yes, sure. He says he can't
11 recall if they asked about any. I'm not
12 going to put them all in because it will
13 have here all afternoon or all evening. So
14 let's just ask about that one.

15
16 --- EXHIBIT NO. 8: Rent document from Peace Bridge
17 Authority, dated March

18
19 BY MR. SHEA:

20 1370. Q. What percentage of the rent do you
21 claim two million dollars equates to?

22 A. At that time are you asking?

23 Like...

24 1371. Q. Sorry, yes, so as at the time the
25 offer was made to pay two million dollars in

1 rent...so I believe it's October of 2021, what do
2 you assert the two...what percentage of the rent do
3 you assert the two million dollars equates to?

4 A. I don't know.

5 1372. Q. So it has no basis to the rent
6 owing. It's just a lump sum?

7 MR. JONES: It's a...sorry, I don't
8 want...it's a number.

9 THE DEPONENT: Yes, so I don't know.

10
11 BY MR. SHEA:

12 1373. Q. So it's not based on any percentage
13 of...

14 A. I would have to go through and
15 reconcile.

16 1374. Q. So you did not calculate that number
17 based on any percentage of rent. It's just a lump
18 sum?

19 MR. JONES: It's a gross number.

20 THE DEPONENT: Yes.

21
22 BY MR. SHEA:

23 1375. Q. And is there any basis for the gross
24 number or is it just...is that the most you can
25 raise? How did you determine two million?

1 A. I don't have that answer.

2 1376. Q. So you don't recall...

3 A. Yes.

4 1377. Q. ...how you came to two million
5 dollars?

6 A. Yes.

7 1378. Q. So it's not...sorry, let me ask you
8 this. Is it based on the financial projections,
9 some account on the financial projections? Is it
10 based on anything you can recall?

11 A. In 2021, I can't recall.

12 1379. MR. SHEA: Okay. So those are my
13 questions.

14

15 --- upon adjourning at 4:55 p.m.

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REPORTER'S NOTE:

Please be advised that any undertakings, objections, under advisements and refusals are provided as a service to all counsel, for their guidance only, and do not purport to be legally binding or necessarily accurate and are not binding upon Victory Verbatim Reporting Services Inc.

I hereby certify the foregoing to be a true and accurate transcription of the above noted proceedings held before me on the **31st DAY OF AUGUST, 2023** and taken to the best of my skill, ability and understanding.

Certified Correct:



Briana Lee
Verbatim Reporter



TAB 10

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

SJ/saa

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

- - - - -

This is the Cross-Examination of EPHRAIM STULBERG, on his Affidavit sworn the 26th day of September, 2023, taken at the offices of VICTORY VERBATIM REPORTING SERVICES INC., 222 Bay Street, Suite 900, Toronto-Dominion Centre, Toronto, Ontario, on the 29th day of September, 2023.

- - - - -

A P P E A R A N C E S:

E. PATRICK SHEA	-- for Buffalo and Fort Erie Public Bridge Authority
BRENDAN JONES	-- for the Respondent

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1 --- upon convening at 9:30 a.m.

2 --- upon commencing at 9:37 a.m.

3
4 EPHRAIM STULBERG, affirmed

5 CROSS-EXAMINATION BY MR. SHEA:

6 1. Q. Good morning, sir. You are here
7 to be examined on a report you produced?

8 A. Yes.

9 2. Q. And you have a copy of that
10 report with you?

11 A. Yes, I do.

12 3. Q. And the report is actually
13 attached, just so we have it on the record, as
14 Exhibit A to an affidavit that you swore, I
15 believe it was the 26th of September 2023, is
16 that correct?

17 A. Yes, that is correct.

18 4. Q. And you have no changes that you
19 want to make to the report, save and except for
20 the change that we discussed which relates to the
21 RFP not being referred to in the documents you
22 considered, no other changes?

23 A. Other than minor typos that I
24 identified in going through things, no.

25 5. Q. We don't worry about typos. If

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one of them is significant I am sure you will point it out to me as we go. So, I want to begin with a little bit of background. So, I take it you are an accountant by training?

A. Yes.

6. Q. And you have experience in loss evaluation as well?

A. Correct.

7. Q. But I take it you have no specific experience in the duty free space?

A. That is correct.

8. Q. So you have never advised a tenant, a duty free tenant, on the negotiation of a lease for a duty free store?

A. I have not.

9. Q. And you have never advised or consulted for a bridge authority or operator of a border crossing with respect to a duty free lease?

A. That is correct.

10. Q. And can you tell me when you were first approached by Peace Bridge Duty Free or Blaney to provide a report?

MR. JONES: Counsel, I don't think it
is relevant when they were first

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1 approached.

2 11. MR. SHEA: I don't know that you are
3 in a position to refuse to answer a
4 question. We have an expert, I am
5 asking the question.

6
7 BY MR. SHEA:

8 12. Q. So, can you tell me when you were
9 first approached?

10 MR. JONES: No, Counsel, we are going
11 to refuse that. /R

12 13. MR. SHEA: Are you acting as counsel
13 for the expert here or are you acting as
14 counsel for Peace Bridge Duty Free?

15 MR. JONES: Well, Counsel, we are
16 acting for Peace Bridge Duty Free.

17 14. MR. SHEA: So, just to be clear, the
18 expert is refusing to tell me when they
19 were first approached to produce the
20 report. Is that correct, sir?

21 MR. JONES: Yes, Counsel.

22
23 BY MR. SHEA:

24 15. Q. Okay. And I notice that, in the
25 documents we were provided, there is no document,

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1 memo or letter providing you with your
2 instructions or assumptions. Were there such
3 documents? Were you, in writing, given the
4 questions you were to answer and any assumptions?

5 A. I was not given a set of
6 assumptions or a written set of questions, no.

7 16. Q. Okay. So how did you come to
8 know the questions you were to answer or the
9 assumptions you were to make?

10 A. I had a phone conversation with
11 John Wolf.

12 17. Q. Okay. And do you have notes from
13 that phone conversation?

14 A. I did take notes of that
15 conversation.

16 18. Q. You did not produce those notes?

17 MR. JONES: Counsel, I don't believe
18 that the communications between the
19 expert and counsel are producible,
20 unless you can refer to me to something
21 and I am mistaken.

22 19. MR. SHEA: I am not asking for
23 privileged communication. I am asking
24 for notes that he took of a conversation
25 with respect to the facts that he was to

E. Stulberg - 7

1 rely upon and the questions that he was
2 to answer.

3 MR. JONES: Okay. So, again, if you
4 can provide me with some authority that
5 that would be producible in these
6 circumstances...

7 20. MR. SHEA: The rules of civil
8 procedure contemplate that we are
9 entitled, as I understand, to know the
10 assumptions upon which...

11 MR. JONES: They are in the report.

12 21. MR. SHEA: Okay. So you are refusing
13 to produce documents or the notes from
14 the communications with Mr. Wolf in
15 which the expert was provided the
16 questions they were to answer and the
17 assumptions they were to make?

18 MR. JONES: Yes.

/R

19 22. MR. SHEA: That's fine.

20 MR. JONES: And what I've asked
21 you...

22 23. MR. SHEA: So I'd like to go on,
23 please.

24 MR. JONES: ...if you'd be able to
25 provide me with...

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1 24. MR. SHEA: Sorry, sir...

2 MR. JONES: No, Counsel, you've asked

3 me a question...

4 25. MR. SHEA: Sir, to be clear...

5 MR. JONES: Counsel, stop. I am

6 going to finish my answer, okay?

7 26. MR. SHEA: This examination is over.

8 We are going back to the judge.

9 MR. JONES: Why?

10 27. MR. SHEA: If I can't ask the

11 questions without interruptions...

12 MR. JONES: Sit down...

13 28. MR. SHEA: I adjourn this

14 examination...

15 MR. JONES: Sit down...

16 29. MR. SHEA: ...we are going back to the

17 judge. Sit down. No, on the record.

18 Finish answering your question, sir. Go

19 ahead. Go ahead.

20 MR. JONES: The answer to my question

21 was, my understanding is that there is

22 no requirement to provide the

23 communication with counsel, however, if

24 you'd be good enough to provide us with

25 some authority, if I am mistaken on that

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1 point, I would be happy to review it.

2 30. MR. SHEA: Perfect.

3
4 BY MR. SHEA:

5 31. Q. Paragraph 5. You indicate in
6 paragraph 5...can you open that up, please? That
7 you understand that,

8 "...It's Peace Bridge Duty Free's
9 position that, absent an agreement
10 between the landlord [that is our
11 client] and Peace Bridge Duty Free, the
12 court will set the amount of base rent
13 in a manner that is commercially
14 reasonable for both parties..."

15 Do you see that?

16 A. Yes, correct.

17 32. Q. How did you come to that
18 understanding?

19 A. That was based on a discussion
20 with Mr. Wolf.

21 33. Q. So Mr. Wolf told you that?

22 A. Yes.

23 34. Q. And did he tell you that in
24 writing?

25 A. No.

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1 35. Q. Did he tell you that during the
2 conversation you had with him on the phone?

3 A. Yes, this was part of the
4 conversation we had on the phone.

5 36. Q. And those are the notes that you
6 are refusing to produce?

7 MR. JONES: Sorry, Counsel, you have
8 the assumption right there.

9 37. MR. SHEA: I didn't ask that.

10
11 BY MR. SHEA:

12 38. Q. So you are refusing to produce
13 those notes? Thank you.

14 MR. JONES: Yes, we've already gone
15 over that.

16
17 BY MR. SHEA:

18 39. Q. So, am I correct that it is your
19 understanding that the purpose of the report was
20 to provide the court with guidance as to the
21 commercially reasonable amount of rent, base
22 rent?

23 A. It was to provide the court with
24 financial background that would be relevant to it
25 if that was the approach that we are taking, yes.

E. Stulberg - 11

40. Q. To allow the court to determine
what?

A. To determine what a commercially reasonable level of rent would have been during the subject periods that I analyzed.

41. Q. Okay. And your analysis as to commercially reasonable rents is for two periods, 2020 to 2022...this is in paragraph 6?

A. Yes.

42. Q. And second of all 2023 and possibly beyond?

A. Correct.

43. Q. But you were only given projections for 2023, correct?

A. That is not correct.

44. Q. So you were given financial projects beyond 2023?

A. I didn't rely on any financial projections. The projections that I made for fiscal 2023 were my own.

45. Q. So, where did you get the information to make those projections?

A. It is outlined in my report. So I have sales data at schedule 5 of the report.

46. Q. M' hmmm. And where did get...that

E. Stulberg - 12

1 information came from?

2 A. This was based on a spreadsheet
3 containing sales and traffic count data for the
4 first half of 2023.

5 47. Q. Okay. And that data came...

6 A. From Jim Pearce.

7 48. Q. Mr. Pearce. So, Mr. Pearce never
8 gave you projections?

9 A. No, not directly.

10 49. Q. Indirectly, did he give you
11 projections?

12 A. There may have been something in
13 one of the affidavits that was produced. They
14 were quite voluminous, though, and I don't want
15 to definitively say there wasn't anything in
16 there, but I certainly didn't rely on any
17 projections in looking at the 2023 likely
18 profitability of the business.

19 50. Q. And you never produced any
20 productions beyond 2023?

21 A. Correct.

22 51. Q. And Mr. Pierce didn't give you
23 any projections for anything beyond 2023
24 directly?

25 A. No.

E. Stulberg - 13

52. Q. Now, I take it you'd agree that what rent is commercially reasonable as between two parties would generally be determined by the parties' negotiations?

A. In a typical situation, yes, the parties would look at the factors when they were entering into a lease and would negotiate what they felt was reasonable.

53. Q. Thank you. So, you've seen the lease, correct?

A. Yes, I have.

54. Q. So, I am going to show you a copy
of the lease. Counsel, here is a copy for you.

A. Thank you.

55. Q. So, this is a copy of the lease, can you look through it? Is this the copy that you saw?

A. It appears to be.

56. MR. SHEA: Okay. So this will be Exhibit A. Exhibit A is a copy of the lease between the Authority and Peace Bridge Duty Free.

--- EXHIBIT NO. 1: Lease between the Buffalo and
Fort Erie Public Bridge Authority

E. Stulberg - 14

1 and Peace Bridge Duty Free dated
2 July 28, 2016
3

4 BY MR. SHEA:

5 57. Q. Sir, in paragraph 2, you
6 outline...of your report, this is just in the
7 summary, I think you outlined it elsewhere as
8 well. So you are aware that this rent in the
9 lease is what Peace Bridge Duty Free offered the
10 Authority?

11 A. Yes.

12 58. Q. So, in response to the RFP, Peace
13 Bridge Duty Free made an offer to pay rent, and
14 this was the rent they offered to pay?

15 A. Yes, that is correct.

16 59. Q. And you are aware, are you not,
17 that Peace Bridge Duty Free was the operator of
18 the duty free store since 1986?

19 A. I believe that is correct, yes.

20 60. Q. It is in paragraph 25 of your
21 affidavit, if you'd like to confirm.

22 A. Paragraph 1 as well, I see it.

23 61. Q. Okay. So, you'd agree with me
24 that, having run the store since 1986, Peace
25 Bridge Duty Free would be in the best position to

E. Stulberg - 15

1 determine the rent that was commercially
2 reasonable for it to pay?

3 A. I would say that Peace Bridge,
4 when they negotiated and when they bid on the RFP
5 when they did...again, not seeing COVID
6 coming...yes, they would have been in a good
7 position to understand what was a reasonable
8 amount to pay.

9 62. Q. And they would be in the best
10 position to project how much they could earn from
11 this business and what the sales would be?

12 A. They would have had a decent
13 amount of track record to make that projection,
14 yes.

15 63. Q. Since 1986, yes. And do you have
16 any information as to what Peace Bridge was
17 paying in rent prior to this lease?

18 A. I believe I did and I am going to
19 check my report. I believe it was 12 percent of
20 gross revenue.

21 64. Q. And you'll agree with me that it
22 was Peace Bridge Duty Free that agreed to
23 significantly increase the rent that it was
24 offering when it responded to the RFP?

25 A. Yes, I believe that is correct.

E. Stulberg - 16

1 65. Q. And I'll refer you to paragraph
2 26, and I believe that you say in paragraph 26
3 that,

4 "...The Authority was requesting base
5 rent of 2.5 million a year..."

6 A. Yes, that was, I think, a
7 requirement to bid on that RFP.

8 66. Q. And you'll agree with me that
9 Peace Bridge Duty Free offered significantly more
10 than 2.5 million a year?

11 A. Yes.

12 67. Q. Now, I am going to ask you in the
13 lease to turn to Schedule D to the lease, and it
14 begins at the top right.

15 A. Is there a page?

16 68. Q. 98.

17 A. Page 98.

18 69. Q. Top right, 98.

19 A. Okay.

20 70. Q. Do you recall seeing these
21 documents?

22 MR. JONES: Sorry, which page are we
23 on?

24 71. MR. SHEA: 98 of the lease.

25

1 BY MR. SHEA:

2 72. Q. Do you recall seeing...

3 MR. JONES: Bear with me for one
4 second, Counsel.

5 73. MR. SHEA: Top right.

6
7 BY MR. SHEA:

8 74. Q. Do you recall seeing these...

9 MR. JONES: Sorry, my number 98 is
10 something different. So its tab 4.

11 75. MR. SHEA: Qualifications and
12 expertise of the lease?

13 MR. JONES: Yes, I think we are
14 looking at the same one.

15 76. MR. SHEA: Okay. Tab 4?

16 MR. JONES: Yes.

17
18 BY MR. SHEA:

19 77. Q. So, do you recall seeing this
20 document attached to the lease?

21 A. I'll be casual with you, I don't
22 immediately recall it.

23 78. Q. Okay. So I am going to ask
24 you...but you did see it, you were given a copy
25 of the lease?

E. Stulberg - 18

1 A. I did get a copy of the lease,
2 but I didn't review every page of it.

3 79. Q. Well, I'm going to ask you to
4 turn to pages 122 and 123. So do you recall at
5 the bottom, these are forecasted sales and if you
6 turn over the page to 123, you'll see,

7 "...Forecasted Operating and Capital
8 Costs..."

9 Do you recall seeing these?

10 A. I don't.

11 80. Q. Okay. Can you take a moment to
12 review the projections of the sales and the
13 projection of the operating costs?

14 MR. JONES: Should we go off the
15 record?

16 81. MR. SHEA: Sure if you want to take a
17 minute off the record.

18
19 --- DISCUSSION OFF THE RECORD

20
21 BY MR. SHEA:

22 82. Q. So, based on these projections
23 and these costs, total operating costs, do you
24 have any opinion on whether the rent that Peace
25 Bridge Duty Free offered to pay was reasonable?

E. Stulberg - 19

1 A. I guess the first thing I'll
2 point out is that...so this would have been
3 prepared by 2016.

4 83. Q. M'hmm.

5 A. I mean, I can say that, by year
6 three, the sales were nowhere near the 30 million
7 dollars that is forecasted.

8 84. Q. M'hmm.

9 A. Certainly, if they are hitting
10 those sales, then the rent is still leaving them
11 with a nice profit.

12 85. Q. So you have no issue with the
13 commercial reasonability of the rent that was
14 offered in the lease, based on the projections
15 that were prepared by Peace Bridge Duty Free?

16 A. Based on the projections, the
17 rent would have left Peace Bridge Duty Free with
18 a reasonable rate of return, certainly.

19 86. Q. And you'll agree with me that, if
20 Peace Bridge Duty Free didn't hit these levels of
21 sales, they wouldn't be entitled to pay less
22 rent?

23 A. Less rent than what?

24 87. Q. Than what the lease provided for.

25 A. You are asking for my

1 interpretation of the lease?

2 88. Q. Well, you've reviewed the lease.
3 I am not asking for your interpretation. Do you
4 understand that the lease provides a clause that
5 says that, if they don't meet these levels of
6 sales, they get a discount on the rent. Are you
7 aware of...

8 A. I don't believe there is a clause
9 that says that.

10 MR. JONES: You are asking him
11 specifically about sales targets?

12 89. MR. SHEA: Yes.

13
14 BY MR. SHEA:

15 90. Q. And, as I understand, your report
16 assesses what is commercial reasonable rent based
17 on Peace Bridge Duty Free achieving a particular
18 return on assets or particular net income
19 percentage, is that correct?

20 A. It depends which period you are
21 referring to.

22 91. Q. You are right. In the post-2023
23 and potentially beyond, do you not base
24 your...what you believe to be commercially
25 reasonable rent, on Peace Bridge Duty Free

E. Stulberg - 21

1 achieving, I believe it is, 11 point something
2 return on assets and 6.6 net income?

3 A. No, that is correct. I do use
4 those metrics to come up with what one might
5 argue is a reasonable rate of return and the rent
6 is sort of a plug to get to those rates of
7 return.

8 92. Q. You'll agree with me, though,
9 that that is not in the lease?

10 A. I would agree that the lease does
11 not outline those particular rates of return.

12 93. Q. So, your analysis of what is
13 commercially reasonable assumes that the lease
14 doesn't apply?

15 A. I don't think that is a fair
16 characterization.

17 94. Q. Okay. But you do agree with me
18 that the lease doesn't contemplate that Peace
19 Bridge Duty Free will achieve, in any given year,
20 a particular net income?

21 A. I think what I said was that the
22 lease doesn't specifically mention a net income
23 amount or percentage. There is a clause in the
24 lease which I understand is in dispute in this
25 case, which does speak to if there was a change

E. Stulberg - 22

1 in laws, et cetera, then something will happen...

2 95. Q. There will be a consultation...

3 A. And I understand the parties
4 disagree over that and I have no opinion as to
5 what that means. I am not here to interpret that
6 clause.

7 96. Q. So you are not providing anything
8 to interpret that clause?

9 A. I am not interpreting what that
10 clause means directly, no.

11 97. Q. Okay. And I take it there is no
12 dispute that the lease contemplates base rent of
13 four million?

14 A. The lease outlines a base rent of
15 four million dollars per year.

16 98. Q. And there is also no dispute that
17 if, under the terms of the lease, subject to
18 18.07, if Peace Bridge Duty Free does not achieve
19 the sales, the level of sales outlined in its
20 response to the RFP, it still has to pay four
21 million dollars minimum?

22 MR. JONES: Counsel, I think, as you
23 know, there is a dispute...

24 99. MR. SHEA: I said in my question
25 subject to the dispute.

E. Stulberg - 23

1 MR. JONES: Right. I mean, subject
2 to COVID and changes in applicable laws.

3 100. MR. SHEA: Okay.

4
5 BY MR. SHEA:

6 101. Q. So, subject to COVID and
7 applicable laws and whatever 18.07 means...

8 MR. JONES: And the rest of the
9 lease...

10
11 BY MR. SHEA:

12 102. Q. ...the lease does not contemplate
13 that, as of right, if they fail to meet the
14 sales, there is a reduction in the four million
15 dollar minimum rent...there is no tie-in, four
16 million dollars and the sales projections?

17 MR. JONES: Counsel, I am struggling
18 to understand your question. You are
19 asking him to interpret the lease?

20 103. MR. SHEA: I am asking him whether he
21 understands there is any linkage between
22 the minimum rent and the sales
23 projections.

24 MR. JONES: Sorry, you are asking
25 whether...I need to understand the

E. Stulberg - 24

1 question...in coming to the base rent
2 number, there is a linkage...

3 104. MR. SHEA: No...

4 MR. JONES: ...in terms of what the
5 projected sales would be?
6

7 BY MR. SHEA:

8 105. Q. No. Is there a link between the
9 obligation to pay minimum rent and the sales
10 projection? Do you understand whether...so let
11 me ask you this. Based on your understanding, is
12 there a linkage between the obligation to pay
13 rent and the sales projections?

14 A. There is no direct linkage or
15 language to that effect in the lease, as far as I
16 can tell.

17 106. Q. Okay. Thank you. So, your first
18 analysis is the ability to pay in 2020 and 2022,
19 correct?

20 A. 2020 until 2022, so the three-
21 year period.

22 107. Q. Okay. So this period includes
23 the time that the duty free was closed, and a
24 period of time when it was open?

25 A. Yes.

E. Stulberg - 25

1 108. Q. So I assume you were instructed
2 to group 2020 through 2022 as a package?

3 A. I don't recall being directly
4 instructed to do that.

5 109. Q. Okay. So you are aware the duty
6 free store was closed from March 2020 to
7 September of 2021, correct?

8 A. Roughly, yes.

9 110. Q. Well, that is paragraph 38, if
10 you want to check.

11 A. No, mid-march, I think, is the
12 only qualification I would make to that
13 statement.

14 111. Q. So, why, then, did you include in
15 this analysis the period after September of 2021
16 when the duty free was opened?

17 A. The reason I did that was because
18 my understanding of section 18.07, is that it
19 speaks to changes and applicable laws and there
20 were still applicable laws or regulations which
21 would have impacted the financial results of the
22 business. As I outlined at some length in the
23 "Background" section of my report at paragraph 37
24 and, I guess, in fact, even extending beyond
25 that, the US didn't remove the requirement for

E. Stulberg - 26

1 foreign visitors to have a vaccination until the
2 spring of 2023.

3 112. Q. So why didn't you include up to
4 the spring of 2023 in that period, then?

5 A. Because I don't have full
6 financial statements for that period. So I have
7 made estimates for 2023.

8 113. Q. So I am just trying to
9 understand, the reason you included up
10 until...included 2021 from September through 2022
11 in your analysis, is because you were told that
12 there were impacts by legislation during that
13 period?

14 A. I wasn't told that. It seems
15 quite clear from the results and there certainly
16 was, I think, regulations or legislation that
17 would have had an impact on customer flow to the
18 business.

19 114. Q. And you didn't include the period
20 beyond 2022 even though there continued to be
21 impacts because you didn't have numbers for
22 those?

23 A. I don't have a full year of
24 financials statements, so I thought it made sense
25 to segregate the 2020 to 2022 period, in one

E. Stulberg - 27

1 analysis, and then, the 2023, in a second
2 analysis.

3 115. Q. Okay. And during the period
4 March of 2020 to September of 2021, you'll agree
5 that the primary impact on the ability to pay
6 rent was the fact the store was closed?

7 A. From a causation perspective, I
8 don't think that is correct. I would say that
9 the ultimate causation would have been the lack
10 of vehicle traffic as you can see on schedule 6
11 of my report. Vehicle traffic is down to five to
12 10 percent of normal levels during pretty much
13 that entire period. So regardless of whether
14 they were open or not, they would have had great
15 difficulty paying rent.

16 116. Q. But, you'll agree, that, if they
17 would have remained open, they would have had an
18 increased ability to pay rent based on five
19 percent traffic that was still flowing?

20 A. I think that is possible, but I
21 don't know that it's, by any stretch, a
22 certainty. Don't forget, if they are staying
23 open, they are going to generate, let's say, five
24 percent of their normal rent, there is the cost
25 of sales and you've got to staff the place.

E. Stulberg - 28

1 You've got other costs to keep the lights on.
2 Its difficult to say whether they would have been
3 better off having done that.

4 117. Q. But you don't know? You never
5 got the numbers?

6 A. It is difficult to model.

7 118. Q. Okay. Did you try to model that?

8 A. No.

9 119. Q. And you'll agree with me that, in
10 paragraph 55, you say that there is no standard
11 or definitive metric that can be applied to
12 determine reasonable level of rent that would be
13 applicable for the period of COVID?

14 A. Yes, that is correct. There is
15 no standard or definitive metric.

16 120. Q. And are you aware that Peace
17 Bridge Duty Free negotiated a rent deferral
18 arrangement with the Authority?

19 A. I am aware of one such
20 arrangement, yes.

21 121. Q. Did that factor into your
22 analysis at all?

23 A. In what sense?

24 122. Q. Did you consider the fact that,
25 as a contractual matter, the Peace Bridge Duty

E. Stulberg - 29

1 Free had agreed to a rent deferral as opposed to
2 any rent abatement?

3 A. So it is not directly reflected
4 in my calculations.

5 123. Q. And if you turn to paragraph 58.
6 In paragraph 58 you assert that,
7 "...If it would be appropriate for Peace
8 Bridge Duty Free to suffer a loss of 50
9 percent of its retained earnings, then
10 the total base rent that Peace Bridge
11 Duty Free would pay would be 4.6
12 million..."

13 You'll agree with me that that is not what the
14 lease requires?

15 A. You are asking for my
16 interpretation of the lease?

17 124. Q. Well, 4.6 million...you are
18 saying that Peace Bridge Duty Free would have
19 been required to pay 4.6 million in rent between
20 2020 and 2022, is that what you are saying?

21 A. Well, I am saying...there is an
22 "if" at the beginning of the sentence. So, the
23 analysis, again, is premised on a particular
24 understanding or instruction with respect to
25 section 18.07 of the lease.

A. So, the premise or the assumption of the paragraph we just went through, is that at paragraph 5 of the report and, again, the understanding is that Peace Bridge's position is absent an agreement between the landlord and the Bridge, the court will set an amount of rent in a manner that is commercial and made reasonable. The calculation I have described at paragraph 58 is, what, I thought, one way of determining what a commercially reasonable amount of rent would be.

A. It is not based on the four dollar minimum [inaudible], correct.

127. Q. Okay. So it is a freestanding calculation that does not consider how you interpret the lease as requiring the rent be calculated as set out in paragraph 2. In paragraph 2 you say...let me clarify. In

E. Stulberg - 31

1 paragraph 2 you interpret the lease and say this
2 is what it provides in terms of rent. In
3 paragraph 58, that is an entirely different
4 calculation.

5 A. The amounts in paragraph 58 are
6 not based on the four million dollars per year
7 minimum base rent.

8 128. Q. Okay. Now, your analysis of
9 ability to pay in 2023 and possibly beyond. So I
10 want to make sure I understand this right. So I
11 am looking at table 1 and schedules 1B and 2B.

12 A. Okay.

13 129. Q. So, your opinion is that, with
14 sales of 16 million and assuming a return on
15 assets of 11.6, Peace Bridge Duty Free can afford
16 to pay 2.7 million in rent, and will realize a
17 net income of 1.3 million for its shareholders?

18 A. Yes, you are reading that table
19 correctly.

20 130. Q. And with the same level of sales,
21 16 million, and with a net income percentage of
22 6.6, Peace Bridge Duty Free can afford to pay 2.9
23 million in rent in your view, and will realize
24 1.05 million in net income for its shareholders?

25 A. Correct.

E. Stulberg - 32

1 131. Q. Okay. So your analysis assumes
2 that Peace Bridge Duty Free and its shareholders
3 have to earn a specific return or will earn a
4 specific return. So your analysis assumes a
5 specific rate of return?

6 A. It assumes that a commercially
7 reasonable lease, based on the circumstances
8 known, would give the business owner a rate of
9 return on their assets, or a level of
10 profitability.

11 132. Q. And were you told my anyone that
12 the level of profitability that Peace Bridge Duty
13 Free expects is 11.6 return on assets or 6.6 net
14 income percentage?

15 A. I wasn't told that and, in fact,
16 based on the forecast that you provided earlier,
17 clearly they were hoping for more. So this is
18 meant to be more of an objective benchmark
19 looking at other companies in this broad industry
20 and what they are renting.

21 133. Q. Okay. But you agree that it
22 would be reasonable for Peace Bridge Duty Free to
23 accept a lower level of profitability?

24 A. I think there is room to maneuver
25 around those numbers. It is not a hard and fast

E. Stulberg - 33

1 thing. It is a benchmark. It's an average. But
2 certainly, the expectation of it would be this.
3 If you are running a business, you hope to earn a
4 profit and the return on your capital over time.

5 134. Q. Return on capital over the length
6 of the lease or immediately?

7 A. Into the future.

8 135. Q. So, in your report, you refer to
9 offers that were made in October of 2021, which,
10 you will agree, is before this litigation began,
11 and in March of 2023, which is after this
12 litigation began, is that correct?

13 A. I do refer to those offers of
14 those two dates. I confess I am not actually
15 aware of precisely when the litigation began, but
16 I will take your word for it.

17 136. Q. Okay. And those were offers that
18 were made by who to who?

19 A. These were both offers presented
20 on behalf of the Authority to Peace Bridge Duty
21 Free.

22 137. Q. Okay. So I am going to show
23 you...this is...I'll give you the copy without
24 the stamp on it...this is the October 26th copy
25 for you to look at as well. Do you recall this,

E. Stulberg - 34

1 is this the document?

2 A. I believe so.

3 138. Q. And here is a copy of the
4 March...so I am going to...this is a copy for
5 you. Is that copy correct?

6 A. Yes, I believe so.

7 139. Q. Okay. I am going to mark the
8 October 26th as Exhibit B, I believe...or Exhibit
9 2...I apologize, Exhibit 2. And the March will
10 be Exhibit 3, okay?

11
12 --- EXHIBIT NO. 2: October 26th 2021 offer

13
14 --- EXHIBIT NO. 3: March 21st 2023 offer

15
16 BY MR. SHEA:

17 140. Q. Okay. And I am going to assume
18 that these were the only offers you were
19 provided. So you were never provided with any of
20 the other offers exchanged between the parties?

21 A. I believe that is correct.

22 141. Q. Okay. So I am going to show
23 you...I don't know if you have seen it, but...so
24 we have the 26th. So I am going to show you an
25 offer made on 16 November. So, I take it, you've

E. Stulberg - 35

1 never seen this offer before?

2 A. It does not look familiar to me.

3 142. MR. SHEA: Okay. We are going to
4 mark this...Counsel, do we want to mark
5 this for information? Because he has
6 never seen it, but I am going to ask him
7 questions on it, and it is on the
8 record.

9 MR. JONES: So why don't we mark it
10 for identification purposes as we
11 discussed.

12 143. MR. SHEA: So, this is going to be
13 Exhibit A for identification. I
14 apologize, we will give you the list of
15 the Exhibits. The lease is Exhibit 1,
16 not A. Sorry, my mistake.

17
18 --- EXHIBIT A: November 16th, 2021 offer

19
20 BY MR. SHEA:

21 144. Q. Do you want to take few minutes
22 to review that?

23 A. Please, if you don't mind.

24 145. MR. SHEA: Okay. So, we are going to
25 go off the record for a few minutes to

1 review that.

2
3 --- DISCUSSION OFF THE RECORD

4
5 BY MR. SHEA:

6 146. Q. So, your report and your analysis
7 deals with base rent, the payment of rent,
8 correct?

9 A. Yes, that is right.

10 147. Q. And I am going to ask you to have
11 these two side-by-side if you don't mind. You
12 reviewed Exhibit A. You will agree with me that
13 the October 26th, 2021 proposal from Gowlings on
14 behalf of the Authority, contemplates, or offers,
15 an escalation in the base rent from 2.5 million,
16 or 20 percent of sales, in 2022? And I will
17 confess that all these documents...because the
18 lease starts in the middle of a year, what that
19 means, but what exactly that means in terms of
20 when it starts...but, an escalation from 2.5
21 million to 4 million by 2025, and that, beyond
22 2025, the existing lease applies. And that is
23 the offer you considered or that you had before
24 you?

25 A. Yes, that is right.

E. Stulberg - 37

1 148. Q. And I am going to refer you to
2 the November 16th, 2021 response from Peace
3 Bridge Duty Free. You were not given a copy of
4 this document?

5 A. Correct.

6 149. Q. And you will note that what Peace
7 Bridge Duty Free proposes essentially parallels
8 what the Authority was prepared to agree to?

9 A. What do you mean by
10 "essentially"?

11 150. Q. Well, aside from 2022, where
12 there would be a makeup payment to get them to
13 2.5 million or 20 percent of sales, the base rent
14 proposed by the parties is identical?

15 A. Are you talking about the
16 escalations?

17 151. Q. Yes, the escalations are
18 identical, are they not?

19 A. So, the base rent amounts for
20 2023, '24 and '25 are identical. There are
21 differences in the 2022 proposal and there are
22 also differences with respect to how back rent
23 would be treated.

24 152. Q. But you didn't deal with back
25 rent?

1 A. I did.

2 153. Q. Your report dealt with back rent?
3 And what amount of bank rent would be reasonable
4 for them to pay?

5 A. It's looking at the amount of
6 rent that they had paid during that time frame
7 and looking at what additional rents would be
8 payable, and so, yes, it considers all forms of
9 rent that were paid and unpaid.

10 154. Q. So, please point out to me where,
11 in your report, you identify what amount of back
12 rent it would be reasonable for Peace Bridge Duty
13 Free to repay?

14 A. So, I'll take you to schedule 1A
15 and I go through three different scenarios.

16 155. Q. M'hmm.

17 A. In the first one, my conclusion
18 is that, in order for them to break even, on the
19 break even analysis scenario, there wouldn't be
20 any additional back rent paid.

21 156. Q. M'hmm.

22 A. Similarly, if the goal of the
23 commercially reasonable amount to pay would be 20
24 percent of revenue, again, there would be no back
25 rent to pay. They'd already paid in excess of

E. Stulberg - 39

1 that. And in scenario 3, the loss of 50 percent
2 with the book value of their equity, they would
3 have had to pay 1.1 million dollars in rent that
4 they had not paid for that period of time.

5 157. Q. So your opinion is that it would
6 be commercially reasonable for Peace Bridge Duty
7 Free to have to pay back none of the back rent?

8 A. If one viewed a commercially
9 reasonable result for a business affected by
10 COVID during that three-year period for them to
11 earn absolutely no profit, and in fact, to suffer
12 a loss, then, yes, that would be the corollary.

13 158. Q. That they have to pay nothing,
14 but if...explain that to me again...so, if the
15 assumption is that, during that period, Peace
16 Bridge Duty Free must make a profit...

17 A. No.

18 159. Q. Okay.

19 A. If Peace Bridge were to...if the
20 desired commercially reasonable result were for
21 Peace Bridge to break even during that three-year
22 window of 2020 to 2022, based on the amount of
23 income they made and based on the amount of rent
24 they had already paid, they would not be required
25 to pay any more rent than they have already done.

160. Q. If the desired result is to break even?

A. Yes, correct.

161. Q. But if it is acceptable for them to generate a loss during any particular period, then you would agree that some amount of the back rent should be paid?

A. It depends on the magnitude of the loss. As you can see in schedule 1A, I've shown that they made 1.8 million dollars. Before consideration of any base rent paid, they actually paid 3.4 million dollars. So they have, in fact, suffered a loss just based on what they have paid.

162. Q. But you will agree...let's come back to that in a second...so, you agree that the escalation that the parties were discussing in October and November, they were in accord as to what the escalation would be?

A. Yes, for 2023, '24 and '25.

163. Q. And what is the your difference in 2022? Is it not a difference of when it is going to be paid, as opposed to what it is?

A. No, you are right. That is what the difference relates to, but they are

E. Stulberg - 41

1 different. They are not exactly the same.

2 164. Q. The difference is not what rent
3 will be paid in 2022, it is when the makeup will
4 happen?

5 A. That is correct.

6 165. Q. And in terms of the amount,
7 you'll agree with me that, in November of 2021,
8 Peace Bridge Duty Free was agreeing to pay back 2
9 million dollars in back rent?

10 A. In nominal terms, yes, although
11 they were proposing to do so over a period of 14
12 years, roughly.

13 166. Q. And what the Authority was
14 requesting was 50 percent of the back rent?

15 A. Yes, immediately.

16 167. Q. Immediately. And I believe the
17 parties are in accord that the back rent was 5.7
18 million, are you aware of that?

19 A. At that particular point in time
20 I haven't seen that number.

21 MR. JONES: I don't think the numbers
22 are in the index.

23

24 BY MR. SHEA:

25 168. Q. Okay. We are going to get to

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1 that. I just asked if you were told what the
2 number was?

3 A. I am not aware of what the number
4 was at that point in time.

5 169. Q. So you were not aware of what the
6 number is, okay. So I am going to show
7 you...because, I take it, you were not, since it
8 was after you were shown an offer that was made
9 by Peace Bridge Duty Free on August 22nd, 2023,
10 were you?

11 A. I was not shown that.

12 170. Q. So I am going to show you a copy
13 of that. So here's a copy for you and a copy for
14 your counsel. This would also be marked as an
15 exhibit for identification purposes and it would
16 be B for identification.

17
18 --- EXHIBIT B: Letter from Blaney McMurtry dated
19 August 22, 2023, for
20 identification
21

22 MR. JONES: We will go off the record
23 while...

24 171. MR. SHEA: Of course. What I am
25 going to take him to starts on

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1 page...top right-hand corner, 17, it is
2 our March 22nd, 2023 letter and it is
3 the comments from Peace Bridge Duty Free
4 what is agreed to, and what isn't.

5 MR. JONES: Okay. Well let's read
6 the whole thing.

7 172. MR. SHEA: Yes, read the whole thing.
8 Take your time.
9

10 --- DISCUSSION OFF THE RECORD
11

12 BY MR. SHEA:

13 173. Q. So, we were looking at a little
14 bit of context here. So one of the offers that
15 you had talked about and referred to in your
16 report was the 21 March 2023 offer that was made
17 to the Peace Bridge Duty Free and that is Exhibit
18 3. And I am going to refer you to the markup of
19 that that is attached to Exhibit B which you have
20 just looked at, and that begins, top right on
21 mine is page 17, and I don't know why it's 17.
22 So its after Mr. Ullmann's letter, which I am not
23 going to refer you to.

24 A. I have it.

25 174. Q. Okay. And these are Peace Bridge

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1 Duty Free's position. And you will note that, on
2 the first page, Peace Bridge Duty Free accepts
3 that the amount of rent to be paid, the arrears
4 to be paid, is 2.85 million, which they say is 50
5 percent, and I am going to suggest to you, you
6 multiply that by two and you get to 5.7?

7 A. Yes.

8 175. Q. And then we talk about the next
9 page over is what is agreeable to them in terms
10 of the escalation of the base rent. And you'll
11 note that, beside, is reference that Peace Bridge
12 Duty Free accepts this as being an appropriate
13 escalation, do you see that?

14 A. I do, although I am a little bit
15 confused by that because, when I compare the
16 Blaney McMurtry letter with the Gowling markup
17 letter, the years seem to be off by a year.

18 176. Q. That is what I was talking about,
19 I think there is a typo in terms of how we are
20 treating the years. So if you go back and look
21 at Exhibit 2 and Exhibit A...

22 A. Which is this?

23 177. Q. So, Exhibit 2 is the October
24 26th, 2021.

25 A. Right.

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1 178. Q. So it looks like an extra year
2 just got added in by Gowlings for 2021, a minimum
3 rent level for 2021. Everything else lines up.

4 A. So this, just so I understand,
5 the Gowlings letter 2021, means November 1st,
6 2021 to October 31st, 2022?

7 179. Q. I can't say for certain. I
8 believe that is the right...I believe that is the
9 answer.

10 A. That was my reading of the
11 document.

12 MR. JONES: I believe that is the
13 right answer, but I just want
14 to...whatever...it is a Gowlings letter.
15 I can take you to another document that
16 has that laid out, but that other
17 document was just delivered two or three
18 days ago so I don't know if we want
19 to...and it also has no relation to what
20 this witness has seen.

21
22 BY MR. SHEA:

23 180. Q. Okay. As long as what I just
24 suggested to you, does that square with all the
25 other letters?

1 A. Everything squares with all the
2 other letters.

3 181. Q. If we read it that way.

4 A. Yes, I guess...the point of
5 confusion I have is that...okay, I am still a
6 little bit confused. I guess the Blaney McMurtry
7 letter is much more explicit in terms of the
8 periods that it is relating to and I don't...

9 182. Q. I guess my point is...you'll
10 agree that what is indicated in the notation on
11 the letter is that Peace Bridge Duty Free excepts
12 the escalation?

13 A. Those are the notations, I guess,
14 subject to confirmation that they had a correct
15 understanding of what the chronology was meant to
16 signify.

17 183. Q. But you would also agree with me
18 that, when we compare the October 26th, which is
19 Exhibit 2, and Exhibit A for identification,
20 there is also an accord there in terms of the
21 escalation? And those numbers match, the numbers
22 here.

23 A. No, you are right, they do. My
24 concern is it is...at least, a literal reading of
25 the most recent Blaney McMurtry letter suggests

1 that the numbers are off by a year.

2 184. Q. The numbers are off by the year,
3 but the escalation is the same?

4 A. The flow of the escalation is the
5 same.

6 185. Q. Okay. You are right. So...

7 A. Although they are not accepting,
8 I guess, the last escalation.

9 186. Q. Explain that to me.

10 A. Well, in the Blaney McMurtry
11 letter it says,

12 "...For the year ended October 31st,
13 2026..."

14 Which seems, for our purposes, a correspondence
15 to the Gowling letter year 2025, Gowling is just
16 saying that it is 4 million dollars or 20 percent
17 of sales, whichever is greater. Blaney is saying
18 that it is going to be somewhat different, or
19 slightly amends it.

20 187. Q. Well, it is going to say that
21 base rent will be equal to the previous base rent
22 until 4 million dollars is reached, but 2025,
23 they agree...

24 A. I guess they are the same until
25 the 3.5 million threshold, but then they're

1 slightly different.

2 188. Q. But there is that escalation?

3 A. They contain the same escalation,
4 yes.

5 189. Q. Okay. So, we can put these away
6 now, so we can free the table a little bit. I am
7 going to now show you projections. So, in March
8 of...are you aware that, in March of 2021 and
9 August of 2021, Peace Bridge Duty Free provided
10 projections and proposals to the Authority?

11 A. I don't recall that.

12 190. Q. I think they were referenced in
13 the affidavits, but you may not have read them.

14 A. As I mentioned, I didn't go
15 through everything.

16 191. Q. So I am going to show you these
17 and these are...and I am going to show counsel,
18 these are the March 25th and August...there is no
19 date on it, but, from the evidence, it is August
20 the 20th proposals made by the Duty Free that
21 includes cash flow projection...or, not cash flow
22 projections but business projections. So
23 Counsel, do you want to identify these for...I
24 mean, they're in the record.

25 MR. JONES: We will take your word

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1 for it that it's in the record.

2 192. MR. SHEA: But we can just identify
3 them as C and D. I don't mind that,
4 because they are in the record. And the
5 witness hasn't seen them, so the witness
6 has not been provided with these
7 directly, although, presumably, he has
8 been given the documents in the records,
9 but he can't identify them. So, I am
10 happy with C and D.

11 MR. JONES: So you want to mark these
12 as C and D?

13 193. MR. SHEA: I am fine with that. So,
14 March 25th, 2021 document will be C.
15 And the other document that just has on
16 the front, "Duty Free Peace Bridge
17 proposal made to Buffalo and Fort Erie
18 Bridge Authority will be D.

19
20 --- EXHIBIT C: Letter from Peace Bridge Duty
21 Free, dated March 25, 2021
22

23 --- EXHIBIT D: Duty Free Peace Bridge proposal
24 made to Buffalo and Fort Erie
25 Bridge Authority

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1
2 BY MR. SHEA:

3 194. Q. Okay. Now, I know you are going
4 to have to take some time to look at these. So,
5 the specific...if it assists, what I am going to
6 specifically take you to are the financial
7 projections in these documents and, because these
8 come from the record, top right you'll see the
9 page numbers.

10 A. Yes.

11 195. Q. So on the March, the projection I
12 am going to take you to is...where is it,
13 2019...obviously you will read what you wish to
14 read. And on the other document, on the top
15 right, it is page 292. And maybe now is an
16 opportune moment...there isn't a lot left to go,
17 but now is an opportune moment to take the break,
18 is that okay? So we will go off the record. We
19 will take the break.

20
21 --- upon recessing at 10:47 a.m.

22 --- A BRIEF RECESS

23 --- upon resuming at 11:04 a.m.

24
25 EPHRAIM STULBERG, resumed

1 CONTINUED CROSS-EXAMINATION BY MR. SHEA:

2 196. Q. I want you to turn to C and D.

3 So, you've had an opportunity to review the
4 projections?

5 A. I have, yes.

6 197. Q. And you'll agree with me that the
7 projections provided in the March document and
8 the August document are essentially the same?

9 A. Yes.

10 198. Q. The difference is that, as far as
11 I can tell, the difference is that the March
12 includes a running cash balance that is not
13 included in the August documents, but the other
14 numbers appear to be the same?

15 A. They do based on the numbers that
16 I looked at.

17 199. Q. So, you'll agree with me that,
18 for 2022, again we don't know...I will confess
19 that we don't know what "2022" means, whether it
20 means as of 2022 calendar or lease year. I
21 assume it means lease year, but we don't know
22 that from the document. But, in 2022, the
23 projections were 16 million dollars in sales, and
24 I believe they were looking at net income of
25 330,000, correct?

1 A. Yes. Based on the scenario which
2 has them paying rent as a percentage of sales, 20
3 percent of sales.

4 200. Q. Yes, 20 percent of sales...

5 A. Right.

6 201. Q. ...but that is in accord...you'll
7 agree that that's, at least for the escalation
8 period, generally in accordance with the offers
9 that were made? The offers that were made were
10 the greater of x and 20 percent of sales?

11 A. Yes, you are correct.

12 202. Q. So, in 2022, they were looking at
13 percentage rent of 3.2 million, which would be
14 the greater of the amount in the offers and 20
15 percent of sales...so, the greater of 2.5 million
16 and 20 percent of sales?

17 A. Yes. So assuming sales would
18 have been 16 million, the 20 percent would have
19 been higher.

20 203. Q. So that is the projection and
21 they were projecting 333,000 in net income?

22 A. Yes, that's correct.

23 204. Q. And I don't know if you have a
24 calculator there, I could be wrong, but I
25 calculate that as two percent.

1 A. Roughly speaking?

2 205. Q. Roughly speaking, two percent.

3 A. As a net income...well that is
4 after tax, but yes.

5 206. Q. So it would more than that pre-
6 tax?

7 A. The pre-tax number would be
8 higher.

9 207. Q. And when you were calculating
10 your numbers, you were dealing with pre-tax?

11 A. Pre-tax, correct.

12 208. Q. Okay. So the pre-tax number,
13 then, is operating at 6.3 is what they have as
14 operating income?

15 A. Yes, operating income is 636,000
16 it looks like.

17 209. Q. So, it is probably four percent
18 then? Using your calculation method, though,
19 that is four percent roughly?

20 A. Give or take.

21 210. Q. Okay. And then we go over to
22 2023 where they are projecting 18 million in
23 sales. And again, we've got the percentage rent
24 at 20 percent because in that year, again, the
25 proposal made was three million or 20 percent.

1 So they were projecting they would make more, so
2 higher rent. And the income is higher, operating
3 income of 1.162 million and net income of
4 747,000. So that is an increase of net income
5 percentage almost double?

6 A. Yes, a little bit less.

7 211. Q. Yes. So they are projecting
8 increasing net income?

9 A. Yes, that is correct.

10 212. Q. And that pattern continues
11 throughout these projections, does it not?

12 A. Yes, the projection assumes that
13 sales would increase over time and,
14 correspondingly, profitability would generally
15 increase, with the exception of maybe one year in
16 the middle.

17 213. Q. Yes, and, I believe, up until the
18 initial term of the lease is 2031. So there is
19 an extension. 2031 is what I refer to as, I
20 guess, the natural expiry of the lease term. And
21 you'll agree with me that by, that point in time,
22 they were projecting that they would have reached
23 on 21.09 million in sales, they would have an
24 operating income of 2.3 million, and that is
25 significantly higher than 6.6?

1 A. It's about 10 percent.

2 214. Q. 10 percent, yes. So they are
3 proposing a ramp-up...they are projecting a ramp-
4 up of their net income over time and they are
5 also projecting an increase of the cash available
6 in the bank, so to speak, so by the time we get
7 to the end of the lease, there is 12.5 million in
8 the bank, the natural term, 2021. Not going to
9 assume an extension would be available?

10 A. Yes, assuming they never paid out
11 any profits, yes...

12 215. Q. Yes. So, at the end...yes, you
13 are right.

14 A. ...that is what the document
15 says.

16 216. Q. But, they might pay out profits
17 to the shareholders but that would be the
18 shareholders' profit at the end, 12.5?

19 A. Yes.

20 217. Q. Okay. And you'll recall that
21 what Peace Bridge Duty Free offered was the ramp-
22 up in rent and that they would pay back two
23 million dollars of the back rent over the term of
24 the lease? Do you want to refresh your memory on
25 that?

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1 A. You are referring to?

2 218. Q. To their offer. So that would be
3 November 16th, 2021...

4 A. You are correct.

5 219. Q. So that offer, they would ramp it
6 up, they say out to October of 2036, and, by
7 2036, on this projection, they would have 21
8 million, 687 in the bank?

9 A. Yes, that is what the document
10 says.

11 220. Q. So their proposal was to pay 2
12 million, from the 21,687,000 that they were
13 projecting to earn, as back rent?

14 A. They were proposing yes, to pay
15 it over time, in monthly installments between
16 November 2022 and October 2036.

17 221. Q. So, I assume that you would agree
18 that it would be reasonable for the shareholders
19 to be willing to contribute money to the company
20 to preserve or to realize this sort of projected
21 profit?

22 A. What do you mean by that?

23 222. Q. Well, if shareholders stand to
24 gain 21.68 million dollars over the course of the
25 lease, and the cost of that is 2.8 million

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1 upfront, would that not be a reasonable bet?

2 A. Certainly, if that were to be the
3 profitability over time, it would be, yes.

4 223. Q. This is the profitability they
5 were projecting...

6 A. They were...although, I mean, in
7 retrospect, the 2022 results didn't materialize.

8 224. Q. Okay. But this is the
9 information that was available when those offers
10 were made.

11 MR. JONES: So are you asking him to
12 assume that this is like the risk-free
13 revenues and profits?

14 225. MR. SHEA: No, I am asking him, this
15 is what the projections were.

16 MR. JONES: Okay.

17

18 BY MR. SHEA:

19 226. Q. Are you aware of any other
20 projections provided to the Peace Bridge
21 Authority by the fall of 2021?

22 A. No, I am not.

23 227. Q. And you weren't provided with any
24 projections that differ from these?

25 A. No, I don't believe so.

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1 228. Q. And you'll appreciate that these
2 projections are significantly less than the
3 projections in the lease?

4 A. I would agree with that.

5 229. Q. Okay. I want to...the only other
6 documents that I am going to introduce, and this,
7 again, it will be for information or
8 identification, is, I am showing you a March
9 13th, 2023, letter from Blaney. Have you seen
10 that before?

11 A. I don't believe so.

12 230. Q. So, you did...

13 A. Sorry, do you want me to take
14 this copy? This is the...

15 231. Q. Yes, I want that one. So you
16 were not advised that this is the offer that
17 Gowlings was responding to when it made its March
18 21, 2023 offer that you were provided with a copy
19 of?

20 A. That is correct.

21 232. Q. And I believe we get to this one
22 is for identification, are we up to E now? Or D?
23 This is D for identification...E, sorry, E.

24
25 --- EXHIBIT E: Letter from Blaney McMurtry dated

1 March 13, 2023, for
2 identification
3

4 BY MR. SHEA:

5 233. Q. So I assume you have no
6 particular expertise in corporate finance?

7 A. I mean I took courses as part of
8 my MBA...

9 234. Q. Okay.

10 A. ...but it is not a discipline in
11 which I work full-time.

12 235. Q. Okay. Did you consider what
13 level of debt Peace Bridge Duty Free could
14 support based on the projections that were
15 provided? I guess you weren't provided with any
16 projections.

17 A. I didn't have the projections.

18 236. Q. So you were not given an
19 opportunity to...so you have no opinion on what
20 level of debt Peace Bridge Duty Free could
21 support, based on projections, because you
22 weren't given any projections?

23 A. It would very much depend on the
24 level of projections and what debt was already in
25 place and other factors as well.

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1 237. Q. Okay. So in paragraphs 62 and 65
2 of your report, you assert that, if the offers
3 were accepted, it would wipe out the shareholders
4 equity. You are talking the equity at the time?

5 A. I am talking about the equity
6 that existed on January 1st, 2020.

7 238. Q. Okay. And you weren't provided
8 any information on the dividends that the
9 shareholders had taken out of Peace Bridge Duty
10 Free before that time?

11 A. I think I had the financial
12 statements for the company for a couple of years
13 before, but, no, I don't have the broader history
14 or really any information on the financial
15 situation of the shareholders.

16 239. Q. And were you aware that the
17 shareholders...as to what capital contribution
18 the shareholders had made to this company?

19 A. What do you mean by that?

20 240. Q. Well, were you aware whether they
21 put any cash into the company to buy their shares
22 or loan the company money?

23 A. So that should be apparent in the
24 balance sheet that I have summarized here. The
25 common stock is \$21,000. So that would have been

1 the initial share capital.

2 241. Q. \$21,000?

3 A. Yes.

4 242. Q. And you are not aware of how much
5 profit they took out of the company over the
6 years, or even in the immediate years leading up
7 to?

8 A. No, I don't have that broader
9 context.

10 243. Q. You will agree that the
11 projections that we looked at contemplate
12 that...at least at 2031, that the shareholders
13 will have realized 12.5 million in profit?

14 A. Yes, or I guess, more
15 specifically, that would be the increase in cash
16 available, yes.

17 244. Q. And that cash available
18 presumably for distribution?

19 A. Based on this model, yes.

20 245. Q. And if the lease was extended to
21 2036, that would grow to 21 million?

22 A. Yes, that is what the model says.

23 246. Q. Okay. And since you weren't
24 given projections, you have no opinion, I take
25 it, on whether the shareholders should contribute

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1 money to this company to allow it to realize
2 that, or whether it would be reasonable for them
3 to contribute money to the company to allow them
4 to realize that level of profit?

5 A. Well, I suppose the other
6 question is, do they have the capacity to do
7 that? And I don't know. I've analyzed the
8 company just based on its own books and records
9 without considering...or knowledge of the extent
10 to which the shareholders had the ability to fund
11 it.

12 247. Q. Okay, that is fair. And this is
13 the last few questions. In your report you refer
14 in a number of places to how the Peace Bridge
15 Authority was less impacted by COVID than the
16 Peace Bridge company, the duty free operator.
17 Why is the landlord's level of profitability
18 relevant to what a commercial tenant...what would
19 be reasonable for a commercial tenant to pay?

20 A. The idea is simply that COVID was
21 an unforeseen event. Based on at least one
22 interpretation of the lease agreement, there was
23 a duty to, perhaps, do something about it, given
24 there was a change in government regulation...

25 248. Q. But you are not finding that's

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1 how the lease should be interpreted?

2 A. No, to be clear I am not
3 interpreting the lease at all, but that is my
4 understanding of Peace Bridge's view, and just to
5 finish my answer, in that context, it is relevant
6 to look at the financial position, the financial
7 capacity of both parties.

8 249. Q. So is it your view that
9 reasonable rent, as an objective matter, should
10 be determined based on the profitability of the
11 landlord?

12 A. My view is that, when one looks
13 at the capacity to bear the burden of COVID, then
14 the financial situation of both parties would be
15 a relevant factor.

16 250. Q. And that is to bear the financial
17 burden of COVID?

18 A. Of COVID and the impact of COVID
19 on the respective entities.

20 251. Q. And do you express any...let me
21 ask you this. Do you have any knowledge of,
22 aside from the publicly available information, do
23 you have any knowledge of Peace Bridge Duty Free
24 obligations...sorry, Peace Bridge Authority's
25 obligations?

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1 A. In what sense?

2 252. Q. Well, do you have any knowledge
3 of how concessions given might impact the
4 covenants under their bonds?

5 A. I know they have about 80 million
6 dollars of unrestricted cash, but no, I am not
7 familiar with the covenants that might relate to
8 their particular financial...

9 253. Q. So you have no knowledge as to
10 what, if any, impact financial concessions given
11 to Peace Bridge Duty Free might impact the
12 Authority's obligations under its bonds?

13 A. I don't have a specific knowledge
14 of that.

15 254. Q. And do you have...did you conduct
16 PPSA searches of the Authority to determine
17 whether they have secure creditors, security over
18 these assets?

19 MR. JONES: Which assets?

20 THE DEPONENT: Over which assets?

21

22 BY MR. SHEA:

23 255. Q. The assets of the company
24 generally. So, the cash. Did you conduct a PPSA
25 search?

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1 A. I did not, although I wouldn't
2 have been surprised, just given the level of cash
3 they have on their books.

4 256. Q. Sorry, they also have debt on
5 their books.

6 A. Sure, but the excess of assets...

7 257. Q. I am a little concerned. So you
8 are saying that the fact that someone has excess
9 cash over their debts, means that there would not
10 be security over the cash?

11 A. I am saying, given the size of
12 the book value of equity...so, in excess of the
13 debts that they have, it would strike me as
14 unusual, or unlikely, that they would do that.

15 MR. JONES: Do you want to direct him
16 to anything in the records?

17 258. MR. SHEA: No, I am just asking
18 whether he did a PPSA search to
19 determine whether there was security
20 interest, and the answer is no.

21 MR. JONES: That is correct.

22

23 BY MR. SHEA:

24 259. Q. So, I want to turn to schedule 2B
25 of your report. So my understanding is, when you

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1 are talking about rent, or what you consider to
2 be commercially reasonable rent, you are talking
3 about it being based on the sales at the Peace
4 Bridge Duty Free?

5 A. As opposed to what?

6 260. Q. Well, as opposed to any other
7 place?

8 A. Sure. In particular, the
9 reference to schedule 2B, yes, the model is based
10 on the sales at that store.

11 261. Q. But when you include the
12 expenses, you appear to include expenses from the
13 Hamilton International Airport?

14 A. \$59,000, yes.

15 262. Q. Well, what about...are you aware
16 of whether the Hamilton International Airport
17 expenses are included elsewhere in here?

18 A. I assume whatever expenses would
19 be included in here, but they would be de minimis
20 though.

21 263. Q. How do you know that?

22 A. Because I have reconciled between
23 the annual financial statements of the company
24 and the specific store level data that was
25 provided and the deduction is quite small.

E. Stulberg - 67

1 264. Q. So you have analyzed these
2 numbers without the Hamilton Airport in them?

3 A. What I am saying is the impact of
4 the Hamilton Airport would be de minimis. And
5 the truth is that I have made an assumption that
6 it would be equal to precisely 75 percent of pre-
7 COVID sales. The truth is, year-to-date, it has
8 been closer to 71 percent. So we are talking
9 about relatively minor rounding issues.

10 265. Q. So your view is, it all works out
11 in the wash, even though you have included
12 Hamilton expenses in this?

13 A. Yes, the Hamilton revenues or
14 expenses really would be an insignificant factor
15 in this analysis.

16 266. Q. Okay. Footnote 5. Sorry,
17 footnote 4, I apologize. You refer to
18 discussions with Jim Pearce.

19 A. Yes.

20 267. Q. Did you have those discussions, I
21 assume, verbally?

22 A. Yes.

23 268. Q. And did you keep notes from those
24 discussions?

25 A. I did.

E. Stulberg - 68

269. Q. And did you produce those notes
to us?

A. I sent them to counsel.

270. Q. So the notes that we have, the handwritten notes provided, we can assume those handwritten notes are from the discussions with Mr. Pearce? Because there is no notation at the top as to...

A. I'd have to...I believe so, yes.

271. Q. Okay. Did you have any discussion with anyone else gathering information for your reports, aside from Mr. Pearce?

A. No.

272. Q. Okay. In paragraph 47 you make
the assertion that,

"...Other bridge authorities appear to have taken different approaches to the COVID pandemic and their commercial tenants decreasing lease rates by different levels..."

Looking at the documents that you've produced, is your support for that, the financial statements that you reviewed of these entities, or did you have anything else to back that up?

A. This is based on the financial

1 statements of those entities.

2 273. Q. So you have no idea whether
3 agreements were reached with these duty free
4 tenants or not?

5 A. I see the level of rental income
6 going down in the respective years and...

7 274. Q. But that could be because they
8 are just not paying rent?

9 A. I didn't see a bad debt expense
10 and so, my reading of that, was that something
11 had been agreed to.

12 275. Q. But you made that assumption?

13 A. I did, yes, as opposed to when I
14 looked at the financials of the Authority in our
15 matter, they do show a bad debt expense.

16 276. Q. Did you reach out to anyone to
17 confirm that there were agreements with these
18 tenants?

19 A. I did not.

20 277. Q. And even if there are agreements,
21 you have no idea what the terms of those
22 agreements are?

23 A. All I can see is the net impact
24 on the rental revenue on the financial
25 statements.

E. Stulberg - 70

1 278. Q. Okay. So the answer to that is,
2 you don't have any knowledge as to what the terms
3 of any agreements were?

4 A. I see the end result but no, I
5 don't have any "inside baseball", so to speak.

6 279. Q. And with respect to footnote 5,
7 my understanding is that a copy of the RFP that
8 you were given will be given to us, am I correct
9 on that?

10 A. Yes, that is correct.

11 280. Q. So the RFP will be given.

12 A. I apologize for that.

13 281. MR. SHEA: No, it's fine. Just give
14 me a moment. That's it, we are done.

15 MR. JONES: I just have one question.
16

17 RE-EXAMINATION BY MR. JONES:

18 282. Q. When you were being asked
19 questions about the financial projections on
20 Exhibits C and D, I thought I heard you say that
21 the actual sales didn't pan out as the
22 projections provided for. Did I hear you
23 correctly?

24 A. Yes, that is correct. So the
25 projection says the 2022 sales would be 16

E. Stulberg - 71

1 million dollars, and, in point of fact, was
2 substantially less than that. It was 11.7
3 million dollars.

4 283. MR. JONES: Thank you.

5
6 --- upon adjourning at 11:30 a.m.

7

8

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Please be advised that any undertakings, objections, under advisements and refusals are provided as a service to all counsel, for their guidance only, and do not purport to be legally binding or necessarily accurate and are not binding upon Victory Verbatim Reporting Services Inc.

I hereby certify the foregoing to be a true and accurate transcription of the above-noted proceedings held before me on the **29th DAY OF SEPTEMBER, 2023**, and taken to the best of my skill, ability and understanding.



Sage Jackson
Verbatim Reporter



TAB 11

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

SJ/saa

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

- - - - -

This is the Cross-Examination of LISA HUTCHESON, on her Affidavit sworn the 26th day of September, 2023, taken at the offices of VICTORY VERBATIM REPORTING SERVICES INC., 222 Bay Street, Suite 900, Toronto-Dominion Centre, Toronto, Ontario, on the 29th day of September, 2023.

- - - - -

A P P E A R A N C E S:

E. PATRICK SHEA	-- for Buffalo and Fort Erie Public Bridge Authority
BRENDAN JONES	-- for the Respondent

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1 --- upon commencing at 1:02 p.m.

2
3 LISA HUTCHESON, affirmed

4 CROSS-EXAMINATION BY MR. SHEA:

5 1. Q. Good afternoon, Ms. Hutcheson,
6 how are you?

7 A. Good thanks.

8 2. Q. So, I am going to examine you
9 today on a report that you produced dated August
10 16th, 2023. Do you have a copy of that report
11 with you?

12 A. I do.

13 3. Q. And are there any changes that
14 you want to make to the report?

15 A. I just wanted to highlight
16 actually, I noticed an error related to the date
17 of the lease.

18 4. Q. The date of the lease?

19 A. Yes, it's just a typo.

20 5. Q. Oh, where it says '19 instead of
21 '16?

22 A. '16, yes.

23 6. Q. Okay. So, when were you first
24 approached to do your report? You are going to
25 object.

L. Hutcheson - 4

1 MR. JONES: Yes, I am.

2 7. MR. SHEA: So, that is a refusal, and
3 we will deal with that. /R

4

5 BY MR. SHEA:

6 8. Q. So, for the purposes of your
7 report you interviewed both Greg O'Hara and Jim
8 Pearce, correct?

9 A. That is correct.

10 9. Q. And we don't seem to have
11 received any notes from those meetings. Did you
12 keep notes from those meetings?

13 A. We have notes from a call with
14 Jim Pearce. Greg O'Hara was out of the province
15 at the time when I spoke to him, so it was a very
16 brief phone call. So I don't have official notes
17 from that.

18 10. Q. And for Mr. Pearce, did you
19 produce those notes?

20 A. I thought we did.

21 11. Q. I can tell you what we received
22 was...okay, well, to the extent you do have
23 notes, will you please produce those?

24 A. Sure. I think there were
25 emails...

L. Hutcheson - 5

1 12. Q. I have those emails.

2 A. Okay.

3 13. Q. We have emails, but I am asking
4 were there actual notes of your conversation,
5 handwritten notes?

6 A. I don't believe so. Not
7 handwritten. There would be emails.

8 14. Q. If there were typed notes, okay.
9 If you can produce those, that would be
10 excellent.

11 A. M'hmm. U/T

12 15. Q. And hopefully I'll pronounce his
13 name, Mr. Heuman, of your firm, called duty free
14 operators, correct?

15 A. He did.

16 16. Q. And we don't seem to have any
17 notes from those calls, did he keep notes?

18 A. It was a random sampling and it
19 was just to...so I don't know the answer to that
20 off the top of my head.

21 17. Q. Can you inquire to see if he kept
22 notes and, if he did keep notes, produce those
23 notes?

24 A. Sure. U/T

25 18. Q. And Mr. Neuman (sic) visited...

L. Hutcheson - 6

1 A. Heuman...

2 19. Q. Heuman?

3 A. Yes.

4 20. Q. Oh, Heuman, sorry. Mr. Heuman

5 visited the duty free on 19th May 2023, is that

6 correct?

7 A. That's correct.

8 21. Q. Did he take any pictures while he

9 was in attendance?

10 A. I don't recall. He may have.

11 22. Q. Can you inquire as to whether he

12 took any pictures... U/T

13 A. Sure.

14 23. Q. ...and provide those if he did?

15 A. Sure. U/T

16 24. Q. And did he take any notes?

17 A. No.

18 25. Q. Okay. So, as I understand, your

19 expertise is in the retail sector, am I correct?

20 A. That is correct.

21 26. Q. And you have had experience

22 advising store operators, retail store operators,

23 correct?

24 A. Yes.

25 27. Q. And shopping mall operators?

L. Hutcheson - 7

1 A. Yes.

2 28. Q. And, I believe, municipalities as
3 well?

4 A. Yes.

5 29. Q. Have you had any specific
6 experience concerning duty free operators?

7 A. Not specifically.

8 30. Q. And have you ever assisted a duty
9 free operator in negotiating their lease or
10 advised them on their lease?

11 A. No.

12 31. Q. Have you ever acted for a bridge
13 authority or other operator of a cross border
14 crossing?

15 A. No.

16 32. Q. Have you done any studies of duty
17 free stores?

18 A. Not that I am aware of.

19 33. Q. Have you ever included duty free
20 stores in any of your other studies? For
21 example, I believe you did a study of May this
22 year, growth in the retail sector?

23 A. I don't believe that duty free
24 was isolated.

25 34. Q. Did you...were duty frees even

1 included in that study?

2 A. No.

3 35. Q. Okay. I am going to talk first
4 about leasing rates in the Niagara region. So
5 your opinion as to a typical leasing rate in Fort
6 Erie is based on the comparables at Exhibit D, is
7 that correct?

8 A. Yes.

9 36. Q. And no other comparables?

10 A. No.

11 37. Q. And with the exception of 1 which
12 I believe is 1127 Garrison Road South, all of
13 those comparables seem to be units in strip
14 malls, is that accurate?

15 A. They could be, I can cross-
16 reference.

17 38. Q. Well, can you check the pictures
18 in Exhibit D? I believe...so it's 87 of your
19 report.

20 A. Yes.

21 39. Q. So those appear to be units in
22 strip malls?

23 A. Yes.

24 40. Q. Except for 1127 Garrison Road
25 South. Do you know what that is? It looks like

1 a restaurant.

2 A. It could be. We were just doing
3 a sampling of what was available at the time of
4 the audit, just to get a cross-reference of what
5 was available.

6 41. Q. So, on page 21 of your report...

7 A. M'hmm.

8 42. Q. ...I am going to refer you to
9 just in 6.3. And I think this rough statement is
10 made elsewhere as well. You say,

11 "...Duty free stores can be desirable
12 for retail operators. As such, the base
13 rents are higher than comparable lease
14 rates in the surrounding trade area.
15 For this reason, in my opinion, it is
16 most relevant to compare the base rent
17 of Peace Bridge Duty Free to other duty
18 free stores in Canada as opposed to the
19 local trade area, as it would be
20 expected that Fort Erie, Ontario would
21 have generally, on average, lower retail
22 lease rates as a ratio of gross sales
23 compared to Peace Bridge Duty Free..."

24 Given that opinion, why did you proceed to do a
25 comparison of local retail operations or retail

L. Hutcheson - 10

1 locations in Fort Erie?

2 A. I don't recall which was done
3 first, actually, in terms of forming an opinion,
4 but I thought it was important to consider what
5 was in the trade area, just to provide a
6 comparison, just to have an understanding.

7 43. Q. But, you'll agree, it's not a
8 good comparison?

9 A. It was the only comparison
10 available.

11 44. Q. Okay. And have you seen a copy
12 of the lease? I assume you have.

13 A. Yes.

14 45. Q. He's already got a copy, so I am
15 going to give you...or you want another one?

16 A. Sure.

17 46. Q. I'll give you a copy of the
18 lease, thank you.

19 MR. JONES: [inaudible] copies of the
20 lease, thank you.

21

22 BY MR. SHEA:

23 47. Q. This is a copy of the lease that
24 was provided to you. Can you look through it and
25 make sure?

L. Hutcheson - 11

1 A. Oh, yes, I apologize.

2 48. MR. SHEA: So, I am going to mark
3 this as Exhibit 1 on this examination.

4
5 --- EXHIBIT NO. 1: Lease dated July 28, 2016
6

7 BY MR. SHEA:

8 49. Q. So, you are generally familiar
9 with the lease I take it?

10 A. Yes.

11 50. Q. So you'll agree that...and you
12 are generally familiar with the process by which
13 the lease was negotiated or arrived at?

14 MR. JONES: What do you mean by that?
15

16 BY MR. SHEA:

17 51. Q. So, I am going to ask...are you
18 aware that the rent contemplated by the lease is
19 what Peace Bridge Duty Free offered to the
20 Authority?

21 A. Yes.

22 52. Q. And you'll agree that the lease
23 does not base rent on square footage?

24 A. Correct.

25 53. Q. The lease is based entirely on

L. Hutcheson - 12

1 sales with a base and then a percentage rent?

2 A. Yes.

3 54. Q. And you are aware that the duty
4 free has operated this location...Peace Bridge
5 Duty Free, the corporation, has operated this
6 location since 1986?

7 A. Yes.

8 55. Q. And you agree with me that Peace
9 Bridge Duty Free, the corporation, is in the best
10 position to determine what it would offer in
11 terms of rent to secure this location?

12 A. I believe that is correct.

13 56. Q. And I am going to ask you, so
14 given that this lease is not based on square
15 footage or dollars per square foot, but is based
16 on sales, is there any relevance of Schedule D in
17 your comparison to locations based on square
18 footage and what people are willing to pay per
19 square foot?

20 A. I believe it was important to
21 have some context in terms of what is happening
22 in the trade area. It could have been higher, it
23 could have been lower. It was important to us as
24 part of our analysis.

25 57. Q. But, you'll agree with me, the

1 rents in this lease is not based on square
2 footage?

3 A. The rents in the lease were also
4 negotiated some time ago, so it was important for
5 us to understand what is happening in the market
6 now as well.

7 58. Q. And I am interested in that. So,
8 what do you understand the purpose of your report
9 is? So, you understand that this is a case
10 involving the interpretation of a lease?

11 A. M'hmm.

12 59. Q. So, what do you understand the
13 information you are providing in this
14 report...how is that going to help the judge?

15 A. To understand what is happening
16 in the marketplace, what is happening in relation
17 to the pandemic and its effect on leasing.

18 60. Q. Okay. And you indicate, in page
19 4, that,

20 "... Peace Bridge Duty Free appears to
21 be paying the highest sales-to-rent
22 ratio in the duty free sector..."

23 But you'll agree that you have no independent
24 knowledge of what the sales-to-rent ratio being
25 paid by other operators is, correct?

1 A. Well, we were provided some
2 information from Mr. Pearce.

3 61. Q. That is what we will get to. So
4 the extent of your market data on rent paid in
5 the duty free sector comes, as I read your
6 report, from two sources, Mr. Pearce and a draft
7 set of minutes from the Sault Ste. Marie Bridge
8 Authority, is that correct?

9 A. That is correct.

10 62. Q. Did you have any other source of
11 information?

12 A. No.

13 63. Q. And as I understand, you were
14 unable to secure any information from other duty
15 free operators. They wouldn't give you the
16 information?

17 A. They would not.

18 64. Q. And, as I understand, the FDFA,
19 which is an organization that represents duty
20 free operators, indicated to you that they don't
21 collect that information and it is not provided
22 to them by their operators, is that correct?

23 A. That is my understanding.

24 65. Q. Now, Mr. Pearce appears to have
25 told you that the low end of the percentage rate

L. Hutcheson - 15

1 rent among duty frees would be 10 to 12 percent,
2 and the average is 14 to 16, do you recall that?

3 A. Yes.

4 66. Q. Did you ask him where he got
5 those numbers?

6 A. Yes, we had a conversation and he
7 said he was in contact with other operators
8 because of their relationship. And so, he was
9 aware of that, and I believe he had also been on
10 the board as well.

11 67. Q. But you'll agree with me that the
12 board, the FDFA, does not track minimum rents and
13 that information is not shared with FDFA,
14 correct?

15 A. Officially.

16 68. Q. Officially. So, do you believe
17 that Mr. Pearce obtained information that was not
18 otherwise shared with FDFA?

19 A. Perhaps. I have been in
20 environments like that, that I taught colleagues
21 to speak amongst themselves and have
22 conversations that don't end up getting
23 publicized.

24 69. Q. Did he give you any specific duty
25 free operators and what they were paying?

L. Hutcheson - 16

1 A. No.

2 70. Q. So he just told you that the low
3 end of the percentage rate was 10 to 12 and the
4 average would be 14 to 16?

5 A. That is correct.

6 71. Q. So how, from that, did you get
7 that they were paying at the top end, more than
8 everyone else?

9 A. Because they were paying...we did
10 the calculation based on what was in the lease,
11 as well as...I mean, the lease first and
12 foremost, and then the percentage rent that they
13 were paying over the last period...

14 72. Q. So, based on that, and the
15 information you got from Mr. Pierce, that's the
16 only information upon which you assert that Peace
17 Bridge Duty Free is paying the most in the
18 market?

19 A. Yes.

20 73. Q. Okay. But, again, you'll agree
21 that is the rent that they offered?

22 A. Yes.

23 74. Q. And when you were taking this
24 information from Mr. Pearce, you realized that
25 Mr. Pearce is an officer of Peace Bridge Duty

1 Free?

2 A. Yes.

3 75. Q. And you were aware that he swore
4 affidavits in these proceedings?

5 A. Yes.

6 76. Q. And you are aware that he is a
7 witness in these proceedings?

8 A. Yes.

9 77. Q. And you still accepted his
10 information as being accurate?

11 A. Yes.

12 78. Q. And you never sought to verify
13 that information with anyone?

14 A. We did, but it wasn't available.

15 79. Q. And that is because they wouldn't
16 share the information with you?

17 A. No, they are privately operated
18 businesses.

19 80. Q. And your information with respect
20 to the Sault Ste. Marie duty free comes from
21 draft minutes of a board meeting on 13 May, 2021,
22 correct?

23 A. Correct.

24 81. Q. Where did you get those draft
25 minutes?

1 A. Online.

2 82. Q. Okay. And did you ever ask for,
3 or receive, a final version of the minutes?

4 A. We did not.

5 83. Q. So you never asked?

6 A. No.

7 84. Q. Now, the reference to the
8 percentage rent paid by the Canadian operator in
9 those minutes is in reference to a comparison to
10 the American and the Canadian, correct?

11 A. Yes.

12 85. Q. And it simply refers to the
13 Canadian duty free paying rent equal to 16
14 percent of gross sales, correct?

15 A. Correct.

16 86. Q. You've never seen the lease with
17 the Sault Ste. Marie duty free have you?

18 A. No.

19 87. Q. And you don't know the
20 circumstances of the operator, correct?

21 A. No.

22 88. Q. Would it surprise you to learn
23 that the Authority in Sault Ste. Marie doesn't
24 own the land on which the duty free is situated?

25 A. No.

1 89. Q. Were you aware of that?

2 MR. JONES: Is there evidence to that
3 effect?

4 90. MR. SHEA: It is in their
5 financial...sorry, it is in there...

6 MR. JONES: Is it in the record?

7 91. MR. SHEA: No.

8
9 BY MR. SHEA:

10 92. Q. So let me ask this, so you don't
11 know. Let me rephrase the question. Are you
12 aware of the circumstances of the Sault Ste.
13 Marie duty free?

14 A. I really don't recall.

15 93. Q. Did you do any investigation?

16 A. We did, and it was several months
17 ago, so I can't remember off the top of my head.

18 94. Q. You are here to be cross-examined
19 today, Ma'am. So did you do any investigation
20 with respect to Sault Ste. Marie?

21 A. I don't believe so.

22 95. Q. So, when you said, before, you
23 don't recall, you do recall, you didn't do it?

24 A. My colleague may have.

25 96. Q. Can you make inquiries to Mr.

L. Hutcheson - 20

1 Heuman to determine if he did any investigations
2 with respect to Sault Ste. Marie?

3 MR. JONES: What are you asking for?
4 What about Sault Ste. Marie, how it is
5 owned?

6 97. MR. SHEA: The circumstances
7 surrounding...the circumstances of the
8 operator of the Sault Ste. Marie duty
9 free. Did you do any investigations
10 concerning...

11 MR. JONES: What does that mean
12 though, "the circumstances of the
13 operator"?

14 98. MR. SHEA: I asked the question. You
15 can refuse it.

16 MR. JONES: But I am trying to
17 understand...

18 99. MR. SHEA: I'll take that as a
19 refusal.

20 MR. JONES: If you don't explain to
21 me what you mean by "circumstances",
22 then I can't...

23 100. MR. SHEA: But you are not counsel to
24 her.

25 MR. JONES: It is just a question

L. Hutcheson - 21

1 that doesn't make a lot of sense, in
2 fairness.

3 101. MR. SHEA: I asked if any
4 investigations were done. Her answer
5 was, she didn't recall. Then her answer
6 was, no. Then she said that Mr. Heuman
7 might...

8 MR. JONES: All I am trying to
9 understand is what you mean by
10 "circumstances".

11 102. MR. SHEA: Do they own...let's go
12 through all the details.

13
14 BY MR. SHEA:

15 103. Q. What are the terms of the lease?
16 Did you do any investigation as to what the terms
17 of the lease are?

18 A. No.

19 104. Q. Did you do any investigation as
20 to when they negotiated their lease?

21 A. I did not.

22 105. Q. Did Mr. Heuman?

23 A. He may have.

24 106. Q. Can you inquire with Mr. Heuman
25 as to whether he did any investigations to

L. Hutcheson - 22

1 determine when the Sault Ste. Marie operator
2 entered into their lease?

3 A. Of course. U/T

4 107. Q. Did you do any investigation to
5 determine if the Sault Ste. Marie operator owns
6 the land on which...whether the Bridge Authority
7 owns the land on which the operator has its
8 store?

9 A. Again, Mr. Heuman would probably
10 have to answer that for me.

11 108. Q. So, will you make inquiries of Mr.
12 Heuman to determine if he did any inquiries to
13 determine if the operator of the Sault Ste. Marie
14 store...the Authority owns the land on which the
15 operator has its store?

16 A. Of course. U/T

17 109. Q. And I assume you've never seen a
18 copy of their lease?

19 A. No.

20 110. Q. Did you review any other minutes
21 of any other meetings or the annual reports of
22 the Sault Ste. Marie Bridge Authority to
23 determine information concerning what the duty
24 free operator pays?

25 A. No.

1 111. Q. So the sole source of your
2 information on 16 percent is a reference in draft
3 minutes from 13 May 2021?

4 A. Yes.

5 112. Q. Thank you. So in 6...I am going
6 to talk about the NER analysis that you do.
7 Isn't...I'll start with this. Isn't the analysis
8 in 6.5 of your report? So what you are dealing
9 with in 6.5, is that not...are you at 6.5 yet?
10 71, if it helps.

11 A. I have a different numbering
12 system.

13 113. Q. So you indicate when you refer
14 the question, you are asked,

15 "...Having regard to a review of
16 historical gross sales and traffic
17 volume trends, what is a reasonable
18 range of expected outcomes for a
19 replacement tenant secured to an RFP
20 process? To the extent applicable,
21 please consider tenant improvement
22 allowances, fixture periods, free rent,
23 key money, minimum rent obligations et
24 cetera..."

25 Isn't all of that just setting the foundation for

L. Hutcheson - 24

1 the NER analysis? Because the NER analysis takes
2 all of these numbers and plugs them in as
3 deductions against the rent, or plugs them into
4 the analysis. Is that a fair assessment?

5 A. Yes.

6 114. Q. Okay. Can you explain to me how
7 understanding what my client might expect will
8 result from an RFP process, can assist in
9 interpreting article 18.7 of the lease?

10 A. Can you rephrase that?

11 115. Q. So you are aware that the issue
12 before the court is the interpretation of article
13 18.7 of the lease?

14 A. Yes.

15 116. Q. And article 18.07 of the lease,
16 in general terms...I can take you to it...
17 provides that, in the event changes in applicable
18 laws results in a material adverse change to the
19 business of Peace Bridge Duty Free, there will be
20 consultation?

21 MR. JONES: I don't think that is
22 the...

23 117. MR. SHEA: I said I would paraphrase.
24 If you want to take her to it, we will
25 take her to it.

1 MR. JONES: Fine.

2
3 BY MR. SHEA:

4 118. Q. Okay. Let's take you to the
5 exact section. So, 18.7 in the lease. It is at
6 page 80, top right 80.

7 A. M'hmm.

8 119. Q. So can you read that...take a
9 moment to read that, please?

10 A. Yes.

11 120. Q. So, how does understanding what
12 our client, the Authority, might expect in terms
13 of an outcome from an RFP process, assist in
14 understanding what this clause means?

15 A. Well, it helps understand whether
16 or not, if there was perhaps a negative
17 outcome...

18 121. Q. Yes, go on. There was a negative
19 outcome...

20 A. ...and a replacement tenant were
21 to be required.

22 122. Q. So is your point that the
23 Authority might not do as well if Peace Bridge
24 Duty Free vacates and we have to go to another
25 RFP, is that your point?

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1 A. If...yes, in one way or another.

2 123. Q. Okay. So, in fact, on page 6, I
3 think you say that you think,
4 "... Peace Bridge Authority [our client]
5 would be better off going forward with
6 Peace Bridge Duty Free as a tenant..."
7 don't you?

8 A. Yes.

9 124. Q. But, first of all, isn't that a
10 business decision for Peace Bridge Duty Free to
11 make?

12 A. Sure.

13 125. Q. Okay. And, second of all, isn't
14 that assumption based on, I believe you find this
15 on page 41, it is based on the assumption that
16 Peace Bridge Duty Free pays rent, the 4 million
17 dollar minimum rent beginning in 2024, in
18 accordance with the lease, correct?

19 A. Yes.

20 126. Q. Were you advised that Peace
21 Bridge Duty Free is prepared to begin to pay rent
22 in accordance with the lease in 2024?

23 A. No.

24 127. Q. Okay. Thank you. So, then the
25 assumption is wrong.

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1 A. Counsel, the assumption is not
2 wrong. They are currently paying full rent.

3 128. Q. Sorry...

4 A. What are you talking about the
5 assumption is wrong? There is an assumption.

6 129. Q. And I asked whether, just to be
7 clear, your client is asking for that money back,
8 if they are unsuccessful. The assumption is
9 based on Peace Bridge Duty Free being prepared to
10 begin to pay 4 million dollars in minimum rent
11 beginning in 2024.

12 MR. JONES: So there is a comparison
13 of what the two outcomes would be?

14 130. MR. SHEA: I just...sorry, I am
15 asking her a question...

16 MR. JONES: No, but you...

17 131. MR. SHEA: Let's move on.

18 MR. JONES: You gave an unfair...

19 132. MR. SHEA: Let's move on...

20 MR. JONES: You gave an unfair...

21 133. MR. SHEA: I did not. Move on. We
22 are moving on, sir.

23 MR. JONES: You premised your
24 question unfairly.

25 134. MR. SHEA: It was answered. We are

1 moving on.

2 MR. JONES: No, you can't trick the
3 witness. That is not fair.

4 135. MR. SHEA: I did not trick...we are
5 moving on.

6 MR. JONES: I think you have to be...

7 136. MR. SHEA: You can raise it with the
8 judge if you wish.

9 MR. JONES: I think that is totally
10 inappropriate.

11 137. MR. SHEA: Yes, you may agree. You
12 may say that and you can raise that with
13 the judge if you wish.

14

15 BY MR. SHEA:

16 138. Q. So, your assumption that the
17 Peace Bridge Authority will generate lower NER if
18 the lease is terminated, is based on a few
19 factors, I think. And I want to take you through
20 those. So, I think one of those factors is gross
21 sales for the new operator. So your opinion
22 seems to be that a new duty free operator will
23 only realize 80 to 100 percent of the sales
24 generated by Peace Bridge Duty Free, is that
25 correct?

1 A. Yes.

2 139. Q. But you have no experience in the
3 duty free space, correct?

4 A. I am an expert in terms of
5 general retail operations and turnover and so,
6 whether it is duty free or a fashion retailer or
7 an electronics retailer, there are lots of
8 similarities.

9 140. Q. But the other expert has equated
10 the Peace Bridge Duty Free to a liquor store,
11 liquor store/beer store based on the sales being
12 primarily liquor, beer and cigarettes?

13 MR. JONES: That is totally an unfair
14 characterization, Counsel. If you want
15 to put it to her that the...he was using
16 the profit calculations from Statistics
17 Canada.

18

19 BY MR. SHEA:

20 141. Q. Let us go to what he said. Give
21 me a moment and we will pull it up.

22 MR. JONES: It was profit rates.

23 142. MR. SHEA: No, he said percentage
24 sales, the primary sales were alcohol,
25 tobacco and therefore he equated the

1 business...he said,

2 "...According to the data published..."

3 You are right,

4 "...the NAICS, beer wine and liquor

5 stores is around 6.6..."

6 But he equates this operation to a beer, liquor,

7 or wine store based on the nature of this

8 historic sales. Did you consider that?

9 A. No, we went based on what we saw
10 as inventory on their website.

11 143. Q. And what...

12 A. We had more than just beer,
13 wine...

14 144. Q. But you did not analyze the
15 nature of their sales historically?

16 A. We did not.

17 145. Q. And when you say, "realize a low
18 of 80 percent", where do you get that number?
19 What analysis or what research founds that this
20 replacement operator may only be able to realize
21 80 percent?

22 A. My experience in terms of the
23 time it takes for a new operator in any business
24 to typically ramp up.

25 146. Q. Did you make any inquiries of any

1 other operators in the space to determine what
2 their views might be?

3 A. No.

4 MR. JONES: Like, other operators...

5 147. MR. SHEA: Other duty free operators.

6 MR. JONES: So, you are asking
7 whether she asked other duty free
8 retailers if they were replaced by
9 another retailer...

10
11 BY MR. SHEA:

12 148. Q. If they were to replace...because
13 you need to have a licence to do this...if they
14 were to replace Peace Bridge Duty Free, how
15 quickly could they ramp up sales?

16 A. No.

17 149. Q. In your analysis, you indicate...
18 one of your factors is what rent the Peace Bridge
19 Authority could expect, and you factored that
20 into your analysis, and you say that a new lease
21 negotiation would certainly not yield the same
22 base rent that Peace Bridge Duty Free is paying.
23 But, again, you have no experience in the duty
24 free space?

25 A. No. I am a generalist retail

1 expert.

2 150. Q. Thank you. And at the end, at
3 the high end of your range, you say that 20
4 percent of gross sales is reasonable. Where did
5 you get the 20 percent and what is the foundation
6 for the 20 percent?

7 A. Based on the estimate that Peace
8 Bridge...the current operator, was using.

9 151. Q. But that's what Peace Bridge Duty
10 Free offered in its RFP?

11 A. Correct.

12 152. Q. Could it be 22 percent?

13 MR. JONES: Could what be 22 percent?
14

15 BY MR. SHEA:

16 153. Q. Would a reasonable percentage
17 rent be 22 percent?

18 A. Not in my opinion.

19 154. Q. Could it be 18 percent?

20 A. I still think that that is very
21 high.

22 155. Q. But, yet, you say a reasonable is
23 20 percent and that is just because that's what
24 they agreed to?

25 A. That's what they had agreed to.

1 156. Q. So you agree that, what Peace
2 Bridge Duty Free proposed, is reasonable?

3 A. In 2016.

4 157. Q. But that is what they agreed to
5 in 2016 and the lease term goes out to 2031. So,
6 in your experience, if a party enters into a bad
7 lease, does the landlord have to renegotiate it?

8 A. Times have changed. COVID has
9 had a dramatic impact on commercial real estate
10 and retail.

11 158. Q. That is not answering my
12 question. So, if there is a bad lease...

13 MR. JONES: Counsel, in fairness,
14 what does that question have to do with
15 anything in the record...

16 159. MR. SHEA: Her answer to the question
17 was that the lease was reasonable in
18 2016, but things have now changed.

19
20 BY MR. SHEA:

21 160. Q. But the lease goes out to 2031,
22 correct?

23 A. Yes.

24 161. Q. So the lease was negotiated in
25 2016, it goes out to 2031, minimum. Okay. So

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1 tenant improvement allowances. You indicate that
2 in your opinion, the Authority may need to offer
3 a \$40-a-square-foot tenant improvement allowance.
4 Are you aware of any other duty free operator who
5 was given a tenant improvement allowance?

6 A. No.

7 162. Q. And you'll agree that, in the
8 lease, Peace Bridge Duty Free wasn't given a
9 tenant improvement allowance?

10 A. Correct.

11 163. Q. Have you seen the RFP?

12 A. I did...I saw the response.

13 164. Q. Okay. But you never saw the RFP?

14 A. No.

15 165. Q. So you have no knowledge as to
16 whether a tenant improvement allowance was
17 offered?

18 A. No.

19 166. Q. You indicate in your opinion that
20 there would be a three-month rent free fixturing
21 period, correct?

22 A. Yes.

23 167. Q. And you'll agree that, in the
24 lease, Peace Bridge Duty Free wasn't given a rent
25 fee fixturing period?

1 A. That is correct.

2 168. Q. And you'll agree that, even
3 during the time they were required to make major
4 renovations, they were still required to pay rent
5 in accordance with the lease?

6 A. Yes.

7 169. Q. Are you aware of any other duty
8 free operator who was given a rent free fixturing
9 period?

10 MR. JONES: During COVID or at all?

11 170. MR. SHEA: I am asking the
12 questions...

13 MR. JONES: She has told you...

14 171. MR. SHEA: Sir, you can re-examine if
15 you'd like. I am asking the questions.

16 MR. JONES: She told you that there
17 was...

18 172. MR. SHEA: Sir, you can re-examine if
19 you'd like. I am asking the questions.
20 I'd ask you to be quiet.

21 MR. JONES: As long as your questions
22 are fair.

23
24 BY MR. SHEA:

25 173. Q. Are you aware of any duty free

1 operator who was given a rent free fixturing
2 period ever?

3 A. I am not aware.

4 174. Q. You also said that, in your
5 opinion, my client would give a prospective
6 tenant a three month rent free period so they
7 could generate rent free income, is that correct?

8 A. Can you point me to the section
9 again?

10 175. Q. Hold for a second. 71 is where
11 it starts. "Rent free period", 74. Last
12 paragraph.

13 A. M'hmm. I am just refreshing.
14 And can you repeat your question?

15 176. Q. So, the first one was confirming
16 that it was your opinion that a prospective
17 tenant would be offered a three-month rent free
18 period?

19 A. Likely, yes.

20 177. Q. Are you aware that any duty free
21 operator, at any time, was given a three-month
22 rent free period?

23 A. Not to my knowledge.

24 178. Q. And you'll agree that Peace
25 Bridge Duty Free was not given a rent free

1 period?

2 A. Correct.

3 179. Q. You indicate in your opinion that
4 key money would not be considered by the
5 landlord, by my client. Did you have a
6 discussion with my client and ask them that?

7 A. I did not.

8 180. Q. And your opinion with respect to
9 key money is based entirely on your general
10 experience in retail?

11 A. Correct.

12 181. Q. Did you reach out to any other
13 authority to determine what they feel about, what
14 you refer to as, "key money"?

15 A. Can you define "authority"?

16 182. Q. Bridge authority, or other
17 operator of a cross border crossing?

18 A. No.

19 183. Q. You indicate that there will be a
20 delay in finding a new tenant. Are you implying
21 that the store will go dark for a period of time?

22 A. It could. That's what it could
23 mean.

24 184. Q. Did you consider that Royal Bank
25 of Canada has sought an order appointing a

1 receiver, and giving the receiver the ability to
2 operate the duty free store?

3 A. No, I don't believe I did.

4 185. Q. Did you consider that Peace
5 Bridge Duty Free is engaged in contingency
6 planning to mitigate against the store going
7 dark?

8 A. No.

9 186. Q. And these are the factors that
10 play into your analysis of NER, correct?

11 A. Yes.

12 187. Q. So at the end of the day, don't
13 all of the factors you have identified create a
14 risk for the Authority? I mean it's the
15 Authority's risk to take, is it not?

16 MR. JONES: What do you mean is it...
17

18 BY MR. SHEA:

19 188. Q. Well, it's the Authority...the
20 issue here is that the Authority may make less
21 rent, may recover less rent...less rent if the go
22 to an RFP? Is that not a risk for the Authority
23 to take?

24 A. Yes.

25 189. Q. Given that Peace Bridge Duty Free

1 (sic) has experience in the sector and has access
2 to information from other authorities...

3 MR. JONES: Sorry, Peace Bridge Duty
4 Free has access to...

5 190. MR. SHEA: No, no, Peace Bridge
6 Authority has access...

7 MR. JONES: Where...

8 191. MR. SHEA: Sir...

9 MR. JONES: No, but you are putting a
10 fact to her, and I don't know that that
11 fact is in the record anywhere.

12 192. MR. SHEA: That we don't have
13 experience in the duty free sector?

14 MR. JONES: No, that you have access
15 to other authorities.

16 193. MR. SHEA: In the record there is
17 disclosure by our client that they have
18 contacted the other duty free operators
19 and there is evidence of what he found
20 out from them.

21 MR. JONES: Where?

22 194. MR. SHEA: If you want to refuse the
23 question, I'll treat it as refusal and
24 we will move on.

25 MR. JONES: No, what I am...

1 195. MR. SHEA: Then let me ask...

2 MR. JONES: ...if you are putting a
3 fact, an assumed fact, it needs to be in
4 the record.

5 196. MR. SHEA: Okay. Given...

6 MR. JONES: You are putting to her
7 that the Authority has general access to
8 other authorities information...

9 197. MR. SHEA: Let's make an
10 assumption...

11 MR. JONES: ...which is not in the
12 record.

13 198. MR. SHEA: Let's make an
14 assumption...

15 MR. JONES: Counsel, no...

16 199. MR. SHEA: Let's assume...

17

18 BY MR. SHEA:

19 200. Q. Let's assume that the Peace
20 Bridge Authority has the ability to talk to other
21 authorities, can we accept that as an assumption,
22 a reasonable assumption? They have the ability
23 to talk to other authorities?

24 A. Canadian authorities?

25 201. Q. I guess. They could probably

1 talk to anyone they want. What makes your
2 opinion with respect to these matters...so key
3 money, how long it will take them to get someone
4 in there, rent free periods, what makes your
5 opinion on those matters more valuable or more
6 valid than my client's opinion.

7 A. Well, I have experience, while
8 not with duty free, I have experience in public
9 sector and doing RFP processes for other
10 government...or public sector organizations and
11 understand the factors and the steps that are
12 required.

13 202. Q. Okay. Outline some of that
14 experience. So who have you acted for in terms
15 of RFP processes for tenancies?

16 A. Numerous hospitals, numerous
17 universities and colleges.

18 203. Q. And all of those, how many of
19 those have involved duty free operations?

20 A. They are just various types of
21 retail operations and food service.

22 204. Q. In food service?

23 A. And food service.

24 205. Q. But the Authority runs the
25 bridge. So are you saying that your opinion with

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1 respect to what they can expect is more valid
2 than their own business views?

3 A. No. I do know, particularly the
4 RFP process, did run four months in the
5 last...with the current incumbent.

6 206. Q. And did the store go dark during
7 that period?

8 A. No, they were the current
9 operator.

10 207. Q. And, in that process, you'll also
11 agree that there was no rent free period
12 provided?

13 A. Correct.

14 208. Q. And there was no tenant
15 improvement allowance provided?

16 MR. JONES: We've already answered
17 these questions.

18 209. MR. SHEA: I'm asking them again,
19 sir. You can't use "we", because you
20 are not her lawyer.

21 MR. JONES: Sorry, we've already
22 listened to the answers of these
23 questions.

24 210. MR. SHEA: I am going to ask them
25 again.

1
2 BY MR. SHEA:

3 211. Q. And you'll agree there was no
4 fixturing period provided?

5 A. No.

6 212. Q. Thank you. So you also raise
7 "capture rate" and you say that there were a
8 limited number of benchmarks against which to
9 compare Peace Bridge Duty Free's capture rate,
10 but you don't identify any benchmarks in your
11 report, do you?

12 A. No.

13 213. Q. So you weren't able to obtain any
14 data from any duty free operator concerning their
15 capture rate?

16 A. We had some discussion with Ms.
17 Barrett, but I don't think they were provided.

18 214. Q. Okay. So, really, when you talk
19 about comparing capture rates, you are comparing
20 Peace Bridge Duty Free capture rate against Peace
21 Bridge Duty Free's capture rate, there is no
22 comparison?

23 A. Pre-COVID and after COVID.

24 215. Q. Yes. But a capture rate is based
25 on the percentage of cars that go over the Peace

1 Bridge that turn into the duty free, correct?

2 A. And go in, yes.

3 216. Q. Yes. So what...of the traffic
4 going by that you capture, how would a capture
5 rate be implemented by bridge closures or border
6 restrictions? Isn't it the case that, if 100
7 cars go by and 20 pull in, it's a 20 percent
8 capture rate, and, if 10 cars go by and 2 go in,
9 it's a 20 percent capture rate? So how does
10 bridge closure impact capture rate?

11 A. During COVID, in my
12 understanding, during the pandemic, customers
13 were reluctant to get out of their cars. So
14 while they may have been 20 percent, if they were
15 nervous, there was less inclination to go into a
16 store, rather than pre-COVID, pre-pandemic.

17 217. Q. So, during the pandemic they were
18 less likely to go into the store than pre-
19 pandemic?

20 A. Correct.

21 218. Q. But Peace Bridge Duty Free was
22 closed?

23 A. Yes, I am talking about the
24 capture rates. You asked me about capture rates.

25 219. Q. You are talking capture rates for

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1 other retail, not capture rates for Peace Bridge?

2 A. No, you were asking me about
3 capture rates related to a moment comparing, like
4 we have to compare apples to apples.

5 220. Q. Okay. So how would Peace Bridge
6 Duty Free's capture rate be impacted by a bridge
7 closure, the rate be impacted by a bridge closure
8 or border restrictions?

9 A. The customers...with having a
10 bridge restriction or a closure, makes for
11 different customers that are going across,
12 whether they are leisure or whether they are
13 going across for essential services, and,
14 therefore, their needs are different in terms of
15 going into a store or not into a store.

16 221. Q. But you divide capture rate out
17 by different users?

18 A. Yes, we did.

19 222. Q. But the capture rate is the
20 percentage of cars going by that turn in. So how
21 does the fact that the bridge is closed to, say,
22 passenger traffic, how does that change the
23 capture rate for passenger vehicles?

24 A. So it is the amount of people
25 that get out of their cars to come into the

1 store.

2 223. Q. Sure. But if you've got zero
3 people going over, zero people getting out,
4 you've got a capture rate of what?

5 A. Zero, yes.

6 224. Q. If...or is it 100 percent because
7 you have got no people going over. So if you've
8 got 2 cars going over and one turns in, it is 50
9 percent?

10 A. Yes.

11 225. Q. So, I am struggling with how the
12 Peace Bridge Duty Free's capture rate is
13 connected to legislation to close the bridge. I
14 understand why the gross traffic is connected.
15 What I don't understand is how the capture rate
16 is connected.

17 MR. JONES: Are you referring to
18 18.07?

19 226. MR. SHEA: No, I am referring to how
20 a bridge...

21 MR. JONES: But only the laws
22 affecting the bridge closer?

23 227. MR. SHEA: I am asking in general,
24 how does any bridge closure impact the
25 percentage of cars that turn in?

1 MR. JONES: But what I am trying to
2 understand is, are you trying to isolate
3 the bridge closure legislation versus
4 the health legislation generally?

5 228. MR. SHEA: I am not talking about the
6 legislation.

7
8 BY MR. SHEA:

9 229. Q. I'm talking about, generally, a
10 bridge closure. I am trying to understand why,
11 aside from the fact Mr. Wolf wanted it in here,
12 why capture rate is relevant.

13 A. To understand...it gets
14 at...there is not one metric that has shaped our
15 opinion in this, and we take it into
16 consideration when we do a report in this nature,
17 to consider numerous variables to help us shape
18 our opinion.

19 230. Q. But what is your opinion?

20 A. Okay, I am getting there...

21 MR. JONES: You've got to let her
22 answer the question.

23 THE DEPONENT: So, capture rate is
24 just another metric that helps us
25 understand what was happening at

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1 this...to understand the trends, what
2 was happening in terms of consumer
3 sentiment and what the capture rate
4 demonstrates to us that...you are
5 correct in terms of how it is captured,
6 but it points to the fact that if
7 capture rate is lower, there
8 was...during the time of the pandemic
9 and still to this day, traffic and
10 capture rate are down in retail because
11 people are still a bit nervous to go out
12 and do non-essential shopping. And so,
13 if the capture rate is down as they
14 cross the bridge, it is because they
15 don't want to go into a high traffic
16 area, and just points to the fact that
17 going into a duty free shop may not be
18 desirable for them and, therefore, they
19 don't go in, and the capture rate is
20 lower.

21
22 BY MR. SHEA:

23 231. Q. So, how is that linked to changes
24 in legislation?

25 A. Because...can you clarify and

1 expand on that?

2 232. Q. So, the fact that the border was
3 closed, do you have any data to directly link a
4 border closure with reduced capture rates?

5 A. I am sorry, I am just trying to
6 frame up the question.

7 233. Q. So 18.07...

8 A. Yes.

9 234. Q. ...is triggered by changes in
10 applicable legislation.

11 A. Yes.

12 235. Q. The assertion appears to be that
13 border restrictions...they use the term "border
14 restrictions", you see in the affidavits...border
15 restrictions were imposed, which had a negative
16 effect. How, based on what you've said...I hear
17 you that the pandemic has had a carry-on effect
18 and people are less likely to go into crowded
19 place, the pandemic, how is that connected to
20 border restrictions in your view?

21 MR. JONES: I think you said how are
22 the border restrictions impacting border
23 restrictions? I think what you meant to
24 say is capture rates.

25

1 BY MR. SHEA:

2 236. Q. Okay. How are the border
3 restrictions...

4 MR. JONES: But, one thing I do want
5 to clarify, because you are limiting it
6 to border restrictions, and I think the
7 health restrictions as well are in the
8 affidavit material, the vaccine mandates
9 and the...

10 237. MR. SHEA: You define...I said define
11 border restrictions...capital B and R,
12 that's what you define them all as.

13 MR. JONES: But...

14 238. MR. SHEA: And I asked her if she
15 read the affidavit.

16 MR. JONES: Okay. Counsel, in
17 fairness, you can't give her a defined
18 term without...

19 239. MR. SHEA: Okay, let's move on.

20
21 BY MR. SHEA:

22 240. Q. So, you'll agree that capture
23 rate is about getting people into the store?

24 A. Yes,

25 241. Q. And other factors influence that.

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1 I believe you wrote a study for a municipality, I
2 can't remember if it was Toronto or Wasaga Beach
3 where you talked about...I think you talked about
4 the retail environment or how it looked being
5 related to capture rates, so, it has to be
6 welcoming?

7 A. Yes.

8 242. Q. Do you recall that?

9 A. I am not sure if I worked on that
10 specifically, but they...

11 243. Q. It was a good report. So I am
12 going to show you some pictures of the duty free.
13 So, since you haven't seen these before, we are
14 going to mark them as Exhibit A for
15 identification.

16
17 --- EXHIBIT A: Photographs of Duty Free Store,
18 taken in spring 2023, for
19 identification

20
21 MR. JONES: Are these in the record
22 somewhere?

23 244. MR. SHEA: Yes, they are. These were
24 in the record that you indicated that
25 one of the reasons that you had this

1 report and required it in the record is
2 because we put these pictures in.

3
4 BY MR. SHEA:

5 245. Q. So these are pictures of the
6 interior of the store, the first two pictures.

7 A. Can you tell me when they were
8 taken?

9 246. Q. These were taken in the spring,
10 so various times in the spring of this year.

11 A. Okay.

12 247. Q. And then we got a picture of the
13 store from the road, a picture of the store from
14 the highway, that thing sticking up is the duty
15 free store, then we have a sign, the duty free
16 sign, and we have the parking lot. I am going to
17 refer you to, if you don't mind, the lease and
18 the lease includes how the duty free...some
19 pictures of how the duty free envisioned it. And
20 I am going to refer you to page...let's start at
21 125 and then, over on the page, is the layout.
22 127 is the main stand, and 128 is again, the
23 layout. You'll agree with me that, from a
24 retailer's perspective, those pictures don't look
25 very inviting when compared to the proposal?

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1 MR. JONES: Well, Counsel...

2 248. MR. SHEA: She is an expert.

3 MR. JONES: First of all, you
4 directed her to a mood board and you've
5 taken some very isolated pictures, one
6 of them is crooked...

7 249. MR. SHEA: I am sorry my client
8 doesn't take very straight pictures...

9 MR. JONES: It is not of the entire
10 store, it is of two shelves...

11
12 BY MR. SHEA:

13 250. Q. Okay. So let's start with the
14 duty free sign...no, look on these pictures,
15 please. Let's go from the back forward, so the
16 last picture of the parking lot. Is that going
17 to attract people into the business, in your
18 opinion?

19 A. Again...

20 MR. JONES: Counsel, what
21 direction...you've got to orient the
22 witness.

23
24 BY MR. SHEA:

25 251. Q. There is the highway behind.

1 This is the parking lot of the building. So in
2 your view...

3 MR. JONES: Looking at the highway?
4

5 BY MR. SHEA:

6 252. Q. Is this a very inviting picture,
7 the signs?

8 A. Again, when was this taken?

9 253. Q. The spring of 2023.

10 A. No.

11 254. Q. The next picture over shows,
12 again, the highway and the signs. Again, spring
13 of 2023, not a very inviting picture?

14 A. Not that particular sign.

15 255. Q. And then, going over, is the sign
16 that tells you there is a duty free?

17 MR. JONES: Well, Counsel, in
18 fairness, this one appears to be in the
19 process of being taken down by a
20 construction vehicle?

21 256. MR. SHEA: Actually, no. That
22 construction vehicle is over in the side
23 working in the field. That is how the
24 sign looks.

25 MR. JONES: As I understand it, the

1 property has been sold and its...

2 257. MR. SHEA: Where in the record am I
3 going to find that?

4 MR. JONES: You are the one putting
5 this document to her without proper
6 context.

7
8 BY MR. SHEA:

9 258. Q. It doesn't look very inviting,
10 does it?

11 A. Again, I need to understand the
12 context. I don't know if a storm was the day
13 before and its, you know, it happened the day
14 before. I don't know. The others do look like
15 they may have been...

16 259. Q. Fair enough. Go to the next
17 picture on. This is the tower in front of the
18 store. If you were driving by, would you, in
19 your opinion, would you think that indicates that
20 there is even a store there?

21 A. I recall seeing a sign in
22 previous pictures that I had gone back...again, I
23 don't know the context. I don't know if they are
24 in the middle of a sign change. Is it a one day
25 at a time? I don't...

1 260. Q. But, you will agree, that various
2 other factors can influence capture rates?

3 A. Yes.

4 261. Q. And various other factors can
5 influence sales? It is not just the pandemic?

6 A. Well, the pandemic influenced a
7 lot of things, particularly around marketing. In
8 fact, the government encouraged people to stay at
9 home and, therefore, a lot of retailers were not
10 marketing and trying to encourage traffic.

11 262. Q. And has that changed now? What
12 are people doing now?

13 A. Now that restrictions...which
14 were not fully lifted until Victoria Day of this
15 year, which is encroaching summer.

16 263. Q. And when you say...that was U.S.-
17 based restrictions?

18 A. Yes.

19 264. Q. Not Canadian restrictions?

20 A. No.

21 MR. JONES: Counsel, in fairness, it
22 was restrictions for people travelling
23 across the border from Canada.

24 265. MR. SHEA: I asked whether they were
25 U.S. based or Canadian-based. Your

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1 propensity to interrupt examinations is
2 frustrating to say the least.

3 MR. JONES: Counsel, I expect you
4 will get your...

5 266. MR. SHEA: I think we are almost
6 done.

7 MR. JONES: The examinations that we
8 conducted were interrupted constantly.

9 267. MR. SHEA: Not by me. You're
10 asserting I interrupted on your
11 examinations? I wasn't there.

12 MR. JONES: No, I agree you weren't
13 there, but whether it was you or your
14 colleague...

15 268. MR. SHEA: Let's go on.

16 MR. JONES: ...the interruptions were
17 far more often than you are suggesting
18 that I am interrupting you.

19
20 BY MR. SHEA:

21 269. Q. Let's go on. So I just want
22 to...so as I understand your report, and just to
23 summarize, the just of your report is that there
24 is risk to Peace Bridge Authority in going to
25 another RFP, does that summarize it accurately?

1 A. Yes.

2 270. Q. And so then I'll ask...so what is
3 to be made of that? Your opinion is, the
4 Authority should negotiate a deal with the Peace
5 Bridge Duty Free to let them stay? Is that what
6 you are getting at?

7 A. I think it should be a
8 consideration.

9 271. Q. Okay. And what about from the
10 other side? So are you aware...actually you've
11 seen the projections in the lease. Peace Bridge
12 Duty Free appears to be...at least was,
13 projecting a very large profit. Is it not
14 incumbent on them to negotiate with the Authority
15 to preserve the lease?

16 A. Sure.

17 272. Q. So, you believe that it is
18 incumbent on the parties, given the risk to the
19 Authority, to try to come to terms on a new
20 lease?

21 A. Well, I think it is
22 important...in my experience through the
23 pandemic, landlords and tenants tried to work
24 together to be good partners.

25 273. Q. And did they always succeed?

1 A. I can't think of an example that
2 wasn't good.

3 274. Q. Hudson's Bay and their commercial
4 leases? That didn't work out so well and you
5 were involved in some of that, weren't you?

6 A. Correct.

7 275. Q. Did Hudson's Bay not end up
8 having to pay 100 percent of the rent they owed,
9 yes?

10 A. Yes.

11 276. Q. And are you familiar with the
12 situation involving The Duke restaurants? Were
13 you involved in that?

14 A. No.

15 277. Q. Were you involved in any other
16 negotiations between retailers and landlords as a
17 result of COVID?

18 A. No.

19 278. Q. No?

20 A. Well, one. It is not rectified
21 yet.

22 279. Q. So you have experience with one
23 negotiation of a lease between a landlord and
24 tenant during COVID?

25 A. In addition to the Hudson's Bay.

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1 280. Q. Yes, and the Hudson's Bay...well,
2 we talked about how the Hudson's Bay came out.
3 Those are my questions. That is all. Thank you.

4 MR. JONES: I just have a few
5 questions.
6

7 RE-EXAMINATION BY MR. JONES:

8 281. Q. So, in the Hudson's Bay lease,
9 are you aware, did it have a provision similar to
10 section 18.07 of the Peace Bridge lease?

11 A. There were several and I would
12 have to go back to refresh myself.

13 282. Q. Whether they had an 18.07 clause?

14 A. Correct. Those cases were
15 specifically just in terms of operating practices
16 as it related to the pandemic.

17 283. Q. So they didn't involve an
18 analysis...

19 A. They did review...

20 284. Q. ...of 18.07?

21 MR. SHEA: Stop, you asked her
22 whether she was aware they had 18.07.
23 Her answer was she was not. You then
24 can't put to her, "Did they involve
25 18.07".

BY MR. JONES:

A. Yes.

A. There are more. There is much negotiating and deal-making that has all the factors involved in it now.

A. I think it is a case-by-case basis.

289. Q. And in terms of the capture rates, would those be affected by health restrictions beyond the border closures, things like mask mandates and vaccine mandates?

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1 A. Yes.

2 290. Q. So in what sense would the
3 capture rates be affected?

4 A. Negatively. Customers are
5 still...there is still some reluctance. We are
6 still experiencing, in certain markets, that
7 traffic is down and capture rate customers have
8 still not recovered in terms of their sentiment
9 with regards to the pandemic.

10 291. MR. JONES: Okay. Thank you, those
11 are my questions.

12

13 --- upon adjourning at 2:05 p.m.

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TAB 12

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

AFFIDAVIT OF JIM PEARCE

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

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

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

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

with RBC and had entered into a forbearance with RBC, which was terminated over concerns with the landlord. Absent RBC's concerns about the landlord terminating our lease, I believe that RBC would not be bringing a receivership application.

4. I make this affidavit in support of Duty Free's request to have the receivership application adjourned to allow for more time for good faith negotiations with the landlord and RBC to reach an acceptable resolution. If negotiations stall and the landlord continues to dispute that its enforcement rights are stayed under Part IV of the *Commercial Tenancies Act* (the "**Act**"), Duty Free seeks an opportunity to bring an application for an order enjoining the landlord from taking any enforcement steps in accordance with the Act.

Background

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

6. By lease dated July 28, 2016, Duty Free leased the Leased Premises from the Buffalo and Fort Erie Public Bridge Authority (the "**Landlord**") 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**"). The terms of the Lease were amended by rent deferral agreements, which are further detailed below. Attached as **Exhibit "A"** is a copy of the Lease.

7. 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.

8. 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. The retail store sells alcohol, tobacco and other products such as fragrances, cosmetics, jewelry and sunglasses. Other services provided at the store include currency exchange, motor coach parking and travel services, such as processing customs paperwork for truck drivers. The duty-free store is located at the border crossing with Buffalo, New York, which is the main north-south travel corridor between Canada and the United States.

9. Before the pandemic, the duty free shop would at times have more than 500 customers in the store, with approximately 60% of customers from Canada and 40% from the United States. Particularly during busy travel times, the store would be at capacity and the parking lot full of buses and cars. The duty free shop is a destination retail store for Western New York State. Duty Free has also done extensive marketing campaigns to bring tourists to Canada, including bus tour companies from Asia and Southern United States. Duty Free was awarded second place as the Best Land Border Store in the Americas and was a finalist in the Best Land Border store in the world.

10. Prior to the COVID-19 pandemic, the retail store also had a full-service Tim Hortons on site, but it closed in August 2020. There is currently no food vendor in the Leased Premises.

11. The duty free store is typically open 24 hours a day and 365 days a year, although the store's hours were impacted by the pandemic. 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. Forty employees were full-time staff, including myself. All staff live locally and all

functions are performed at the store location. The Fort Erie store is one of the busiest stores in the 49th Parallel and is steady from mid-March through to December.

12. 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 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.

13. When the retail store was closed for approximately a year and a half, Duty Free maintained staff to secure the Leased Premises. Washroom facilities were opened for truckers and essential workers in the Spring of 2020. Since the store reopened to retail customers in mid-September 2021, the business has approximately 20 employees and is operating at 30% capacity as compared to pre-pandemic levels.

14. In addition to the duty free store operating from the Leased Premises, Duty Free also operates a duty free shop and convenience store at the Hamilton International Airport by way of a lease with Hamilton International Airport Limited. Inventory for the Hamilton store is shipped from the Leased Premises. There are no issues with the lease or the landlord relating to the Hamilton Airport location.

Tenant Improvements to the Leased Premises

15. Duty Free was the successful bidder in a request for proposal ("RFP") process initiated by the Landlord prior to entering into the Lease. As part of the RFP, Duty Free was required to and

agreed that it would undertake significant capital improvements to the Leased Premises. As a result, Duty Free undertook a major renovation of the Leased Premises, including reconfiguring the space with new entrance and exit ways, redoing the stucco and exterior, installing a new roof, gutting the interior and putting in new floors, ceiling, and walls, and fixing the parking lot. The renovation work started in August 2018 and finished in May 2019. During the renovation, the duty free shop operated at half capacity because we renovated half of the store at a time.

16. The renovations were significant in scale and cost Duty Free over \$6 million. As will be explained in greater detail below, Duty Free obtained financing from RBC in the amount of approximately \$4.2 to fund the project. In addition, Duty Free invested more than \$1.8 million of company assets into the improvements.

The Fort Erie Tenancy

17. 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.

18. The amount payable for Base Rent and Percentage Rent are set out in subsections 4.02 and 4.03 of the Lease and can generally be described as approximately 20% of sales with a floor of \$4,000,000.

19. The agreement on the amount of Rent was largely based on traffic and revenue expectations, as attached at Schedule D to the Lease. Obviously, the worldwide pandemic that prohibited virtually all cross-border travel destroyed any business during the time the bridge was closed to non-essential travel.

20. 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]

21. 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]

22. 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).

Rent Deferral Agreements

23. Duty Free’s revenues relied heavily on a retail duty-free store that catered exclusively to members of the public that are crossing the Canada-US border, and the pandemic had a profound impact on its business, particularly during the year and a half that the border was closed to non-essential travel.

24. 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. A copy of the April rental deferral agreement is attached hereto and marked as **Exhibit "B"**.

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

26. The first agreement expired on July 31, 2020. The parties continued to act as if the agreement had been extended.

27. 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.

28. Duty Free executed the second deferral agreement and delivered it to the Landlord in accordance with the Landlord's request on November 19, 2020. The Landlord has not yet delivered an executed copy of the agreement to us. A copy of the second rental deferral agreement is attached hereto and marked as **Exhibit "C"**. The parties have conducted themselves in accordance with the rental deferral agreement since November 19, 2020.

29. Notwithstanding that under the rent deferral agreement the Rent Deferral Period ended on March 31, 2021 and the Restart Date was April 1, 2021, the Canada-US border remained closed

and the retail duty-free store remained closed. Again, the parties continued to act as if the agreement had been extended.

30. During all Rental Deferral Periods, Duty Free paid all Additional Rent in accordance with its obligation under the rent deferral agreements.

31. 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.

32. 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. It was my understanding that the parties agreed to continue these arrangements until the border reopened. The Landlord did not raise any objection until it demanded immediate payment of all Deferred Rent plus three months' accelerated rent on September 8, 2021, some 13 days before Duty Free opened for business.

Duty Free Participated in CERS

33. Duty Free participated in the government programs designed to assist small businesses that were affected by Covid-19 with rent payments.

34. In or about October 2020, the Canadian government announced the Canada Emergency Rent Subsidy ("**CERS**") that provided a subsidy to cover part of eligible commercial rent for small businesses impacted by Covid-19 to be administered in several four (4) week periods. The CERS program applied retroactively starting September 27, 2020, and ran until October 23, 2021.

35. Duty Free applied for and was approved for CERS. Duty Free obtained rent assistance under CERS between September 25, 2020 through to October 23, 2021, when the program was completed. A summary of the timing and amounts of funds received by Duty Free related to CERS is attached hereto and marked as **Exhibit "D"**.

Landlord Delivers Notices of Default

36. On September 8, 2021, the Landlord provided Duty Free with two Notices of Default, one relating to purported monetary defaults and one relating to non-monetary defaults. A copy of the Notices of Default are attached as Exhibit "G" to the Affidavit of Christopher Schulze, sworn December 2, 2021 ("**Schulze Affidavit**").

37. The monetary default sought payment of approximately \$5.9 million of rent arrears 9 days later, which represented the full amount of all unpaid Rent. The Landlord threatened to seize our property and/or terminate the Lease if this payment was not made.

38. The monetary Notice of Default asserts that Duty Free's arrears at the time were \$5,931,389, despite the fact that the Deferred Rent was to be payable in equal installments over a two-year period (as set out in the amortization schedule in subsection 2.3 of the November rent deferral agreement). There had been no previous Notice of default or allegation of an Event of Default. Duty Free disputes the accuracy of the amount of arrears of Rent identified in the monetary Notice of Default and takes the position that the Notice of Default is invalid.

39. The second Notice of Default was a non-monetary default alleging that Duty Free breached the Lease by not being open for business 24 hours a day, 7 days a week, 365 days a year, and also alleged Duty Free had abandoned the Leased Premises in March 2020. The notice further said that

Duty Free breached the Lease by being closed for 10 consecutive days without the prior consent of the Landlord. Finally, the notice alleged that 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 even though the Canada-US border and the duty free shop had not re-opened. The Landlord demanded payment in 14 days of three month's accelerated rent, being about \$1.2 million dollars plus \$10,000 of legal expenses and more taxes.

40. The total amount demanded to be paid by certified cheque in 14 days under the two Notices of Default exceeded \$7 million and the Duty Free was not yet open for business.

41. Regarding the second (non-monetary) notice of default, Duty Free has restored the \$50,000 letter of credit and reopened the duty-free store, thus curing the non-monetary defaults, to the extent they were *bona fide* defaults.

42. Since re-opening for business on September 19, 2021, in addition to Additional Rent and CERS payments, Duty Free has made the following payments to the Landlord, which represent 20% of gross sales: \$19,533 for September rent paid; \$61,600 for October rent; and \$109,400 for November rent. Unfortunately, as of November 2021, traffic across the bridge and Duty Free's gross sales remain down approximately 70-60% from pre-Covid-19 levels.

Duty Free Subject to Eviction Moratorium under the Act

43. Duty Free advised the Landlord that, as a result of qualifying for CERS, it was protected by the eviction moratorium mandated by the Ontario government as set out in the Act. Duty Free further advised the Landlord that it had applied for, been approved to receive and did receive CERS

payments, which had all been paid to the Landlord as rent. In total, Duty Free paid \$220,161.00 in CERS payments to the Landlord before September 20, 2021. Duty Free also provided the Landlord with retroactive CERS approval notices. These sums are in addition to the monthly payments of Additional Rent made during the deferment period.

44. Copies of letters between Duty Free and its Landlord in regards to the Notices of Default and Duty Free's CERS payments are attached hereto and marked as **Exhibit "E"**.

45. Duty Free and the Landlord entered into without prejudice negotiations to try and settle issues related to the Notice of Default and the Lease. These negotiations have not resulted in an agreement at this time.

46. Duty Free continued to qualify for and receive CERS payments after September 2021. Most recently, Duty Free was approved for CERS claim period 14 (September 26, 2021 to October 23, 2021) on November 8, 2021. Attached as **Exhibit "F"** is a copy of the CERS approval notice from CRA dated November 8, 2021.

47. On November 12, 2021, I provided evidence of Duty Free's CERS approval to the Landlord by sending a copy of the CERS approval notice to the Landlord by email. Attached as **Exhibit "G"** to this Affidavit is a copy of my email to the Landlord dated November 12th, 2021.

48. As a result of Duty Free receiving CERS up to the last CERS period, I believe that the Landlord cannot take any steps to terminate the Lease or take possession of the inventory at the store because of the eviction moratorium under the Act.

Licenses to Operate the Duty Free Store

49. Duty Free is authorized by the Liquor Control Board of Ontario (“**LCBO**”) to buy and sell alcohol. Alcohol sales amounts to approximately 50% of the company’s business. Spirits are typically re-stocked on a weekly basis, and wine is purchased bi-weekly. New orders for alcohol products for the Spring and Fall of 2022 need to be organized through the LCBO in the next month or two. Attached hereto and marked as **Exhibit “H”** is a copy of the Land Border Duty Free Shop Authorization between the LCBO and Duty Free.

50. Duty Free also holds two licenses from the Canada Border Services Agency (“**CBSA**”) which provides it with authority to operate the duty free stores at its two locations. The CBSA license for the Hamilton Airport location, which expires on April 30, 2027 is attached hereto and marked as **Exhibit “I”**. The CBSA license for the Leased Premises is valid until January 25, 2025 and is attached hereto and marked as **Exhibit “J”**.

51. The CBSA licenses are non-transferrable. It is my understanding that the store cannot be operated by a trustee in bankruptcy or receiver. This is being further reviewed by our counsel. The CBSA contacted me following service by the receiver to ascertain if, despite the application to appoint a receiver, we were continuing to operate. Attached hereto and marked as **Exhibit “K”** is a copy of the e-mail I received from the CBSA in regards to the appointment of a receiver.

52. As mentioned above, December is typically a top month for sales due to holiday travel between Canada and the United States. We expect that business will continue to improve because the Canadian government has recently lifted testing requirements for travellers returning to Canada. As of December 8th, fully vaccinated Canadian travelling to the United States for 72 hours

or less do not need to have a pre-entry test. In addition, there is a Buffalo Bills home game in December, which attracts tourists to Buffalo and is an extremely busy time for the store.

53. Given the complexities of dealing with the inventory in a highly regulated environment and the fact that December is a particularly busy month, it would be extremely difficult for a Receiver to manage the business, were it even allowed to do so. Obtaining key product, such as wine and spirits, while overseeing sales and navigating the CBSA requirements in December will be challenging for a party that is not familiar with the procedures between the CBSA and Duty Free.

54. Given the foregoing, my belief is that a Receiver appointed over the business is more likely to shut down the business than to operate it, at least initially. I note that the application materials provided by RBC do not say they intend for the Receiver to operate the business, nor do they say they intend to continue the employment of the staff.

Credit Facilities with RBC

55. Duty Free obtained financing from the Royal Bank of Canada ("**RBC**") pursuant to the terms of a credit agreement dated July 20, 2018, as amended on July 5, 2021 and October 8, 2021 (collectively, the "**Credit Agreement**"). A copy of the Credit Agreement is attached as Exhibit "D" to the Schulze Affidavit.

56. The Credit Agreement provided Duty Free access to the following facilities:

- a. Facility #1: \$900,000 revolving demand facility by way of Royal Bank Prime loans and Royal Bank US Base Rate loans;

- b. Facility #2: \$575,900 revolving demand facility by way of letters of guarantee;
- c. Facility #3: \$5,000,000 revolving lease line of credit by way of leases; and
- d. VISA Business credit card to a maximum of \$300,000.

57. As set out above, Duty Free financed renovations of the Leased Premises by way of borrowings against the revolving lease line of credit.

58. Duty Free has always had a productive and open relationship with RBC. Duty Free kept RBC apprised of issues it was facing during the COVID-19 pandemic and provided it with business plans and other financial reporting in a timely fashion, as required under the Credit Agreement.

59. Duty Free has made all payments to RBC when due and has continued to pay amounts owing in accordance with the terms of the Credit Facilities up to now.

60. As a result of the land border being closed between March 2020 and August 2021 (in the case of Americans entering Canada) and November 2021 (in the case of Canadians travelling to the United States), the duty free shop was closed to retail customers between March 2020 and September 2021. Since Duty Free had no sales revenue during this time, it was offside of its financial covenants under the Credit Agreement. On July 2, 2021, RBC sent Duty Free a letter indicating that it was aware of the company's plan to remedy the default by December 31, 2021, but took no further steps, which are appreciated. A copy of the July 2nd letter is attached hereto and marked as **Exhibit "L"**.

61. However, after the Landlord issued its Notice of Default on September 8, 2021, RBC made demand and sent a Notice of Intention to Enforce Security on September 23, 2021. A copy of the demand letter is attached as Exhibit "H" to the Schulze Affidavit.

62. On October 8, 2021, RBC and Duty Free entered into a Forbearance Agreement. The Forbearance Agreement was set to expire on the earlier of either January 4, 2022 or an "Intervening Event," which included if the Landlord purported to terminate the Lease or levy distress against the company's assets. A copy of the Forbearance Agreement is attached as Exhibit "D" to the Schulze Affidavit.

63. We allowed for the inclusion of this "Intervening Event" because we believed that the landlord was stayed from acting during the forbearance period due to the moratorium under the Act.

64. On November 23, 2021, RBC terminated the Forbearance Agreement on the grounds that Duty Free had failed to deliver by no later than November 15, 2012, "evidence that an arrangement satisfactory to the Lender, in its sole discretion, has been entered into between the Borrower and the Landlord in respect of the Lease and the defaults thereunder to ensure that the Landlord will not terminate the Lease before the end of its current term." A copy of RBC's termination letter is attached hereto and marked as **Exhibit "M"**.

65. I have reviewed the Schulze Affidavit and it appears that the termination notice was sent following an e-mail from counsel for the Landlord to counsel for RBC indicating that the parties have been unable to resolve their issues and that the Landlord "intends to exercise its remedies under the default provisions of the Lease." However, the letter does not mention that negotiations were still on-going at that time and RBC did not provide Duty Free with time to cure the default.

Duty Free a Viable Business

66. Under the Forbearance Agreement, Duty Free provided monthly cash flow statements to RBC for the months of October and November 2021. Cash flow statements from October to December are attached hereto and marked as **Exhibit "N"**.

67. The cash flows demonstrate the Duty Free is currently a viable business and will continue to stay that way as long as border restrictions stay the same. Indeed, in November, the business was profitable due to higher than expected sales revenue and lower than expected costs, and because Duty Free paid rent at 20% of sales to the Landlord.

68. As mentioned above, we expect that December will be a busy month for sales, especially because the testing requirements for short-term vaccinated travellers have reduced. I believe it is likely we will see an improvement in respect of our projections for December. I am hopeful that the business has weathered the worst of the pandemic and we can look forward to a continued increase in travellers and, therefore, customers at the Fort Erie land border.

69. However, terminating the lease will destroy the business. Since duty free stores can only be operated at airports or land borders, there are very few opportunities to conduct business elsewhere in Ontario. Duty Free spent approximately one year and more than \$6 million making significant improvements to the Leased Premises. It continued to secure the Leased Premises during the time when the land border was closed to non-essential travel and has reopened its retail store as quickly as possible once the border reopened. Having endured the challenges of the COVID-19 pandemic, it is not appropriate to now allow the Landlord to terminate the Lease, thereby precipitating RBC's receivership application, when an eviction moratorium is in place and the business' cash flow supports its continued operation.

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

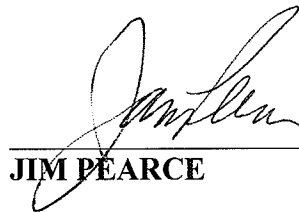
71. On December 8, 2021, the Duty Free retained Blaney McMurtry LLP ("**Blaney**") as local specialist counsel to assist in this matter. Blaney offered on December 10th to enter into negotiations with the Landlord. The Landlord replied that it was available for a meeting on Monday morning. A copy of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

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

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



A Commissioner for Taking Affidavits,
Alexandra Teodorescu



JIM PEARCE

Signature:

Email: jimp@dutyfree.ca

This is Exhibit “A” referred to in the Affidavit of Jim Pearce sworn remotely this 12th day of December 2021.

A handwritten signature in blue ink, appearing to read 'Alexandra Teodorescu', is centered on the page.

Commissioner for Taking Affidavits (or as may be)

Alexandra Teodorescu

BUILDING LEASE

BETWEEN

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

- AND -

PEACE BRIDGE DUTY FREE INC.

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SCHEDULES:

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SCHEDULE "B"	PLAN OF LEASED PREMISES
SCHEDULE "C"	RULES AND REGULATIONS
SCHEDULE "D"	TENANT'S PROPOSAL

THIS LEASE is dated as of the 28th day of July, 2016.

B E T W E E N:

**BUFFALO AND FORT ERIE PUBLIC BRIDGE
AUTHORITY**, an entity created pursuant to an Act of the State of
New York, with the consent of the United States Congress, and by
an Act of the Government Of Canada

(the "Landlord")

AND:

PEACE BRIDGE DUTY FREE INC., a corporation incorporated
under the laws of the Province of Ontario

(the "Tenant")

ARTICLE I BASIC LEASE TERMS

1.01 Basic Lease Terms

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

Address of Landlord:

- (b) Tenant: Peace Bridge Duty Free Inc.

Address of Tenant:

- (c) Leased Premises: The Building and the portion of the Lands as identified in Schedule "B".
- (d) Term: 15 years.
- (e) Commencement Date: November 1, 2016.
- (f) Termination Date: October 31, 2031.
- (g) Letter of Credit: \$50,000.
- (h) Extension Options: One option to extend the term for an additional period of five years.

ARTICLE II DEFINITIONS AND INTERPRETATION

2.01 Definitions

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

- (a) **"Additional Rent"** means all money or charges which the Tenant is required to pay under this Lease (except Base Rent, Percentage Rent and Sales Taxes) whether or not they are designated "Additional Rent" whether or not they are payable to the Landlord or to third parties.
- (b) **"Additional Services"** means those services provided to the Tenant at its request, as additional services, which are not part of the services provided by the Landlord to the Tenant in accordance with the terms of this Lease and charged as Operating Costs including, but not limited to, maintenance, repair, janitorial or cleaning services. Additional Services also includes any services provided by the Landlord on behalf of the Tenant in respect of any obligations of the Tenant required under this Lease which the Tenant fails to observe and perform.
- (c) **"Adverse Effect"** means any one or more of:

- (i) impairment of the quality of the natural environment for any use that can be made of it;
 - (ii) injury or damage to property or to plant or animal life;
 - (iii) harm or material discomfort to any Person;
 - (iv) an adverse effect on the health of any Person;
 - (v) impairment of the safety of any Person;
 - (vi) rendering any property or plant or animal life unfit for human use;
 - (vii) loss of enjoyment of a normal use of property; and
 - (viii) interference with the normal conduct of business.
- (d) “**Alterations**” has the meaning ascribed to that term in Section 12.02.
- (e) “**Applicable Laws**” means any statutes, laws, by-laws, regulations, ordinances and requirements of governmental and other public authorities having jurisdiction over or in respect of the Leased Premises or the Property, or any portion thereof, and all amendments thereto at any time and from time to time, and including but not limited to the Environmental Laws.
- (f) “**Architect**” means the architect, engineer or land surveyor named by the Landlord from time to time.
- (g) “**Base Rent**” means the annual base rent payable by the Tenant and described in Section 4.02.
- (h) “**Building**” means the building located on the Lands as shown on Schedule B as it exists from time to time.
- (i) “**Building Systems**” means: (i) the equipment, facilities and all systems, services and installations from time to time installed in or servicing the Leased Premises (or any portion thereof) including, but not limited to: mechanical (including plumbing, sprinkler, drainage and sewage) and electrical systems and appurtenances thereto; utilities (including, without limitation, electricity, water, hydro and gas), lighting, sprinkler, life safety (including fire prevention, communications, security and surveillance); computer (including environmental, security and lighting control); and (ii) all machinery, appliances, equipment, apparatus, components, computer software and appurtenances forming part of or used for or in connection with any of such systems, services, installations and facilities including, but not limited to, boilers, motors, generators, fans, pumps, pipes, conduits, ducts, valves, wiring, meters and controls, and the structures and shafts housing and enclosing any of them.

- (j) “**Business Day**” means any day other than a Saturday, Sunday or statutory holiday in the Province of Ontario.
- (k) “**Business Taxes**” means every tax, duty and licence fee which is levied, rated, charged or assessed against or in respect of the business carried on in the Leased Premises or in respect of the use or occupancy of the Leased Premises by the Tenant whether the taxes, rates, duties, assessments or licence fees are rated, charged or assessed by any Government Authority during the Term.
- (l) “**Claims**” means any threatened or actual claim, demand, action, cause of action, administrative order, requirement or proceeding, damage, loss, cost, fine, penalty, interest, liability and expense including, without limitation, reasonable engineering and legal fees and disbursements on a full indemnity basis.
- (m) “**Commencement Date**” means the date set out in Section 1.01(e).
- (n) “**Contaminants**” means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an Adverse Effect and includes any waste, dangerous good, hazardous product, controlled substance or any other substance or thing regulated or reportable under any Environmental Laws.
- (o) “**Environmental Approvals**” means all applicable permits, licences, authorizations, consents, directions and approvals required by Governmental Authorities pursuant to Environmental Laws in respect of the Leased Premises and the equipment, structures, substances and activities located or carried on therein or thereon by the Tenant.
- (p) “**Environmental Laws**” means all existing and future federal, provincial and municipal laws, regulations, by-laws, ordinances, notices, orders, rules, protocols, policies, directions and guidelines and all present and future principles of common law and equity relating to the protection of the environment, including Contaminants, pollution and waste management.
- (q) “**Environmental Site Assessment**” or “**ESA**” includes a visual and instructive inspection of property, buildings, structures, soils, bedrock and groundwater, including the installation of monitoring and measurement devices, for the purpose of determining the presence of Contaminants or compliance with Environmental Laws.
- (r) “**Event of Default**” has the meaning ascribed to that term in Section 17.01.
- (s) “**Extension Term**” has the meaning ascribed to that term in Section 3.06.
- (t) “**Governmental Authorities**” means all applicable federal, provincial and municipal agencies, boards, tribunals, ministries, departments, inspectors, officials, employees, servants or agents having jurisdiction and “**Government Authority**” means any one of them.

- (u) **"HVAC System"** means the whole of any systems required for the supply of heating, ventilating or air-conditioning to the Building and the improvements, fixtures, appurtenances, equipment and systems associated with or required therefor and for the further processing and distribution or exhaust of air such as ducts, diffusers, reheat coils, controls and other apparatus and equipment therefor.
- (v) **"Landlord"** means the party named in Section 1.01(a) and all successors and assigns of such party.
- (w) **"Lands"** means the lands more particularly described in Schedule "A".
- (x) **"Leased Premises"** means collectively the Building and the portion of the Lands as identified in Schedule "B".
- (y) **"Leasehold Improvements"** means all fixtures, improvements, installations, Alterations and additions from time to time made, erected or installed by or on behalf of the Tenant or any former occupant of the Leased Premises, including cabling, trenches, concrete bases, doors, hardware, partitions (including moveable partitions) and wall-to-wall carpeting, but excluding furniture and equipment not in the nature of fixtures.
- (z) **"Letter of Credit"** means the letter of credit described in Section 4.06.
- (aa) **"Licence"** shall mean the licence, permission, registration, authorization, appointment, power, jurisdiction, or other similar right granted or conferred by the Government of Canada upon the Tenant and allowing the Tenant to operate a duty free shop at the Leased Premises.
- (bb) **"Mortgage"** means any mortgage or other security against the Leased Premises or the Landlord's interest in this Lease, from time to time.
- (cc) **"Mortgagee"** means the holder of any Mortgage from time to time.
- (dd) **"Operating Costs"** has the meaning ascribed to that term in Section 6.04.
- (ee) **"Percentage Rent"** means the percentage rent payable by the Tennant and described in Section 4.03
- (ff) **"Permitted Use"** means the operation of a duty free shop and related services (such as banking and travel related services).
- (gg) **"Person"** if the context allows, includes any person, firm, partnership or corporation, or any group of persons, firms, partnerships or corporations or any combination of them.
- (hh) **"Prime Rate"** means the annual rate of interest announced from time to time by the Canadian chartered bank chosen by the Landlord as the daily rate of interest used by such bank as a reference rate in setting rates of interest for Canadian dollar

commercial loans and commonly referred to by such bank as its Canadian “prime rate”.

- (ii) **“Property Taxes”** means all real property taxes, rates, duties, levies, fees, charges (including local improvement charges) and assessments, whether general or special, that are levied, rated, charged or assessed against the Lands, the Leased Premises or any part of it from time to time by any lawful taxing authority, whether federal, provincial, regional, municipal, school or otherwise and any taxes or other amounts which are imposed in lieu of, as a substitute for or in addition to, any of the foregoing whether or not similar to or of the foregoing character or not and whether or not in existence at the Commencement Date, and any such taxes levied or assessed against the Landlord on account of its ownership of the Lands or its interest in it, including capital taxes imposed on the Landlord and including taxes levied on the Landlord on account of rents payable by the Tenants, and all legal and other professional fees and interest and penalties on deferred payments incurred by the Landlord in contesting or appealing any Property Taxes.
- (jj) **“Release”** means, in respect of Contaminants, without limitation, a spill, leak, disposal, dumping, pumping, pouring, emission, emptying, discharge, deposit, injection, escape, release or leaching.
- (kk) **“Released Persons”** includes the Landlord, the property manager for the Leased Premises, if any, the Mortgagee and their respective directors, officers, employees, agents, contractors and other Persons for whom they are responsible in law.
- (ll) **“Rent”** means collectively the Base Rent, Percentage Rent and Additional Rent payable under this Lease.
- (mm) **“Rental Year”** means a period of time, the first Rental Year of the Term commencing on the Commencement Date and ending on October 31, 2017. After the first Rental Year each Rental Year of the Term will consist of a period of twelve (12) calendar months, but the last Rental Year of the Term will terminate on the Termination Date or earlier termination of the Term. Despite what is stated above, if the Landlord considers it necessary or convenient, it may from time to time, by written notice to the Tenant, specify an annual date from which each subsequent Rental Year is to commence for the purposes of any other provision of this Lease, and the Rental Year then current for that purpose or those purposes will terminate on the day immediately preceding the commencement of the new Rental Year.
- (nn) **“Rules and Regulations”** means the rules and regulations promulgated by the Landlord from time to time pursuant to the terms of this Lease.
- (oo) **“Sales Taxes”** means all goods and services, harmonized sales taxes, business transfer, value-added, national sales, multi-stage sales, sales, use or consumption taxes or other taxes of a similar nature imposed by any lawful taxing authority upon the Landlord or the Tenant with respect to Rent, this Lease, the rental of space pursuant to this Lease, or the goods and services provided by the Landlord to the

Tenant, including, without limitation, the provision of administrative services to the Tenant hereunder.

- (pp) **“Tenant”** means the party named in Section 1.01(b). A reference to “Tenant” includes, where the context allows, the employees, agents, contractors, invitees and licensees of the Tenant, and any other Persons over whom the Tenant may reasonably be expected to exercise control, including but not limited to any and all sub-tenants, licensees or assignees of the Leased Premises or any portion thereof, and such other Persons for whom the Tenant is responsible at law.
- (qq) **“Tenant’s Audited Gross Sales”** shall mean a statement of the Tenant’s Gross Sales prepared and verified by the auditor of the Tenant in accordance with generally accepted auditing principles completed in a form and manner satisfactory to the Landlord acting reasonably.
- (rr) **“Tenant Construction Criteria”** means the criteria provided, upon request, by the Landlord to the Tenant from time to time setting out the construction criteria relating to Alterations and which may also provide for Landlord’s reasonable review and supervision fees.
- (ss) **“Tenant’s Gross Sales”** means the total dollar amount of all sales of goods or services made on or from the Leased Premises by the Tenant to the Tenant’s customers (and by any subtenant to the subtenant’s customers) during the specific period(s) of time referred to herein. In the case of currency exchange or financial services it shall mean the gross revenue derived from that service and not the total of the actual currency exchanged. In the case of ticket sales, it shall mean the gross revenue derived from the service and not the total face value of actual ticket sales. In the case of Travel Services, it shall mean the gross revenue derived from the Travel Services and not the total face value of any accommodation booking or travel ticket sales. Tenant’s Gross Sales includes but is not limited to:

- (i) orders taken or received at the Leased Premises or any offsite sales outlet servicing the Leased Premises, whether by telephone, internet or other electronic means, or in writing or other form of communication and whether the orders are filled from the Leased Premises or elsewhere,

- (ii) deposits not refunded to purchasers; and

- (iii) all other receipts and receivables from sales or services (including interest, instalment and finance charges) from business conducted in or from the Leased Premises,

whether the sales or other receipts or receivables are made by cheque, cash, credit, charge account, exchange or otherwise and whether the sales are made by means or mechanical or other vending devices in the Leased Premises. Bank charges or uncollectible credit accounts or charges made by collection agencies will not be deducted and no allowances will be made for bad debts. Each charge or sale made on instalment or credit will be treated as a sale for the full selling price in the month

for which the charge, sale or rental is made, regardless of the time when the Tenant receives payment (whether full or partial).

There shall be excluded or deducted, as the case may be, from the calculation of Tenant's Gross Sales:

- (i) all refunds of merchandise, the sale price of which has already been included in the Tenant's Gross Sales;
 - (ii) all sales taxes, harmonized sales taxes, goods and services taxes, or any other taxes imposed in lieu thereof;
 - (iii) discounts, allowances or credits given to the Tenant's customers;
 - (iv) all interest, finance or carrying charges charged by the Tenant above the selling price to its customers, as incidental to the sale and with no profit to the Tenant;
 - (v) gift or merchandise certificates or cards provided that such gift or merchandise certificate or card shall be included in the calculation of Gross Sales at the time of their redemption on the Leased Premises;
 - (vi) any sales of the Tenant's used fixtures, chattels or other equipment out of the ordinary course of business; and
 - (vii) transfers of merchandise between any of the Tenant's other stores
- (tt) **"Tenant's Proposal"** means the Tenant's proposal for capital expenditures for the Leased Premises and for the general operation and management of the duty free shop from the Leased Premises as detailed in Schedule "D".
- (uu) **"Term"** means the period of time set out in Section 1.01(d).
- (vv) **"Termination Date"** means the date set out in Section 1.01(f).
- (ww) **"Transfer"** has the meaning ascribed to that term in Section 14.01.
- (xx) **"Transferee"** has the meaning ascribed to that term in Section 14.01.
- (yy) **"Travel Services"** means providing services for booking reservations at hotels, inns, campsites and other accommodations and for selling or reserving travel tickets.
- (zz) **"Unavoidable Delay"** means any delay by a party in the performance of its obligations under this Lease caused in whole or in part by any acts of God, strikes, lockouts or other industrial disturbances, acts of public enemies, sabotage, war, blockades, insurrections, riots, epidemics, washouts, nuclear and radiation activity or fallout, arrests, civil disturbances, explosions, unavailability of materials,

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

2.02 Net Lease

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

2.03 Extended Meanings

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

2.04 Entire Agreement

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

2.05 Governing Law

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

2.06 Time of the Essence

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

2.07 No Limitation

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

2.08 Headings and Captions

The table of contents, article numbers, article headings, section numbers and section headings in this Lease are inserted for convenience of reference only and are not to be considered when interpreting this Lease.

2.09 Severability

Each provision of this Lease is distinct and severable. If any provision of this Lease, in whole or in part, is or becomes illegal, invalid or unenforceable in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect the legality, validity or enforceability of the remaining provisions of this Lease, or the legality, validity or enforceability of that provision in any other jurisdiction.

2.10 Successors and Assigns

The rights and liabilities of the parties shall enure to the benefit of their respective successors and assigns, subject to any requirement for consent by the Landlord hereunder.

2.11 No Partnership or Agency

The Landlord does not in any way or for any purpose become a partner of the Tenant in the conduct of its business, or otherwise, or a joint venturer, or a member of a joint enterprise with the Tenant, and the relationship of principal and agent is not created as a result of the entering into of this Lease.

2.12 Joint and Several Liability

The liability to pay Rent and perform all other obligations under this Lease of each Person signing this Lease as the Tenant where the Tenant is more than one Person, shall be deemed to be joint and several.

2.13 Landlord as Agent

The Tenant agrees that the Landlord acts as agent or trustee for the Released Persons to the extent necessary to ensure that all exculpatory provisions and indemnities included in favour of the Released Persons in this Lease are enforceable by the Landlord against the Tenant.

2.14 Interpretation

The Landlord and the Tenant agree that notwithstanding any rule of law or equity, presumption, principle of construction, law or statutory enactment to the contrary:

- (a) in any controversy, dispute, contest, arbitration, mediation or legal proceeding of any kind, including an action, lawsuit, motion, application, reference or appeal regarding the interpretation, validity or enforcement of this Lease or any of its provisions, there shall be no inference, presumption or conclusion drawn whatsoever against either the Landlord or the Tenant by virtue of that party having

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

- (b) any deletion of language or wording from this Lease prior to execution by the Landlord and the Tenant shall not be construed to have any particular meaning or to raise any presumption, construction or implication including, without limitation, any implication that by the deletion of certain language or wording, the Landlord and the Tenant intended to state the opposite of the deleted language or wording; and
- (c) the selection or use of any bold, italicized, underlined or coloured print in this Lease shall not be construed to have any particular meaning or to raise any presumption, construction or implication.

2.15 Reasonableness

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

2.16 Conflict with Schedules

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

2.17 Amendment and Waiver

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

ARTICLE III GRANT AND TERM

3.01 Demise

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

3.02 Commencement and Termination Date of Term

The Tenant will have and hold the Leased Premises for and during the Term commencing on the Commencement Date and expiring on the Termination Date, unless terminated earlier pursuant to the provisions hereof.

3.03 “As Is” Condition of Leased Premises

The Tenant agrees to accept the Leased Premises in an “as is, where is” condition, except as otherwise provided herein. The Tenant further agrees that, except as may be specifically set out herein, there is no promise, representation or undertaking binding upon the Landlord with respect to any alteration, remodelling or decoration of the Leased Premises or with respect to the installation of equipment or fixtures in the Leased Premises, or to prepare them or make them suitable for the Tenant's occupancy and use.

3.04 Delay in Possession

Should the Tenant be delayed by any fault of the Landlord or any other reason (other than the fault of the Tenant) in taking possession of the Leased Premises at the start of the Commencement Date, then and only then shall the Commencement Date and the Term be postponed for the same number of days that the Tenant is delayed in taking possession of the Leased Premises. The Tenant acknowledges and agrees that such postponement shall be full settlement for any claims it might have against the Landlord for such delay.

3.05 Restrictive Covenant

The Landlord hereby agrees that it shall not at any time during the Term, lease, sublease, licence or allow the occupation of any part of the Landlord's property located in Canada, servicing U.S. bound traffic, for any duty-free, banking, currency exchange or for any other retail operation, services or purposes which are or may be in any way competitive with the facilities and services offered within the Leased Premises.

3.06 Right to Extend the Term

Provided that the Tenant: (i) is itself in physical occupation of the whole of the Leased Premises; (ii) has duly and regularly paid the Rent, (iii) is actively operating from the Premises and performs all of the covenants, provisos and agreements on the part of Tenant to be paid and performed in this Lease; and (iv) has given Landlord no less than twelve (12) months' written notice and no more than eighteen (18) months' written notice prior to the expiry date of the Term of its election to extend the Term, Tenant shall have the right and option to extend the Term for one (1) additional period of five (5) years (the “Extension Term”) upon the same terms and conditions as in this Lease except that there shall be no further right to extend the term. If Tenant elects to exercise its said option to extend, the Term shall be automatically extended for the Extension Term covered by the option so exercised. If Tenant shall fail to give notice in writing exercising its option to extend within the time stipulated in this section 3.06 the Tenant's rights to extend the Term of this Lease shall be null and void. There will be no further right to extend the Term beyond the Extension Term.

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

ARTICLE IV RENT

4.01 Covenant to Pay

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

4.02 Base Rent

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

4.03 Percentage Rent

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

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

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

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

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

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

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

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

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

4.04 Accrual of Rent

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

4.05 Rent and Payments Generally

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

- (a) be paid when due hereunder, without prior demand therefor and without any abatement, set-off, compensation or deduction whatsoever (except as otherwise specifically provided for in this Lease);
- (b) be applied towards amounts then outstanding hereunder in such manner as the Landlord determines in its sole discretion;
- (c) bear interest at a rate equal to twenty-four percent (24%) per annum, calculated and payable monthly from the date such Rent or other payments became due to and including the date of payment;
- (d) an administrative charge of \$150.00 will be charged in connection with any late payment or returned cheque to cover the Landlord's additional administration costs;
- (e) in addition the Tenant shall pay all Sales Taxes. The amount of such Sales Taxes will be calculated by the Landlord in accordance with the applicable legislation and will be paid to the Landlord (or to the lawful taxing authority, as the Landlord may direct) on the due date of the amounts in respect of which such Sales Taxes are payable. All such payments shall be made prior to the date that the same shall become due and payable and any interest and any penalties assessed as a result of any default in or late payment of same shall be the sole responsibility of the Tenant. Notwithstanding any other provision of this Lease, the amount payable by the Tenant under this section shall be deemed not to be Rent but the Landlord shall have all of the same remedies for and rights of recovery of such amount as it has for the recovery of Rent under this Lease or otherwise; and
- (f) if the Commencement Date is on a day other than the first day of a calendar month or if the Term ends on any day other than the last day of the month, Rent for the fractions of a month at the Commencement Date and at the end of the Term shall be calculated on a pro rata basis.

4.06 Letter of Credit

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

may, in addition to any and all other rights and remedies provided for in this Lease or at law, draw a portion of or all of the principal amount of the Letter of Credit, whereupon the proceeds thereof shall be applied to compensate Landlord for damages suffered by it as the result of Tenant's default, and the balance, if any, will be returned to the Tenant. If the Landlord draws all or part of the Letter of Credit, the Tenant shall provide the Landlord with a replacement Letter of Credit in the full amount of \$50,000 upon written demand from the Landlord to do so.

The rights of Landlord hereunder, in respect of the Letter of Credit, shall continue in full force and effect and shall not be waived, released, discharged, impaired or affected by reason of the release or discharge of Tenant in any receivership, bankruptcy, insolvency, winding-up or other creditors' proceedings including, without limitation, any proceedings under the *Bankruptcy and Insolvency Act* (Canada) or the *Companies Creditors' Arrangement Act* (Canada), or the surrender, disclaimer, repudiation or termination of the Lease in any such proceedings and shall continue with respect to the periods prior thereto and thereafter as if the Lease had not been surrendered, disclaimed, repudiated, or terminated.

At the end of the Term or any Extension Term if applicable and provided that the Tenant is not then in default, which default remains uncured, under the terms of this Lease, the Landlord shall return the Letter of Credit, or the remaining balance of the Letter of Credit if it has been drawn upon in accordance with the terms hereof, to the Tenant.

ARTICLE V FINANCIAL INFORMATION

5.01 Monthly Statements

The Tenant shall furnish in writing to the Landlord by the tenth (10th) calendar day of the succeeding month, monthly statements of the Tenant's Gross Sales, patron counts, vehicle counts for the preceding month, and any other similar financial or statistical information which the Landlord may request. The monthly statement of the Tenant's Gross Sales shall: (i) state that the Tenant's Gross Sales as reported in the monthly statement is in accordance with the definition of Tenant's Gross Sales in Section 2.01(ss) (ii) contain a certification by the Tenant that the monthly statement is correct; (iii) is in the detail and form that the Landlord requires; and (iv) without limiting the requirements stated above, shows (1) the amount of Tenant's Gross Sales for the preceding month, (and fractional months, if any, at the commencement or end of the Term); (2) the amount of Tenant's Gross Sales for all preceding months of the Rental Year, (and fractional months, if any, at the commencement or end of the Term); and (3) the monthly payments made on account of Basic Rent and Percentage Rent for the Rental Year.

Failure of the Tenant to comply with this provision shall at the option of the Landlord constitute a default under the terms of this Lease and the Landlord shall be entitled to exercise all of its rights and remedies as herein provided.

5.02 Annual Statements

The Tenant shall furnish in writing to the Landlord within forty five (45) calendar days of the end of each year of this Lease and any renewal thereof, the Tenant's Audited Gross Sales statements. Failure of the Tenant to comply with this provision shall at the option of the Landlord constitute a

default under the terms of this Lease and the Landlord shall be entitled to exercise all of its rights and remedies as herein provided.

If the total of the Percentage Rent paid by the Tenant in respect of a Rental Year is less than the amount of Percentage Rent payable for such Rental Year calculated based on the Tenant's Audited Gross sales statement delivered in accordance with this Section 5.02, the Tenant shall pay the difference to the Landlord no later than the first day of the month immediately following the month in which the Landlord receives the statement. Provided that the Tenant is not in default, if the Percentage Rent paid is greater than the actual amount of Percentage Rent payable for such Rental Year, the difference shall be applied in reduction of future payments, if any, due under this Lease, or if no future payments are due, shall be refunded to the Tenant.

5.03 Traffic Reports

The Landlord shall provide the Tenant with a copy of the daily bridge traffic counts for the Peace Bridge.

5.04 Books and Records

The Tenant will keep in the Leased Premises or at its principal office in Canada, for at least four (4) years after the end of each Rental Year, adequate books and records kept in accordance with generally accepted accounting principles that show inventories and receipts of merchandise at the Leased Premises and daily receipts from all sales, charges, services and other transactions, in or from the Leased Premises made by the Tenant and any other Persons conducting business in or from the Leased Premises as well as sales tax returns, pertinent original sales records, and any other sales records that the Landlord reasonably requires and that would normally be examined by an accountant pursuant to accepted auditing standards in performing a detailed audit of Tenant's Gross Sales. The Tenant will also cause the records described above to be kept by all Persons doing business in or from the Leased Premises. The Tenant, and all other Persons conducting business in or from the Leased Premises, will record at the time of the sale, in the presence of the customer, all receipts from sales, charges, services or other transactions whether for cash or credit, in a cash register or registers having a sealed cumulative total and any other control features that are required by the Landlord.

5.05 Right to Examine

The Tenant shall make available for inspection and audit by a representative of Landlord, at reasonable times during business hours, all such books, records and other information in order to allow Landlord to verify such statements of Tenant's Gross Sales and the inventories of merchandise at the Leased Premises. The Landlord and its authorized representatives may examine the Tenant's records and procedures during regular business hours, and may have a Person in the Leased Premises to check, verify and tabulate the Tenant's Gross Sales, or to examine accounting records and procedures including control features affecting the determination of the Tenant's Gross Revenue.

5.06 Audit

The Landlord may, at reasonable times, cause a complete audit to be made of the Tenant's business and records relating to the calculation of the Tenant's Gross Sales completed by an auditor who shall be a chartered accountant or other accredited public accountant independent of the Landlord. If the auditor reports that the Tenant's records and procedures are insufficient to permit a determination of the Tenant's Gross Sales for a Rental Year, or a part of a Rental Year, or that the Tenant is not complying with this ARTICLE V, the Landlord may deliver to the Tenant an estimate (which will be final and binding on the Tenant) of the Tenant's Gross Sales for the relevant period and the Tenant will immediately pay to the Landlord the amount shown in the estimate to be owing.

If any inspection or audit by Landlord reveals an understatement by Tenant of the Tenant's Gross Sales by more than two percent (2%) and such understatements occur twice or more within any five-year period, Tenant shall pay Landlord on demand for the cost of each such inspection and audit, as well as five (5) times the amount by which Rent was understated or underpaid for each applicable period. If the Tenant substantially, continually or repeatedly fails to produce records and follow procedures sufficient to permit a determination of the Tenant's Gross Sales or if the Tenant's Audited Gross Sales is understated by two percent (2%) or more on more than three (3) occasions, then in addition to any other remedies of the Landlord under this Lease or otherwise, the Landlord may terminate this Lease on five (5) days' prior written notice to the Tenant. Landlord must inspect and audit such records within two years after the date of each annual statement and Landlord's inspection and audit shall be limited to the period covered by such statement.

5.07 Confidentiality

The Landlord undertakes to treat the financial information of the Tenant provided to the Landlord under this Lease as strictly confidential and not to divulge such financial information to any person, firm, corporation or other entity (other than the Landlord's directors, officers, employees or professional advisors who have a need to know such financial information and who shall be obligated to treat all such financial information confidential). The confidentiality obligations under this Section 5.07 shall not apply to: (i) information which is generally available to the public; (ii) information which after disclosure by the Landlord becomes generally available to the public, otherwise than through any act or omission on the part of the Landlord; or (iii) information which the Landlord is obligated to disclose by law.

5.08 Tenant's Failure

If the Tenant fails to deliver a statement or an audit opinion required under this ARTICLE V within the time required, the Landlord may, on five (5) days' notice to the Tenant, employ an auditor to examine the Tenant's books and records to certify the amount of the Tenant's Gross Sales for the period related to the statement or the audit opinion, and the Tenant will pay to the Landlord, on demand, as Additional Rent the cost of the examination together with the sums shown by the examination to be owing on account of Percentage Rent with interest on the latter calculated from the date the statement or the audit opinion was required at five percent (5%) above the Prime Rate.

ARTICLE VI
PROPERTY TAXES AND OPERATING COSTS

6.01 Property Taxes Payable by the Tenant

The Tenant shall pay to the Landlord, as Additional Rent, all Property Taxes levied, rated, charged or assessed throughout the Term, on or in relation to the Leased Premises, or any part thereof, in accordance with the following:

- (a) payment shall be due in equal monthly installments over each taxation period or such shorter period as Landlord may reasonably require such that the Landlord will have received an amount sufficient to pay each installment of Property Taxes when due to the taxing authorities. Prior to the commencement of each taxation period, the Landlord shall estimate the amount of such equal monthly installments and notify the Tenant in writing of such estimate. From time to time during the taxation period, the Landlord may re-estimate the amounts payable for such taxation period, in which event the Landlord shall notify the Tenant in writing of such re-estimate and fix monthly installments for the remaining balance of such taxation period;
- (b) to the extent that a separate assessment and separate tax bill for Property Taxes in respect of the Leased Premises are not provided by the assessment and/or taxing authorities, the Tenant will pay a share of Property Taxes levied, rated, charged or assessed on or in relation to all of the Lands on such basis as the Landlord shall reasonably and equitably determine. To the extent the Leased Premises are assessed and billed separately with respect to any Property Taxes, then, at the election of the Landlord, the Tenant's share of such Property Taxes shall be computed on the basis of such separate assessments or apportionments; and
- (c) if the Landlord so directs, the Tenant shall pay Property Taxes directly to the taxing authorities. In that event, the Tenant shall make payment on or before the due date of each installment and shall provide to the Landlord on demand evidence of payment in the form of receipted bills.

6.02 Contesting Property Taxes

Property Taxes, or the assessments in respect of Property Taxes which are the subject of any contest by Landlord or Tenant, shall nonetheless be payable in accordance with the foregoing provisions hereof, provided, however, that in the event Tenant shall have paid any amount in respect of Property Taxes in excess of the amount ultimately found payable as a result of the disposition of any such contest, and Landlord receives a refund in respect thereof, the appropriate amount of such refund shall be refunded to or, at the option of Landlord, credited to the account of Tenant. Landlord may contest any Property Taxes with respect to the Leased Premises or all or any part of the Lands and appeal any assessments related thereto and may withdraw any such contest or appeal or may agree with the relevant authorities on any settlement, compromise or conclusion in respect thereof and Tenant consents to Landlord's so doing. Tenant will co-operate with Landlord in respect of any such contest and appeal and shall make available to Landlord such information in respect thereof as Landlord requests. Tenant will execute forthwith on request all

consents, authorizations or other documents as Landlord requests to give full effect to the foregoing.

Tenant will not contest any Property Taxes or appeal any assessments related to the Leased Premises or the Lands. However, provided Landlord is not otherwise contesting such assessment, Tenant may contest any separate assessment that relates solely to the Leased Premises, with the consent of Landlord, such consent not to be unreasonably withheld, provided that Tenant shall be solely responsible, and shall indemnify Landlord, for all costs, penalties or fees, relating to such contest, including without limitation, any resulting increase in Property Taxes. Tenant shall pay to Landlord forthwith upon demand such reasonable share as allocated by Landlord, acting reasonably, of all costs and expenses of any kind incurred by Landlord bona fide and acting reasonably in obtaining or attempting to obtain information in respect of or a reduction or re-allocation in respect of Property Taxes and any assessments related thereto including, without limitation, legal, appraisal, administration and overhead costs.

6.03 Business Taxes

In each and every year during the Term, the Tenant shall either pay all Business Taxes as Additional Rent or discharge within fifteen (15) days after they become due and indemnify the Landlord from and against payment of, and any interest or penalty in respect of Business Taxes.

6.04 Operating Costs

In each Rental Year, the Tenant will pay to the Landlord, as Additional Rent, the costs, expenses, fees, rentals, disbursements and outlays of every nature and kind paid, payable or incurred by or on behalf of the Landlord in owning, maintaining, repairing, replacing, operating, administering and managing the Leased Premises (the “**Operating Costs**”). The Operating Costs shall include, without limitation or duplication, all of the following costs, expenses, fees, rentals, disbursements and outlays:

- (a) the cost of the Landlord's insurance premiums on lands, buildings, improvements, equipment and other property in the Leased Premises together with all amounts falling below the level of the Landlord's insurance deductibles which are paid by the Landlord in connection with claims made against it, including the costs of the insurance detailed in Section 10.06. The Landlord's insurance and costs of insurance may include, without limitation, (A) loss of insurable gross profits attributable to the perils insured against by the Landlord or commonly insured against by landlords, including loss of Rent and other amounts receivable from the Tenant pursuant to this Lease, (B) commercial general liability coverage including the exposure of personal injury, bodily injury and property damage occurrence, including all contractual obligations coverage and including actions of the employees, contractors, subcontractors and agents working on behalf of the Landlord and (C) costs and expenses for defending and payment of claims below deductibles;

- (b) accounting, auditing, legal and other professional and consulting fees relating to any reports or actions required to be taken by the Landlord under the terms of this Lease;
- (c) the cost of any and all environmental inspections and Environmental Site Assessments of the Leased Premises conducted by the Landlord from time to time which are not the responsibility of the Tenant;
- (d) the cost of any and all repairs, replacements (including major repairs and any repairs and replacements required to comply with all Applicable Laws, or the requirements of the Landlord's insurers), preventative and ongoing maintenance and operation, inspection, engineering and service contracts and consulting services, if any, relating to the Leased Premises;
- (e) all costs incurred in contesting or appealing Property Taxes with respect to the Leased Premises or related assessments, including legal, appraisal and other professional fees and administration and overhead related thereto;
- (f) all other direct and indirect costs and expenses of every kind, to the extent incurred in or allocable to the operation, supervision, administration or management of work or maintenance at all or any part of the Leased Premises, or any of its appurtenances; and
- (g) Sales Taxes on the purchase of goods and services included in the calculation of Operating Costs to the extent that the Landlord has not recovered an input tax credit or refund in respect of the same; notwithstanding any other provision of this Lease, the amount payable by the Tenant under this paragraph shall be deemed not to be Rent but the Landlord shall have all of the same remedies for and rights of recovery of such amount as it has for the recovery of Rent under this Lease or otherwise.

6.05 Payment of Operating Costs

Before the commencement of each Rental Year, the Landlord will estimate the Operating Costs. The Tenant shall pay such estimated amount to the Landlord in equal consecutive monthly instalments, each in advance on the first day of each month during such Rental Year. The Landlord may from time to time during a Rental Year re-estimate any items of Operating Costs and may fix monthly instalments for the then remaining balance of the Rental Year so that such items will have been entirely paid during such Rental Year.

Within one hundred and twenty (120) days after the end of such Rental Year, the Landlord will determine and provide the Tenant with a statement in reasonable detail for the relevant Rental Year of the Operating Costs and Property Taxes. If the total of the monthly instalments paid by the Tenant in respect of estimated Operating Costs and Property Taxes for such Rental Year is less than the amount of Operating Costs and Property Taxes payable for such Rental Year shown on such statement, the Tenant shall pay the difference to the Landlord no later than the first day of the month immediately following the month in which the Tenant receives the statement. Provided that the Tenant is not in default, if the estimated amount of such monthly instalments paid is greater than the actual amount of Operating Costs and Property Taxes payable for such Rental Year, the

difference shall be applied in reduction of future payments, if any, due under this Lease, or if no future payments are due, shall be refunded to the Tenant. Neither party may claim a re-adjustment in respect of Operating Costs and Property Taxes for a Rental Year except by written notice delivered to the other party within one year after the delivery date of the Landlord's statement of Operating Costs and Property Taxes.

ARTICLE VII UTILITIES

7.01 Charges for Utilities

The Tenant shall pay promptly when due all charges, costs, accounts and any other sums payable by reason of the supply of the utilities to the Leased Premises and shall indemnify the Landlord from and against payment of, and any interest or penalty, in respect of all such utilities. The Tenant, at its own cost and expense, shall procure each and every permit, licence or other authorization required pertaining to any work required in respect of utilities consumed in or for the Leased Premises. The Tenant acknowledges and agrees that in the event any such utility supplier requires as a condition of the utility supply, or as a condition of constructing any infrastructure or installing any equipment to enable the utility supplier to provide such utility for the Tenant's use or consumption, that an agreement or contract shall be entered with the utility supplier and/or that a letter of credit or other form of security be posted with or delivered to the utility supplier, the Tenant shall, upon the written request of the Landlord, execute and deliver such agreement in the Tenant's name to such supplier, and cause to be issued, at the Tenant's sole cost and in the Tenant's name and deliver such letter of credit or other security to such supplier. Should the Tenant fail to execute and deliver any such agreement or to cause to be issued and delivered such letter of credit or to pay such other security deposit, within twenty (20) days of receipt of the Landlord's written notice that it do so, the Landlord shall be entitled on behalf of and as lawful attorney for the Tenant to execute and deliver such agreement in the name of and on behalf of the Tenant, and to pay such deposit on behalf of the Tenant, and in such event the Landlord's costs of so doing shall be payable by the Tenant forthwith upon demand as Additional Rent.

7.02 Tenant Not to Overload Facilities

The Tenant shall not install any equipment which overloads the capacity of any utility, electrical or mechanical facilities in the Leased Premises. The Tenant agrees that if any changes proposed or use by the Tenant requires additional utility, electrical or mechanical facilities, the Landlord may, in its sole discretion, if they are available, elect to install them in accordance with plans and specifications to be approved in advance in writing by the Landlord and the cost thereof, together with an administration fee equal to fifteen percent (15%) of such cost, shall be payable on demand by the Tenant as Additional Rent.

7.03 No Liability

In no event shall the Landlord be liable for any injury to the Tenant, its employees, agents or invitees, or to the Leased Premises, or to any property of the Tenant or anyone else, for any loss of profits or business interruption, indirect or consequential damages, or for any other costs, losses

or damages of whatsoever kind arising from any interruption or failure in the supply of any utility or service to the Leased Premises.

ARTICLE VIII HVAC

8.01 HVAC System

The Tenant shall be responsible, at its sole cost, for operating, maintaining, repairing and replacing the HVAC System throughout the Term. The Tenant covenants and agrees to take out and keep in force throughout the Term a standard servicing contract with a reputable company for the preventative maintenance and service of the HVAC System. Thirty (30) days prior to the end of each Rental Year (excluding the initial 2016 partial Rental Year), the Tenant will provide the Landlord with a certificate from a recognized, reputable heating and air-conditioning contractor approved in writing by the Landlord, stating that the HVAC System is in good working order. If such certificate is not provided, the Landlord may obtain such a certificate on behalf of the Tenant and if required, perform all necessary repairs and replacements to the HVAC System, and the cost of such certificate and work, together with an administration fee equal to fifteen percent (15%) of such cost, shall be payable by the Tenant to the Landlord as Additional Rent, forthwith on demand.

8.02 Landlord's Right to Maintain / Repair HVAC System

In the event that the Tenant neglects or refuses to maintain and repair the heating, ventilating and/or air conditioning system and equipment serving the Leased Premises, then the Landlord, after five (5) days written notice to the Tenant during which period the Tenant has not commenced to maintain or repair the system and equipment, may maintain and repair the heating, ventilating and/or air conditioning system and equipment serving the Leased Premises and the Tenant shall reimburse the Landlord its costs and expenses of all such repairs, replacements to and maintenance and operation of the heating, ventilating and air conditioning equipment and systems which serve the Leased Premises in accordance with the terms of Section 9.05.

8.03 Tenant's Responsibility

The Tenant will heat and ventilate the Leased Premises at all times throughout the Term in order to maintain reasonable conditions of temperature and humidity within the Leased Premises, in accordance with the terms of this Lease and all Applicable Laws.

ARTICLE IX USE OF THE LEASED PREMISES

9.01 Use of the Leased Premises

The Tenant shall not use the Leased Premises for any purpose other than the Permitted Use. The Tenant acknowledges that the Landlord is making no representations with respect to the zoning of the Property or the compliance therewith of the Tenant's Permitted Use and it shall be the Tenant's sole responsibility to satisfy itself in this regard.

9.02 Conduct and Operation of Business

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

- (a) operate its business 24 hours a day, seven days a week, 365 days a year with due diligence and efficiency and maintain an adequate staff to properly serve all customers;
- (b) observe and obey the reasonable rules and regulations of the Landlord promulgated from time to time for reasons of safety, health or preservation of property or for the maintenance of the good and orderly appearance and operations of the Peace Bridge. Without limiting the generality of the foregoing, the Landlord, after consulting with the Tenant, may provide rules setting out where customers of the Tenant shall park their vehicles and may further provide for the orderly flow of traffic entering and exiting from the area of the Leased Premises provided such rules are reasonable and acceptable to the Tenant, acting reasonably. The Tenant agrees that it shall be responsible to provide any and all traffic direction required in or upon the Leased Premises.
- (c) abide by all reasonable rules and regulations and general policies formulated by the Landlord from time to time relating to the delivery of goods and merchandise to the Leased Premises;
- (d) not erect, maintain or display any signs or any advertising at or on the exterior of the Leased Premises without the prior written approval of the Landlord, such approval not to be unreasonably withheld;
- (e) keep the Leased Premises clean, neat and free of hazards and fire dangers at all times;
- (f) perform all landscaping and maintenance of all outside areas, including cleaning, line painting, snow and ice clearing and removal and salting of sidewalks, driveways and parking facilities and all lawn and garden maintenance;
- (g) provide policing, supervision and security as required;
- (h) maintain proper lighting in the parking facilities;
- (i) take any and all action necessary to prevent any of its employees from affecting the orderly flow of traffic in or upon the Leased Premises or any other lands owned by the Landlord;
- (j) dispose of all waste or recyclable material at a location in the Leased Premises at such times and in such manner as may be directed by the Landlord from time to time and in accordance with Applicable Law;

- (k) obtain a Licence and maintain its Licence in good standing;
- (l) provide adequate public restrooms for the anticipated number of travelers using the Peace Bridge, including persons who may not be patrons of the duty free shop;
- (m) in the event that the Tenant's Licence is terminated, revoked or suspended for any period of Time, or has expired, the Tenant shall cause its Licence to be reinstated or renewed within 60 days of such termination, revocation, suspension or expiration;
- (n) operate and manage the business at the Leased Property in a manner consistent with the Tenant's Proposal; and
- (o) abide by any and all directives of Canada Border Services Agency in regards to the conduct of the Tenant's business.

9.03 Nuisance and Waste

The Tenant shall not commit any waste upon, or damage to, the Leased Premises or commit any nuisance or other act or thing and will not perform any acts or carry on any practices which may damage the Leased Premises. The Tenant will not permit any odours, vapours, steam, water, vibrations, noises or other undesirable effects to emanate from the Leased Premises or any equipment or installation therein which, in the Landlord's opinion, are objectionable, and the Tenant will not cause any interference with the safety, comfort or convenience of the Landlord.

9.04 Observance of Law

The Tenant shall, at its own expense, comply with all Applicable Laws affecting the Leased Premises or the use or occupation thereof including, without limitation, police, fire and health regulations and requirements of the fire insurance underwriters. The Tenant shall carry out modifications, alterations or changes to the Leased Premises and the Tenant's conduct of business in or use of the Leased Premises which are required by any such authorities and shall keep its Licence in good standing.

9.05 Additional Services of the Landlord

The Tenant shall pay to the Landlord the costs of all Additional Services provided by the Landlord to the Tenant, together with an administration fee equal to fifteen percent (15%), forthwith on demand as Additional Rent.

9.06 Traffic Direction

In the event that the Landlord, after consultation with the Tenant, determines that additional traffic personnel are required as a result of the operations of Tenant, Landlord shall add such additional personnel as may be required, and Tenant and Landlord shall each pay one-half of the cost of such additional personnel.

ARTICLE X
TENANT'S ENVIRONMENTAL COVENANT AND INDEMNITY

10.01 Compliance with Environmental Laws and Environmental Approvals

The Tenant shall comply with all applicable Environmental Laws and shall obtain and comply with any Environmental Approvals that may be required for the Tenant's use of the Leased Premises. Without restricting the generality of the foregoing, the Tenant shall not use, generate, handle, transport, manufacture, refine, treat, store, remove, recycle or dispose of any Contaminant on the Leased Premises except in compliance with all applicable Environmental Laws.

10.02 Release of a Contaminant

- (a) In the event of a Release of a Contaminant at or from the Leased Premises other than in compliance with Environmental Laws, the Tenant shall immediately notify the Landlord of the Release and shall at its own expense, immediately retain a qualified environmental consultant acceptable to the Landlord, acting reasonably, to prepare a report assessing the full nature and extent of the Release and recommending the work plan to remediate the Release and to restore the Leased Premises, any affected abutting lands, as well as the natural environment, to the condition they were in before the Release, and the Tenant shall submit this report to the Landlord for the Landlord's approval acting reasonably.
- (b) Upon the Landlord's approval of the report and at the sole option of the Landlord, either the Tenant shall arrange for the implementation of the work plan, or the Landlord shall arrange for the implementation of the work plan, in either case at the cost of the Tenant, together with an administration fee of fifteen percent (15%) of such cost, which shall be payable as Additional Rent forthwith upon receipt of written demand for payment from the Landlord.
- (c) In the event that the Landlord, acting reasonably, does not approve of the report submitted by the Tenant, the Landlord shall retain a qualified environmental consultant to prepare a report, the cost of which plus an administration fee of fifteen percent (15%) of such cost, shall be borne by the Tenant. Upon the completion of the report, at the sole option of the Landlord, either the Tenant shall arrange for the implementation of the work plan, or the Landlord shall arrange for the implementation of the work plan, in either case at the cost to the Tenant together with an administration fee of fifteen percent (15%) of such costs, which shall be payable as Additional Rent forthwith upon receipt of written demand for payment from the Landlord.
- (d) In addition, the Tenant shall be liable to the Landlord for loss of rent, loss of profits, or for any consequential, incidental, indirect, special or punitive damages of any kind resulting from the Release and any remediation required pursuant to this Section.

10.03 Environmental Site Assessment

The Landlord and its agent shall have the right to enter upon the Leased Premises and conduct an Environmental Site Assessment from time to time. In the event the ESA discloses a Release, any apparent or imminent contravention of Environmental Laws or other matter requiring remediation or other action in order to prevent a Claim from arising for which the Tenant or any person for whom the Tenant is responsible at law, the Tenant shall pay for the ESA; in the event the ESA does not disclose such a Release or other condition, the cost of the ESA shall be paid for by the Landlord.

10.04 Tenant's Environmental Indemnity

The Tenant hereby indemnifies and saves harmless the Released Persons from and against any and all Claims which may be made against the Released Persons as a direct or indirect result of the failure or neglect by the Tenant to comply with any Environmental Laws or Environmental Approvals in respect to the Leased Premises, as a direct or indirect result of the existence on, in, under or adjacent to the Leased Premises of any Contaminant attributable to the Tenant's use or occupation of the Leased Premises or as a result of any Claims made against the Tenant arising from or involving Environmental Laws. This indemnity shall survive the termination or surrender of this Lease or any renewal or extension thereof and shall continue in full force and effect without time limit.

10.05 Governmental Authority Requirements

If any Governmental Authority having jurisdiction shall lawfully require the investigation, monitoring or remediation of any Contaminant used, held, released, discharged, abandoned or placed upon the Leased Premises or Released into the environment by the Tenant, then the Tenant shall, at its own expense, subject to Section 10.02, carry out all lawfully required work and shall provide to the Landlord full information with respect to all such work and comply with all applicable Environmental Laws with respect to such work. At the option of the Landlord, the Landlord may itself undertake such work or any part thereof at the cost and expense of the Tenant and that cost and expense plus an administration fee equal to fifteen percent (15%) shall be paid to the Landlord forthwith on demand as Additional Rent.

10.06 Pre Existing Contaminants

The Landlord hereby releases the Tenant from liability to the Released Persons for any and all Claims which may be made against the Released Persons as a result of the existence as at the Commencement Date of any Contaminant on, in, under or adjacent to the Leased Premises.

10.07 Responsibility for Environmental Contaminants

- (a) Despite any statutory provision or rule of law to the contrary, any Contaminants brought to or resulting from activities carried out on the Leased Premises during the Term or any renewal or extension thereof shall be and remain the sole and exclusive property of the Tenant and shall not become the property of the Landlord despite the degree of affixation of the Contaminants or the goods contained in the Contaminants to the Leased Premises and despite the expiry, repudiation,

disclaimer or earlier termination of this Lease; and, at the option of the Landlord, to the extent there is non-compliance with applicable Environmental Laws, any substance, including soil and groundwater contaminated by such Contaminants shall become the property of the Tenant.

- (b) The Tenant covenants and agrees to carry out at the request of the Landlord at its own cost and expense, remediation of all Contamination of the Leased Premises arising out of the Tenant's uses or occupation thereof so that the soil and groundwater condition of the Leased Premises and any affected areas beyond the Leased Premises or property owned or controlled by a third party, complies with remediation criteria set out in guidelines, policies, criteria or otherwise established under Environmental Laws. Risk assessment will not be used unless agreeable to the Landlord. This covenant shall survive the Termination Date.
- (c) At the option of the Landlord, the Landlord may itself undertake such work or any part thereof at the cost and expense of the Tenant and that cost and expense plus an administration fee equal to fifteen percent (15%) shall be paid to the Landlord forthwith on demand as Additional Rent; but having commenced such work, the Landlord shall have no obligation to the Tenant to complete such work.
- (d) The obligations of the Tenant hereunder relating to Contaminants shall survive any assignment, expiry, repudiation, disclaimer or earlier termination of this Lease. To the extent that the performance of those obligations requires access to or entry upon the Leased Premises, the Tenant shall have such entry and access after such expiry, repudiation, disclaimer or earlier termination only at such times and upon such terms and conditions as the Landlord may reasonably from time to time specify.

ARTICLE XI INSURANCE AND INDEMNITY

11.01 Tenant's Insurance

The Tenant will obtain and maintain the following insurance throughout the Term and any renewal or extension thereof:

- (a) "All risks" (including flood and earthquake) property insurance for the full replacement cost, insuring (a) all property owned by the Tenant, or for which the Tenant is responsible, and located within the Leased Premises including, but not limited to, fittings, fixtures, additions, alterations, partitions and all other Leasehold Improvements, and (b) the Tenant's furniture, inventory and equipment;
- (b) broad form boiler and machinery insurance on a blanket repair and replacement basis with limits for each accident in an amount equal to at least the replacement cost of the property with respect to all boilers and machinery owned or operated by the Tenant or by others (other than the Landlord) on behalf of the Tenant in the Leased Premises;

- (c) Business interruption insurance for a minimum period of twenty-four (24) months or such longer period that will reimburse the Tenant for direct and indirect loss of earnings and profit attributable to damage caused by the perils insured against under Subsections (a) and (b) above, and other perils insured by prudent tenants, or attributable to prevention of access to the Leased Premises by civil authorities;
- (d) Commercial general liability insurance under a standard commercial general liability form which shall include coverage against bodily injury, including death, and property damage. Such insurance shall:
 - (i) include extensions such as personal injury, blanket contractual liability, employers liability, owner's and contractor's protective liability, cross liability, severability of interests coverage, breach of warranty clause and non-owned automobile insurance;
 - (ii) cover the Tenant's use of the Leased Premises, including all of the Tenant's activities and operations therein and any other Persons performing work on behalf of the Tenant, and those for whom the Tenant is responsible at law;
 - (iii) be written on an "occurrence" form with inclusive limits of liability not less than Five Million Dollars (\$5,000,000.00) per occurrence or such higher limits as the Landlord may require from time to time;
 - (iv) include tenant's legal liability insurance covering the perils of "all risks" for the replacement cost of the Leased Premises, including loss of use thereof; and
 - (v) include standard automobile insurance covering third party liability with limits of liability not less than One Million Dollars (\$1,000,000.00) per accident, plus accident benefits, for all automobiles owned or operated by or on behalf of the Tenant; and
- (e) Any other form of insurance the Tenant, the Landlord or its Mortgagee may require from time to time, in form, in amounts insured, and for perils or risks insured against, which a prudent tenant would insure.

11.02 Requirements of Insurance

- (a) The policies required under Sections 11.01(a), 11.01(b), 11.01(c) and 11.01(d) above will also contain a waiver of all subrogation rights which the Tenant's insurers may have against the Released Persons whether or not the damage is caused by their act, error, omission or negligence.
- (b) All policies will:
 - (i) be placed with insurers acceptable to the Landlord, in a form acceptable to the Landlord;

- (ii) name the Released Persons and such other Persons as the Landlord may designate from time to time, as additional insureds;
 - (iii) be primary, and not excess or contributing with any other insurance available to the Landlord;
 - (iv) provide for deductibles which are acceptable to the Landlord;
 - (v) not be invalidated as respects the interests of the Released Persons, or any of them, by reason of any breach or violation of warranty, representation, declaration or condition contained in the policies, or any of them; and
 - (vi) contain a condition by insurers to notify the Released Persons in writing not less than thirty (30) days before any cancellation or material change in policy conditions is effected.
- (c) The Tenant will deliver certificates of insurance duly executed by the Tenant's insurers or their duly authorized representatives, evidencing that all such insurance described above is in full force and effect prior to going into occupancy of the Leased Premises and thereafter at least thirty (30) days prior to the expiry of the then current term of the insurance. Such certificates must confirm the limits and special conditions of such insurance as required by this Section. No review or approval by the Landlord of any such insurance certificates shall operate to derogate from or diminish the Landlord's rights under this Lease.

11.03 Sign Insurance

The Tenant shall insure and keep insured, at its expense, all signs relating to the Tenant's business placed or erected on the exterior of the Leased Premises for and in its name and in the name of the Landlord. The Tenant waives any right of complaint as to the form and location of the Landlord's existing signs.

11.04 Increase in Insurance Premiums

The Tenant will comply promptly with all requirements of the Insurer's Advisory Organization and of each insurer pertaining to the Leased Premises. If the occupancy of the Leased Premises, the conduct of business in the Leased Premises or any acts or omissions of the Tenant in the Leased Premises, or any part thereof, cause an increase in premiums for the insurance carried from time to time by the Landlord on the Leased Premises, the Tenant shall pay the increase as Additional Rent immediately after invoices for the additional premiums are rendered by the Landlord.

11.05 Cancellation of Insurance

If any insurance policy on the Leased Premises is cancelled, or threatened by the insurer to be cancelled, or if the coverage under any insurance policy is reduced in any way by the insurer because of the use or occupation of any part of the Leased Premises by the Tenant or by any occupant of the Leased Premises, and if the Tenant fails to remedy the condition giving rise to the cancellation, threatened cancellation or reduction of coverage within forty-eight (48) hours after

notice by the Landlord, the Landlord may either: (a) re-enter and take possession of the Leased Premises immediately by leaving upon the Leased Premises a notice of its intention to do so, following which the Landlord will have the same rights and remedies as are contained in Article XVII; or (b) enter upon the Leased Premises and remedy the condition giving rise to the cancellation, threatened cancellation or reduction of coverage, and the Tenant will immediately pay the costs and expenses to the Landlord, together with an administration fee equal to fifteen percent (15%) of such costs and expenses, which costs and expenses may be collected by the Landlord as Additional Rent, and the Landlord will not be liable for any damage or injury caused to any property of the Tenant or others located on the Leased Premises as the result of the entry. Such an entry by the Landlord is not a re-entry or a breach of any covenant for quiet enjoyment.

11.06 Landlord's Insurance

The Landlord will obtain and maintain the following insurance throughout the Term of this Lease and any renewal or extension thereof:

- (a) insurance on the Building and improvements and equipment contained therein owned or leased by Landlord or which Landlord desires to insure against damage by fire and extended perils coverage in those reasonable amounts and with those reasonable reductions that would be carried by a prudent owner of a reasonably similar premises, having regard to size, age and location;
- (b) broad form boiler and machinery insurance on a blanket repair and replacement basis with limits for each accident in an amount equal to at least the replacement cost of the boilers and machinery owned by the Landlord, including the HVAC System;
- (c) public liability and property damage insurance with respect to the Landlord's operations in the Leased Premises, in those reasonable amounts and with those reasonable deductibles, that would be carried by a prudent owner of a reasonably similar premises, having regard to size, age and location; and
- (d) such other forms of insurance which the Landlord or the Mortgagee considers advisable from time to time.

Despite this Section 11.06, and regardless of any contribution by the Tenant to the costs of insurance premiums: (i) the Tenant is not relieved of any liability arising from or contributed to by its negligence or its wilful acts or omissions; and (ii) no insurable interest is conferred upon the Tenant under any policies of insurance carried by the Landlord and the Tenant has no right to receive any proceeds of any such insurance policies. The costs of the Landlord's insurance under this Section 11.06 will be included in Operating Costs.

11.07 Loss or Damage

None of the Released Persons shall be liable for any death or injury from or out of any occurrence in, upon, at or relating to the Leased Premises, or damage to property of the Tenant or of others located on the Leased Premises, and will not be responsible for any loss of or damage to any property of the Tenant or others from any cause whatsoever, whether or not the death, injury, loss

or damage results from the negligence of the Released Persons, or any of them. Without limiting the generality of the foregoing, the Released Persons will not be liable for any injury or damage to Persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain, flood, snow or leaks from any part of the Leased Premises or from the pipes, appliances, plumbing works, roof, subsurface of any floor or ceiling or from the street or any other place, or from any dampness or by any other cause whatsoever. None of the Released Persons shall be liable for any damage caused by occupants of adjacent property, or the public, or caused by construction or by any private, public or quasi public work. All of the property of the Tenant kept or stored on the Leased Premises shall be kept or stored at the risk of the Tenant only, and the Tenant will indemnify the Released Persons and save them harmless from any claims arising out of any damages to that property including, but not limited to, any subrogation claims by the Tenant's insurers.

11.08 Indemnification of the Landlord

Despite anything to the contrary contained in this Lease, the Tenant will indemnify the Released Persons and save them harmless from and against any and all Claims (including loss of Rent payable by the Tenant under this Lease), in connection with loss of life, personal injury, damage to property or any other loss or injury whatsoever arising from or out of this Lease, or any occurrence in, upon or at the Leased Premises, or the occupancy or use by the Tenant of the Leased Premises, or any part thereof, or occasioned wholly or in part by any act or omission of the Tenant or by anyone permitted to be on the Leased Premises by the Tenant. If a Released Person, without fault on its part, is made a party to any litigation commenced by or against the Tenant, then the Tenant will protect, indemnify and hold the Released Person harmless and will pay all costs, expenses and reasonable legal fees (on a substantial indemnity basis) incurred or paid by the Released Person in connection with that litigation. The Tenant will also pay all costs, expenses and legal fees (on a substantial indemnity basis) that may be incurred or paid by the Landlord in enforcing the terms, covenants and conditions in this Lease, unless a court decides otherwise. This indemnity will survive the Termination Date.

ARTICLE XII MAINTENANCE, REPAIRS AND ALTERATIONS

12.01 Maintenance and Repairs and Replacement by the Tenant

The Tenant shall, throughout the Term and any extension or renewal thereof, at its sole cost, keep the Leased Premises in a first class condition, as required by the Landlord. The Tenant shall, at its sole cost and expense, maintain, repair and replace, as required, the following:

- (a) the whole of the Leased Premises including, but not limited to, entrances, and all glass, windows and doors, including their frames and mouldings;
- (b) all signs (both interior and exterior), partitions, trade fixtures and Alterations located in or upon the Leased Premises;
- (c) the exterior areas of and facilities on the lands included in the Leased Premises which include, without limitation, the parking areas, driveways, sidewalks, loading

areas, concrete aprons, curbs, gutters, access points, control gates, security barriers or fences, landscaped areas;

- (d) the structural components of the Building including, without limitation, the roof (including the roof deck and roof membrane), foundations, interior walls, interior concrete slab floors and exterior walls; and
- (e) all Building Systems.

If any of the foregoing repairs or replacements (excluding repairs or replacement of the HVAC System) are of a capital nature that are required as a result of the useful life of a capital asset coming to an end and are capable of being amortized by the Landlord according to generally accepted accounting principles, the Tenant may request that same be paid for by the Landlord and charged back to Tenant as Additional Rent with the costs of such items to be amortized over such period as determined by Landlord, provided that such determination is made in accordance with generally accepted accounting principles, on a straight line basis to zero and interest to be calculated and paid annually during the Term on the unamortized cost of such items in respect of which amortization is included at 4% per annum in excess of the Prime Rate. For greater certainty, capital repairs do not include (i) repairs necessary to keep an asset in as good working condition as such asset was as of the Commencement Date (reasonable wear and tear excepted); (ii) any wear on or elimination of parking lot lines, black topping or asphalt sealing, or tarring or asphaltting of cracks or holes or asphaltting of less than the entire of the driveway or parking lot; or (iii) any replacement of glass in the windows.

The Landlord shall cooperate with the Tenant so that in the performance of the Tenant's covenants in this Section 12.01 and the Tenant will have the benefit of any warranties held by the Landlord in respect of the Building.

12.02 Landlord's Approval of Alterations

- (a) Except as provided in Section 12.02(b), the Tenant will not make any repairs, alterations, replacements, Leasehold Improvements or improvements (collectively the "**Alterations**") to the Leased Premises without first obtaining the Landlord's prior written approval. Prior to commencing any Alterations, the Tenant will submit to the Landlord: (i) details of the proposed Alterations including drawings and specifications; (ii) any indemnification or security against liens, costs, damages and expenses the Landlord requires; and (iii) evidence that the Tenant has obtained the necessary consents, permits, licences and inspections from all governmental authorities having jurisdiction.
- (b) The Tenant shall not be required to obtain the Landlord's prior written approval for any minor decorations to the interior of the Building.
- (c) Alterations shall be performed at the Tenant's sole cost in a good and workmanlike manner by competent workmen, in accordance with the drawings and specifications approved by the Landlord and subject to the reasonable restrictions imposed by the Landlord, all in accordance with the Tenant Construction Criteria.

- (d) Despite anything to the contrary contained in this Section, the Landlord may, at its option, complete the Alterations. Upon completion of the Alterations, the Tenant will pay to the Landlord, upon demand, as Additional Rent, the cost of the Alterations as well as any fees related thereto as may be set out from time to time in the Tenant Construction Criteria, together with an administration fee equal to fifteen percent (15%) of such costs,

12.03 Landlord's Inspection

The Tenant permits the Landlord and its agents, upon reasonable prior notice to the Tenant and during normal business hours (except in emergency) of the Tenant without interference to the operations of the Tenant, to enter the Leased Premises to examine the condition, management and operation thereof. In addition to the Tenant's obligations under Section 12.01, the Tenant shall effect the maintenance and carry out any work referred to in that Section in accordance with notice from the Landlord following its inspection. The failure to give the notice does not relieve the Tenant from its obligations under Section 12.01.

12.04 Surrender of the Leased Premises

On the Termination Date or earlier termination of the Term, the Tenant shall peaceably surrender up the Leased Premises to the Landlord in first class condition, will deliver all of the keys for the Leased Premises to the Landlord and will inform the Landlord of all combinations of locks, safes and vaults, if any, in the Leased Premises. The Tenant shall also remove its trade fixtures and the Leasehold Improvements in accordance with the provisions of Section 12.07 at the Termination Date or earlier termination of the Term.

12.05 Repair where Tenant at Fault

Despite anything to the contrary contained in this Lease, if the Leased Premises or any part thereof, requires repair or replacement because of the act of the Tenant, the cost of such repair or replacement, together with an administration fee equal to fifteen percent (15%) of such cost, shall be paid by the Tenant to the Landlord as Additional Rent on demand.

12.06 Tenant Not to Overload Floors

The Tenant will not bring upon the Leased Premises, or any part thereof, any machinery, equipment, article or thing that by reason of its weight, size or use might in the opinion of the Landlord damage the Leased Premises and shall not at any time overload the floors of the Building.

12.07 Removal and Restoration by the Tenant

- (a) Any Leasehold Improvements made by the Tenant, or made by the Landlord on the Tenant's behalf, immediately shall become the property of the Landlord and will not be removed from the Leased Premises except that: (i) the Tenant may, during the Term, in the usual course of its business, and with the prior written consent of the Landlord, remove the trade fixtures which it has installed, but only if they have become excess for the Tenant's purposes or if the Tenant is substituting new and similar trade fixtures, and the Tenant is not in default under this Lease; (ii) the

Tenant will, at the expiration of the Term, at its cost, remove all of its trade fixtures installed in the Leased Premises and those Leasehold Improvements which the Landlord requires to be removed; and all Contaminants required pursuant to ARTICLE X.

- (b) The Tenant will repair any damage to the Leased Premises caused by the installation or removal of the items described in subsection (a) above. This obligation will survive the Termination Date or earlier termination of the Term.
- (c) If the Tenant does not remove any of the items described in subsection (a) which it is required to remove, the Landlord may do so and the Tenant will pay the Landlord's removal, disposal, sale and storage charges. Any Leasehold Improvements or other items not removed shall, at the Landlord's option, become the property of the Landlord and may be removed from the Leased Premises and sold or disposed of by the Landlord in such manner as it deems advisable.
- (d) The parties agree that the Tenant's trade fixtures do not include any of the following: (i) the HVAC System; (ii) floor coverings, ceilings, partitioning and draperies; (iii) light fixtures; (iv) washroom fixtures and hot water tank; (v) electrical service including any transformer; (vi) internal stairways; (vii) show windows and doors; and (viii) signs, all of which are Leasehold Improvements.

12.08 Tenant Capital Expenditures and Improvements

The Tenant shall, in compliance with the provisions contained in this Lease, complete the capital expenditures and Leasehold Improvements that are detailed in the Tenant's Proposal, which is attached to this Lease (as Schedule D) for purposes of outlining the proposed capital expenditures and Leasehold Improvements.

12.09 Notice of Defects

The Tenant will notify the Landlord of any damage to, or deficiency or defect in, the Leased Premises, and any equipment, utility systems or installations located therein or thereon, immediately following the date the Tenant becomes aware of such damage, deficiency or defect, whether or not the Landlord has an obligation to repair the damage, or remedy the deficiency or defect.

12.10 Liens

The Tenant will promptly pay its contractors, material men, suppliers and workmen and will do everything necessary to ensure that no lien is registered against the Leased Premises or against the Landlord's interest in the Leased Premises, or against the Tenant's interest in the Leased Premises. If such a lien is made, filed or registered on title to the Leased Premises, the Tenant will discharge it, or cause it to be discharged, immediately, at the Tenant's expense. If the Tenant fails to discharge any such lien as required herein, the Landlord, in addition to its other remedies hereunder, at law or in equity may, but shall not be required to, discharge the lien by paying the amount claimed into court, together with any security for costs, or by paying the amount claimed directly to the lien claimant and the amount so paid, together with all related costs and expenses,

including solicitor's fees (on a substantial indemnity basis) and an administration fee equal to fifteen percent (15%) of such costs and expenses, all of which shall be payable by the Tenant on demand as Additional Rent.

12.11 Signs and Advertising

The Tenant shall not paint, affix or display any sign, picture, advertisement, notice, lettering or decoration on any part of the exterior of or in any part of the Building without, in each case, the prior written approval of the Landlord, such approval not to be unreasonably withheld. All signs erected by the Tenant shall comply with all Applicable Laws.

ARTICLE XIII DAMAGE AND DESTRUCTION AND EXPROPRIATION

13.01 Damage or Destruction to the Leased Premises

Subject to the following, if the Building, or any portion thereof, are damaged or destroyed by fire or by other casualty, Rent shall abate in proportion to the area of that portion of the Building which, in the opinion of the Architect, is thereby rendered unfit for the purposes of the Tenant until the Building is repaired and rebuilt, and the Landlord shall repair and rebuild the Leased Premises. Notwithstanding the foregoing, if the Tenant has caused or contributed to the damage or destruction, it shall not be entitled to any abatement of Rent. Rent shall recommence to be payable one (1) day after the Landlord notifies the Tenant that the Tenant may reoccupy the Building for the purpose of undertaking its work.

13.02 Rights to Termination

Notwithstanding Section 13.01:

- (a) if the Building or any portion thereof are damaged or destroyed by any cause whatsoever and cannot be rebuilt within one hundred and eighty (180) days of the damage or destruction, the Landlord may, instead of rebuilding the Building, terminate this Lease by giving to the Tenant notice of termination within thirty (30) days after the occurrence of such damage or destruction and thereupon Rent shall be apportioned and paid to the date of the occurrence of such damage or destruction and the Tenant shall immediately deliver up vacant possession of the Leased Premises to the Landlord; and
- (b) if the Building shall, at any time, be wholly or partially damaged or destroyed to the extent that twenty-five percent (25%) or more of the Building has become unfit for use, the Landlord may elect, within thirty (30) days from the date of the occurrence of such damage or destruction, to terminate this Lease on thirty (30) days' notice to the Tenant, in which event Rent shall remain payable until the date of termination (unless it has abated under Section 13.01).

13.03 Certificate Conclusive

Any decisions regarding the extent to which the Leased Premises have become unfit for use or the length of time required to complete any repair or reconstruction shall be made by the Architect whose decision shall be final and binding upon the parties.

13.04 Insurance Proceeds

Notwithstanding Sections 13.01 and 13.02, in the event of damage or destruction occurring by reason of any cause in respect of which proceeds of insurance are insufficient to pay for the costs of rebuilding the Building, or are not payable to or received by the Landlord, or in the event that any Mortgagee or other Person entitled thereto shall not consent to the payment to the Landlord of the proceeds of any insurance policy for such purpose, or in the event that the Landlord is not able to obtain all necessary approvals and permits from Governmental Authorities to enable it to rebuild the Building, the Landlord may elect, on written notice to the Tenant, within thirty (30) days following the occurrence of such damage or destruction, to terminate this Lease, and the Tenant shall immediately deliver up vacant possession of the Leased Premises to the Landlord in accordance with the Landlord's notice.

13.05 Landlord's Rights of Rebuilding

In performing any reconstruction or repair, the Landlord may use drawings, designs, plans and specifications other than those used in the original construction of the Building and may alter or relocate the Building. The Landlord shall have no obligation to grant to the Tenant any allowances or inducements to which it may have been granted at the beginning of the Term, and shall not be required to repair any damage to Leasehold Improvements (which include the HVAC System), fixtures, chattels the Tenant's trade fixtures or any other property of the Tenant.

13.06 Negligence of the Tenant

Notwithstanding anything to the contrary contained in this Lease, if any damage or destruction by fire or other casualty to all or any part of the Leased Premises is due to the fault or the negligence of the Tenant, the Tenant shall be liable for all costs and damages incurred or suffered by the Landlord without prejudice to any other rights and remedies of the Landlord and without prejudice to the rights of subrogation of the Landlord's insurer.

13.07 Expropriation

If all or any part of the Leased Premises is taken or expropriated by any lawful expropriating authority, or purchased under threat of such taking, or if part of the Leased Premises is taken so that substantial alteration or reconstruction of the Building is necessary or desirable as a result thereof, this Lease shall automatically terminate on the date on which the expropriating authority takes possession. Upon any such taking or purchase, the Landlord shall be entitled to receive and retain the entire award or consideration for the affected lands and improvements, and the Tenant shall not have, and shall not advance, any claim against the Landlord for the value of the Tenant's property or its leasehold estate or the unexpired Term, or for costs of removal or relocation, or business interruption expense or any other damages arising out of such taking or purchase. Nothing herein shall give the Landlord any interest in or preclude the Tenant from seeking and

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

ARTICLE XIV

ASSIGNMENT, SUBLETTING, PARTING WITH POSSESSION AND CORPORATE CONTROL

14.01 Transfers

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

14.02 Landlord’s Option to Terminate

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

14.03 Consent Required

- (a) The Landlord shall not be considered to be unreasonably withholding its consent, and may, whether or not it would otherwise be considered unreasonable, refuse to give its consent, if its reason or reasons for doing so is or are based upon all or any of the following factors:
 - (i) any factor which a court of law would consider to be reasonable;
 - (ii) the Tenant is in default under this Lease, whether or not an Event of Default has occurred;
 - (iii) the proposed Transfer does or could result in violation or breach of any covenants or restrictions affecting the Lands;
 - (iv) the Transferee does not have a good credit rating, is not of substantial means, is not capable of financing its acquisition of the Tenant's business and this Lease on terms and conditions at least as favourable as those originally obtained by the Tenant or has a history of unsuccessful business operations in the business conducted on the Leased Premises;
 - (v) the Transferee previously has been bankrupt or insolvent or has defaulted under the terms of any lease for industrial, commercial or office premises whether leased from the Landlord or other parties; or
 - (vi) any Mortgagee, whose consent is required, refuses to consent to the Transfer for whatever reason.
- (b) Upon any Transfer, the Landlord may collect Rent from the Transferee and apply the net amount collected to the Rent required to be paid under this Lease, but no acceptance by the Landlord of any payments by a Transferee shall be construed as a waiver of any right of the Landlord, or the acceptance of the Transferee as tenant or a release of the Tenant from the performance of its obligations under this Lease. Any document effecting the Transfer of this Lease and every document consenting to the Transfer shall be prepared by the Landlord or its solicitors and the legal costs and other expenses in connection with such documents shall be paid to the Landlord by the Tenant upon demand, as Additional Rent, in addition to the administration fee described in Section 14.01.
- (c) Any Transfer shall be subject to the following conditions:
 - (i) the Transferee and the Tenant shall promptly execute an agreement agreeing with the Landlord whereby the Transferee shall be bound by all the Tenant's obligations under this Lease as if the Transferee had originally executed this Lease as tenant and the Tenant shall agree to remain jointly and severally liable with the Transferee on this Lease and any renewals or extensions thereof and will not be released from any obligations under this Lease as amended from time to time;

- (ii) if the Transferee agrees to pay the Tenant or any Person any amount in excess of the Rent payable under this Lease or provides any other benefit in each case in consideration for the Transfer, the Tenant shall pay such excess amount or an amount equal to such benefit to the Landlord at the same time as the Rent is due and payable hereunder; and
- (iii) the Tenant shall pay for all of the Landlord's reasonable legal costs incurred to approve and complete all agreements necessitated by the Transfer.

14.04 No Advertising of the Leased Premises

The Tenant shall not advertise the whole or any part of the Leased Premises or this Lease for the purpose of a Transfer and will not permit any broker or other Person to do so on its behalf.

14.05 Corporate Ownership

- (a) If the Tenant is a corporation, any transfer or issue by sale, assignment, bequest, inheritance, operation of law or other disposition, or by subscription from time to time of all or any part of the corporate shares of the Tenant, or of any holding body corporate or subsidiary body corporate of the Tenant, or any corporation which is an affiliated body corporate of or is associated with the Tenant (as those terms are defined in the *Canada Business Corporations Act*, as amended, which results in any change in the present effective voting control of the Tenant by the Person holding that voting control at the date of execution of this Lease (or at the date of a Transfer to a corporation) shall be considered to be a Transfer to which Section 14.01 of this Lease apply. The Tenant shall make all corporate books and records of the Tenant available to the Landlord for inspection at all reasonable times.
- (b) Section 14.05(a) does not apply to the Tenant as long as: (i) the Tenant is a public corporation whose shares are traded and listed on any recognized stock exchange in Canada or the United States; or (ii) the Tenant is a private corporation and is controlled by a public corporation described in item (i).
- (c) The Tenant represents and warrants to and in favour of the Landlord that it has provided to the Landlord a certificate of an officer of the Tenant showing the current ownership and effective voting control of the Tenant as at the date hereof.

14.06 Assignment or Transfer by the Landlord

If the Landlord sells, leases or otherwise disposes of the Leased Premises, or if it assigns this Lease or any interest of the Landlord in it, then, to the extent that the purchaser, transferee or assignee assumes the obligation of the Landlord under this Lease, the Landlord shall, without further agreement, be released from all liability with respect to the Landlord's obligations under this Lease. In addition, upon the Landlord transferring any outstanding Letter of Credit to the purchaser, transferee or assignee, the Landlord shall be released from all liability to the Tenant in connection therewith.

ARTICLE XV ACCESS

15.01 Right to Show the Leased Premises

The Landlord and its agents have the right to enter the Leased Premises at all times to show them to prospective tenants.

15.02 Emergencies

If the Tenant is not personally present to permit an entry into the Leased Premises at any time when for any reason an entry is necessary or permitted, the Landlord or its agents may forcibly enter them without liability and without affecting this Lease.

15.03 Access Not Re-entry

Any entry by the Landlord on the Leased Premises in accordance with the provisions of this Lease shall not be considered a re-entry or a breach of covenant for quiet enjoyment.

15.04 Roof Rights

- (a) The Landlord may at any time, and from time to time, prior to or during the Term, grant a licence (a “**Roof licence**”) to third parties (individually a “**Roof Licensee**”) for the purpose of installing, operating and maintaining equipment (“**Roof-Top Equipment**”) on the roof of the Building, it being understood and agreed that the Roof-Top Equipment does not include any part of the HVAC System. Without limiting the rights which the Landlord may grant to the Roof Licensee, the Roof Licensee shall:
 - (i) be entitled to have such access to the Leased Premises at times agreed upon by the Tenant, the Tenant hereby agreeing to act reasonably in dealing with a Roof Licensee’s request for such access, as it may require in order to install, operate, maintain and repair the Roof-Top Equipment. For greater certainty, the foregoing right shall apply to the Roof Licensee’s employees, servants, agents, contractors and those Persons for whom the Roof Licensee is responsible in law (collectively, the “**Roof Licensee’s Employees**”);
 - (ii) be entitled to:
 - (1) sell or otherwise deal with any good or service generated or provided by the Roof-Top Equipment in such manner as a Roof Licensee may determine; and
 - (2) install such equipment and wiring and cabling as may be required so that goods or services generated or provided by the Roof-Top Equipment can be distributed off-site of the Property; and

- (iii) be under no obligation to sell or otherwise make available to the Tenant any good or service generated or provided by the Roof-Top Equipment.

The Tenant shall not interfere with the exercise by the Roof Licensee of any rights granted to it by the Landlord.

- (b) If the Landlord grants a Licence to a Roof Licensee, then upon the commencement of the installation of the Roof-Top Equipment on the roof of the Building:
 - (i) the Tenant will have no further maintenance, repair or replacement obligations with respect to any damage to the Leased Premises caused by the Roof Licensee or the Roof Licensee's Employees; and
 - (ii) the Landlord shall thereafter be responsible, at its sole cost, for repairing all damage:
 - (1) caused to the roof (including, without limitation, the roof membrane) by the Roof-Top Equipment, including, without limitation, repairing all leaks in the roof caused by the Roof-Top Equipment; and
 - (2) to the Leased Premises caused by the Roof Licensee or the Roof Licensee's Employees, the Landlord and its contractors being entitled to have such access to the Leased Premises as may be required in order to carry out repair of any such damage.
- (c) except as set out in Section 15.04(b)(ii), the Landlord shall have no liability whatsoever for and the Tenant hereby releases the Landlord from all Claims arising out of damages, injuries (including, without limitation, bodily injuries) or losses (including without limitation, loss of life) caused or contributed to by the Roof-Top Equipment, the Roof Licensee or the Roof Licensee's Employees; and
- (d) if the Roof-Top Equipment is subsequently removed from the roof of the Building, the Landlord will (at its sole cost) repair all damage to the roof of the Building caused by the installation and removal of the Roof-Top Equipment and thereafter the provisions of Section 15.04(b) shall cease to have effect.

15.05 Right to Install Solar Panels

The Landlord shall be entitled to have such access to the Leased Premises at times agreed upon by the Tenant, the Tenant hereby agreeing to act reasonably in dealing with the Landlord's request for such access, as it may require in order to install, operate, maintain and repair solar panels on the roof of the Building. The Landlord will not disturb the operation of the Tenant's business any more than is reasonably necessary in the circumstances while carrying on such work.

ARTICLE XVI
STATUS STATEMENT, ATTORNMENT AND SUBORDINATION

16.01 Status Statement

Within ten (10) days after a written request by the Landlord, the Tenant shall deliver, in a form supplied by the Landlord, a status statement or certificate to any Mortgagee or purchaser of the Leased Premises, or to the Landlord, stating the following:

- (a) that this Lease is unmodified and in full force and effect (or if there have been modifications, that this Lease is in full force and effect as modified and identifying the modification agreements) or if this Lease is not in full force and effect, the certificate shall so state;
- (b) the Commencement Date;
- (c) the date to which Rent has been paid under this Lease;
- (d) whether or not there is any existing default by the Tenant in the payment of any Rent or other monies due and owing under this Lease, and whether or not there is any existing or alleged default by either party under this Lease with respect to which a notice of default has been served and if there is any such default, specifying the nature and extent of it;
- (e) whether there are any set-offs, defences or counter claims against enforcement of the obligations to be performed by the Tenant under this Lease; and
- (f) with reasonable particularity, details respecting the Tenant's financial standing and corporate organization.

16.02 Subordination and Attornment

The Tenant's rights under this Lease are subordinate to any Mortgages registered on title to the Lands, or any part thereof, from time to time. Upon request, the Tenant shall subordinate this Lease and all of its rights under it, in the form the Landlord requires, to any such Mortgage, and if requested, the Tenant shall attorn to the Mortgagee. The Tenant shall, if possession is taken under, or any proceedings are brought for the foreclosure of, or the power of sale is exercised under any Mortgage granted by the Landlord or otherwise in existence against the Leased Premises, attorn to the Mortgagee, and recognize the Mortgagee, as the Landlord under this Lease.

16.03 Financial Information

- (a) The Tenant shall, upon request, provide the Landlord with such information as to the financial standing and corporate organization of the Tenant as the Landlord or the Mortgagee requires. Failure of the Tenant to comply with the Landlord's request shall be a default under this Lease.

- (b) Without limiting the generality of the foregoing, the Tenant shall provide the Landlord with its most recent audited annual financial statements immediately upon request and in any event within one hundred and twenty (120) days of the end of each fiscal year of the Tenant.
- (c) The Tenant agrees to provide to the Landlord prompt notice of any impending financial difficulties that could lead to a secured creditor exercising, or providing notice of an intention to exercise, its remedies, including a notice under Section 244 of the *Bankruptcy and Insolvency Act* (Canada).

ARTICLE XVII DEFAULT

17.01 Event of Default

An “**Event of Default**” shall be considered to have occurred when any one or more of the following happens:

- (a) the Tenant fails to pay any Rent when it is due and such failure continues for five (5) days after notice from the Landlord to the Tenant of such failure;
- (b) the Tenant fails to observe or perform any other of the terms, covenants, conditions or agreements contained in this Lease and such failure continues for ten (10) days after notice from the Landlord to the Tenant specifying the failure (except as set out in paragraphs (c)–(n), both inclusive, below where the Landlord shall have no obligation to provide such notice to the Tenant);
- (c) the Term or any of the goods, chattels or fixtures of the Tenant on the Leased Premises are seized or taken in execution or attached by any creditor;
- (d) a writ of execution or sequestration is issued against the goods, chattels or fixtures of the Tenant;
- (e) the Tenant makes a sale in bulk of all or a substantial portion of its assets other than in a Transfer approved by the Landlord;
- (f) the Tenant sells or disposes of the goods, chattels or fixtures or removes them or any of them from the Leased Premises without complying with Section 12.07;
- (g) the Tenant abandons or attempts to abandon the Leased Premises or the Leased Premises remain vacant for ten (10) consecutive days or more without the prior written consent of the Landlord;
- (h) the Leased Premises are used by any Person other than those Persons entitled to use them under this Lease;
- (i) the Tenant makes an assignment for the benefit of creditors or commits any act of bankruptcy as defined in the *Bankruptcy and Insolvency Act* (Canada) or any

successor of it, or becomes bankrupt or insolvent or takes the benefit of any legislation now or hereafter in force for bankrupt or insolvent debtors;

- (j) an order is made for the winding up or liquidation of the Tenant, or the Tenant voluntarily commences winding-up procedures for liquidation;
- (k) an order or appointment is made for a receiver or a receiver and manager of all of the assets or undertaking of the Tenant;
- (l) any insurance policy covering any part of the Leased Premises is, or is threatened to be, cancelled or adversely changed or the premium cost is, or may be, significantly increased as a result of any act or omission by the Tenant or any person for whom the Tenant is responsible in law;
- (m) the Tenant's Licence is revoked, suspended or terminated; or
- (n) any default or event of default occurs under any lease or agreement to lease relating to other properties owned by the Landlord, leased to or occupied by the Tenant or any Person related to the Tenant.

17.02 Rights of the Landlord

Upon the occurrence of any Event of Default the following provisions apply:

- (a) The Landlord may terminate this Lease by notice to the Tenant, or re-enter the Leased Premises and repossess them and, in either case, enjoy them as of its former estate and the Landlord may remove all Persons and property from the Leased Premises and the property may be sold or disposed of by the Landlord as it considers advisable or may be stored in a public warehouse or elsewhere at the cost and for the account of the Tenant, all without service of notice or resort to legal process and without the Landlord being guilty of trespass or being liable for any loss or damage which may be occasioned thereby.
- (b) If the Landlord elects to re-enter the Leased Premises as provided in this Section, or if it takes possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may either terminate this Lease or it may from time to time, without terminating this Lease, make those alterations and repairs which are necessary in order to re-let the Leased Premises or any part of them for a term (which may be for a term extending beyond the Term) and at a rent and upon those other terms, covenants and conditions which the Landlord, in its discretion, considers advisable. Upon each reletting, the rent received by the Landlord from the reletting shall be applied first to the payment of any indebtedness other than Rent due under this Lease from the Tenant to the Landlord; second to the payment of any costs and expenses of the reletting including brokerage fees and solicitors' fees and the costs of the alterations and repairs; third to the payment of Rent due and unpaid under this Lease; and the residue, if any, shall be held by the Landlord and applied towards payment of future Rent as it becomes due under this Lease. If the rent received from the reletting during any month is less than the Rent to be

paid during that month by the Tenant under this Lease, the Tenant will pay the deficiency, which shall be calculated and paid monthly in advance on or before the first day of each month. No re-entry or taking possession of the Leased Premises by the Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of that intention is given to the Tenant. Despite any reletting without termination, the Landlord may at any time afterwards elect to terminate this Lease for the previous breach. If the Landlord at any time terminates this Lease for any breach, in addition to any other remedies it may have, it may recover from the Tenant all damages it incurs by reason of the breach including, without limitation, the costs of recovering the Leased Premises, solicitors' fees (on a substantial indemnity basis) and the worth, at the time of the termination, of the excess, if any, of the amount of Rent and charges equivalent to Rent required to be paid under this Lease for the remainder of the Term over the then reasonable rental value of the Leased Premises for the remainder of the Term.

- (c) The Landlord may remedy, or attempt to remedy, the default of the Tenant and in so doing may make any payments due or alleged to be due by the Tenant to third parties and may enter upon the Leased Premises to do any work or other things therein or thereon, in which case all the Landlord's costs and expenses, together with an administration fee of fifteen percent (15%) of such costs and expenses, shall be payable on demand by the Tenant as Additional Rent. The Landlord will not be liable for any loss or damage resulting from any action or entry by the Landlord under this Subsection 17.02(c) and will not be considered to have breached any covenant for quiet enjoyment.
- (d) The Landlord may recover from the Tenant the full amount of the current month's instalment of Rent together with the next three (3) months' instalments of Rent, all of which shall be deemed to be accruing on a day-to-day basis, and shall immediately become due and payable as accelerated Rent, and the Landlord may immediately distrain for such accelerated Rent together with any other Rent arrears.

17.03 Expenses

If legal action is brought for recovery of possession of the Leased Premises, for the recovery of Rent or any other amount due under this Lease, or because of the breach of any other terms, covenants or conditions contained in this Lease on the part of the Tenant to be kept or performed, and a breach is established, the Tenant shall pay to the Landlord all the expenses incurred in connection with it, including solicitor's fees (on a substantial indemnity basis), unless a court otherwise awards.

17.04 Waiver of Exemption from Distress

Despite anything to the contrary contained in this Lease or the provisions of applicable legislation, none of the goods and chattels of the Tenant on the Leased Premises at any time and from time to time during the Term, or any extension or renewal thereof, shall be exempt from levy by distress for Rent in arrears and the Tenant hereby waives any rights it has or might otherwise have under any such applicable legislation in that regard. If any claim is made for such an exemption by the

Tenant, or if distress is made by the Landlord, this Section may be pleaded as an estoppel against the Tenant in any action brought to test the right of the levying upon any of those goods which are named as exempted in any sections of any applicable legislation.

17.05 Remedies Generally

The exercise by the Landlord of any particular remedy does not preclude the Landlord from exercising any other remedy in respect of the occurrence of an Event of Default. No remedy shall be exclusive or dependant upon any other remedy, and the Landlord may from time to time exercise one or more of its remedies generally or in combination, those remedies being cumulative and not alternative.

ARTICLE XVIII MISCELLANEOUS

18.01 Rules and Regulations

The Rules and Regulations set out in Schedule "C" attached hereto form part of this Lease and the Tenant shall comply with and observe such Rules and Regulations throughout the Term. The Tenant's failure to comply with and observe the Rules and Regulations shall be a default under this Lease in the same manner as if the Rules and Regulations were set out as covenants in this Lease. The Landlord may from time to time establish new Rules and Regulations or amend, supplement or terminate the existing Rules and Regulations. Notice of the Rules and Regulations and any amendments, supplements or termination thereof, shall be given to the Tenant and the Tenant shall comply with and observe same from the date upon which it is so notified. The Rules and Regulations shall not conflict with or contradict the other provisions of this Lease.

18.02 Overholding

If the Tenant remains in possession of the Leased Premises after the end of the Term, or any renewal or extension thereof, without having executed and delivered a new lease, it shall be considered to be occupying the Leased Premises as a tenant from month-to-month on the same terms and conditions as are set out in this Lease, except that it shall be liable for payment of Rent at the rate equal to 150% of the Base Rent and Percentage Rate which it was responsible for paying during the last month of the Term, or any renewal or extension thereof, together with Additional Rent as set out in this Lease. In addition, the Landlord may exercise all of its rights and remedies under this Lease and at law to remove the Tenant from the Leased Premises.

18.03 Notices

Any notice, demand, request, consent or other instrument which may be or is required to be given under this Lease shall be delivered in person or sent by registered mail postage prepaid and shall be addressed: (a) if to the Landlord at the address set out in Section 1.01(a) or to such other Person or at such other address as the Landlord designates by written notice; (b) if to the Tenant, at the address set out in Section 1.01(b) or at such other address as the Tenant designates by written notice. If there is more than one Tenant, any notice under this Lease may be given by or to any one of them and will have the same effect as if given by or to all of them. Any notice, demand, request, consent or other instrument shall be conclusively deemed to have been given or made on

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

18.04 Registration

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

18.05 Quiet Enjoyment

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

18.06 Landlord's Co-Operation and Access

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

18.07 Regulatory Changes

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

18.08 Unavoidable Delay


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

[END OF PAGE]

IN WITNESS WHEREOF, the parties have executed this Lease as of the date first above written.

**BUFFALO AND FORT ERIE PUBLIC
BRIDGE AUTHORITY**

Per


Name: Ron Kleins

Title: general manager 7/28/16

Per

Name:

Title:

I/We have authority to bind the Compact

PEACE BRIDGE DUTY FREE INC.

Per


Name: GREGORY G. O'HARA

Title: PRESIDENT

I have the authority to bind the Corporation

SCHEDULE "A"
LEGAL DESCRIPTION OF THE LANDS

PT LT 229-233 PL 519, PT LT 166-180 PL 519, PT DOUGLAS ST PL 505, PT LANE PL 519 ABUTTING LT 229-233, PT MAIN ST PL 519 CLOSED BY R0691414, R0458946, BB98631 & R0114588, PT LT 221-223 PL 519, LT 224, 225, 226 PT LT 227 PL 519, PT FOURTH ST PL 519, PT WADSWORTH ST PL 505 CLOSED BY R0691414, LT 81-91 PL 519, LANE PL 519 ABUTTING LT 81 TO 88 & LT 88 TO 91 CLOSED BY BB57684, LT 116-126 PL 519, LANE PL 519 ABUTTING LT 119 TO 126 & 116 TO 119 CLOSED BY BB30073 & R0143454 LT 181-195 PL 519, LANE PL 519 ABUTTING LT 181-195 CLOSED BY R0691414, LT 55-85 PL 524, PT PRICELAND RD PL 524 CLOSED BY R0221079, LT 1-4 PL 505 E/S DOUGLAS ST, LT 5 PL 505 N/S GARRISON RD, PT LT 6 PL 505 N/S GARRISON RD, PT LT 7 PL 505 W/S WADSWORTH ST, LT 8-10 PL 505 W/S WADSWORTH ST, LT 1-4 PL 505 E/S WADSWORTH ST, PT LT 5-8 PL 505 W/S NORTH ST, PT QUEENSBURY RD PL 524 CLOSED BY R0691414 PT 1, 2, 5, 6, 7, 8, 9, 10, 11, 12 59R10134, PT 1, 2, 3, 12 59R8848, PT 1 59R9201, AS IN R0655269, R0660595, R0658993 EXCEPT PT 1 59R11984, S/T BB29712, S/T R0485157, S/T R0486298, S/T R0486299, S/T R0688285, S/T R0688286, S/T R0688288, T/W R0655269; FORT ERIE E.

Being all of PIN 64220-0290 (LT)

SCHEDULE "B"
LEASED PREMISES PLAN



SCHEDULE "C"
RULES AND REGULATIONS

1. The Tenant shall not place or cause to be placed any additional locks upon any doors of the Building without the approval of the Landlord and subject to any conditions imposed by the Landlord.
2. The washrooms and other water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes or other substances shall be thrown therein. Any damage resulting from misuse shall be borne by the Tenant by whom or whose agents, servants, or employees cause the damage. The Tenant shall not let the water run unless it is in actual use, and shall not deface or mark any part of the Building.
3. No one shall use the Building for sleeping apartments or residential purposes, or for the storage of personal effects or articles not required for business purposes.

SCHEDULE "D"
TENANT'S PROPOSAL

Please see attached as labeled Schedule D

SCHEDULE D

**Response to Request for Proposal
Operation of a Duty Free Shop at the Peace Bridge
Issued by the Buffalo and Fort Erie Public Bridge Authority**

**The Technical Proposal
May 9, 2016**

Submitted to: Buffalo and Fort Erie Public Bridge Authority
Attn: Kimberlee Kaiser, Executive Assistant
100 Queen Street
Fort Erie, Ontario
L2A 3S6

Proponent: Peace Bridge Duty Free Inc.
1 Peace Bridge Plaza
Fort Erie, Ontario
L2A 5N1

Contact: Gregory G. O'Hara
President and Chief Executive Officer
905-871-5400 ext. 107
gohara@dutyfree.ca

The attached bid includes confidential business and commercial information pertaining to Peace Bridge Duty Free Inc. Peace Bridge Duty Free Inc. respectfully requests that the contents of the bid not be disclosed to anyone other than employees, officers, directors or evaluation committee members of the Buffalo and Fort Erie Public Bridge Authority.

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4	Qualifications & Experience	
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	• Financial Statements	3
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	• Experience in Similar Retail Operations	9
	• Distinguishing Features	9
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P.O. Box 339 Peace Bridge Plaza Fort Erie, Ontario L2A 5N1 Canada
P.O. Box 572 Buffalo, New York USA 14213-0572
T: 905-871-5400 F: 905-871-6335

May 9, 2016

Kimberlee Kaiser
Executive Assistant
Buffalo & Fort Erie Public Bridge Authority
100 Queen Street
Fort Erie, ON L2A 3S6

Dear Ms. Kaiser:

Peace Bridge Duty Free Inc. ("PBDF") is pleased to submit a proposal in response to the Request for Proposal (the "RFP") issued by the Buffalo & Fort Erie Public Bridge Authority (the "Authority") to develop and operate a duty free Store on the Canadian side of the Peace Bridge.

PBDF has reviewed the lease included in Appendix A of the RFP and confirms that PBDF understands the principal terms of the lease. If successful in this RFP process, PBDF is committed to entering into the lease in a form to be agreed upon by PBDF and the Authority, including those provisions identified as mandatory provisions in Part V, Section B of the RFP.

Peace Bridge Duty Free Inc. is the incumbent operator at the Peace Bridge Plaza and firmly believes that it is the best qualified to operate the duty free Store. The reasons for PBDF's belief in this regard are set out in full detail our proposal, which PBDF confirms is a firm and irrevocable offer.

PBDF believes that it is the best qualified to develop and operate the duty free Store at the Peace Bridge for many key reasons including:

- PBDF has a senior management group and staff that have extensive duty free industry business experience and its ownership is stable and has a strong financial capability.
- PBDF is an award winning duty free operator that has received numerous duty free industry distinctions over the years including the "Platinum Award" from the Frontier Duty Free Association in recognition for being the "Best Canadian Land Border Duty Free Store."
- PBDF has demonstrated a track record of generating incremental sales and mitigating significant business challenges including dealing with declining Peace Bridge vehicle traffic from Canada to the United States for more than a decade.





P.O. Box 339 Peace Bridge Plaza Fort Erie, Ontario L2A 5N1 Canada
P.O. Box 572 Buffalo, New York USA 14213-0572
T: 905-871-5400 F: 905-871-6335

- PBDF has engaged a renowned design team SmartDesign Group, that has a tremendous amount of experience with respect to specialized retail environments, to assist PBDF in creating an unparalleled luxury land border duty free shopping experience.
- PBDF has entered into many strategic relationships. These relationships will significantly enhance the business at the Store.

PBDF owners, staff and partners look forward to the exciting opportunity to develop and operate a land border duty free store at the Peace Bridge Plaza in Fort Erie, Ontario.

I, Gregory G. O'Hara, am an official with PBDF and will be the primary contact person with the Authority.

Yours truly,

Gregory G. O'Hara
President and Chief Executive Officer
Peace Bridge Duty Free Inc.
1 Peace Bridge Plaza
Fort Erie, Ontario

Email: gohara@dutyfree.ca
Phone: 905-871-5400 ext. 107



Non-collusive Proposal Certification



P.O. Box 339 Peace Bridge Plaza Fort Erie, Ontario L2A 5N1 Canada
P.O. Box 572 Buffalo, New York USA 14213-0572
T: 905-871-5400 F: 905-871-5335

In accordance with Item (iv) of Part IV.A.1.2a. of the RFP, I, Gregory G. O'Hara, President and Chief Executive Officer of Peace Bridge Duty Free Inc., hereby certify that:

- This proposal is genuine and is not made in the interest of, or on behalf of, an undisclosed person or corporation;
- Peace Bridge Duty Free Inc. has not directly or indirectly induced or solicited any other Proponent to submit a false or sham Proposal, or decline to submit a Proposal;
- Peace Bridge Duty Free Inc. has not sought, by collusion, to obtain any advantage over any other Proponent or over the Authority; and
- I, Gregory G. O'Hara, am entitled to represent Peace Bridge Duty Free Inc., empowered to submit the bid, and authorized to sign a lease with the Authority.

Gregory G. O'Hara
President and Chief Executive Officer
Peace Bridge Duty Free Inc.



Conflict of Interest Declaration



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P.O. Box 572 Buffalo, New York USA 14213-0572
T: 905-871-5400 F: 905-871-6335

In accordance with item (v) of Part IV.A1.2a. of the RFP, I, Gregory G. O'Hara, President and Chief Executive Officer of Peace Bridge Duty Free Inc., hereby certify, on behalf of Peace Bridge Duty Free Inc., that there is no actual or potential Conflict of Interest relating to the preparation of this proposal, and/or Peace Bridge Duty Free Inc. does not foresee an actual or potential Conflict of Interest in performing the contractual obligations contemplated in the RFP.

I also confirm that I have the power to bind Peace Bridge Duty Free Inc. and, therefore, I am entitled to make this certification and declaration on behalf of Peace Bridge Duty Free Inc.

In the interests of full disclosure, the only individual involved in the preparation of the proposal that has had any employment relationship with the Bridge Authority is an individual who worked as a summer student at the Buffalo and Fort Erie Public Bridge Authority ("**Authority**") over 35 years ago. The full details of his employment are:

Name: John Menchella

Last date of employment with the Authority: John Menchella was employed by the Authority for the summer terms of 1978 and 1979.

Name of last supervisor with the Authority: unknown

Description of individual's job functions at last position with the Authority: John Menchella was employed as a summer student with the Authority for a short period in 1978 and 1979. John Menchella was assigned tasks related to traffic direction.

Description of the nature of individual's participation in preparation of proposal: John Menchella acted as a consultant and provided advice regarding the preparation of the proposal.

Gregory G. O'Hara
President and Chief Executive Officer
Peace Bridge Duty Free Inc.



Statement of Insurability



McAvoy, Belan & Campbell
Insurance and Financial Services Ltd.

April 26, 2016

Peace Bridge Duty Free Inc.
P.O. Box 339
Peace Bridge Plaza
Fort Erie, Ont.
L2A 5N1

Attention: Jim Pearce

Dear Sir:

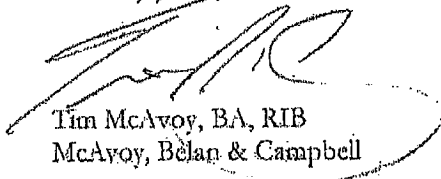
I have examined the lease requirements and confirm that we are currently providing and/or exceeding the required types and levels of insurance as outlined in the leasing conditions. We will have no problem maintaining these requirements in the future.

In addition to the lease requirements, we have added the following enhancements:

- 1) Business interruption on the main location has been extended to cover the bridge itself. This will allow the Duty Free income stream to continue if one of the same perils befalls the structure
- 2) Terrorism insurance, which is a standard exclusion in Canada, has been purchased through the international markets to cover the main location for property and loss of income. It has also been extended to cover the bridge structure as described above
- 3) Other coverage added to the main location include:
 - a. Privacy Breach Liability
 - b. Pollution Liability
 - c. Flood & Earthquake Coverage

If you require further information, please do not hesitate to contact me.

Sincerely yours,



Tim McAvoy, BA, RIB
McAvoy, Belan & Campbell

351 CANBORO ROAD
RIDGEVILLE ON
L0S 1M0
905.892.9590

350 KING STREET
PORT COLBORNE ON
L3K 4H3
905.834.3666

mbefinancial.ca

Consent to Surety



RBC
Royal Bank

Chris Miotto
Senior Account Manager

Commercial Financial Services
Grantham Shopping Plaza Branch
380 Scott Street
St. Catharines, ON L2M 3W4
Transit 04242

Tel: (905) 934-4415
Fax: (905) 934-4676
E-mail: chris.miotto@rbc.com

April 6, 2016

Jim Pearce
Manager Finance
Peace Bridge Duty Free Inc.
P.O. Box 339, Peace Bridge Plaza
Fort Erie, Ontario, L2A 5N1

Dear Jim:

Further to our discussions, we congratulate Peace Bridge Duty Free Inc. for their outstanding historical financial performance. This letter will confirm that RBC Royal Bank and Peace Bridge Duty Free Inc. have an outstanding business relationship spanning several years. RBC Royal Bank currently supports and will continue to support the company's vision and future plans.

We at RBC Royal Bank acknowledge the strong relationship that Peace Bridge Duty Free Inc. has with the Buffalo & Fort Erie Public Bridge Authority and such, offer the following surety statement. Based on the company's strong historical financial results, Peace Bridge Duty Free Inc. would qualify and be eligible for a Letter of Credit to be issued to the benefit of the Landlord, the Buffalo & Fort Erie Public Bridge Authority in the amount of \$500,000.

Peace Bridge Duty Free Inc. has made notable contributions to Fort Erie's community & economic development, and such, the outstanding financial results could not have been reached without the company's strong leadership and commitment to quality customer service.

Congratulations again, we trust the foregoing meets your requirements; however, should you require further information, please feel free to give me a call.

Yours truly,

A handwritten signature in black ink, appearing to read 'Chris Miotto', written over a horizontal line.

Chris Miotto
Senior Account Manager