

**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

**NON-CONFIDENTIAL RESPONDING APPLICATION RECORD OF  
PEACE BRIDGE DUTY FREE INC.  
(Returnable March 27<sup>th</sup>, 2025)**

<b>Dated:</b> March 3 <sup>rd</sup> , 2025	<b>BLANEY MCMURTRY LLP</b> Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5  <b>David T. Ullmann</b> (LSO #42357I) Tel: (416) 596-4289 <b>Email:</b> <a href="mailto:dullmann@blaney.com">dullmann@blaney.com</a>  <b>Anisha Samat</b> (LSO #82342Q) Tel: (416) 593-3924 <a href="mailto:asamat@blaney.com">asamat@blaney.com</a>  Lawyers for the Respondent
<b>To:</b>	The Service List

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TAB 1

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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B E T W E E N:

**ROYAL BANK OF CANADA**

Applicant

- and -

**PEACE BRIDGE DUTY FREE INC.**

Respondent

**NON-CONFIDENTIAL RESPONDING 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. (“**PBDF**” or the “**Company**” hereafter). 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 this affidavit have the same meaning as in my affidavit sworn December 12, 2021 (without exhibits), or my affidavit sworn January 24, 2024 (without exhibits), which are attached hereto as **Exhibits “A” and “B”**.

3. Although the Company consented to the granting of a Receivership, as further set out herein, that consent was over 11 months ago. We understand that determining whether to grant a

Receivership order, the court must still consider the reasonableness of doing so. As such, this affidavit is made in to assist the Court by providing an update on the Company's current financial condition so it can determine whether or not a Receivership is appropriate.

### **History of Receivership Proceedings**

4. On or about December 3, 2021, RBC brought the Receivership Application to appoint msi Spergel Inc. ("**Spergel**") as Receiver over the Company's assets, properties and undertakings, which resulted in the Monitorship being established by the Order of Justice Pattillo dated December 14, 2021. The Company has operated under the Monitorship since that date until now.

5. During these proceedings, the Company and the Landlord litigated the question of the amount of the abatement of rent to which the Company should be entitled to, under the provision of its lease. On December 15, 2023, this Court issued a decision refusing the Company's interpretation of the lease. On December 27, 2023, the Company filed a Notice of Appeal.

6. In January 2024, the Receivership Application was returned to this Court, however it was adjourned on consent of the parties to April 26, 2024, due to the pending appeal. Attached as **Exhibit "C"** is a copy of the Order of Justice Kimmel dated January 29, 2024, *inter alia*, adjourning the Receivership Application to April 26, 2024.

7. On or about April 18, 2024, RBC consented to a further adjournment in exchange for the Company providing a Consent to Receivership pending the outcome of the Appeal. Attached as **Exhibit "D"** is a copy of the executed Consent to Receivership (the "**Consent**"), and attached as **Exhibit "E"** is a copy of Justice Kimmel's Endorsement dated April 19, 2024.

8. On January 27, 2025, the Court of Appeal for Ontario released its decision dismissing the Appeal. Attached as **Exhibit “F”** is a copy of the Court of Appeal’s decision. RBC thereafter scheduled the return of the Receivership, and I understand RBC intends to rely on the Consent.

### **The Company’s Current Financial Position**

9. At the time the Receivership Application was brought in 2021, the Company had recently reopened after an 18-month closure due to COVID-19 restrictions, which had caused it considerable financial distress. It was struggling to meet its rent obligations and was facing a challenging financial situation.

10. However, the circumstances have shifted, as more than three years have passed since the Receivership Application was initiated, and the Company has successfully mostly recovered from the adverse financial impacts of the COVID-19 pandemic and continues to do so.

11. As demonstrated below, the Company now has more than sufficient funds and assets on hand to repay the indebtedness owed to RBC.

### ***Company’s Indebtedness to RBC***

12. The only debts owing to RBC that are outstanding at this time are pursuant to:

- a. a lease facility, which is a term debt and not repayable on demand (the “**Lease**”). A copy of the Lease is attached as **Exhibit “G”**; and
- b. a Highly Affected Sectors Credit Availability Program loan facility (the “**HASCAP Loan**”), which was part of a program that provided businesses heavily hit by the

COVID-19 pandemic access of up to \$1 million in additional financing, 100% guaranteed by the Business Development Bank of Canada (“**BDC**”).

13. To the best of my knowledge, neither the Lease nor the HASCAP Loan are in default in accordance with its terms. Certainly, all payments have been made when due under the above two facilities throughout this process. In addition, the Company has also complied with providing regular reporting to the Monitor as required by the orders in this process, as required by the Bank. One recent such Report, i.e. the unaudited quarterly Cashflow and Inventory Report (the “**CFI Report**”) dated February 6, 2025 is attached as **Confidential Exhibit “H”**.

14. During the term of this proceeding the Company has always maintained the minimum cash and inventory thresholds required by the Bank and the Court and has made regular reporting as required. In addition, the Company provided the Bank with \$850,000.00 as cash collateral when requested by the Bank, although not otherwise required under the terms of the lending arrangements. Subsequently, in April 2024, the Company agreed to and did maintain increased minimum cash amounts in their account with the Bank to ensure the Bank was comfortable that its position would not deteriorate while we waited for the outcome of the Appeal.

15. The Company’s cashflow report (based on unaudited financial statements for the 2024 fiscal year) dated February 25, 2025 (the “**Cashflow Report**”) attached as **Confidential Exhibit “I”**, shows that the current loan balances owing to RBC (the “**Loan Balances**”) are as follows:

- a. RBC Lease Balance: \$1,757,000.00; and
- b. HASCAP Loan Balance: \$759,000.00. Attached as **Confidential Exhibit “J”** is a copy of the RBC Loan Statement for the HASCAP Loan dated December 31, 2024,

which shows that the opening principal balance as of December 31, 2023, was \$870,370.36 and the closing principal balance as of December 31, 2024 was \$759,259.24.

16. Thus, the total indebtedness currently owed by the Company to RBC is approximately **\$2,516,000.00.**

***Company's Current Cashflow, GICs and Inventory***

17. Per the Company's CFI Report, the cash on hand (in the Company's accounts at RBC) as at March 1, 2025 is projected to be at approximately \$1,158,000.00, and inventory at approximately \$1,208,000.00.

18. As required by the cash collateral requirements of the Bank, as they evolved in this process, the Company also holds guaranteed GICs with RBC, in the amount of approximately \$1,497,684.14 (the "**GIC Funds**"). Attached as **Confidential Exhibits "K" and "L"** are copies of the GIC details of GIC 00130198779-0003 in the initial investment amount of \$850,000, and the GIC Investment Confirmation from RBC dated October 21, 2024, in the initial investment amount of \$647,684.14.

19. Accordingly, the total cash (including the GIC Funds) available to the Company at this time is approximately **\$2,655,684.14**, which is itself more than \$100,000 more than the total debt owing to the Bank. All of this cash is already in the possession of the bank and would instantly be swept by the Bank upon a Receiver being appointed, thereby presumably wiping out the debt.

20. In addition, to the extent the debt were not instantly retired by the available cash, the value of the inventory would quickly satisfy any shortfall. As previously reported, a material amount of

the inventory is composed of tobacco and alcohol, which can be returned at full value. It is effectively cash. The balance of the inventory is also made up of other high value commodity items. If the likely liquidation value of the inventory is also considered in combination with the cash and cash collateral, the assets of the Company are more than \$1,000,000.00 in excess of the amounts owed to the Bank. Attached as **Confidential Exhibit “M”** is a copy of the Company’s inventory list as of February 23, 2025.

21. In addition, the Company’s financial records and projections reveal a clear upward trajectory, which is also indicative of its current financial health. Attached as **Confidential Exhibit “N”** is a copy of the Company’s draft and unaudited Statement of Income dated February 27, 2025, for the year ending December 31, 2024 and with comparative figures for 2023. This document demonstrates, *inter alia*:

- a. a significant increase in the Company’s net income for 2024 compared to 2023, as well as a corresponding reduction in the Company’s deficit for the same period;
- b. a decrease of nearly 50% in administrative expenses since 2023; and
- c. a significant decrease in losses (before tax calculations) since 2023.

22. The Cashflow Report and the Company’s Year-to-Date Income Statement as of December 31, 2024 (based on unaudited financial statements for the 2024 fiscal year) (the “**Income Statement**”), attached as **Confidential Exhibit “O”**, also show that:

- a. the Company’s net income in 2024 was \$184,000 and is projected to be \$969,000.00 in 2025; and

- b. the opening cash balance for the Company for 2025 was \$2,006,000.00, with the ending cash balance for 2025 projected to be \$2,431,000.00. This is a positive delta of \$425,000.00.

### ***Further Considerations***

- 23. The Company has made significant efforts to rebound from the challenges posed by the COVID-19 pandemic. It currently employs nearly forty full-time employees, all of whom face the imminent risk of losing their jobs as a result of a Receivership.

### **Negotiations with the Landlord**

- 24. In the interest of further transparency, I have attempted to provide a brief summary of the settlement discussions between the Landlord and the Company over the past year.

- 25. Since the Endorsement of Justice Kimmel dated May 17, 2023, the Company has dutifully paid full rent under the term of its lease with the Landlord, in the sum of at least \$333,333.00 per month. Attached as **Exhibit “P”** is a copy of the Endorsement of Justice Kimmel dated May 17, 2023.

- 26. On January 24, 2024, Mr. David T. Ullmann, counsel for the Company presented Mr. Patrick Shea, counsel for the Landlord, with a settlement offer. It offers terms identical to the last offer made by the Landlord prior to the conclusion of the rent dispute hearing, plus providing a material amount for costs. A copy of the offer and the last offer from Mr. Shea, which was made known at the hearing, is attached as **Exhibit “Q”**.



27. I am advised that on March 20, 2024, Mr. Ullmann wrote to Mr. Shea on a without prejudice basis, enclosing additional information in furtherance of the January proposal to the Landlord.


28. I am advised that on June 18, 2024, Mr. Ullmann provided further information to Mr. Shea on a without prejudice basis and also followed up on September 26, 2024. Mr. Ullmann also spoke with Mr. Shea on a without prejudice basis recently.

29. No offer made to date has been acceptable to the Landlord.


30. I believe that a three-way mediation, involving the Landlord, the Company and the Bank would be a preferred alternative to the appointment of a Receiver. The parties have not attended a formal mediation since 2022, and the Bank was not in attendance at that mediation.

31. In the alternative, if there is in fact anything owing to the Bank beyond the value of the cash assets of the Company, and the court decides a Receivership is just and convenient, I understand from discussions with David Ullmann, that the court can consider appointing a Receiver over specific assets rather than the entire business. It would appear to me that if the Receiver was appointed over only the inventory (or more accurately the net proceeds derived therefrom) and the Company's cash assets, the Bank could recover its debt from those assets without requiring that the entire business be operated by a Receiver or requiring the shut-down of the Company's business.

32. I make this affidavit in relation to the Receivership Application and for no other or improper purpose.

**SWORN BEFORE ME REMOTELY BY** )  
Jim Pearce stated as being located in the Town )  
of Fort Erie, Province of Ontario, on this 3<sup>rd</sup> )  
day of March, 2025, in accordance with O.Reg. )  
431/20, Administering the Oath or Declaration )  
remotely. )  
 )  
)

*A Commissioner for Taking Affidavits,*  
**Anisha Samat, LSO #82342Q**

  
Jim Pearce (Mar 3, 2025 13:23 EST)

**JIM PEARCE**

This is Exhibit “A” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

***Anisha Samat***

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 49<sup>th</sup> 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 31<sup>st</sup>, 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 12<sup>th</sup>, 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 8<sup>th</sup>, 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 2<sup>nd</sup> 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.

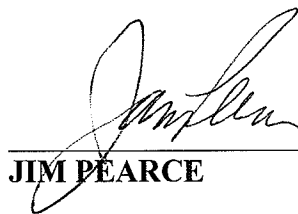
71. On December 8, 2021, the Duty Free retained Blaney McMurtry LLP ("**Blaney**") as local specialist counsel to assist in this matter. Blaney offered on December 10<sup>th</sup> to enter into negotiations with the Landlord. The Landlord replied that it was available for a meeting on Monday morning. 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 12<sup>th</sup> 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

**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

**AFFIDAVIT OF JIM PEARCE**  
(Motion Seeking to Adjourn the Application of Royal Bank of  
Canada)**BLANEY MCMURTRY LLP**Barristers & Solicitors  
2 Queen Street East, Suite 1500  
Toronto, ON, M5C 3G5**David T. Ullmann** (LSO #42357I)

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Lawyers for the Respondent

This is the Exhibit “B” referred to in the Responding Affidavit of  
Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



---

*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

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

**NON-CONFIDENTIAL  
RESPONDING 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**" or the "**Company**" hereafter). 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) or in my affidavit in these proceedings affirmed December 12, 2021 (attached hereto, without exhibits, as **Exhibit "A"** to this affidavit – the "**2021 Affidavit**").
3. This Affidavit is provided in further response to the application by Royal Bank of Canada ("**RBC**" or the "**Bank**" hereinafter) to appoint a Receiver, nearly 25 months after first applying

to have a receiver appointed over the business. The receivership has been adjourned since that time.

4. At the time of the initial application by RBC, as set out in my December Affidavit, the Company had just reopened after having been closed for 18 months due to COVID-19 restrictions. The Company was also unable to pay the rent being charged and was in a difficult financial position.

5. The situation now is completely different.

6. RBC is now holding an additional \$825,000 of cash collateral which it did not have at the time of the initial application. The Company has made all payments when due to RBC throughout this proceeding and the debt owed to RBC has been reduced by approximately \$1,700,000 to just over \$2,400,000.

7. The Company is no longer in default of any of its lending or security arrangements, including it has corrected its alleged covenant default.

8. RBC has been advised of the financial condition of the Company but has advised that it requires repayment of its loan in full, even though the loan is not a demand loan and is not in default. This receivership is apparently brought as an attempt to allow the Bank to collect payment in full on its debt which it could not otherwise do under the terms of its security and lending arrangements with the Company at this time.

9. The only threat to the business is the possible enforcement by the Landlord for alleged arrears of rent. The Landlord has taken no steps to enforce its lease and has agreed not to do so pending the outcome of this motion. The question of the correct amount owing to the Landlord, if



any, is awaiting further clarification at the Court of Appeal for Ontario. The Landlord has not brought a lift stay application.

## **Background**

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

11. 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.

12. 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.

13. 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.

14. The pandemic was obviously very difficult for the Company. During the pandemic, during the 18 months the store was closed it earned no revenue. Even today, bridge traffic is still 15% below pre pandemic norms and important business segments, such as tour buses which were material sources of revenue, have not returned.

15. The shareholders have not taken a dividend or received any money (other than salary) since 2020. All of the Company's resources have been marshalled towards paying rent, paying the Bank and paying for operations.

16. 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 49<sup>th</sup> Parallel and is steady from mid-March through to December.

17. The store currently employs 29 full time staff which is approximately 50% greater than the number of employees during the pandemic. We expect the trend of hiring back staff to continue throughout the year to eventually return to what it was pre pandemic.

18. 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.

### **Credit Facilities with RBC**

19. 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.

20. 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.

21. As set out in my December Affidavit, Duty Free financed \$6,000,000 of renovations of the Leased Premises shortly before the pandemic by way of borrowings against the revolving lease line of credit.

22. 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.

23. 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.

24. In and around September 2021, RBC terminated the revolving demand facilities. The only debt outstanding currently (other than a negligible amount of credit card debt) is in respect of the lease facility. The current lease is attached to **Confidential Exhibit “B”**.

25. The lease is a term debt and is not repayable on demand. The terms of the lease are paramount to the credit agreement terms.

### **Landlord Issues**

26. In 2021 a dispute arose with Fort Erie Public Bridge Authority (the “**Authority**” or the “**Landlord**” hereinafter).

27. The Company sought a declaration from this court that under the Company’s interpretation of the obligations of the parties under the Lease no further rent was in fact owing to the Landlord given the amounts actually paid during the period the store was closed and the amounts paid thereafter.

28. The court dismissed the Company’s motion on December 15, 2023, but did affirm that the Company was entitled to a rent abatement and that the Company could continue to pay the so called Ramp Up rent (being a phased in return to full rent which both parties agreed was

reasonable) while this matter continued. A copy of the decision of Justice Kimmel is attached as **Exhibit “C”** (the “**Decision**”).

29. The Company is capable of making the required payments while continuing to pay the Bank and continuing to meet the financial covenants with the Bank, to the extent they are applicable.

30. The Company has appealed the Decision of this court. A copy of the Notice of Appeal is attached as **Exhibit “D”**.

31. Pending the completion of the appeal, the orders of this court in respect of the Decision is stayed, including the cost award made in conjunction therewith. As such, it remains the position of the Company that no amount is owing to the Landlord and that the Landlord is not entitled to any arrears.

32. The Company is meeting its liabilities as they fall due and operating under the supervision of the court and a court officer. As ordered by the court, it makes monthly reports to the court appointed monitor. The most recent report is attached hereto as **Confidential Exhibit “E”**. The monthly reports are provided to the Monitor who provides them to the Bank.

33. The Company has, today, made an offer to the Landlord to settle the issue with the Landlord. The offer made to the Landlord is consistent with the terms which the Landlord had previously said it would accept, albeit before the Decision. We do not have a response as of yet. As further set out herein the sending of that offer was delayed by negotiations with the Bank.

34. Were that offer accepted, it would require the Company to use its cash reserves to settle with the Landlord.

35. If the Bank were to allow the Company access to its funds, a settlement could be possible. If a settlement is obtained with the Landlord, there would be no threat to the Bank or its collateral and the appeal would be moot.

36. Further, as set out in the **Confidential Exhibit “F”**, the Company has provided the Bank with a cash flow projection which demonstrates the Company would be able to continue to meet its obligations to the Bank thereafter as it has been doing in these proceedings. [REDACTED]

[REDACTED]

[REDACTED]

37. The court ordered the Company to meet certain cash thresholds during these proceedings. The court subsequently ordered the Company to provide cash to be held by the Bank in an amount equal to the cash they are now holding.

38. In the initial order in these proceedings, which was a consent order between the Bank and the Company, the parties agreed and Justice Pattillo ordered that the Company would maintain cash in excess of \$825,000 and inventory in excess of \$1,150,000. A copy of the Order of Justice Pattillo dated January 17, 2022 is attached as **Exhibit “G”**.

39. Upon the first return to court of this matter, in January 2022, at the request of the Bank and with the agreement of the Company, the Bank asked and the Court ordered that instead of the Company maintaining the cash required by the Bank, the Company would instead provide those funds to the Bank to hold in a GIC.

40. The funds were provided as additional security to the Bank. They were not provided as a payment to the Bank.

41. There is nothing in the security and lending arrangements between the Company and the Bank which require the Company to provide that cash collateral to the Bank as a payment. Were the receivership to be dismissed, these funds would be returned to the Company. The Bank has no right to apply these funds to the debt, given that the debt is a term debt only.

42. Nonetheless, when the Company has asked the Bank to release these funds so they can apply them in a settlement with the Landlord, the Bank has said no.

43. I met with Mr. Gardent and with Mr. O Hara on January 17, 2024, to expressly ask the Bank for these funds and present the Bank with its plans to settle with the Landlord using those funds. In fact, we only asked for [REDACTED] of these funds.

44. At that meeting, the Bank was presented with the calculations and projections in **Confidential Exhibit “H”**. It was made clear to the Bank that without these funds, the Company did not think it could make the best possible offer to the Landlord.

45. The Bank has taken the position that they require that they be paid out in full or they will proceed with the receivership. Attached as **Exhibit “I”** is correspondence between the Bank and ourselves, and correspondence between the Banks counsel and our counsel which demonstrates this fact.

46. The Bank has refused to release these funds. We wrote to the Landlord and advised them that our ability to present them with an offer was being hampered by the Bank. A copy of our counsel’s email to Mr. Shea, counsel to the Landlord, and his response, is attached hereto as **Exhibit “J”**.

47. It is an unusual fact that all of the other offers between the Landlord and the Company made in this process have been disclosed to this court. As such, we also enclose herewith a copy of our offer and a comparison against the last offer made by the Landlord (which offer from the Landlord we acknowledge is expired) attached hereto as **Exhibit “K”**. As noted therein, the offer had to be made conditional on the release of funds by RBC.

48. Given the courts direction to the parties to act reasonably following the Decision, we expect the Landlord will do so and will either accept this offer or make a reasonable counter offer which will further narrow the gap between the parties. We believe a settlement is possible in the near future.

49. At this point in the proceedings, the cash collateral held by the Bank pursuant to the January 2022 order should be returned to the Company. The Bank has been paid down well beyond the value of that cash collateral since the commencement of these proceedings.

50. As set out in the confidential exhibits, the assets of the Company are in excess of the correct calculation of the debt owing to the Bank.

51. Since the initial application RBC has received every payment when due under its term lending facility.

52. As set out in the email of our counsel dated January 9, 2024, we deny that we missed the projections we provided to the Bank in December 2023. In any event, the projections are not relevant to the position of the Bank. What is relevant is the collateral available to the Bank, which is explained in the confidential sections of this affidavit.



53. There is no out of the ordinary course erosion of the collateral forecast. This is set out in the last report provided to the Bank on January 17, 2023. December through March are the weakest months of the business cycle. The collateral will increase as we move into Spring.

54. When I asked Mr. Gardent in our meeting as to why he wanted to proceed with the receivership, his main answer seemed to be that this process had been going on for a long time and it had to end at some point. His other main point was that the Bank required repayment of its entire debt, although it was not made clear to me why that was the case. Attached hereto as **Exhibit “L”** is a copy of his Email to us in advance of our meeting and the email from his counsel which followed.

55. With respect, the Bank has been treated exceptionally well in these proceedings. Their risk has been reduced materially to a point to where we say there is no risk. In my opinion it would not be appropriate to terminate a viable business and terminate the employment of dozens of people simply because the Bank is exhausted by this process.

56. The Bank’s complaints about professional fees at this time is also odd. The Bank was at all times aware of the professional fees being spent. The professional fees were set out in the monthly reports provided to the Bank pursuant to the court order. The Bank was made aware of the retainer funds held by Blaney McMurtry as well. At no time did the Bank complain about the professional fees being spent on this process. Indeed, the continuation of this process has greatly benefitted the Bank as it allowed for payments to be made throughout this period without risk from the Landlord.

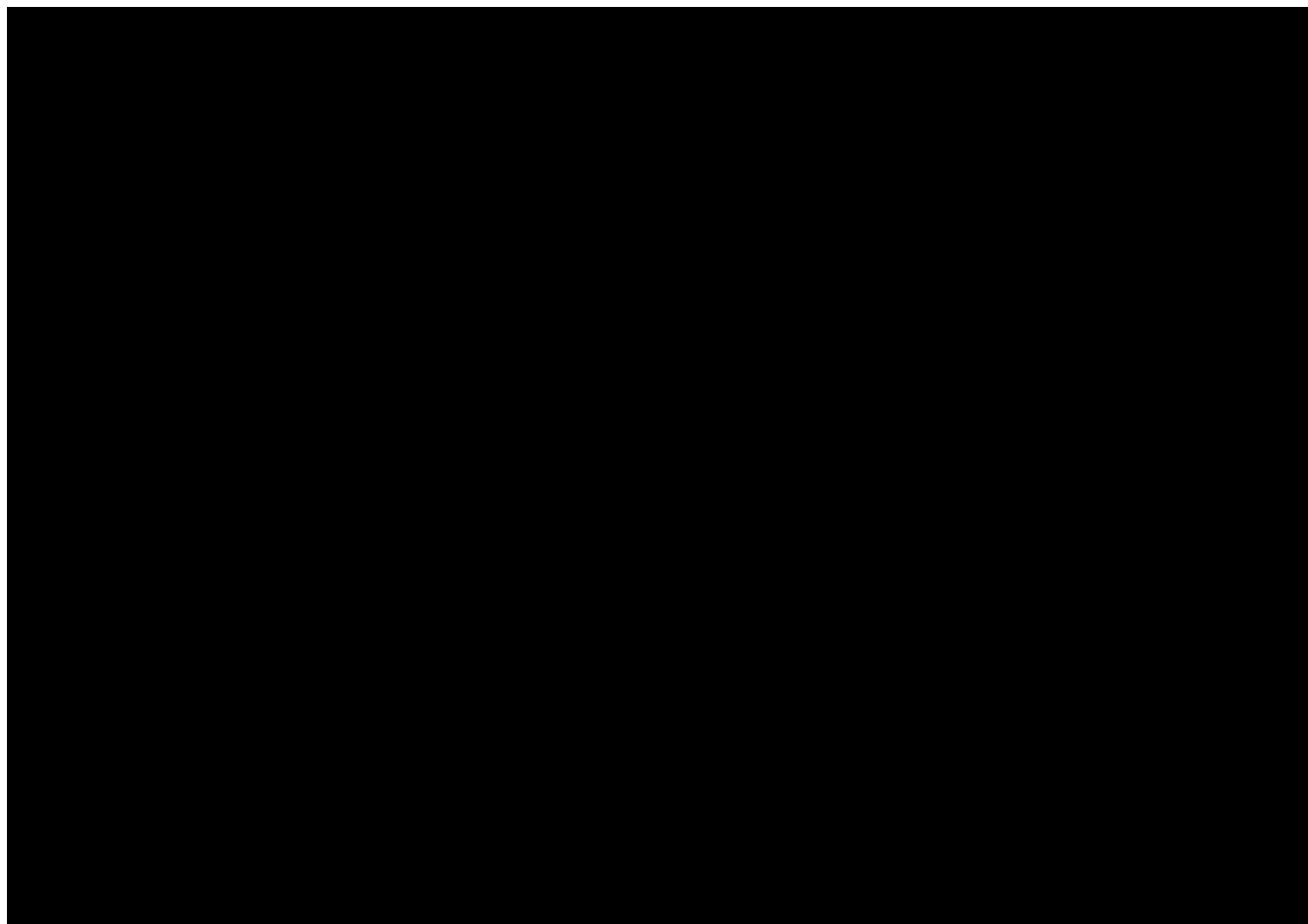
57. The Bank’s debt service ratio comment and suggestion that the non-tolerance letters provide a basis for this receivership is also misplaced and somewhat disingenuous. The Bank was provided with all the security it required during this process by a court order to which they

consented. There was no reason for the debt covenant to continue to apply. At any time, the Bank could have brought a lift stay motion if this was genuine concern and they did not do so.

58. In any event, as presented to the Bank on January 17, 2024 (albeit after the materials from the Bank were sworn) the Bank was presented at our meeting with the chart attached at Confidential Exhibit “H” which demonstrates that the Company is no longer offside the debt covenant, if it ever was.

### **Bank Debt and Collateral**

REDACTED CONFIDENTIAL SECTION FOLLOWS



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[end of redacted section]

### **Next Steps**

86. The Company is caught between the Landlord and the Bank. Much of the Company's efforts in these proceedings has been focused on negotiating with the Landlord, which negotiations have been productive, but are unfinished.

87. The parties have basically had only a month to consider the Decision and incorporate that into its negotiations. The parties have also been distracted by attending to the Appeal by waiting for the cost award and by the Holiday schedule that had people out of the office until January 9, 2024.

88. Having reached a productive point with the Landlord, the Company turned to the Bank for the release of the Company's money to make an offer to the Landlord possible. The Bank responded instead with a requirement for payment in full of its debt and proceeded with this unnecessary receivership application.

89. It would seem to me that if the Bank and the Landlord could be encouraged to attend a three way meeting or mediation with the Landlord, this situation may be able to be resolved. The Bank did not attend the mediation held in this matter in 2023 as they were not required to attend.

### **Impacted Receivership**

90. As set out in my affidavit before this court affirmed November 13, 2022, the impact of the receivership proceeding would be severe. I stated the following, which the Bank did not contradict at that time or in its materials for this motion:

97. My expectation is that a receiver appointed by RBC would not receive permission from Canada Border Services Agency to continue the day-to-day operations of the duty-free shop. Rather, the most likely scenario is that the receiver would shut down the business, return product to suppliers to the extent possible and liquidate the balance of the inventory offsite.

98. RBC has not requested any information in respect of day to day operations or staffing which in my view supports my expectation. If RBC was planning for the eventual receivership operation of Duty Free, especially after the Authority's motion I would have expected it to reach out to duty Free for its co-operation. I have spoken with RBC during this period about other matters.

99. The imposition of a receiver defacto results in the destruction of Duty Free

116. In the event the Lease is terminated, all Duty Free employees will lose their jobs, likely resulting in employment insurance applications; a licensed replacement operator will need to be found, and will likely take a minimum of up to six months to begin operating, resulting in a total rent loss for that period. During any such period all of Duty Free's suppliers will lose all of their sales.

118. In the event the Lease is terminated, there will be no duty-free services for people leaving Canada into the U.S. at the Peace Bridge border crossing while the destruction caused by the Authority is sorted out, a new operator is found, a new lease negotiated, and the new operator gets the business up and running again, along with all the growing pains involved starting a new business in a highly regulated environment.



119. Licensing may be a further obstacle. In June 2022, I was advised by Charles Melchers, Director Regulatory Trade Programs for Canada Border Services Agency, that it would not be issuing new licenses for duty free stores at least well into 2023.

91. I believe that, given more time, a commercial resolution can be reached with the Landlord reflecting a fair compromise to both parties without providing any unusual risk to the Bank.

**SWORN BEFORE ME REMOTELY BY** )  
 Jim Pearce stated as being located in the City )  
 of Toronto, Province of Ontario, on this 24<sup>th</sup> )  
 day of January 2024, in accordance with )  
 O.Reg. 431/20, Administering the Oath or )  
 Declaration remotely. )



*A Commissioner for Taking Affidavits,*  
**Ines Ferreira**



**JIM PEARCE**

**ROYAL BANK OF CANADA**

and

**PEACE BRIDGE DUTY FREE INC.**

Applicant

Respondent

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

Proceeding commenced at Toronto

**NON-CONFIDENTIAL RESPONDING AFFIDAVIT OF  
JIM PEARCE****BLANEY MCMURTRY LLP**

Barristers &amp; Solicitors

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Lawyers for the Respondent

This is Exhibit “C” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

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

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

THE HONOURABLE MADAM

)

MONDAY, THE 29<sup>th</sup>

JUSTICE KIMMEL

)

DAY OF JANUARY, 2024

)

**ROYAL BANK OF CANADA**

Applicant

- and -

**PEACE BRIDGE DUTY FREE INC.**

Respondent

**ORDER**

**THIS APPLICATION**, made by Royal Bank of Canada ("**RBC**") for, amongst other things, an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing msi Spergel inc. ("**Spergel**") as the court-appointed receiver, without security, of all the assets, properties and undertakings of Peace Bridge Duty Free Inc. (the "**Debtor**"), and all proceeds thereof, was heard on this day at 330 University Avenue, Toronto, Ontario.

**ON HEARING** the submissions of counsel as were present, no one appearing for any other stakeholder although duly served as appears from the affidavits of service,

**AND ON CONSENT OF THE PARTIES,**

**AND UNOPPOSED BY THE LANDLORD AND THE MONITOR,**

1. **THIS COURT ORDERS** that the Debtor shall forthwith advise Spergel, in its existing capacity as the court-appointed monitor of the Debtor (in such capacity, the "**Monitor**") of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in the Debtor's possession or control, and shall provide to the Monitor or permit the Monitor to make, retain and take away copies thereof and grant to the Monitor unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 1 or in paragraph 2 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure. The Monitor be and is hereby directed to analyze the Records and report to affected stakeholders on:

- (a) the impact of any proposed settlement between The Buffalo and Fort Erie Public Bridge Authority (the "**Landlord**") and the Debtor on the ongoing viability of the Debtor; and
- (b) the Debtor's ongoing compliance with the terms of its lending agreements with RBC.

For greater certainty, the foregoing shall include a review of RBC's security position with respect to the Debtor, including, without limitation, a review of the Debtor's bank account statements, cash float, internally prepared financial statements and other reports (including, without limitation, accounts payable, prepaid expenses, trial balances and general ledgers), preparation of a forecast and commissioning inventory counts and/or appraisals, all in the Monitor's discretion.

2. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, the Debtor shall forthwith give unfettered access to the Monitor for the


purpose of allowing the Monitor to perform the tasks contemplated by the previous paragraph of this Order, and shall not alter, erase or destroy any Records without the prior written consent of the Monitor. Further, for the purposes of this paragraph, the Debtor shall provide the Monitor with all such assistance in gaining immediate access to the information in the Records as the Monitor may, in its discretion, require including providing the Monitor with instructions on the use of any computer or other system and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the information.

3. **THIS COURT ORDERS AND DIRECTS** the Debtor to pay any and all outstanding fees and expenses of the Monitor and its counsel in accordance with paragraph 14 of the Order of Justice Pattillo dated January 17, 2022 on or before February 2, 2024 and all future fees and expenses within seven (7) days of presentment of same to the Debtor.

4. **THIS COURT ORDERS** that the parties are to complete cross examinations, if any, on their respective affidavits by February 29, 2024.

5. **THIS COURT ORDERS** that the balance of the relief sought by RBC in its application be and is hereby adjourned to April 26, 2024 (the "**Receivership Return Date**"), subject to the terms of the previous orders and endorsements granted in this proceeding, as amended by this Order.

6. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of today's date and are enforceable without the need for entry or filing.

 Digitally signed by  
Jessica Kimmel  
Date: 2024.01.30  
13:07:52 -05'00'

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**ROYAL BANK OF CANADA**

- and -

**PEACE BRIDGE DUTY FREE INC.**

Applicant

Respondent

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

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

**Proceedings commenced at Toronto**

**ORDER**

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
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*Lawyers for Royal Bank of Canada*

This is Exhibit “D” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*



# CONSENT TO RECEIVER

TO: Royal Bank of Canada (the "Lender")

AND TO: its solicitors, Aird & Berlis LLP

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PEACE BRIDGE DUTY FREE INC. (the "Debtor") hereby consents to: (i) the immediate appointment by the Lender of a private receiver or receiver and manager in respect of the Debtor's assets, properties and undertakings and any and all of the Debtor's books and records (collectively, the "Assets"); and/or (ii) the immediate appointment by Court Order of an interim receiver, receiver or receiver and manager of the Assets pursuant to subsections 47(1) and 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*.

DATED this \_\_\_\_ day of April, 2024.

PEACE BRIDGE DUTY FREE INC.

By: \_\_\_\_\_

Name: G. G. O'HARA

Title: PRESIDENT

I have authority to bind the corporation.

This is Exhibit “E” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: CV-21-00673084-00CL DATE: April 19, 2024

NO. ON LIST: 1

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

BEFORE JUSTICE: **KIMMEL**

**PARTICIPANT INFORMATION**

**For Applicant:**

Name of Person Appearing	Name of Party	Contact Info
Sanjeev Mitra	Counsel for Royal Bank of Canada	<a href="mailto:smitra@airdberlis.com">smitra@airdberlis.com</a>

**For Respondent:**

Name of Person Appearing	Name of Party	Contact Info
David Ullman	Counsel for Peace Bridge Duty Free Inc.	<a href="mailto:dullman@blaney.com">dullman@blaney.com</a>

**For Other:**

Name of Person Appearing	Name of Party	Contact Info
Patrick Shea	Counsel for the Landlord (Buffalo and Fort Erie Public Bridge Authority)	<a href="mailto:Patrick.Shea@gowlingwlg.com">Patrick.Shea@gowlingwlg.com</a>

**ENDORSEMENT OF JUSTICE KIMMEL:**

1. Subject to the terms below, the Receivership Application of RBC scheduled for April 26, 2024 is adjourned upon the request of the Respondent Company and unopposed by the Bank, no position taken by Landlord, to a date to be set at a case conference to be scheduled before me on no less than 3 days notice upon the earlier of:

- a. a binding settlement having been reached between the Landlord and the Company which is satisfactory to RBC; or
- b. the Appeal currently pending before the Court of Appeal in this proceeding being decided by the Court of Appeal.

2. In the interim the Company agrees that:

- a. The stay of proceedings in this matter currently in place shall continue pending the return of the within application.
- b. Commencing May 31, 2024. the Company shall maintain a minimum cash balance in its accounts with RBC as at the last day of each month of no less than \$950,000
- c. The Company shall deliver its Audited Financial Statements for 2023 to RBC by April 30, 2024
- d. The Company shall continue its reporting requirements under the Order of Justice Pattillo dated January 17, 2022
- e. The Company shall continue to pay the full contract rent due under the Lease to the Landlord and will abide by the terms of the Lease.

A handwritten signature in dark ink, appearing to read "Kimmel J.", with a stylized flourish at the end.

KIMMEL J.

This is Exhibit “F” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

## COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Peace Bridge Duty Free Inc., 2025 ONCA  
54

DATE: 20250127

DOCKET: COA-23-CV-1355

Lauwers, Paciocco and Harvison Young JJ.A.

BETWEEN

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 *Court of Justice Act*,  
R.S.O. 1990, c. C.43, as amended

David T. Ullmann and Brendan Jones, for the appellant

Patrick Shea and Shuang Ren, for the respondent Buffalo and Fort Erie Public  
Bridge Authority

Christian Delfino, for the applicant Royal Bank of Canada<sup>1</sup>

Heard: September 5, 2024

On appeal from the order of Justice Jessica Kimmel of the Superior Court of  
Justice, dated December 15, 2023, with reasons reported at 2023 ONSC 7096.

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<sup>1</sup> Mr. Delfino appeared but made no written or oral submissions on behalf of the applicant.

**Lauwers J.A.:**

**A. OVERVIEW**

[1] Peace Bridge Duty Free Inc. (“Peace Bridge” or the “Tenant”) is the tenant of a duty-free shop on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York. The landlord is the Buffalo and Fort Erie Public Bridge Authority (the “Authority” or the “Landlord”). Peace Bridge has operated the retail duty-free store for more than three decades. In normal times, the store was open 24 hours a day, every day, and employed about 90 staff.

[2] The current lease, dated July 28, 2016, ends in October 2031. It requires Peace Bridge to pay rent, which is comprised of base rent and percentage rent, and to pay any applicable sales taxes, property taxes, operating costs, and utilities. The minimum annual base rent is \$4 million or \$333,333 per month.

[3] The dispute turns on the interpretation of s. 18.07 of the lease and its application in the context of the store’s closure and reduced business during the COVID-19 pandemic. Section 18.07 of the lease 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 the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.

[4] The parties agree that the COVID-19 pandemic and resulting border restrictions had a material adverse effect on Peace Bridge's business. Peace Bridge invoked s. 18.07 of the lease in April 2020. The parties initially focused negotiations on two rent deferral agreements. After Peace Bridge's duty-free store re-opened in September 2021, the parties focused negotiations on the rent to be paid by Peace Bridge during the store's closure and going forward.

[5] By the time of the merits hearing before the motion judge in November 2023, the parties reached an agreement in principle about the rent payable during the period from November 2021 until October 31, 2026. Peace Bridge would pay the greater of a set amount for the year or 20 percent of sales with an increase to \$4 million in 2026.

[6] However, this agreement in principle was subject to the parties reaching an agreement about the rent payable during the closure period. The parties negotiated but were unable to agree on that rent payable. Peace Bridge sought relief in the form of a court-imposed rent adjustment or abatement.

[7] The motion judge found, at para. 159, 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."



[8] However, the motion judge declined to grant Peace Bridge any relief for three main reasons: s. 18.07 did not mandate the judicial imposition of a rent adjustment; the Authority had not breached s. 18.07; and the Authority had not failed in its duty of good faith performance in negotiating.

[9] For the reasons that follow, I would affirm the motion judge's decision and dismiss Peace Bridge's appeal.

## **B. THE ISSUES ON APPEAL**

[10] The overarching issue is whether the motion judge properly interpreted and applied s. 18.07 of the lease. Peace Bridge argues that she did not and raises issues on appeal that I would reframe as follows:

1. Whether the motion judge erred in failing to consider, as part of the factual matrix, discussions between the parties around the time s.18.07 was added to the lease in 2016, including the Landlord's representations as to how 18.07 was to be applied.
2. Whether she erred in failing to give effect to her finding that s. 18.07 of the lease gives rise to a substantive right or obligation to make an adjustment to base rent.
3. Whether she erred in finding that the Landlord did not breach its duty of honest performance in negotiating a rent adjustment under s. 18.07.

[11] I describe the factual and procedural context before attending to the analysis.

### **C. THE FACTUAL AND PROCEDURAL HISTORY**

[12] The motion judge's lengthy reasons are supplemented by her reasons in the stay application reported at *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2023 ONSC 327. Together, the two sets of reasons explain the factual background, the complications in the negotiations between the parties, and the involvement of the Royal Bank of Canada ("RBC") as Peace Bridge's primary lender. I set out only those facts that are pertinent to this appeal.<sup>2</sup>

[13] The COVID-19 pandemic caused the closure of the bridge and border to non-essential traffic from March 21, 2020 until November 8, 2021. During this period, only essential travelers, mostly day-crossing workers who were ineligible to purchase any duty-free products, were permitted to cross the border at the Canadian side. Peace Bridge lost virtually all its customers.

[14] Peace Bridge's retail store re-opened on September 19, 2021, in the expectation that restrictions on non-essential travelers into the United States would ease. The last border restriction, which required persons travelling from Canada into the United States to be fully vaccinated, was lifted on May 11, 2023.

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<sup>2</sup> A detailed chronology is appended.

[15] Peace Bridge invoked s. 18.07 of the lease on April 3, 2020, within the first month of the bridge closure. After many failed attempts at negotiating, the Authority issued a notice of default under the lease agreement on September 8, 2021. Peace Bridge then entered into a forbearance agreement with RBC, contingent on it reaching an agreement with the Authority by November 15, 2021. When the parties did not reach an agreement, RBC instituted receivership proceedings, which were ultimately stayed.

[16] On January 16, 2023, the motion judge ordered the parties to participate in mediation by March 31, 2023, but the effort failed. She was then required to address the merits of Peace Bridge's cross-motion for a continuation of the lease with judicially imposed terms.

[17] In all, the parties negotiated from time to time from April 11, 2020 until October 13, 2023, without success. The motion judge heard Peace Bridge's cross-motion for relief by way of judicially prescribed rent abatement from November 1-3, 2023, leading to the order that is the subject of this appeal.

#### **D. THE POSITIONS OF THE PARTIES**

[18] Peace Bridge takes the position that s. 18.07 of the lease, properly interpreted, requires a rent adjustment, if not abatement, to be judicially imposed because the parties were unable to agree on the amount of the abatement; the

motion judge also erred in her approach to the Authority's duty of good faith in the performance of its obligations under the lease.

[19] More particularly, Peace Bridge asserts on appeal that s. 18.07 of the lease entitles it to an abatement of rent during the "Closure Period" between March 21, 2020 and November 8, 2021 and during a "Ramp Up Period" between November 2021 and October 2026, as follows:

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.

[20] For the Ramp Up Period, Peace Bridge asserts that the motion judge should have imposed terms that the parties agreed-upon in principle, as summarized in para. 12 of her decision:

[D]uring 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.

[21] The Authority takes the position that the appeal should be dismissed and asserts that the motion judge's interpretation of the lease and her approach to the duty of good faith performance were correct; Peace Bridge has not established that she made a palpable and overriding error.

## **E. ANALYSIS**

[22] I address each issue in turn.

**(1) Did the motion judge err by failing to consider, as part of the factual matrix, discussions between the parties around the time s.18.07 was added to the lease in 2016, including the Landlord's representations as to how 18.07 was to be applied?**

[23] Peace Bridge argues that the motion judge relied on an "outdated technical rule of construction" to exclude the evidence of pre-contractual representations that should dictate how the parties would interpret and apply s. 18.07.

**(a) The Governing Principles**

[24] The purpose of contractual interpretation is to determine the objective intentions of the parties; it is a fact-specific exercise: *JPM Trade Capital Inc. v. Blanchard*, 2024 ONCA 876, at para. 11, citing *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at para. 28.

[25] The Supreme Court laid out the principles of contract interpretation in relation to the “factual matrix” in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633. This court in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, *per* Brown J.A., *rev’d* on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, summarized the principles guiding the approach to interpreting commercial contracts as follows:

When interpreting a contract, an adjudicator should:

- (i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the “cardinal presumption” that they have intended what they have said;
- (ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were

known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and

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

[26] There are therefore limits to the effect that can be given to the factual matrix surrounding the formation of a contract: *Sattva*, at para. 58. The Supreme Court noted:

1. The surrounding circumstances must never overwhelm the words of an agreement. The interpretation of a contract is necessarily grounded in its text and read in light of the whole contract: *Sattva*, at para. 57.
2. Courts may never use the surrounding circumstances to deviate from the text of the contract such that it creates a new agreement: *Sattva*, at para. 57.
3. The surrounding circumstances must only consist of evidence that is objective of the background facts at the time of the contract's execution: *Sattva*, at para. 58.

**(b) Application**

[27] The motion judge reviewed the disputed evidence, considered it, and found, at para. 60, that Peace Bridge was seeking the admission of evidence of subjective intention to colour the interpretation of the lease agreement. She concluded that doing so would be problematic and the evidence should be given little or no weight.

[28] According to Peace Bridge, the parties met on July 18th, 2016 to discuss renewing the lease. They spoke about s. 18.07. The motion judge recognized, at para. 50, that s. 18.07 was added to the draft lease agreement by the Authority at the request of Peace Bridge. She summarized the evidence at para. 51:

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.

[29] Peace Bridge's proposed evidence was that at the time of renewing the lease in 2016, the Authority rejected the inclusion of a formulaic rent abatement as proposed by Peace Bridge out of concern that such a formula might hinder the Authority's ability to make a business interruption claim. Peace Bridge also asserted the parties agreed that changes in government regulations that would



materially impact Peace Bridge's business would give rise to the need for a rent abatement in order to pay the minimum base rent. Peace Bridge suggested the following wording at the July 18, 2016 meeting:

In the event that during the Term, there are issues that arise beyond the Tenant's control (including but not limited to vehicle traffic volume declines, bridge construction, changes in government regulations, etc.) that materially impact the Tenant's duty free sales, then the Landlord and the Tenant, both acting reasonably and in good faith, agree to amend this lease (including but not limited to the rent terms, term, etc.) as appropriate in a fair and equitable manner. As a guideline, a material impact would be one in which duty free sales decline over a comparable three month period by 5% or more.

[30] However, the Authority insisted on the current wording of s. 18.07.

[31] Peace Bridge also sought to rely on an email between the parties' representatives who negotiated the lease. Essentially, the Authority's representative confirmed that s. 18.07 protected Peace Bridge from changes in government regulations that could materially impact the business. Therefore, the understanding that s. 18.07 would be applied to provide a rent abatement was objective information that formed part of the factual matrix. The Authority objected to the admission of much of this evidence during the motion.

[32] In dealing with this issue, the motion judge noted, at para. 49, that much of this evidence strikes the core of s. 18.07's purpose. Since the parties agreed on the purpose of s. 18.07 by the time of the hearing, Peace Bridge's evidence on the pre-contractual negotiations was not material to the outcome of the case. The

dispute no longer hinged on whether providing a partial adjustment was reasonable on the facts. Rather, it hinged on precisely how the court was to determine such a reasonable adjustment given the lack of guidance in the text of s. 18.07 itself. Put differently, the surrounding circumstances did not assist the court in determining the appropriate calculation of a rent abatement.

[33] As a corollary, Peace Bridge attempted to tender evidence to support the notion that the flat base rent figure was tied to its actual sales. In making this submission, Peace Bridge argued that the impact on the lease resulting from the change in government regulations is ascertainable with reference to its reduction in sales. By drawing on evidence about its own rationale for offering the \$4 million base rent figure in its Request for Proposal, Peace Bridge noted that this amount was tied to its annual projections. Accordingly, \$4 million in base rent represents 20 percent of Peace Bridge's annual sales projections. Despite acknowledging that it did not discuss such calculations with the Authority, thereby creating a one-sided narrative on how base rent was determined, Peace Bridge asserted that it should not pay any base rent during the Closure Period. In other words, since Peace Bridge used a percentage-based calculation to determine the base rent based on sales, and there were no sales during the Closure Period, the base rent figure should be zero.

[34] The motion judge noted, at para. 54, that this proposed evidence would not be helpful to the resolution of the dispute for two reasons. First, "one party's

subjective understandings and intentions do not assist the ultimate goal of ascertaining the objective commercial purpose and intent” of a contract. Second, the motion judge highlighted that the evidence Peace Bridge wanted to rely on did not support the outcome Peace Bridge “urges upon the court.”

[35] The motion judge dismissed Peace Bridge’s argument, noting, at para. 55: “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.”

[36] Though the parties might have incorporated intentional uncertainty in s. 18.07 as a matter of practical necessity, using Peace Bridge’s subjective understandings as a proxy for determining a rent adjustment is improper. Without more guidance in the text of s. 18.07, the impact on Peace Bridge’s sales alone cannot inform the judicial imposition of a rent adjustment.

[37] The motion judge also observed, at para. 56, that Peace Bridge’s argument would contradict other provisions in the lease, pointing to the “entire agreement” clause and to the “no rent abatement” clause. I do not read the motion judge’s references to these clauses as dictating the outcome. The decision went on to discuss at length, from paras. 136 to 155, the central issue raised by s.18.07 on Peace Bridge’s interpretation: whether the provision mandated the judicial

imposition of the rent abatement. I address this argument in the next section of these reasons. The bulk of the motion judge's decision was devoted to the issue of the Authority's good faith in negotiating a rent adjustment.

[38] In all, the motion judge conducted a thorough examination of the relevant jurisprudence and the applicable facts to find that the evidence was irrelevant to the resolution of the dispute. Further, the proposed evidence of bargaining tended to support the Authority's interpretation, not Peace Bridge's. The motion judge refused to admit the evidence, noting, at para. 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.

[39] I see no error in the motion judge's decision that the proposed evidence was not admissible. Peace Bridge's evidence of its subjective intention has no place in determining the interpretation of the lease. Concomitantly, the motion judge correctly noted that the admission of the evidence could provide no assistance in determining what Peace Bridge should pay in base rent during the Closure Period.

Peace Bridge's argument to admit the proposed evidence would have been of no assistance because the parties had already agreed that s. 18.07 could give rise to a rent adjustment in this case. Therefore, I would dismiss this ground of appeal.

**(2) Did the motion judge err in failing to give effect to her finding that s. 18.07 of the lease gives rise to a substantive right or obligation to make an adjustment to base rent?**

[40] The motion judge noted, at para. 65 of her decision, the parties' concurrence that s. 18.07 "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." Having accepted this "agreement," Peace Bridge asserts that the motion judge effectively rendered s. 18.07 meaningless by failing to determine and impose the base rent adjustment or abatement.

[41] In my view, the motion judge did not err in refusing to determine and impose a base rent adjustment despite recognizing that one was warranted on the facts. The construction of s. 18.07 does not mandate the judicial imposition of a base rent adjustment and imposing one would not be consistent with the applicable law.

**(a) The Governing Principles**

[42] The leading case on implying contractual terms is *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. Iacobucci J. cited the following test at paras. 27-29:

The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed” (p. 775).

...

A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. [Emphasis added.]

[43] Where parties use an objective standard or formula that adds detail to a provision in an agreement, courts will maintain the commercial bargain that the parties intended provided that there is an ascertainable meaning, as was the case in *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 50 B.C.L.R. (2d) 126 (C.A.), leave to appeal refused, [1990] S.C.C.A. No. 472, *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93, 393 D.L.R. (4th) 690, and more recently, *1284225 Ontario Limited v. Don Valley Business Park Corporation*, 2024 ONCA 247.

[44] While it is true that “courts will try, wherever possible, to give the proper legal effect to any clause that the parties understood and intended was to have legal

effect,” this does not mean that courts will impose terms: *Empress Towers*, at p. 403; *Mapleview*, at para. 29. In fact, “It is trite law that the courts will not enforce ‘an agreement to agree’ and that there must be reasonable certainty as to the length of the term of a lease or of a renewal option, as well as to the amount of rent to be paid”: *Mapleview*, at para. 27.

### **(b) Application**

[45] Section 18.07 is plainly an agreement to agree or an agreement to negotiate on a rent adjustment on the happening of an event that has a material adverse effect on the Tenant’s ability to conduct business, as the motion judge found at para. 150 of her reasons. The parties were free to negotiate such a provision.

[46] However, the motion judge pointed out, at para. 153, that there is no guidance in the words of s. 18.07 providing a roadmap for a court to impose a reasonable rent adjustment for the Closure Period. The parties never agreed on a mechanism for establishing a rent adjustment. The parties agreed only that they would *consult* and *discuss* whether and how to adjust the rent. As the motion judge noted, at para. 159:

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.

[47] The motion judge explained her holding, at para. 159, in these terms:

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.

[48] Although the motion judge recognized that a rent adjustment was warranted on the facts, she did not err in concluding that a specific adjustment should not be judicially imposed. Recognizing a substantive right to a base rent adjustment alone is a necessary, but not a sufficient, condition for the court to impose one on the parties. It is not the court's function to arbitrarily set rent, and doing so would go far beyond the law on implying contractual terms.

[49] Such a conclusion does not render s. 18.07 nugatory, as Peace Bridge argues. The motion judge noted, at para. 85, the parties did not bargain for Peace Bridge to maintain a minimum guaranteed threshold of profitability. They bargained for the reasonable expectation of good faith in consultations about rent relief, which the parties undertook. The point that deserves emphasis is that Peace Bridge's insistence on a full rent abatement for the Closure Period would allocate all risk of



loss to the Authority, an outcome to which the Authority did not agree and for which there is simply no warrant in the record.

[50] I acknowledge that the Authority and the motion judge described s. 18.07 as creating a substantive right to a rent adjustment, but I understand this characterization to be a short-form way of describing a provision that does no more than impose an obligation on the Authority to “consult with the Tenant to discuss the impact” of an event that “causes a material adverse effect on the business operations of the Tenant”. It seems obvious that one possible outcome could be a rent adjustment. The motion judge’s analysis, and the plain language of the contract, reinforce this more modest reading. The motion judge arrived at the correct interpretation of s. 18.07 and did not impose a rent adjustment. This shows that her characterization of the obligation to consult and discuss as a substantive right to a rent adjustment was not what she intended. She did not find a right to a rent abatement under s 18.07 and did not err in refusing to impose that as a remedy.

[51] I would dismiss this ground of appeal.

[52] Notably, Peace Bridge argues that the motion judge’s decision creates a commercially absurd result by finding that if the parties cannot agree on the quantum of a rent adjustment, then the outcome is to provide no adjustment. Resultantly, there would be no reason for the Authority to ever agree to a change

in rent. I disagree. For reasons I outline below, the doctrine of good faith in contractual performance imposes precisely such a reason on both parties. The fact that they might not reach agreement is not commercially absurd, but follows naturally from the language of the contract.

**(3) Did the motion judge err in finding that the Landlord did not breach its duty of honest performance in negotiating a rent adjustment under s. 18.07?**

[53] The parties acknowledge that they were required to fulfill their obligations under s. 18.07 of the lease and negotiate a rent adjustment in good faith. However, they disagree as to what constitutes compliance with that obligation.

**(a) The Governing Principles**

[54] In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the Supreme Court recognized that good faith in contractual performance is “a general organizing principle of the common law of contract” in Canada and requires parties to act “honestly and reasonably and not capriciously or arbitrarily” in the performance of their contractual duties: *Bhasin*, at paras. 33, 63.

[55] Generally, good faith obliges each party to a contract: to co-operate in order to achieve the objects of the contract; to exercise discretionary power in good faith; not to evade contractual duties; and to perform contractual obligations honestly and reasonably: *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590, 462 D.L.R. (4th) 291, at para. 44; *Bhasin*, at paras. 33, 47.

[56] This case focuses on good faith performance in the negotiations required by s. 18.07 of the lease, which engages the discretionary power of each party. A party exercising contractual discretion must do so reasonably and “in a manner consistent with the purposes for which it was granted in the contract”: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, at para. 63.

[57] The cases recognize and reconcile competing tensions: a party’s duty of good faith performance, on the one hand, and the party’s achievement of its legitimate economic self-interest, on the other hand. The duty of good faith in contractual performance must be balanced with other bedrock principles of contract law, such as a party’s freedom to act in its own self-interest in accordance with commercial realities. The Supreme Court noted in *Bhasin*, at para. 70:

In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31.

[58] The *Bhasin* court added an important caution, at para. 70:

The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or “palm tree” justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[59] In other words, good faith performance “does not require that contracting parties serve each other’s interests”: *2161907 Alberta Ltd.*, at para. 43; see also *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908, at para. 82. Put differently, “A contracting party can act in its own best interests, but it must not seek to undermine the legitimate interests of the other party in bad faith”: *Lafarge Canada Inc v. Bilozir*, 2018 ABCA 416, at para. 5, citing *Bhasin*, at para. 65.

[60] The duty of good faith in contractual performance will not produce mutually agreeable results in every fact situation. The duty’s purpose is to ensure a “standard that underpins” contractual performance and is afforded “different weight in different situations”: *Bhasin*, at para. 64. Accordingly, “The duty’s animating principle is focused on good faith performance of contracts, not the creation of a generalized duty of good behaviour”: *Potash Corporation of Saskatchewan Inc. v. HB Construction Company Ltd.*, 2022 NBCA 39, at para. 163.

[61] Finally, I note that in examining whether a party has breached its duty to exercise contractual discretionary power in good faith, the court must determine whether the party exercised its discretion for an improper purpose, that is, one unconnected to the purpose for which the contract granted the discretion; if so, the party has not exercised the power in good faith: *Wastech*, at para. 69.

**(b) Application**

[62] There is no evidence in the record that supports the conclusion that during negotiations after Peace Bridge invoked s. 18.07, the Authority was dishonest, was not cooperative, or exercised its discretion for an improper purpose. That the Authority was assertive, even “aggressive,” in its own interests does not necessarily manifest bad faith because, as noted, the duty of good faith does not compel a party to give up the legitimate pursuit of its own economic self-interest. Had the Authority simply refused to negotiate, as required by s.18.07 of the lease, it plainly would have failed in its good faith duty to negotiate. But that is not what happened.

[63] In short, the deep issue that drove the outcome was whether the Authority did, in fact, negotiate in good faith. The motion judge’s focus on this issue shows that it was her central concern. She framed the issue properly: “Did the Landlord fail in its duty to act in good faith in its dealings with the Tenant after s. 18.07 was triggered?” The motion judge’s assessment occupied more than half of the text of her lengthy decision. Her assessment is essentially a factual finding that attracts appellate deference.

[64] The motion judge described the ‘to and fro’ of the negotiations in detail from paras. 109 to 127, before reaching the conclusion, in para. 128, that Peace Bridge had not established, on a balance of probabilities, that the Authority “was not acting

in good faith with a view to trying to preserve the tenancy in the course of the consultations and negotiations”. She added a detailed and lengthy Appendix entitled “Chronology of Dealings Between the Parties”. The motion judge had engaged with the parties on several occasions over a lengthy period of time. There can be no doubt that she was deeply immersed in the facts.

[65] Peace Bridge has pointed to no errors in the motion judge’s self-instructions on the applicable law, nor in her interpretation of the cases she cited. Peace Bridge points to no error in principle, no factual misapprehensions on the motion judge’s part, and no merely conclusory language. What Peace Bridge identifies as palpable and overriding errors are restatements of factors that the motion judge took into account, but which Peace Bridge urges this court to characterize differently.

[66] Peace Bridge disagrees with the motion judge’s assessment, asks this court to reverse it and to reach a factual finding to the contrary, and to judicially impose rent terms. It is not our role to retry the case, and more is required before appellate intervention is warranted.

[67] While there is no need to repeat in other words the motion judge’s careful analysis, I pick out a few higher-level notes.

[68] The parties agree that the purpose of s. 18.07 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": at para. 48. There is significant evidence in the record that shows the Authority's desire to preserve the tenancy as the parties navigated the COVID-19 pandemic. For example, the Authority allowed Peace Bridge to operate under the terms of the second deferral agreement despite the expiry of the deferral period, offered to split the burden of the base rent, and continued negotiations even after RBC sought the appointment of a receiver. Each of these actions aligns with the general purpose of s. 18.07.

[69] The Authority was entitled to fiercely protect its interests without breaching its good faith obligations. The evidence is that the Authority was under significant financial pressure, in which Peace Bridge's rental income was a factor. If anything, as the motion judge noted at para. 99, it was financially more worthwhile for the Authority to maintain the lease terms with Peace Bridge than to contract with another tenant.

[70] The exercise of discretion in negotiations under s. 18.07 of the lease did not oblige the Authority to capitulate to Peace Bridge's demands. The parties spent nearly three years negotiating the contours of a solution in response to Peace Bridge invoking s. 18.07 of the lease agreement. During this time, the parties explored many different methods of resolving the rent dispute, including two rent deferral agreements, providing financial assurances, partial repayment plans paired with rent repayment schedules, providing business plans and sales

projections, and mediation. Despite the prolonged efforts to reach a resolution, the parties were unable to come to an agreement on how to handle the rent abatement.

[71] It is true that the motion judge found, at para. 113, that the Authority made “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” at the beginning of the negotiation period. However, the motion judge also noted that the Authority was still demanding less than full performance of the lease agreement.

[72] In negotiating the second rent deferral agreement in late 2020, Peace Bridge suggested deferring rent to March 2021, which the Authority tentatively approved so long as certain financial assurances were given. On December 9, 2020, after receiving Peace Bridge’s financial information, the Authority explicitly communicated that it was not prepared to defer all rental payments until March 2021, and suggested paying one-third of the outstanding 2020 rent upfront with the balance to be deferred to March 31, 2021. In response, on December 23, 2020, Peace Bridge asked for the opportunity to discuss an extension of the rent deferral and expected payment schedule. On January 15, 2021, nearly a month after this proposal, Peace Bridge provided the Authority with a business plan that eliminated the payment of base rent and only incorporated paying a percentage-based rent. The Authority rejected this plan on January 19, 2021, expressly noting that eliminating base rent entirely was unacceptable. At this point in the negotiation



process, it was abundantly clear that the Authority was not amenable to a total rent abatement nor solely to a percentage-based rental repayment scheme.

[73] On May 13, 2021, the parties met and Peace Bridge said it needed time to discuss its next business proposal with RBC. The Authority asked for the proposal by June 1, 2021. On August 21, 2021, nearly two months after the date the Authority requested, Peace Bridge sent a formal proposal for rental repayment that sought an abatement of all rent from March 2020 until the store's re-opening and a switch to a percentage-based rent only after the store opened. A notice of default followed shortly after this proposal.

[74] Although the Authority took a strong position on refusing to accept total rent abatement, a full shift to percentage-based rent, and a lease extension, the motion judge did not perceive this as bargaining in bad faith. Nor do I. On the contrary, it is difficult for Peace Bridge to mount such an argument because it was the party putting forward terms that it knew were not amenable to the Authority. I agree with the motion judge's conclusion, at para. 85 of her reasons, that "[t]he 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." It bears repeating that Peace Bridge's insistence on a full rent abatement for the Closure Period would allocate all risk of loss to the Authority, an outcome to which the Authority did not agree in the lease and for which there is simply no warrant in the record.

[75] Peace Bridge takes issue with the Authority's "threats" to enforce its remedial options, but surely those form part of the legal context and the bargaining calculus for both sides. As the motion judge noted, the Authority made many good faith efforts to resolve its dispute with Peace Bridge.

[76] The motion judge held, at para. 159, that:

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.

[77] These factual findings are well-supported by the motion judge and the record. I would defer to them. In fact, I agree with them. I would dismiss this ground of appeal.

## **F. DISPOSITION**

[78] For the foregoing reasons, I would dismiss Peace Bridge's appeal with costs, as agreed, in the amount of \$20,000, all-inclusive.

Released: January 27, 2025 *PDL*

*Phawers J.A.*

*I agree. J.A.*

*I agree. A. Haman Young J.A.*

### Appendix: Chronology of Events

Date	Event
April 3, 2020	Peace Bridge invoked s. 18.07 of the lease in a letter and requested a meeting with the Authority.
September 8, 2021	The Authority issued notices of default. These notices resulted in Peace Bridge's default under its facilities with RBC.
October 8, 2021	Peace Bridge and RBC entered into a Credit Amending and Forbearance Agreement. The Authority was not a signatory. In this agreement, Peace Bridge agreed to deliver evidence satisfactory to RBC that an agreement had been entered into with the Authority to ensure they would not terminate the lease. This evidence was due by November 15, 2021.
November 16, 2021	The parties did not reach an agreement, which triggered default under the Credit Amending and Forbearance Agreement with RBC.
Early December 2021	RBC commenced its application seeking to appoint a receiver.
December 13, 2021	Peace Bridge issued a notice of motion seeking to adjourn RBC's application.
December 14, 2021	RBC's application for the appointment of a receiver was stayed on terms that included the appointment of a monitor. The purpose of the stay was to afford Peace Bridge more time to reach a commercial resolution with the Authority. RBC's application was adjourned until January 17, 2022.
October 5, 2022	The Authority brought a motion to lift the stay.
November 13, 2022	Peace Bridge issued a notice of cross-motion in response to the Authority's motion.
January 5, 2023	The motion judge heard the Authority's motion to lift the stay restrictions under the appointment order.
January 16, 2023	The motion judge dismissed the Authority's motion to lift the stay put in place by the appointment order.
November 1-3, 2023	The motion judge heard the lease dispute on the merits.
December 15, 2023	The motion judge dismissed Peace Bridge's cross-motion for relief by way of judicially prescribed rent abatement.
December 27, 2023	Peace Bridge appealed the motion judge's December 15, 2023 order.

January 17, 2024	The motion judge issued the cost endorsement for the stay motion and the cross-motion.
January 29, 2024	RBC's receivership application was adjourned to April 26, 2024.
September 5, 2024	The Court of Appeal for Ontario heard the appeal of the motion judge's December 15, 2023 order.

This is Exhibit “G” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*



**Royal Bank of Canada**  
 Commercial Financial Services  
 80 King St  
 Suite 1  
 St Catharines ON L2R 7G1

July 20, 2018

**Private and Confidential**

**PEACE BRIDGE DUTY FREE INC.**

1 Peace Bridge Plaza  
 Fort Erie ON  
 L2A5N1

ROYAL BANK OF CANADA (the "**Bank**") hereby confirms the credit facilities described below (the "**Credit Facilities**") subject to the terms and conditions set forth below and in the attached Terms & Conditions and Schedules (collectively the "**Agreement**"). This Agreement amends and restates without novation the existing agreement dated November 5, 2012 and any amendments thereto. Any amount owing by the Borrower to the Bank under such previous agreement is deemed to be a Borrowing under this Agreement. Any and all security that has been delivered to the Bank and is set forth as Security below, shall remain in full force and effect, is expressly reserved by the Bank and, unless expressly indicated otherwise, shall apply in respect of all obligations of the Borrower under the Credit Facilities.. Unless otherwise provided, all dollar amounts are in Canadian currency.

The Bank reserves all of its rights and remedies at any time and from time to time in connection with any or all breaches, defaults or events of default now existing or hereafter arising under this Agreement or any other agreement delivered to the Bank, and whether known or unknown, and this Agreement shall not be construed as a waiver of any such breach, default or event of default.

**BORROWER:** Peace Bridge Duty Free Inc. (the "**Borrower**")

**CREDIT FACILITIES**

**Facility #1:** \$900,000.00 revolving demand facility by way of:

a) RBP based loans ("**RBP Loans**")

Revolve in increments of:	\$5,000.00	Minimum retained balance:	\$0.00
Revolved by:	Bank	Interest rate (per annum):	RBP + 0.50%

b) RBUSBR based loans in US currency ("**RBUSBR Loans**")

Revolve in increments of:	\$5,000.00	Minimum retained balance:	\$0.00
Revolved by:	Bank	Interest rate (per annum):	RBUSBR + 0.50%

**AVAILABILITY**

The Borrower may borrow, convert, repay and reborrow up to the amount of this facility provided this facility is made available at the sole discretion of the Bank and the Bank may cancel or restrict the availability of any unutilized portion at any time and from time to time without notice.

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<sup>®</sup> Registered Trademark of Royal Bank of Canada

**REPAYMENT**

Notwithstanding compliance with the covenants and all other terms and conditions of this Agreement, Borrowings under this facility are repayable on demand.

**GENERAL ACCOUNT**

The Borrower shall establish current accounts with the Bank in each of Canadian currency and US currency (each a "**General Account**") for the conduct of the Borrower's day-to-day banking business. The Borrower authorizes the Bank daily or otherwise as and when determined by the Bank, to ascertain the balance of each General Account and:

- a) if such position is a debit balance the Bank may, subject to the revolving increment amount and minimum retained balance specified in this Agreement, make available a Borrowing by way of RBP Loans, or RBUSBR Loans as applicable, under this facility;
- b) if such position is a credit balance, where the facility is indicated to be Bank revolved, the Bank may, subject to the revolving increment amount and minimum retained balance specified in this Agreement, apply the amount of such credit balance or any part as a repayment of any Borrowings outstanding by way of RBP Loans, or RBUSBR Loans as applicable, under this facility;

**Facility #2:** \$575,900.00 revolving demand facility by way of:

- a) Letters of Guarantee ("**LGs**")

1.00 % per annum. Fees and drawings to be charged to Borrower's accounts. Minimum fee of \$100.00.

**AVAILABILITY**

The Borrower may borrow, repay and reborrow up to the amount of this facility provided this facility is made available at the sole discretion of the Bank and the Bank may cancel or restrict the availability of any unutilized portion at any time and from time to time without notice.

**REPAYMENT**

Notwithstanding compliance with the covenants and all other terms and conditions of this Agreement, and regardless of the maturities of any outstanding instruments or contracts, Borrowings under this facility are repayable on demand.

**Facility #3:** \$5,000,000.00 revolving lease line of credit by way of Leases. Leases will be governed by this Agreement and separate agreements between the Borrower and the Bank. In the event of a conflict between this Agreement and a separate agreement, the terms of the separate agreement will govern.

**AVAILABILITY**

The Borrower may borrow, repay and reborrow up to the amount of this facility provided this facility is made available at the sole discretion of the Bank and the Bank may cancel or restrict availability of any unutilized portion of this facility at any time from time to time without notice. The determination by the Bank as to whether it will enter into any Lease will be entirely at its sole discretion.

**OTHER FACILITIES**

The Credit Facilities are in addition to the following facilities (the "**Other Facilities**"). The Other Facilities will be governed by this Agreement and separate agreements between the Borrower and the Bank. In the event of a conflict between this Agreement and any such separate agreement, the terms of the separate agreement will govern.

- a) VISA Business to a maximum amount of \$300,000.00.



**FEES****One Time Fee:**

Payable upon acceptance of this Agreement or as agreed upon between the Borrower and the Bank.

Review Fee: \$2,500.00

**SECURITY**

Security for the Borrowings and all other obligations of the Borrower to the Bank, including without limitation any amounts outstanding under any Leases, (collectively, the "**Security**"), shall include:

- a) General security agreement on the Bank's form 924 signed by the Borrower constituting a first ranking security interest in all personal property of the Borrower;
- b) Certificate of insurance evidencing fire and other perils coverage on the assets of the Borrower, showing the Bank as loss payee as its interests may appear;

**FINANCIAL COVENANTS**

In the event that the Borrower changes accounting standards, accounting principles and/or the application of accounting principles during the term of this Agreement, all financial covenants shall be calculated using the accounting standards and principles applicable at the time this Agreement was entered into.

Without affecting or limiting the right of the Bank to terminate or demand payment of, or cancel or restrict availability of any unutilized portion of any demand or other discretionary facility the Borrower covenants and agrees with the Bank that the Borrower will:

- a) maintain to be measured as at the end of each fiscal year:
  - i. Debt Service Coverage, of not less than 1.25:1.

**REPORTING REQUIREMENTS**

The Borrower will provide the following to the Bank:

- a) annual audited financial statements for the Borrower, within 120 days of each fiscal year end;
- b) such other financial and operating statements and reports as and when the Bank may reasonably require.

**CONDITIONS PRECEDENT**

In no event will the Credit Facilities or any part thereof be available unless the Bank has received:

- a) a duly executed copy of this Agreement;
- b) the Security provided for herein, registered, as required, to the satisfaction of the Bank;
- c) such financial and other information or documents relating to the Borrower or any Guarantor if applicable as the Bank may reasonably require; and
- d) such other authorizations, approvals, opinions and documentation as the Bank may reasonably require.

Additionally;

- e) all documentation to be received by the Bank shall be in form and substance satisfactory to the Bank;
- f) no Lease will be made available to the Borrower unless it meets the leasing criteria established by the Bank and the Bank has received such documentation in respect thereof as may be required by the Bank.



**CONDITIONS PRECEDENT FACILITY #3**

In addition to the conditions set forth in the Conditions Precedent section above and the terms and conditions of the Lease Agreement, the availability of any Borrowing under Facility #3 is further conditional upon the receipt of:

- a) a request for advance, together with:
  - i) a report showing the cost of work completed to date, the cumulative positive or negative value of any change orders, the amount of any holdbacks under any real property lien legislation and the current cost to complete the Project; and
  - ii) an update to the Project Budget and Project Schedule together with comments on any material variances from the original Project Budget and Project Schedule provided to the Bank;
- b) evidence, satisfactory to the Bank that all draws are subject to review and approval by RBC Leasing, including but not limited to the following conditions:
  - i) 100% financing related to major expansion and renovation, as per concurrence from Leasing Manager Cory Munro; and
  - ii) maximum 84 month amortization, as per concurrence from Leasing Manager Cory Munro;
- c) evidence, satisfactory to the Bank, that the aggregate of undrawn availability at any time must be equal to or greater than the estimated cost to complete the Project plus any outstanding related payables. Should the cost to complete the Project plus any outstanding related payables at any time exceed the remaining funds available under the loan, the Bank will be under no obligation to advance further funds and the Borrower will immediately provide sufficient funds to cover the deficiency.

**BUSINESS LOAN INSURANCE PLAN**

The Borrower hereby acknowledges that the Bank has offered it group creditor insurance coverage on the Borrowings under the Business Loan Insurance Plan and the Borrower hereby acknowledges that it is the Borrower's responsibility to apply for any new or increased insurance amount for the Borrowings that may be eligible.

If the Borrower decides to apply for insurance on the Borrowings, the application will be made via the Bank's Business Loan Insurance Plan application (form 3460 ENG or 53460 FRE). If the Borrower has existing uninsured Borrowings and decides not to apply for Business Loan Insurance Plan coverage on any new Borrowings, it hereby acknowledges that the Bank may accept the Borrower's signature below as the Borrower's waiver of the Bank's offer to apply for Business Loan Insurance Plan coverage on all such Borrowings, and that all such Borrowings are not insured under the Policy as at the date of acceptance of this Agreement.

If the Borrower has Business Loan Insurance Plan coverage on previously approved Borrowings, such coverage will be applied automatically to all new Borrowings eligible for Business Loan Insurance Plan coverage that share the same loan account number, up to the approved amount of Business Loan Insurance Plan coverage. This Agreement cannot be used to waive coverage on new Borrowings eligible for Business Loan Insurance Plan coverage if Business Loan Insurance Plan coverage is in effect on the Borrower's existing Borrowings. If the Borrower does not want Business Loan Insurance Plan coverage to apply to any new Borrowings, a different loan account number will need to be set up and all uninsured loans attached to it.

If the Borrower has existing Borrowings to which Business Loan Insurance Plan coverage applies, and any new Borrowings would exceed the approved amount of Business Loan Insurance Plan coverage already in place, the Borrower must apply for additional Business

Peace Bridge Duty Free Inc.

July 20, 2018

Loan Insurance Plan coverage (if eligible) in order for Business Loan Insurance Plan coverage to apply to any new Borrowings. If the Borrower decides not to apply for additional Business Loan Insurance Plan coverage in respect of any new Borrowings (if eligible), the Borrower hereby acknowledges that the Bank may accept the Borrower's signature below as the Borrower's waiver of the Bank's offer to apply for additional Business Loan Insurance Plan coverage on such new Borrowings and that such new Borrowings are not insured under the Policy as at the date the Borrower executes this Agreement.

If there are any discrepancies between the insurance information in this Agreement and the Business Loan Insurance Plan documents regarding the Borrowings, the Business Loan Insurance Plan documents govern.

Business Loan Insurance Plan premiums (plus applicable taxes), will be taken as a separate payment, directly from the bank account associated with the loan, at the same frequency and schedule as your regular loan payments, where applicable. As premiums are based on the outstanding loan balance and the insured person's age at the time the premiums are due, the cost of Business Loan Insurance Plan coverage may increase during the term of the loan. The premium calculation is set out in the Business Loan Insurance Plan terms and conditions provided to the Borrower at the time the application for Business Loan Insurance Plan coverage was completed. Refer to the terms and conditions (form 3460 ENG or 53460 FRE) for further explanation and disclosure.

#### **GOVERNING LAW JURISDICTION**

Province of Ontario.

#### **ACCEPTANCE**

This Agreement is open for acceptance until August 20, 2018, after which date it will be null and void, unless extended in writing by the Bank.

#### **ROYAL BANK OF CANADA**

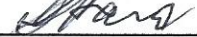


Per: \_\_\_\_\_  
Name: Mike Cussen  
Title: Vice President, Business Credit

/mp

We acknowledge and accept the terms and conditions of this Agreement on this 27 day of July, 2018.

#### **PEACE BRIDGE DUTY FREE INC.**

Per:   
Name: GREGORY G. O'HARA  
Title: PRESIDENT & C.E.O.

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

I/We have the authority to bind the Borrower

Attachments:

Terms and Conditions

Schedules:

- Definitions
- Calculation and Payment of Interest and Fees
- Additional Borrowing Conditions
- RBC Covarity Dashboard Terms and Conditions



## TERMS AND CONDITIONS

The Bank is requested by the Borrower to make the Credit Facilities available to the Borrower in the manner and at the rates and times specified in this Agreement. Terms defined elsewhere in this Agreement and not otherwise defined in the Terms and Conditions below or the Schedules attached hereto have the meaning given to such terms as so defined. In consideration of the Bank making the Credit Facilities available, the Borrower agrees, and if the Borrower is comprised of more than one Person, such Persons jointly and severally agree, or in Quebec solidarily agree, with the Bank as follows:

### REPAYMENT

Amounts outstanding under the Credit Facilities, together with interest, shall become due in the manner and at the rates and times specified in this Agreement and shall be paid in the currency of the Borrowing. Unless the Bank otherwise agrees, any payment hereunder must be made in money which is legal tender at the time of payment. In the case of a demand facility of any kind, the Borrower shall repay all principal sums outstanding under such facility upon demand including, without limitation, an amount equal to the face amount of all LGs which are unmatured or unexpired, which amount shall be held by the Bank as security for the Borrower's obligations to the Bank in respect of such Borrowings. Where any Borrowings are repayable by scheduled blended payments, such payments shall be applied, firstly, to interest due, and the balance, if any, shall be applied to principal outstanding. If any such payment is insufficient to pay all interest then due, the unpaid balance of such interest will be added to such Borrowing, will bear interest at the same rate, and will be payable on demand or on the date specified herein, as the case may be. Borrowings repayable by way of scheduled payments of principal and interest shall be so repaid with any balance of such Borrowings being due and payable as and when specified in this Agreement. The Borrower shall ensure that the maturities of instruments or contracts selected by the Borrower when making Borrowings will be such so as to enable the Borrower to meet its repayment obligations. For any Borrowings that are repayable by scheduled payments, if the scheduled payment date is changed then the Maturity Date of the applicable Borrowings shall automatically be amended accordingly.

In the case of any reducing term loan and/or reducing term facility ("**Reducing Term Loan/Facility**"), provided that nothing contained in this paragraph shall confer any right of renewal or extension upon the Borrower, the Borrower and the Bank agree that, at the Bank's option, the Bank may provide a letter ("**Renewal Letter**") to the Borrower setting out the terms upon which the Bank is prepared to extend the Reducing Term Loan/Facility. In the event that the Bank provides a Renewal Letter to the Borrower and the Reducing Term Loan/Facility is not repaid on or before the Maturity Date of the applicable Reducing Term Loan/Facility, then at the Bank's option the Reducing Term Loan/Facility shall be automatically renewed on the terms set out in the Renewal Letter and the terms of this Agreement shall be amended accordingly.

### PREPAYMENT

Where Borrowings are by way of RBP Loans or RBUSBR Loans, the Borrower may prepay such Borrowings in whole or in part without fee or premium.

The prepayment of any Borrowings under a term facility and/or any term loan will be made in the reverse order of maturity.

### EVIDENCE OF INDEBTEDNESS

The Bank shall maintain accounts and records (the "**Accounts**") evidencing the Borrowings made available to the Borrower by the Bank under this Agreement. The Bank shall record the principal amount of such Borrowings, the payment of principal and interest on account of the Borrowings, and all other amounts becoming due to the Bank under this Agreement. The Accounts constitute, in the absence of manifest error, conclusive evidence of the indebtedness of the Borrower to the Bank pursuant to this Agreement. The Borrower authorizes and directs the Bank to automatically debit, by mechanical, electronic or manual means, any bank account of the Borrower for all amounts payable under this Agreement, including, but not limited to, the



repayment of principal and the payment of interest, fees and all charges for the keeping of such bank accounts.

#### **GENERAL COVENANTS**

Without affecting or limiting the right of the Bank to terminate or demand payment of, or cancel or restrict availability of any unutilized portion of, any demand or other discretionary facility, the Borrower covenants and agrees with the Bank that the Borrower:

- a) will pay all sums of money when due under the terms of this Agreement;
- b) will immediately advise the Bank of any event which constitutes or which, with notice, lapse of time or both, would constitute a breach of any covenant or other term or condition of this Agreement or any Security;
- c) will file all material tax returns which are or will be required to be filed by it, pay or make provision for payment of all material taxes (including interest and penalties) and Potential Prior-Ranking Claims, which are or will become due and payable and provide adequate reserves for the payment of any tax, the payment of which is being contested;
- d) will give the Bank 30 days prior notice in writing of any intended change in its ownership structure and it will not make or facilitate any such changes without the prior written consent of the Bank;
- e) will comply with all Applicable Laws, including, without limitation, all Environmental and Health and Safety Laws;
- f) will immediately advise the Bank of any action requests or violation notices received concerning the Borrower and hold the Bank harmless from and against any losses, costs or expenses which the Bank may suffer or incur for any environment related liabilities existent now or in the future with respect to the Borrower;
- g) will deliver to the Bank such financial and other information as the Bank may reasonably request from time to time, including, but not limited to, the reports and other information set out under Reporting Requirements;
- h) will immediately advise the Bank of any unfavourable change in its financial position which may adversely affect its ability to pay or perform its obligations in accordance with the terms of this Agreement;
- i) will keep its assets fully insured against such perils and in such manner as would be customarily insured by Persons carrying on a similar business or owning similar assets and, in addition, for any buildings located in areas prone to flood and/or earthquake, will insure and keep fully insured such buildings against such perils;
- j) except for Permitted Encumbrances, will not, without the prior written consent of the Bank, grant, create, assume or suffer to exist any mortgage, charge, lien, pledge, security interest or other encumbrance affecting any of its properties, assets or other rights;
- k) will not, without the prior written consent of the Bank, sell, transfer, convey, lease or otherwise dispose of any of its properties or assets other than in the ordinary course of business and on commercially reasonable terms;
- l) will not, without the prior written consent of the Bank, guarantee or otherwise provide for, on a direct, indirect or contingent basis, the payment of any monies or performance of any obligations by any other Person, except as may be provided for herein;
- m) will not, without the prior written consent of the Bank, merge, amalgamate, or otherwise enter into any other form of business combination with any other Person;
- n) will permit the Bank or its representatives, from time to time, i) to visit and inspect the Borrower's premises, properties and assets and examine and obtain copies of the Borrower's records or other information, ii) to collect information from any entity regarding any Potential Prior-Ranking Claims and iii) to discuss the Borrower's affairs with the auditors, counsel and other professional advisers of the Borrower. The Borrower hereby authorizes and directs any such third party to provide to the Bank or its representatives all such information, records or documentation requested by the Bank; and
- o) will not use the proceeds of any Credit Facility for the benefit or on behalf of any Person other than the Borrower.

#### **FEES, COSTS AND EXPENSES**

The Borrower agrees to pay the Bank all fees stipulated in this Agreement and all fees charged by the Bank relating to the documentation or registration of this Agreement and the Security. In



addition, the Borrower agrees to pay all fees (including legal fees), costs and expenses incurred by the Bank in connection with the preparation, negotiation, documentation and registration of this Agreement and any Security and the administration, operation, termination, enforcement or protection of its rights in connection with this Agreement and the Security. The Borrower shall indemnify and hold the Bank harmless against any loss, cost or expense incurred by the Bank if any facility under the Credit Facilities is repaid or prepaid other than on its Maturity Date. The determination by the Bank of such loss, cost or expense shall be conclusive and binding for all purposes and shall include, without limitation, any loss incurred by the Bank in liquidating or redeploying deposits acquired to make or maintain any facility.

#### **GENERAL INDEMNITY**

The Borrower hereby agrees to indemnify and hold the Bank and its directors, officers, employees and agents harmless from and against any and all claims, suits, actions, demands, debts, damages, costs, losses, obligations, judgements, charges, expenses and liabilities of any nature which are suffered, incurred or sustained by, imposed on or asserted against any such Person as a result of, in connection with or arising out of i) any breach of any term or condition of this Agreement or any Security or any other agreement delivered to the Bank by the Borrower or any Guarantor if applicable, ii) the Bank acting upon instructions given or agreements made by electronic transmission of any type, iii) the presence of Contaminants at, on or under or the discharge or likely discharge of Contaminants from, any properties now or previously used by the Borrower or any Guarantor and iv) the breach of or non compliance with any Applicable Law by the Borrower or any Guarantor.

#### **AMENDMENTS AND WAIVERS**

No amendment or waiver of any provision of this Agreement will be effective unless it is in writing, signed by the Borrower and the Bank. No failure or delay, on the part of the Bank, in exercising any right or power hereunder or under any Security or any other agreement delivered to the Bank shall operate as a waiver thereof. Any amendments requested by the Borrower will require review and agreement by the Bank and its counsel. Costs related to this review will be for the Borrower's account.

#### **SUCCESSORS AND ASSIGNS**

This Agreement shall extend to and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns. The Borrower shall not be entitled to assign or transfer any rights or obligations hereunder, without the consent in writing of the Bank. The Bank may assign or transfer all or any part of its rights and obligations under this Agreement to any Person. The Bank may disclose to potential or actual assignees or transferees confidential information regarding the Borrower and any Guarantor if applicable, (including, any such information provided by the Borrower, and any Guarantor if applicable, to the Bank) and shall not be liable for any such disclosure.

#### **GAAP**

Unless otherwise provided, all accounting terms used in this Agreement shall be interpreted in accordance with Canadian Generally Accepted Accounting Principles, as appropriate, for publicly accountable enterprises, private enterprises, not-for-profit organizations, pension plans and in accordance, as appropriate, with Public Sector Accounting Standards for government organizations in effect from time to time, applied on a consistent basis from period to period. All financial statements and/or reports shall be prepared using one of the above bases of presentation, as appropriate. Except for the transition of accounting standards in Canada, any change in accounting principles or the application of accounting principles is only permitted with the prior written consent of the Bank.

#### **SEVERABILITY**

The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement and such invalid provision shall be deemed to be severable.

**GOVERNING LAW**

This Agreement shall be construed in accordance with and governed by the laws of the Province identified in the Governing Law Jurisdiction section of this Agreement and the laws of Canada applicable therein. The Borrower irrevocably submits to the non-exclusive jurisdiction of the courts of such Province and acknowledges the competence of such courts and irrevocably agrees to be bound by a judgment of any such court.

**DEFAULT BY LAPSE OF TIME**

The mere lapse of time fixed for performing an obligation shall have the effect of putting the Borrower, or a Guarantor if applicable, in default thereof.

**SET-OFF**

The Bank is authorized (but not obligated), at any time and without notice, to apply any credit balance (whether or not then due) in any account in the name of the Borrower, or to which the Borrower is beneficially entitled (in any currency) at any branch or agency of the Bank in or towards satisfaction of the indebtedness of the Borrower due to the Bank under the Credit Facilities and the other obligations of the Borrower under this Agreement. For that purpose, the Bank is irrevocably authorized to use all or any part of any such credit balance to buy such other currencies as may be necessary to effect such application.

**NOTICES**

Any notice or demand to be given by the Bank shall be given in writing by way of a letter addressed to the Borrower. If the letter is sent by telecopier, it shall be deemed received on the date of transmission, provided such transmission is sent prior to 5:00 p.m. on a day on which the Borrower's business is open for normal business, and otherwise on the next such day. If the letter is sent by ordinary mail to the address of the Borrower, it shall be deemed received on the date falling five (5) days following the date of the letter, unless the letter is hand-delivered to the Borrower, in which case the letter shall be deemed to be received on the date of delivery. The Borrower must advise the Bank at once about any changes in the Borrower's address.

**CONSENT OF DISCLOSURE**

The Borrower hereby grants permission to any Person having information in such Person's possession relating to any Potential Prior-Ranking Claim, to release such information to the Bank (upon its written request), solely for the purpose of assisting the Bank to evaluate the financial condition of the Borrower.

**NON-MERGER**

The provisions of this Agreement shall not merge with any Security provided to the Bank, but shall continue in full force for the benefit of the parties hereto.

**JOINT AND SEVERAL**

Where more than one Person is liable as Borrower or Guarantor if applicable for any obligation under this Agreement, then the liability of each such Person for such obligation is joint and several (in Quebec, solidarily) with each other such Person.

**COUNTERPART EXECUTION**

This Agreement may be executed in any number of counterparts and by different parties in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together constitute one and the same instrument.

**ELECTRONIC MAIL AND FAX TRANSMISSION**

The Bank is entitled to rely on any agreement, document or instrument provided to the Bank by the Borrower or any Guarantor as applicable, by way of electronic mail or fax transmission as though it were an original document. The Bank is further entitled to assume that any communication from the Borrower received by electronic mail or fax transmission is a reliable communication from the Borrower.



**ELECTRONIC IMAGING**

The parties hereto agree that, at any time, the Bank may convert paper records of this Agreement and all other documentation delivered to the Bank (each, a "**Paper Record**") into electronic images (each, an "**Electronic Image**") as part of the Bank's normal business practices. The parties agree that each such Electronic Image shall be considered as an authoritative copy of the Paper Record and shall be legally binding on the parties and admissible in any legal, administrative or other proceeding as conclusive evidence of the contents of such document in the same manner as the original Paper Record.

**REPRESENTATIONS AND WARRANTIES**

The Borrower represents and warrants to the Bank that:

- a) it is duly incorporated, validly existing and duly registered or qualified to carry on business in each jurisdiction in which its business or assets are located;
- b) the execution, delivery and performance by it of this Agreement have been duly authorized by all necessary actions and do not violate its constituting documents or any Applicable Laws or agreements to which it is subject or by which it is bound;
- c) no event has occurred which constitutes, or which, with notice, lapse of time, or both, would constitute, a breach of any covenant or other term or condition of this Agreement or any Security or any other agreement delivered to the Bank;
- d) there is no claim, action, prosecution or other proceeding of any kind pending or threatened against it or any of its assets or properties before any court or administrative agency which relates to any non-compliance with any Environmental and Health and Safety Laws which, if adversely determined, might have a material adverse effect upon its financial condition or operations or its ability to perform its obligations under this Agreement or any Security, and there are no circumstances of which it is aware which might give rise to any such proceeding which it has not fully disclosed to the Bank; and
- e) it has good and marketable title to all of its properties and assets, free and clear of any encumbrances, other than as may be provided for herein.

Representations and warranties are deemed to be repeated as at the time of each Borrowing and/or the entering into each Lease hereunder.

**LANGUAGE**

The parties hereto have expressly requested that this Agreement and all related documents, including notices, be drawn up in the English language. Les parties ont expressément demandé que la présente convention et tous les documents y afférents, y compris les avis, soient rédigés en langue anglaise.

**WHOLE AGREEMENT**

This Agreement and any documents or instruments referred to in, or delivered pursuant to, or in connection with, this Agreement constitute the whole and entire agreement between the Borrower and the Bank with respect to the Credit Facilities.

**EXCHANGE RATE FLUCTUATIONS**

If, for any reason, the amount of Borrowings and/or Leases outstanding under any facility in a currency other than Canadian currency, when converted to the Equivalent Amount in Canadian currency, exceeds the amount available under such facility, the Borrower shall immediately repay such excess or shall secure such excess to the satisfaction of the Bank.

**JUDGEMENT CURRENCY**

If for the purpose of obtaining judgement in any court in any jurisdiction with respect to this Agreement, it is necessary to convert into the currency of such jurisdiction (the "**Judgement Currency**") any amount due hereunder in any currency other than the Judgement Currency, then conversion shall be made at the rate of exchange prevailing on the Business Day before the day on which judgement is given. For this purpose "rate of exchange" means the rate at which the Bank would, on the relevant date, be prepared to sell a similar amount of such currency in the Toronto foreign exchange market, against the Judgement Currency, in accordance with normal banking procedures.



In the event that there is a change in the rate of exchange prevailing between the Business Day before the day on which judgement is given and the date of payment of the amount due, the Borrower will, on the date of payment, pay such additional amounts as may be necessary to ensure that the amount paid on such date is the amount in the Judgement Currency which, when converted at the rate of exchange prevailing on the date of payment, is the amount then due under this Agreement in such other currency together with interest at RBP and expenses (including legal fees on a solicitor and client basis). Any additional amount due from the Borrower under this section will be due as a separate debt and shall not be affected by judgement being obtained for any other sums due under or in respect of this Agreement.

## Schedule "A"

### DEFINITIONS

For the purpose of this Agreement, the following terms and phrases shall have the following meanings:

**"Applicable Laws"** means, with respect to any Person, property, transaction or event, all present or future applicable laws, statutes, regulations, rules, policies, guidelines, rulings, interpretations, directives (whether or not having the force of law), orders, codes, treaties, conventions, judgements, awards, determinations and decrees of any governmental, quasi-governmental, regulatory, fiscal or monetary body or agency or court of competent jurisdiction in any applicable jurisdiction;

**"Borrowing"** means each use of a Credit Facility, excluding Leases, and all such usages outstanding at any time are **"Borrowings"**;

**"Business Day"** means a day, excluding Saturday, Sunday and any other day which shall be a legal holiday or a day on which banking institutions are closed throughout Canada;

**"Business Loan Insurance Plan"** means the optional group creditor insurance coverage, underwritten by Sun Life Assurance Company of Canada, and offered in connection with eligible loan products offered by the Bank;

**"Cash Taxes"** means, for any fiscal period, any amounts paid in respect of income taxes;

**"Contaminant"** includes, without limitation, any pollutant, dangerous substance, liquid waste, industrial waste, hazardous material, hazardous substance or contaminant including any of the foregoing as defined in any Environmental and Health and Safety Law;

**"Corporate Distributions"** means any payments to any shareholder, director or officer, or to any associate or holder of subordinated debt, or to any shareholder, director or officer of any associate or holder of subordinated debt, including, without limitation, bonuses, dividends, interest, salaries or repayment of debt or making of loans to any such Person, but excluding salaries to officers or other employees in the ordinary course of business;

**"Debt Service Coverage"** means, for any fiscal period, the ratio of EBITDA, less Cash Taxes and, to the extent not deducted in determining net income, less Corporate Distributions, to the total of Interest Expense and scheduled principal payments in respect of Funded Debt;

**"EBITDA"** means, for any fiscal period, net income from continuing operations (excluding extraordinary gains or losses) plus, to the extent deducted in determining net income, Interest Expense and income taxes accrued during, and depreciation, depletion and amortization expenses deducted for, the period;

**"Environmental Activity"** means any activity, event or circumstance in respect of a Contaminant, including, without limitation, its storage, use, holding, collection, purchase, accumulation, assessment, generation, manufacture, construction, processing, treatment, stabilization, disposition, handling or transportation, or its Release into the natural environment, including movement through or in the air, soil, surface water or groundwater;

**"Environmental and Health and Safety Laws"** means all Applicable Laws relating to the environment or occupational health and safety, or any Environmental Activity;

**"Equivalent Amount"** means, with respect to an amount of any currency, the amount of any other currency required to purchase that amount of the first mentioned currency through the Bank in Toronto, in accordance with normal banking procedures;



**"Funded Debt"** means, at any time for the fiscal period then ended, all obligations for borrowed money which bears interest or to which interest is imputed plus, without duplication, all obligations for the deferred payment of the purchase of property, all capital lease obligations and all indebtedness secured by purchase money security interests, but excluding Postponed Debt;

**"Guarantor"** means any Person who has guaranteed the obligations of the Borrower under this Agreement;

**"Interest Expense"** means, for any fiscal period, the aggregate cost of advances of credit outstanding during that period including, without limitation, interest charges, capitalized interest, the interest component of capital leases, fees payable in respect of letters of credit and letters of guarantee and discounts incurred and fees payable in respect of bankers' acceptances;

**"Lease"** means an advance of credit by the Bank to the Borrower by way of a Master Lease Agreement, Master Leasing Agreement, Leasing Schedule, Equipment Lease, Conditional Sales Contract, or pursuant to an Interim Funding Agreement or an Agency Agreement, in each case issued to the Borrower;

**"Letter of Guarantee" or "LG"** means a documentary credit issued by the Bank on behalf of the Borrower for the purpose of providing security to a third party that the Borrower or a person designated by the Borrower will perform a contractual obligation owed to such third party;

**"Maturity Date"** means the date on which a facility is due and payable in full;

**"Permitted Encumbrances"** means, in respect of the Borrower:

- a) liens arising by operation of law for amounts not yet due or delinquent, minor encumbrances on real property such as easements and rights of way which do not materially detract from the value of such property, and security given to municipalities and similar public authorities when required by such authorities in connection with the operations of the Borrower in the ordinary course of business; and
- b) Security granted in favour of the Bank;

**"Person"** includes an individual, a partnership, a joint venture, a trust, an unincorporated organization, a company, a corporation, an association, a government or any department or agency thereof including Canada Revenue Agency, and any other incorporated or unincorporated entity;

**"Policy"** means the Business Loan Insurance Plan policy 5100, issued by Sun Life Assurance Company of Canada to the Bank;

**"Postponed Debt"** means indebtedness that is fully postponed and subordinated, both as to principal and interest, on terms satisfactory to the Bank, to the obligations owing to the Bank hereunder;

**"Potential Prior-Ranking Claims"** means all amounts owing or required to be paid, where the failure to pay any such amount could give rise to a claim pursuant to any law, statute, regulation or otherwise, which ranks or is capable of ranking in priority to the Security or otherwise in priority to any claim by the Bank for repayment of any amounts owing under this Agreement;

**"RBP" and "Royal Bank Prime"** each means the annual rate of interest announced by the Bank from time to time as being a reference rate then in effect for determining interest rates on commercial loans made in Canadian currency in Canada;

**"RBUSBR" and "Royal Bank US Base Rate"** each means the annual rate of interest announced by the Bank from time to time as a reference rate then in effect for determining interest rates on commercial loans made in US currency in Canada;

**"Release"** includes discharge, spray, inject, inoculate, abandon, deposit, spill, leak, seep, pour, emit, empty, throw, dump, place and exhaust, and when used as a noun has a similar meaning;

**"US"** means United States of America.

**Schedule "B"****CALCULATION AND PAYMENT OF INTEREST AND FEES****LIMIT ON INTEREST**

The Borrower shall not be obligated to pay any interest, fees or costs under or in connection with this Agreement in excess of what is permitted by Applicable Law.

**OVERDUE PAYMENTS**

Any amount that is not paid when due hereunder shall, unless interest is otherwise payable in respect thereof in accordance with the terms of this Agreement or the instrument or contract governing same, bear interest until paid at the rate of RBP plus 5% per annum or, in the case of an amount in US currency if applicable, RBUSBR plus 5% per annum. Such interest on overdue amounts shall be computed daily, compounded monthly and shall be payable both before and after any or all of default, maturity date, demand and judgement.

**EQUIVALENT YEARLY RATES**

The annual rates of interest or fees to which the rates calculated in accordance with this Agreement are equivalent, are the rates so calculated multiplied by the actual number of days in the calendar year in which such calculation is made and divided by 365.

**TIME AND PLACE OF PAYMENT**

Amounts payable by the Borrower hereunder shall be paid at such place as the Bank may advise from time to time in the applicable currency. Amounts due on a day other than a Business Day shall be deemed to be due on the Business Day next following such day. Interest and fees payable under this Agreement are payable both before and after any or all of default, maturity date, demand and judgement.

**RBP LOANS AND RBUSBR LOANS**

The Borrower shall pay interest on each RBP Loan and RBUSBR Loan, monthly in arrears, on the 26th day of each month or such other day as may be agreed to between the Borrower and the Bank. Such interest will be calculated monthly and will accrue daily on the basis of the actual number of days elapsed and a year of 365 days and shall be paid in the currency of the applicable Borrowing.

**LETTER OF GUARANTEE FEES**

The Borrower shall pay LG fees in advance on a quarterly basis calculated on the face amount of the LG issued and based on the number of days in the upcoming quarter or remaining term thereof and a year of 365 days. LG fees are non-refundable.

**Schedule "D"****ADDITIONAL BORROWING CONDITIONS****LGs:**

Borrowings made by way of LGs will be subject to the following terms and conditions:

- a) each LG shall expire on a Business Day and shall have a term of not more than 365 days;
- b) at least 2 Business Days prior to the issue of an LG, the Borrower shall execute a duly authorized application with respect to such LG and each LG shall be governed by the terms and conditions of the relevant application for such contract;
- c) an LG may not be revoked prior to its expiry date unless the consent of the beneficiary of the LG has been obtained;
- d) any LG issued under a term facility must have an expiry date on or before the Maturity Date of the term facility, unless otherwise agreed by the Bank; and
- e) if there is any inconsistency at any time between the terms of this Agreement and the terms of the application for LG, the terms of the application for LG shall govern.



## Schedule "J"

## RBC COVARIETY DASHBOARD TERMS AND CONDITIONS

If the Borrower elects to fulfill the reporting requirements relating to the submission of financial information set out in this Agreement by accessing a secure web based portal ("**RBC Covarity Dashboard**") via the Internet and using RBC Covarity Dashboard to electronically upload the Borrower's financial information and to complete online and electronically submit certificates, reports and/or forms (the "**Service**"), then the following terms and conditions (the "**RBC Covarity Dashboard Terms and Conditions**") apply and are deemed to be included in, and form part of, the Agreement.

**1. Definitions.** For the purpose of the RBC Covarity Dashboard Terms and Conditions:

**"Disabling Code"** means any clock, timer, counter, computer virus, worm, software lock, drop dead device, Trojan horse routine, trap door, time bomb, or any other unauthorized codes, designs, routines or instructions that may be used to access, modify, replicate, distort, delete, damage or disable any Electronic Channel, including any related hardware or software.

**"Designated User"** an individual permitted to act on behalf of and bind the Borrower in all respects, and specifically in the submission of Electronically Uploaded Financial Information and/or Electronically Submitted Certificates.

**"Electronic Channel"** means any telecommunication or electronic transmission method which may be used in connection with the Service, including computer, Internet, telephone, e-mail or facsimile.

**"Electronic Communication"** means any information, disclosure, request or other communication or agreement sent, received or accepted using an Electronic Channel.

**"Electronically Submitted Certificates"** means certificates, reports and/or forms completed online and electronically submitted by any Designated User accessing the Service.

**"Electronically Uploaded Financial Information"** means financial data, reports and/or information of the Borrower electronically uploaded by any Designated User accessing the Service.

**"Internet"** means a decentralized global communications medium and the world-wide network of computer networks, accessible to the public, that are connected to each other using specific protocols, which provides for file transfer, electronic mail, remote log in, news, database access, and other services.

**"Password"** means a combination of numbers and/or letters selected by a Designated User that is used to identify the Designated User. The Password is used in conjunction with a User ID to access the Service.

**"Security Breach"** means any breach in the security of the Service, or any actual or threatened use of the Service, a Security Device, or Electronic Channel in a manner contrary to the Agreement, including, without limitation, the introduction of Disabling Code or a Virus to the Service.

**"Security Device"** means a combination of a User ID and Password.

**"Software"** means any computer program or programming (in any code format, including source code), as modified from time to time, and related documentation.

**"User ID"** means the combination of numbers and/or letters selected by the Borrower used to identify a particular Designated User. The User ID is used in conjunction with a Password to access the Service.

**"Virus"** means an element which is designed to corrupt data or enable access to or adversely impact upon the performance of computer systems, including any virus, worm, logic bomb and Trojan horse.

Terms defined in the Agreement have the same meanings where used in the RBC Covarity Dashboard Terms and Conditions.

**2. Access to the Service.** The Borrower will appoint one or more Designated User(s) to access the Service on behalf of the Borrower. The Borrower acknowledges and agrees that each Designated User appointed by the Borrower may electronically upload the Borrower's financial information and may view all previously uploaded financial information and all calculations in the RBC Covarity Dashboard.

At the time of registration for the Service, the Borrower will advise the Bank of the name and e-mail address of each Designated User. The Borrower will immediately advise the Bank if a Designated User changes or is no longer valid.

The Bank will provide the Borrower with a User ID and temporary password for each Designated User. Each Designated User will receive the User ID and temporary password delivered to their e-mail address. Each Designated User will change the temporary password to a unique Password which may not be easily guessed or obtained by others. If it is suspected or known that the Password has been compromised in any way, the Password must be changed immediately.

On first access to the Service, each Designated User will be required to read and agree to terms of use which will thereafter be accessible from a link located on each web page of the Service.

**3. Security Devices.** The Borrower recognizes that possession of a Security Device by any person may result in that person having access to the Service. The Borrower agrees that the use of a Security Device in connection with the Service, including any information sent, received or accepted using the Service, will be deemed to be conclusive proof that such information is accurate and complete, and the submission of which is authorized by, and enforceable against, the Borrower.

The Borrower is responsible for maintaining the security and confidentiality of Security Devices which may be used in connection with the Service. The Borrower is responsible for ensuring that a Security Device will only be provided to and used by a Designated User. The Borrower agrees to be bound by any actions or omissions resulting from the use of any Security Device in connection with the Service.

**4. Security.** Each party shall at all times have in place appropriate policies and procedures to protect the security and confidentiality of the Service, Electronic Channels and Electronic Communication and to prevent any unauthorized access to and use of the Service and Electronic Channels. The Borrower agrees to comply with any additional procedures, standards or other security requirements that the Bank may require in order to access the Service.

The Borrower will not (i) access or use the Service for an illegal, fraudulent, malicious or defamatory purpose, or (ii) take steps or actions that could or do undermine the security, integrity, effectiveness, goodwill or connectivity of the Service (including illegal, fraudulent, malicious, defamatory or other activities that threaten to harm or cause harm to any other person).

The Borrower agrees not to transmit via the Service any viruses, worms, defects, Trojan horses or any items of a destructive nature. The Borrower shall maintain the security of their computer by using anti-virus scanning, a firewall and installing the latest security patches to provide assurance that no Virus is introduced into the systems or Software while accessing the Service.



**5. Unsecure Electronic Channels.** The Borrower acknowledges and agrees that if it uses, or if it authorizes and directs the Bank to use, any unencrypted Electronic Channel, including unencrypted e-mail or facsimile, any Electronic Communication sent, received and/or accepted using such Electronic Channel is not secure, reliable, private or confidential. Any such Electronic Communication could be subject to interception, loss or alteration, and may not be received by the intended recipient in a timely manner or at all. The Borrower assumes full responsibility for the risks associated with such Electronic Communication.

**6. Notice of Security Breach.** The Borrower shall notify the Bank by notifying the RBC Account Manager in writing immediately of any Security Breach including: (i) any application vulnerability or if a Virus is contained in or affects transmission of information to the Service; or (ii) if the Borrower knows or reasonably ought to know that an unauthorized person may have access to the Service, Security Device or Electronic Channel.

If a Security Breach occurs the Borrower shall: (i) assist the Bank in the management of any consequences arising from it; (ii) take any reasonable steps necessary for it to take to mitigate any harm resulting from it; and (iii) take appropriate steps to prevent its recurrence.

**7. Binding Effect.** Any Electronic Communication that the Bank receives from or in the name of, or purporting to be from or in the name of, the Borrower or any other person on the Borrower's behalf in connection with the Service, will be considered to be duly authorized by, and enforceable against, the Borrower. The Bank will be authorized to rely and act on any such Electronic Communication, even if the Electronic Communication was not actually from the Borrower or such other person or differs in any way from any previous Electronic Communication sent to the Bank. Any Electronically Uploaded Financial Information will be considered to be financial information submitted to the Bank by an individual permitted to act on behalf of and bind the Borrower in all respects, and the Bank will be authorized to rely and act on any such Electronically Uploaded Financial Information accordingly. Any Electronically Submitted Certificates will be considered to be certificates, reports and/or forms completed and submitted to the Bank by an individual permitted to act on behalf of and bind the Borrower in all respects, and the Bank will be authorized to rely and act on any such Electronically Submitted Certificates accordingly.

**8. Representations and Warranties.** The Borrower represents and warrants to the Bank that each time Electronically Uploaded Financial Information and/or Electronically Submitted Certificates are submitted: (i) all financial statements, certificates, forms, reports and all information contained therein will be accurate and complete in all respects; (ii) all amounts certified as Potential Prior-Ranking Claims will be current amounts owing and not in arrears; (iii) all representations and warranties contained in the Agreement will be true and correct; and (iv) no event will have occurred which constitutes, or which, with notice, lapse of time, or both, would constitute an Event of Default or breach of any covenant or other term or condition of the Agreement. The Borrower will be deemed to repeat these representations and warranties each time Electronically Uploaded Financial Information and/or Electronically Submitted Certificates are submitted.

**9. Evidence.** Electronic records and other information obtained by the Bank in an Electronic Communication will be admissible in any legal, administrative or other proceedings as conclusive evidence of the contents of those communications in the same manner as an original paper document, and the Borrower waives any right to object to the introduction of any such record or other information into evidence on that basis.

**10. Limitation of Liability.** The Bank is not responsible or liable for any damages arising from: (i) inaccurate, incomplete, false, misleading, or fraudulent information provided to the Bank; (ii) losses incurred as a result of an actual or potential Security Breach; or (iii) losses incurred as a result of application vulnerability or Virus that is contained in or affects any Software or systems used by or on behalf of the Borrower in connection with the Service.

Although every effort is made to provide secure transmission of information, timely communication and confidentiality cannot be guaranteed. In no event shall the Bank be liable for

any loss or harm resulting from the use of the Service, or from a breach of confidentiality in respect of use of the Service.

**11. Termination.** The ability of the Borrower to fulfill the reporting requirements relating to the submission of financial information set out in the Agreement using RBC Covarity Dashboard shall terminate upon revocation of access to the Service. In addition, the Bank may suspend or terminate access to or discontinue the Service immediately for any reason at any time without prior notice. The Bank will not be responsible for any loss or inconvenience that may result from such suspension or termination. The Borrower, upon giving notice to the Bank by notifying the RBC Account Manager in writing, may terminate use of the Service at any time.

**12. Amendment.** The Bank may amend these RBC Covarity Dashboard Terms and Conditions upon 30 days notice (which may be given electronically by way of e-mail or in writing) to the Borrower. The Borrower agrees that the continued use of the Service after the effective date of a change will constitute conclusive evidence of consent to all such amendments and the Borrower shall be bound by the amendments.



Revision (04/16)

**Commitment to Lease****Lessee No. 756679676****Lease No. 201000041741***Always refer to these numbers*

PEACE BRIDGE DUTY FREE INC.  
 1 Peace Bridge Plaza Box 339  
 Fort Erie, Ontario  
 L2A 5N1

Dear Sirs:

Royal Bank of Canada (hereinafter called "Royal Bank") is pleased to confirm that we are prepared to acquire, for the purpose of leasing to your Company, the assets (hereinafter called the "Equipment") as described below, upon the terms and conditions hereinafter set forth.

1. Lessee

PEACE BRIDGE DUTY FREE INC. (hereinafter called the "Lessee")

2. Lessor

Royal Bank of Canada

3. Equipment

expansion of this retail operation, including LHI/Equipment

The Equipment shall remain the property of Royal Bank, and the Lessee shall have no right or interest in the Equipment except as provided in this agreement. The Equipment shall at all times be and remain personal or movable property, regardless of the manner in which it may be attached to any real or immovable property.

4. Net Equipment Cost

The cost of acquisition of the Equipment (the "Net Equipment Cost"), according to your advice, shall not exceed the sum of \$5,000,000.00. Any increase in the Net Equipment Cost to be paid by Royal Bank is subject to prior written approval.

5. Timing of Purchase

The Equipment must be purchased by Royal Bank prior to June 30 2019 (hereinafter called the "Expiry Date"). Any extension by Royal Bank of this agreement is subject to prior written approval.

6. Term

The Equipment shall be leased for a term of 84 months.

7. Rental

The rentals shall be based on the 7 Yr Swap all-in OFF RBC Lease Base Rate being 2.53% ("Index Rate") on August 21, 2018. For any increase or decrease in the Index Rate as of the day prior to execution of Royal Bank's Leasing Agreement, the rentals will be adjusted upwards or downwards, as the case may be to reflect the new Index Rate.

8. Option to Purchase

The Lessee shall have the right to purchase the Equipment on the dates hereinafter set forth in consideration of the respective purchase price established by applying the respective percentage, or amount where applicable, stated hereunder to the Net Equipment Cost.

Purchase Option DatePurchase Option

After 84  
rentals have been paid

\$1.00

9. Insurance

The Lessee shall provide evidence of public liability and property damage insurance coverage in respect of the Equipment with limits of not less than \$2,000,000.00. The Equipment must also be insured to its full insurable value against all insurable risks and perils consistent with your usual practice for equipment of the same general classification and furnish evidence to Royal bank prior to the delivery of the equipment and thereafter upon request. Such insurance shall take effect on the date on which Royal Bank assumes responsibility for the Equipment or any part thereof.

10. Documentation and Legal Fees

The Lessee acknowledges that it has reviewed Royal Bank's standard Leasing Agreement(s) and that it is deemed acceptable for use on this transaction. A copy of the standard Leasing Agreement(s) will be provided upon request, if the lessee has not already been provided with one prior to this agreement. All expenses, costs or charges incurred by the Lessor, acting reasonably, for the publication or registration of the Leasing Agreement or other documents related to or connected with this proposed transaction are for your account.

All documents, agreements or writings, including without restriction a Leasing Agreement, in the reasonable opinion of our solicitors required to evidence the lease transaction, shall contain such terms and conditions as may be mutually agreed upon, and shall in all respects be satisfactory to our respective solicitors.

In the event you request changes in the terms and conditions of our standard Leasing Agreement which require us to engage counsel to consider and/or negotiate the details of such changes, then the legal fees thus incurred by us will be for your account.

11. Fees

A fee in the amount of \$2,500.00, plus applicable taxes, will be collected upon the execution for the Leasing Agreement.

12. Other Agreements and Appendices

All other agreements held by Royal Bank for the purposes of leasing the Equipment described in paragraph (3) which reference this Commitment to Lease are considered part of this agreement. The undernoted appendices, if shown, also form part of this agreement:

13. General Conditions

The Lessee will personally choose and select the Equipment and Royal Bank shall not, in any respect, be liable or responsible for the quality, adequacy or suitability of the Equipment or for any warranty claims for the maintenance, repair or satisfactory operation of the Equipment. Furthermore, the Lessor hereby conveys to the Lessee the warranty resulting from the sale entered into with the supplier.

Royal Bank will not become obligated to purchase the Equipment or any part thereof until the Leasing Agreement and all other documents required shall have been executed between us.

14. Royal Bank will be entitled to rely on any signature appearing on a facsimile transmission that purports to be a signature of the Lessee or of a representative of the Lessee as being authorized, valid and binding on the Lessee, even if the signature was not, in fact, signed by the Lessee or its representative. The Lessee will keep the originals of all documents and instructions transmitted to Royal Bank by facsimile and will produce them to Royal Bank upon request. Royal Bank and the Lessee agree that a copy of a document transmitted by fax shall be admissible as evidence of its contents and its execution by the parties in the same manner as an original document, and expressly waive any right to object to its introduction in evidence, including any right to object based on the best evidence rule.

This Commitment to Lease is open for acceptance by the Lessee until September 30 2018, after which date, unless extended by us in writing, the same shall lapse, become null and void and be of no further force and effect.

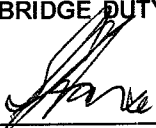
If the foregoing is acceptable to you, please so indicate by executing this agreement and returning a copy to us. Please retain a copy of this agreement for your records and future reference.

We, the undersigned, agree to lease the described Equipment on the above terms and conditions and confirm that we have the authority to sign for on behalf of the Lessee. The Lessee may not assign, cede or otherwise dispose of their rights under this Commitment to Lease and no amendment hereto shall be binding on either of us unless the same is in writing.

*Lessor and Lessee hereby acknowledge that they have required this Agreement and all related documents to be drawn up in the English language. La Banque Royale et le crédit-preneur reconnaissent avoir exigé que la présente demande de crédit-bail et les documents s'y rattachant soient rédigés en anglais.*

Dated on the 21st day of August, 2018.

**PEACE BRIDGE DUTY FREE INC.**

Per:   
(Authorized Signatory) G.G. O'HARA

Title: PRESIDENT

Per: \_\_\_\_\_  
(Authorized Signatory)

Title: \_\_\_\_\_

**Royal Bank of Canada**

Per:   
Eugene Basolini  
Head, Equipment Finance Solution Centre





4/20/2020

Peace Bridge Duty Free Inc.  
1 Peace Bridge Plaza  
Fort Erie, ON  
L2A5N1

### EQUIPMENT LEASE PAYMENT DEFERRAL LETTER

Attention: Gregory O'Hara

Equipment Lease Agreement No.: 201000041741

Dear Greg,

We are writing to confirm your next 6 rental payments will be deferred as requested commencing on 4/29/2020. Your rental payments are scheduled to resume on 10/29/2020. You must advise us within 15 days of this letter which of the following options you wish to have applied to your amended rental payment schedule. RBC will amend your Lease Agreement to reflect your selection and provide you with an amending agreement.

The undersigned, as Lessee, hereby chooses one of the following option:

- ☐ A) Increase the remaining lease rental payments spreading the deferred lease rental adjustment cost across all payments for the balance of the lease term;
- ☐ B) Increase the first rental payment, at the end of the lease rental deferral period, by an amount equal to the deferred lease rental adjustment cost. All remaining rentals will continue at the original rental amount established prior to the deferral period for the balance of the lease term;
- ☒ C) Increase the last scheduled lease rental by the lease rental adjustment amount. The rental payments will resume at the end of the deferral period at the original rental amount for the balance of the lease term, excepting the final rental payment.

The terms and conditions of the Master Lease Agreement and Lease Schedules will remain in full force and effect. The purchase option amount indicated at the end of the regular lease rental period will remain unchanged.

In the event the Lessee fails to execute and deliver this documentation within 15 days, then the Lessee shall be deemed to have elected option (A) above.

If you have any questions or require additional information, we will be happy to assist you. Please contact your local RBC Equipment Finance Specialist.

Please return this signed letter to us by email to [nitin.chandan@rbc.com](mailto:nitin.chandan@rbc.com).

Dated the 15<sup>th</sup> day of MAY, 20 20.

Peace Bridge Duty Free Inc.

(Authorized Signature)

(Authorized Signature)

**Multiple Lease Schedule Appendix**

The following lease contracts are hereby amended per the EQUIPMENT LEASE PAYMENT DEFERRAL LETTER.



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# Amending Agreement

(PPSA)

THIS AGREEMENT made the 18th day of November 2020

BETWEEN:

**PEACE BRIDGE DUTY FREE INC.** ("Lessee"),

-and-

**Royal Bank of Canada** ("Royal Bank"),

WHEREAS:

Royal Bank and the Lessee entered into the following Equipment Lease or Leasing Schedule, hereinafter referred to as the "Lease"

**756679676 – 201000057726 (formerly 201000056627, formerly 201000041741)**

**Please refer to Schedule "A" – for new payment schedule:**

Royal Bank will be entitled to rely on any signature appearing on a facsimile transmission that purports to be a signature of the Lessee or of a representative of the Lessee as being authorized, valid and binding on the Lessee, even if the signature was not, signed by the Lessee or its representative. The Lessee will keep the originals of all documents and instructions transmitted to Royal Bank by facsimile, including the application for this Amending Agreement if it was previously transmitted by facsimile to Royal Bank, and will produce them to Royal Bank upon request. Royal Bank and the Lessee agree that a copy of a document transmitted by fax shall be admissible as evidence of its contents and its execution by the parties in the same manner as an original document, and expressly waive any right to object to its introduction in evidence, including any right to object based on the best evidence rule.

IN ALL OTHER RESPECTS the provisions of the Lease are hereby ratified and confirmed.

**ROYAL BANK OF CANADA**

A handwritten signature in black ink, appearing to read 'Eugene Basolini'.

---

Eugene Basolini  
Head, Equipment Finance Solution Centre  
Duly Authorized Signatory





**Schedule A**

**201000057726 (formerly 201000056627, formerly 201000041741)**

<b>Period</b>	<b>Date</b>	<b>Rent</b>	<b>GST</b>	<b>HST</b>	<b>PST</b>	<b>Total</b>
1-8	08/29/19-03/29/20	68,282.42	0.00	8,876.73	0.00	77,159.15
9-11	04/29/20-09/29/20	0.00	0.00	0.00	0.00	0.00
12-86	10/29/20-12/29/27	68,282.42	0.00	8,876.73	0.00	77,159.15
87	01/29/27	204,363.88	0.00	26,567.30	0.00	230,931.18
88	02/28/27	1.00	0.00	0.13	0.00	1.13

This is Confidential Exhibit “H” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

***Anisha Samat***

This is Confidential Exhibit "I" referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



---

*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

This is Confidential Exhibit “J” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

This is Confidential Exhibit “K” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

This is Confidential Exhibit “L” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

***Anisha Samat***

This is Confidential Exhibit “M” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

***Anisha Samat***

This is Confidential Exhibit “N” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*



This is Confidential Exhibit “O” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

This is Exhibit “P” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

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

DATE: 17 May 2023

NO. ON LIST: 1

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

BEFORE JUSTICE: KIMMEL

**PARTICIPANT INFORMATION****For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Sanjeev Mitra	Lawyer for RBC	smitra@airdberlis.com

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
David Ullmann	Peace Bridge Duty Free Inc., Tenant	dullmann@blaney.com

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Leanne M. Williams	Lawyer for msi Spergel Inc. in its capacity as Court-appointed Monitor of Peace Bridge Duty Free Inc.	lwilliams@tgf.ca
Mukul Manchanda	Monitor's representative	mmanchanda@spergel.ca
Patrick Shea	Lawyer for Buffalo and Fort Erie Public Bridge Authority, Landlord	patrick.shea@gowlingwlg.com

**ENDORSEMENT OF MADAM JUSTICE KIMMEL:**

1. This case conference was scheduled pursuant to the court's last endorsement of April 4, 2023. The primary issue to be addressed was the question of what amount of rent the Tenant could afford to be paying to the Landlord pending the court's decision on the Tenant's Cross-Motion now scheduled to be heard on July 25, 26 and 27, 2023.
2. As provided for in my April 4, 2023 endorsement, the Monitor conducted an independent review and analysis of the Tenant's cash flows and prepared a report that was provided to the Tenant and to RBC on May 5, 2023. The purpose of this report was to ascertain whether the Tenant is able to pay more than 20% of its gross sales in rent pending the determination of its Cross-Motion. As was noted in that endorsement, the Tenant had agreed that it will abide by any direction from the court regarding any increased amount of rent to be paid pending the court's determination of the Lease interpretation point raised by its Cross-Motion, based on the Monitor's report.
3. The court and the Landlord were provided with the following summary of the Monitor's rent affordability report:

The Report concluded that Peace Bridge is able to increase its monthly rent payments to the base rent of \$333,333 ("**Base Rent**") during the period ending September 19, 2023 (the "**Review Period**"), being the date of the return of RBC's motion to appoint a receiver. Notwithstanding that Peace Bridge is financially able to pay the Base Rent, the payment of same will decrease its cash reserves. The Monitor discussed its report and conclusions with RBC who advised that they do not object to Peace Bridge paying Base Rent during the Review Period.

4. The specified Review Period ends on September 19, 2023 which is actually a few days prior to the hearing date that has been scheduled for the Bank's receivership motion (currently returnable on September 22, 2023). This is the period for which the Monitor had the cash flow information and projections from the Tenant.
5. Based on this report from the Monitor, the Tenant made an on the record offer to the Landlord to pay rent (monthly, in arrears) starting on June 1 (for the month of May) and continuing to September 30, over and above the 20% of gross sales that it has been paying, to top up the monthly amount being paid during this interim period to the minimum Base Rent specified in the Lease of \$333,000 per month plus HST. The Tenant's offer was to pay any such "topped up" amount on a without prejudice basis to the Monitor to hold and release to either the Landlord or the Tenant, depending on the outcome of the Cross-Motion.
6. The Landlord's position is that any interim payments of rent should be paid to the Landlord to avoid the continued accrual of interest (at the rate specified in the Lease of 26% per annum). The Landlord says it is good for the money if it is later determined that the Rent owing under the Lease was less than this and if the Landlord is not found to be entitled to set off any such overpayments against outstanding amounts claimed to be owing to the Landlord by the Tenant.
7. The Landlord also indicated that the amount payable in this interim period should be the greater of 20% of the Tenant's gross sales or the specified minimum Base Rent of \$333,333 per month. While viewed as optimistic, the Tenant advised that it is prepared to pay the greater amount if its gross sales translate into a higher amount to be paid, and RBC expressed no objection or concern about this.

8. The court raised questions about the precise period that would be covered by this interim arrangement, with the result that it was determined that it can and should only apply until the payment of rent by the Tenant for the month of August that would be due on September 1, 2023. The Monitor's cash flows and report do not extend to the end of September and a receiver could be appointed in September. For these and other reasons, all parties agree that it would be advisable to have the Monitor prepare a further report, on the same basis as this last one, that covers the month of September and beyond ( the "Monitor's second rent affordability report").
9. After reviewing and considering the letters filed by the Tenant and the Monitor, and hearing the submissions of all counsel appearing, the court directs that the Tenant shall pay monthly rent in arrears directly to the Landlord on an interim basis commencing on June 1, 2023 and continuing until September 1, 2023 (the "Interim Period") of the greater of: (i) 20% of the Tenant's gross sales, and (ii) the specified minimum Base Rent under the Lease of \$333,333 plus HST. I do not see any reason to involve the Monitor in the rental payments given the amounts at issue. Further, while perhaps immaterial in the grand scheme of this dispute, payment directly to the Landlord (on the terms indicated previously, with any overpayments later determined to either be set off or repaid by the Landlord upon the agreement of the parties or, failing agreement, a court order) will avoid the continued accrual of interest if the Landlord's position prevails. The contractual interest rate of 26% is not one that the Monitor could be expected to achieve through the investment of funds paid to it under the Tenant's proposed arrangement.
10. The court's direction regarding these interim payments is without prejudice to any party's position regarding the Rent that is payable under the Lease during this interim period, or during the stay period that preceded it, as may be later determined by the court.
11. The parties reported that they are so far on track in their timetable for pre-hearing steps for the Cross-Motion. Due to a scheduling conflict for one of the lawyers, the June 14, 2023 case conference that was ordered by the court's April 4, 2023 endorsement will now commence at 4:30 p.m. instead of 9:00 a.m.
12. The Monitor's second rent affordability report shall be paid for by the Tenant and shall be prepared on the same terms as the last one, to cover the period to the end of 2023 if possible. The parties shall incorporate the time for delivery of that report into the timetable that they are to agree upon for the Receivership Application.
13. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.



KIMMEL J.



SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

## COUNSEL SLIP/ENDORSEMENT

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

HEARING June 14 and 15 2023

DATE: \_\_\_\_\_

NO. ON LIST: 5

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

BEFORE JUSTICE: KIMMEL

### PARTICIPANT INFORMATION

#### For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Sanjeev Mitra	Lawyer for RBC	smitra@airdberlis.com

#### For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
David Ullmann	Lawyer for Peace Bridge Duty Free	dullmann@blaney.com
Brendan Jones	Inc./Tenant	bjones@blaney.com

#### For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Leanne M. Williams	Lawyer for msi Spergel Inc. in its capacity as Court-appointed Monitor of Peace Bridge Duty Free Inc.	lwilliams@tgf.ca
Mukul Manchanda	Monitor/Proposed Receiver	mmanchanda@spergel.ca
Christopher Stanek	Lawyer for Buffalo and Fort Erie	christopher.stanek@gowlingwlg.com
Patrick Shea	Public Bridge Authority/Landlord	patrick.shea@gowlingwlg.com

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**ENDORSEMENT OF MADAM JUSTICE KIMMEL:**
Issues Raised for Consideration

1. There is a three day hearing scheduled before me on July 25, 26 and 27, 2023 for the Tenant's cross-motion. I will not repeat in this endorsement the history of the proceedings that led the scheduling of that motion. Pre-hearing steps leading up to that motion were timetabled in my endorsement of April 4, 2023.
2. One of those steps was a case conference to be held on June 14, 2023, "which shall be primarily to address evidentiary considerations for the hearing of the Cross-Motion, including whether any party considers that it might be necessary for the court to hear *viva voce* evidence from any of the witnesses. The parties should come to this case conference prepared to discuss any other logistics for the hearing, including any sealing orders that might be requested."
3. Unfortunately, these hearing logistics could not be addressed because the parties reported to the court that various deadlines have been missed in the timetable, specifically:
  - a. The May 26, 2023 deadline for completing r. 39.03 examinations; and
  - b. The June 7, 2023 deadline for completing cross-examinations.
4. These deadlines were missed because of concerns that the Tenant has about the sufficiency of documentary disclosure by the Landlord and the scope of inquiry that the Landlord was prepared to permit on the r. 39.03 examinations of its representatives. These concerns led the Tenant to adjourn the r. 39.03 examinations that had commenced. That, in turn, led to the delay of the cross-examinations which, without leave of the court, cannot proceed until the r. 39.03 examinations have been completed. While the Landlord decided not to conduct any r. 39.03 examinations itself, the sequencing is still applicable to its cross-examinations because the Landlord had exercised its right to examine the Tenant's Rule 30.03 witnesses.
5. The Landlord disagrees with the Tenant's complaints about the sufficiency of its production and disclosure, and observes that there are deficiencies in the Tenant's disclosure as well.
6. Detailed Aide Memoire's were filed for this case conference outlining a multitude of production and disclosure disputes.
7. In general terms, the Tenant was seeking certain directions from the court, but at the same time contending that no substantive orders about production issues could be made without a formal motion. The Tenant suggested that its cross-motion be adjourned to the fall, that the receivership motion currently scheduled for September 22, 2023 be adjourned and that the court time in July be used for production and refusals motions.
8. In general terms, the Landlord was seeking directions on all issues today with a view to requiring the parties to make whatever further disclosure the court might order within a week and complete all examinations by June 30, 2023. It was suggested that, with a compressed revised timetable for answering undertakings and the exchange of factums thereafter, the hearing dates in July for the Tenant's cross-motion could still be preserved.

Interim Period: Without Prejudice Rent and the Monitor's Second Rent Affordability Report

9. The Landlord has been consistent in its concerns raised about delaying the adjudication of the Tenant's cross-motion while the Tenant continues to enjoy the protection of what was supposed to be a temporary stay of proceedings that was put in place in December 2021 when the Monitor was

appointed. Beyond the concerns about the overall delay, the Landlord's concerns about direct prejudice from the Tenant's failure to pay the rent that the Landlord claims to be entitled to during the stay period (which is the very subject of the Tenant's cross-motion) were alleviated on a temporary and without prejudice basis by my endorsement of May 17, 2023 which directed "that the Tenant shall pay monthly rent in arrears directly to the Landlord on an interim basis commencing on June 1, 2023 and continuing until September 1, 2023 (the "Interim Period") of the greater of: (i) 20% of the Tenant's gross sales, and (ii) the specified minimum Base Rent under the Lease of \$333,333 plus HST."

10. Counsel for the Tenant had obtained instructions just prior to this case conference that the Tenant would agree to extend the Interim Period over which it will pay this without prejudice rent until the cross-motion is heard, and offered to work with the Monitor to prepare the second rent affordability report extending out the projections to the end of 2023 on an expedited timeline so that the court (and RBC) can be satisfied that this arrangement is sustainable if the cross-motion and receivership motion are adjourned.
11. The Tenant shall provide the Monitor with the necessary information to prepare this second rent affordability report by June 30, 2023 and the Monitor shall endeavour to have that report prepared and available for the parties' and the court's consideration in connection with the July 25 and 26, 2023 hearing dates (which are being re-purposed, as detailed below).

#### Adjournment of Tenant's Cross Motion and the Receivership Application

12. Because this case conference did not end until 6 pm on June 14, 2023, it was not possible to determine the court's availability to adjourn these motions. Accordingly, the parties were directed to re-attend upon the court's request the next day.
13. As a practical matter, it does not appear that the Tenant's cross-motion can realistically proceed on July 25, 26 and 27, 2023 given the state of the examinations.
14. The court is concerned about continuing delays and has thus now arranged the earliest possible dates in the fall for the cross-motion to be adjourned to which are September 19, 21 and 22, 2023.
15. The July 25 and 26, 2023 dates are being reserved to address production and disclosure and timetabling issues, as detailed below.
16. The intention when these matters were originally scheduled was that the receivership application would be heard after the Tenant's cross motion had been decided. The court's availability in the fall could end up pushing out the receivership application later than the parties are comfortable with, particularly given that the Landlord has been asked to agree to allow the stay to continue, even if it is successful on the Tenant's cross motion, until the receivership application is decided. RBC also may have its own concerns about delaying the receivership application depending on the results of the Monitor's second rent affordability report.
17. It was decided that the determination of a new date for the receivership application will be made when the parties are next before the court on July 25 and 26, 2023, when it is anticipated that the Monitor's second rent affordability report will be available.

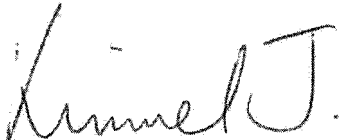
#### Disclosure Issues and Issues to be Determined on July 25 and 26, 2023

18. The Commercial Court does not schedule production and refusal motions. It deals with category based production and disclosure issues that require determinations on matters such as privilege and sealing and proportionality. Some of the concerns identified are about those types of issues. They will be determined by the court on July 25 and 26, 2023 if not resolved by the parties before then.
19. The following observations and expectations of the court are offered:



- a. Full documentary disclosure was not ordered.
  - b. Some directions were provided in the court's April 4, 2023 endorsement about categories of expected disclosure, although that was not intended to be a closed list of all potentially relevant categories of production and disclosure.
  - c. The court expects issues about missing documents within categories of produced documents to be identified and responded to in a timely manner before the examinations, and even if not satisfactorily resolved, to be explored by the parties during the examinations of witnesses familiar with the documents.
  - d. The court expects parties to respond promptly to inquiries about documents that might no longer exist and the circumstances under which they ceased to exist, and to explore this during the examinations if considered relevant.
  - e. The court expects documents in the identified categories that were withheld on grounds of privilege to be listed (as the parties appear now to agree upon).
  - f. The court expects concerns about privilege being addressed through redactions, rather than the withholding of entire documents, on the basis that doing so would not be relied upon as a waiver of privilege, with challenges to the redactions to be brought forward together with any other privilege challenges in a focused manner for the court's consideration and direction.
  - g. Subject to legitimate proportionality and privilege considerations, the court expects questions asked during the examinations to be answered (even if under reserve of objection as to relevance).
  - h. The court expects concerns about confidentiality (*vis-à-vis* the Tenant and/or *vis-à-vis* the public court file, the latter of which might give rise to limited sealing order requests) to be brought forward in focused manner for the court's consideration and direction. In the case of requests for disclosure of third party confidential information, consideration may need to be given to the rights and interests of those third parties and whether, and if so when, they may need to be given on notice.
  - i. The court expects the parties to co-operate in identifying the appropriate witnesses to answer questions, having regard to their scope of direct knowledge.
  - j. The court expects the parties to conduct focused examinations of witnesses; these are not discoveries.
20. With this guidance in mind, the following directions are provided in connection with the July 25, and 26 and September 19, 21 and 22, 2023 hearing dates:
- a. Any disclosure and production that has been previously requested and that the responding party is prepared to provide shall be provided by June 23, 2023;
  - b. The parties shall exchange lists of any remaining outstanding requests, deficiencies and/or production inquiries by June 30, 2023;
  - c. If the Landlord has other issues with the Tenant's performance of its obligations under the Lease, aside from the payment of rent, those should be identified at the same time as the disclosure deficiencies;
  - d. The parties shall attempt to narrow the issues by providing as much information in writing as they can, on the record, in response to the disclosure, production or performance sought;
  - e. Based on the list of outstanding issues, the parties shall agree upon a timetable for the exchange of materials that detail the issues that the court will be asked to decide on July 25 and 26, 2023 that ensures that all material has been exchanged and uploaded onto CaseLines by no later than July 21, 2023;
  - f. If proportionality is a ground for non-disclosure, some evidence will be required to support that;

- g. If the Tenant is seeking disclosure of documents and information about the US Tenant's contractual arrangements and dealings with the Landlord, the only issue that the court will be asked to decide on July 25 and 26, 2023 is the question of relevance of that requested disclosure. No order for production will be made without the US Tenant having been put on notice;
  - h. Time will be reserved on July 25 or 26, 2023 to address any concerns arising out of the Monitor's second rent affordability report. In the meantime, and unless and until the court orders otherwise, the Tenant shall continue to pay the without prejudice monthly rent agreed to at the May 17, 2023 case conference;
  - i. The maximum number of pages of submissions from any party on **all issues** to be considered at the July 25 and 26 hearing shall be 25 pages double-spaced;
  - j. In the meantime, the parties shall also revise the timetable for the Tenant's cross motion and re-schedule the r.39.03 examinations and cross examinations for some time in August, and reschedule the exchange of the remaining material thereafter, so that it has all been delivered and uploaded into CaseLines by no later than September 15, 2023.
21. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.



KIMMEL J.

June 16, 2023



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00673084-00CL DATE: July 25 and 26, 2023

NO. ON LIST: 3

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

BEFORE JUSTICE: KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Sanj Mitra	Lawyers for the Applicant	smitra@airdberlis.com

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
Brendan Jones	Counsel for the Respondent	bjones@blaney.com
David Ullmann		dullmann@blaney.com

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Leanne Williams	Counsel for the Monitor	lwilliams@tgf.ca
E. Patrick Shea	Lawyers for Buffalo and Fort Erie Public Bridge Authority	patrick.shea@gowlingwlg.com
Mukul Manchanda	Proposed Receiver	mmanchanda@spergel.ca

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**ENDORSEMENT OF JUSTICE KIMMEL:**

1. The parties appeared before the court over the course of two days (July 25-26, 2023) to deal with various production, disclosure and other pre-hearing matters so as to keep this matter on track for the hearing of the Tenant's cross-motion currently scheduled to commence on September 19 and to continue on September 21 and 22, 2023.
2. Upon reviewing the written submissions and materials filed by the parties and hearing the oral submissions of counsel over the course of the past two days, the following orders and directions are provided by the court at this time:
  - a. after having directed that a final notice be provided to the American duty free store tenant at the Peace Bridge (the "US Tenant") on July 25, 2023 (by way of the delivery of the court's preliminary endorsement of that day regarding the orders that the court intended to make for disclosure of certain documents relating to that tenancy in this proceeding) and the US Tenant not having raised any objections or concerns with respect to the intended order, the Landlord (Fort Erie Public Bridge Authority, the "Authority") is ordered to produce to the Tenant (Peace Bridge Duty Free Inc.) the following documents relating to the Authority's arrangements and dealings with its US Tenant:
    - i. The lease and any amendments thereto;
    - ii. Any agreements with the US Tenant to defer and/or abate rent;
    - iii. The April 24, 2020 report of the Authority (A869/20) that discusses arrangements with both the US Tenant and the Tenant.
    - iv. Report #934/21 referred to in the April 30, 2021 redacted minutes produced by the Authority.
  - b. If confidentiality concerns are later raised in respect of the filing of the disclosure of any parts of these (or other) documents that either party may wish to place in the public court file, those can be addressed at the September 6, 2023 case conference (scheduled below).
  - c. The Authority is directed to ask its affiant/representative in this proceeding, Mr. Clutterbuck, to send the attached focused list of production and disclosure requests to current and former members of the board of directors of the Authority during the relevant time period(s) and to ask them to provide their written responses on or before August 4, 2023 (or as soon thereafter as possible). After reviewing and vetting any responses received for privilege considerations, the Authority shall forthwith provide all responses received (redacted for privilege, if appropriate) to the Tenant. The court encourages the parties to take all reasonable steps to have these responses available before the resumption of the examinations of the Authority's representative(s).
  - d. The Tenant shall advise the Authority by Friday July 28, 2023 whether there are any ongoing email searches and reviews with respect to the emails identified in the June 23, 2023 letter from Blaney McMurtry relating to the 6,000 recovered emails of Mr. O'Hara from the back-up server and, if so, when that review is expected to be complete. The Tenant shall also advise the Authority by July 28, 2023 whether any emails have been identified for Mr. Pearce on the back-up server and, if so, the process for their review and when it is expected to be completed. The Tenant shall either provide the Authority with any emails identified from the back-up server as producible or advise the Authority if the result of these searches and reviews did not lead to the discovery of any producible emails.
  - e. The Tenant shall provide its further and supplementary responses to the Gowlings letter of June 26, 2023 seeking additional production and disclosure from the Tenant by this Friday, July 28, 2023. The Tenant is on notice (by this letter) of the information that the Authority will be seeking during the cross-examinations of the Tenant's representatives about the matters identified in this request letter and they should come to the examinations prepared to address

these matters, to the extent they have not done so in the supplementary responses delivered on July 28, 2023, keeping in mind the court's previous observations, expectations and directions regarding production and disclosure.

- f. The court's observations, expectations and directions contained in the previous endorsements dealing with production, disclosure and the witness examinations, and the conduct of any other pre-hearings steps, all still continue to apply except to the extent expressly modified by a subsequent endorsement. In particular, but without limitation, subject to concerns about proportionality and privilege or confidentiality, objections on grounds of relevance may be stated and the parties' positions on relevance may be reserved but, relevance in and of itself should not serve as a basis for refusing to make reasonable production and disclosure or to answer reasonable questions during the examinations.
3. The Authority's Notice of Motion dated July 17, 2023 for leave to issue default notice(s) in respect of alleged non-monetary defaults by the Tenant under the Lease is adjourned *sine die*.
4. The court's June 16, 2023 endorsement reflected the Tenant's without prejudice agreement to extend the Interim Period over which the Tenant will pay the greater of: (i) 20% of the Tenant's gross sales, and (ii) the specified minimum Base Rent under the Lease of \$333,333 plus HST to December 31, 2023. The court asked for an updated rent affordability report from the Monitor to be satisfied that this arrangement is sustainable, which the Monitor has now provided.
5. Based on the Monitor's updated rent affordability report dated July 24, 2023, and so long as the minimum Base Rent that the Landlord claims to be entitled to continues to be paid by the Tenant through to the end of the now extended Interim Period, the Authority has advised that it is not seeking any further disclosure at this time about the source documents that were provide by the Tenant and reviewed by the Monitor for purposes of preparing this report.
6. The applicant's motion to appoint a receiver originally returnable on September 22, 2023 has been adjourned and the scheduling of that hearing, if necessary, will be revisited in the fall after the Tenant's cross-motion has been heard, at a case conference to be scheduled by counsel through the commercial list office.
7. The parties costs of the matters addressed on July 25 and 26, 2023 shall be determined in the cause of the Tenant's cross-motion, or as may be further directed by this court.
8. The parties shall attend a one-hour case conference on September 6, 2023 commencing at 9:00 a.m. to consider any logistics for the hearing of the Tenant's cross-motion.
9. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.



KIMMEL J.  
July 26, 2023

This is Exhibit “Q” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 3<sup>rd</sup> day of March 2025.



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*Commissioner for Taking Affidavits (or as may be)*

*Anisha Samat*

**David T. Ullmann***Partner*D: 416-596-4289 E: [DUllmann@blaney.com](mailto:DUllmann@blaney.com)January 24<sup>th</sup>, 2024**Via Email** [patrick.shea@gowlingwlg.com](mailto:patrick.shea@gowlingwlg.com) and [Christopher.Stanek@gowlingwlg.com](mailto:Christopher.Stanek@gowlingwlg.com)Patrick Shea and Christopher Stanek  
Gowling WLG (Canada) LLP  
Barristers & Solicitors  
1 First Canadian Place  
100 King Street West  
Suite 1600  
Toronto, ON, M5X 1G5

Dear Counsel:

**Re: Lease between Buffalo and Fort Erie Public Bridge Authority ("Landlord")  
and Peace Bridge Duty Free Inc. ("Tenant") dated July 20<sup>th</sup>, 2016 ("Lease")****And Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)**

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As you know, we have been speaking with Mr. Mitra about possible scenarios to propose to the landlord with the consent of RBC.

We believe we are getting closer and wanted to deliver the attached offer to settle to your client. It remains conditional upon RBC agreeing to free-up \$500,000 now. We expect that upon a conditional agreement between the landlord and tenant, that the bank will come on board.

By way of offer overview, the tenant has attempted to mirror the landlord's last offer to settle and to agree to as many of the landlord's terms as possible. In particular:

- The tenant will pay arrears in the sum as requested, with \$2.5 million paid up front and the balance within 6 months.
- The tenant will pay the costs submitted in the landlord's bill of costs - not the amount awarded by the court - which accretes about \$100,000 to the landlord.
- The landlord shall be entitled to retain any overpayment of rent through the lease year 2023 totalling approximately \$259,000.
- The tenant has reluctantly agreed to no longer seek an extension of lease term or further option to extend.
- The tenant agrees to address signage at the premises, food services, and removing temporary hoarding as requested.

- The tenant accepts the ramp up period.
- The tenant agrees that subsection 18.07 does not give rise to an entitlement to rent concessions.
- The landlord shall remit any Tenant HST overpayment on receipt.
- The tenant and landlord will exchange releases of all claims to date, including known and unknown claims and also including claims for contribution and indemnity.

The tenant has spent considerable time modelling its obligations and ability to pay and it is confident that it can perform the proposal vis a vis the landlord. This represents a “stretch” in that it is entirely dependent upon a \$500,000 release of security by RBC and also does include a material cash infusion by the shareholders.

We recognize you are well able to assess the benefits to the landlord, and we ask your indulgence while we recount the tenant’s view of the benefits to the landlord:

- The landlord recovers over \$2.8 million arrears unavailable in any insolvency.
- The landlord recovers its substantial indemnity legal fees of approximately \$350,000 unavailable in any insolvency.
- The shareholders are injecting fresh capital into the tenant to make the arrears payment.
- The Appeal will be withdrawn - and landlord costs and delay avoided.
- The landlord avoids the inherent uncertainty of an Appeal – regardless of what percentage of risk the landlord assesses - there is always risk in any litigation.
- The landlord will avoid delay and costs associated with a BIA Proposal or bankruptcy.
- The landlord will avoid vacancy through an RFP process, and the costs of that process.
- The landlord is very likely materially better off financially with the amended lease as proposed than what it could achieve in the open market.
- The landlord is not required to fund any leasehold improvements, free basic rent or fixturing periods typical to a replacement tenancy.
- The landlord will no longer consume senior executive and BOD administrative time.
- The landlord will have the satisfaction of winning the litigation and recovering over \$3 million of monies otherwise forfeited and avoiding downtime, costs and uncertainty of outcome.

The proposal is subject to your review and comments in respect of how it is worded, and we would be pleased to work with you to capture these business terms.



Please call me to discuss, or arrange a time to meet. In this regard, we recall Stephen Morrison owes the parties one day of mediation time.

Yours very truly,

**BLANEY MCMURTRY LLP**

A handwritten signature in dark ink, appearing to read 'D. Ullmann', with a stylized flourish at the end.

David T. Ullmann  
DTU/gf

cc: John C. Wolf and Brendan Jones

Proposed Settlement Terms with PBDF and PBA  
dated January 24<sup>th</sup>, 2024

- **Ramp-up of Base Rent.** Art 4.03 will be amended to provide for the following Base Rent:

Lease Year ending 31 Oct 2022—Base Rent of \$2MM or 20% of sales, whichever is greater.

Lease Year ending 31 Oct 2023—Base Rent of \$2.5MM or 20% of sales, whichever is greater.

Lease Year ending 31 Oct 2024 —Base Rent of \$3MM or 20% of sales, whichever is greater.

Lease Year ending 31 Oct 2025—Base Rent of \$3.5MM or 20% of sales, whichever is greater.

From and after the Lease Year ending October 31<sup>st</sup>, 2026, Base Rent will be payable in accordance with the Lease.

Notwithstanding the foregoing, any over-payment of rent by PBDF up to October 31<sup>st</sup>, 2023 in the sum of \$259,000 will be retained by the Authority and will not be applied to rent payable for any subsequent year.

- **Accrued Rent.** Accrued rent for the period to 31 October 2021 is \$5.703 MM (without interest). The Authority shall waive any interest and accept \$2.852 MM, in full and final satisfaction of the amount owing which shall be paid as follows: \$2.5 million (of which \$500,000 is to be released by RBC and requires its consent which is pending) within 30 days of signing the amendment to the Lease, and \$352,000 6 months later.
- **Food Services.** PBDF will use its commercially reasonable efforts to source a new food service provider or providers within 90 days of the signing the amendment to the Lease. As agreed, rent due to the Authority will be the actual rent paid by the sub-tenant.
- **Refurbishment.** Capital improvements will only be made in YR11 and YR16 of the Lease. No capital improvement in YR6 will be made or required.
- **Interior.** Within no more than 90 days of signing the amendment to the Lease, PBDF will restore the interior of the premises by removing the wall constructed to block the food service areas. The repairs will be conducted in a manner and to a standard acceptable provided for in the Lease.
- **Exterior/Signage.** Within 90 days of the signing the amendment to the Lease, PBDF will repair and/or replace the billboards and exterior signage to be substantially as depicted in the Tenant Proposal.
- **Professional Fees.** Within 90 days of the signing the amendment to the Lease, and upon receipt of an invoice, PBDF will pay the Authority's professional fees in the amount submitted by PBA's cost brief namely \$310,000 plus HST.

- **Subsection 18.07 of the Lease.** The Tenant agrees that subsection 18.07 does not give rise to an entitlement to rent concessions.
- **HST.** PBA will remit to PBDF any Tenant overpayment of HST upon receipt.
- **Releases.** The parties will exchange comprehensive releases of all claims (including for contribution and indemnity) of any kind (known or unknown) against the other in respect of any matters arising to the date of executing the amendment of lease agreement in a form to be agreed to between the parties acting reasonably.

**From:** [Shea, Patrick](#)  
**To:** [David T. Ullmann](#); [Brendan Jones](#); [John C. Wolf](#)  
**Cc:** [Stanek, Chris](#)  
**Subject:** Peace Bridge Offer  
**Date:** September 26, 2023 8:20:36 AM  
**Attachments:** [Settlement Terms with PBDF 26 Sept 2023.pdf](#)

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Attached please find our client's proposed settlement terms. We see no reason to add any commentary or argument as to why these terms are reasonable. Please consider this an offer to settle that will be relied upon for the purpose of costs.

E. Patrick Shea, KC, LSM, CS (he/him)

*Partner*

T +1 416 369 7399

[patrick.shea@gowlingwlg.com](mailto:patrick.shea@gowlingwlg.com)



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### Settlement Terms with PBDF

**Ramp-up of Base Rent.** Art 4.03 will be amended to provide for the following Base Rent:

Lease Year ending 31 Oct 2022—Base Rent of \$2MM or 20% of sales, whichever is greater.

Lease Year ending 31 Oct 2023—Base Rent of \$2.5MM or 20% of sales, whichever is greater.

Lease Year ending 31 Oct 2024 —Base Rent of \$3MM or 20% of sales, whichever is greater.

Lease Year ending 31 Oct 2025—Base Rent of \$3.5MM 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.

Notwithstanding the foregoing any over-payment of rent by PBDF in a particular year will be retained by the Authority and will not be applied to rent payable for any subsequent year.

**Accrued Rent.** The Authority agrees that the accrued rent for the period to 31 October 2021 is \$5.703MM without interest calculated in accordance with the Lease or the First Rent Deferral. The Authority is willing to waive interest and accept \$2.852MM, plus any HST refund received, in full and final satisfaction of the amount owing provided such amount is paid within 30 days of signing the amendment to the Lease. To clarify, the Authority is expecting that PBDF will either borrow the funds necessary to pay the \$2.852MM or receive a capital injection from its shareholders.

**HST.** Any HST refund received by PBA as a result of the abatement of rent will be retained by PBA in addition to the \$2.852MM to be paid by PBDF.

**Food Services.** Within 90 days of the signing the amendment to the Lease, PBDF will source a new food service provide or providers.

**Refurbishment.** PBDF's obligation to incur \$1.25MM in capital improvements in YR 6, YR11 and YR16 will be extended to YR8, YR13 and YR18 in recognition of the fact that the duty free did not operate for between March of 2020 and September of 2021.

**Interior.** Within 90 days of signing the amendment to the Lease, PBDF will have restored the interior of the premises by removing the wall constructed to block of the food service areas. The repairs will be conducted in a manner and to a standard acceptable to the Authority in its sole and absolute discretion.

**Exterior/Signage.** Within 90 days of the signing the amendment to the Lease, PBDF will repair and/or replace the billboards and other roadway and exterior signage to be substantially as depicted in the Tenant Proposal.

**Art 18.07.** Art 18.07 will be amended to clarify that for greater certainty the obligation to consult does not give rise to any obligation on the part of the Authority to amend the Lease or provide PBDF with any accommodations or concessions in terms of the payment of rent as required by Art 4.05.

**Option.** The five-year option provided for by Art 3.06 will be available to PBDF notwithstanding that PBDF has not: (a) duly and regularly paid Rent; or (b) actively operating from the Premises and performed all of the covenants, provisos and agreements on the part of PBDF to be paid and performed in the Lease as at the date of the amendment, provided PBDF complies with the Lease (as amended) and is otherwise entitled under Art 3.06 to the extend the term. To be clear, there will be no further five-year option as is being requested and the maximum term will be 20-years.

**Professional Fees.** Art 17.03 provides for the Authority to recover professional fees. Within 90 days of the signing the amendment to the Lease, PBDF will pay the Authority's professional fees at an amount equal to what PBDF has paid its own professionals.

**Releases.** The parties will exchange comprehensive releases of all claims (including for contribution and indemnity) of any kind (known or unknown) against the other in respect of any matters arising to date in a form to be agreed to between the parties acting reasonably,

58615016\1

**ROYAL BANK OF CANADA**

and

**PEACE BRIDGE DUTY FREE INC.**

Applicant

Respondent

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

Proceeding commenced at Toronto

**NON-CONFIDENTIAL RESPONDING AFFIDAVIT OF  
JIM PEARCE**

**BLANEY MCMURTRY LLP**

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

**David T. Ullmann** (LSO #42357I)

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Tel: (416) 593-3924  
[asamat@blaney.com](mailto:asamat@blaney.com)

Lawyers for the Respondent

**ROYAL BANK OF CANADA**

and

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

**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

**NON-CONFIDENTIAL RESPONDING APPLICATION  
RECORD OF PEACE BRIDGE DUTY FREE INC.**

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