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 MOTION RECORD OF PEACE BRIDGE DUTY FREE INC.
(Returnable January 29, 2024)

Date: January 24, 2024	**BLANEY MCMURTRY LLP** Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5 **David T. Ullmann** (LSO #42357I) **Email:** dullmann@blaney.com **John Wolf** (LSO #30165B) **Email:** jwolf@blaney.com **Brendan Jones** (LSO #56821F) **Email:** bjones@blaney.com Lawyers for the Respondent
To:	The Service List

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TAB 1

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B E T W E E N:

ROYAL BANK OF CANADA

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- 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 at 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 49th 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]

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]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[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 24th)
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

This is Exhibit “A” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

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PEACE BRIDGE DUTY FREE INC.

Respondent

AFFIDAVIT OF JIM PEARCE

I, **Jim Pearce**, of the Town of Fort Erie, in the Province of Ontario, **AFFIRM AND SAY THAT:**

1. I am the general manager as well as an officer holding the position of Secretary/Treasurer of Peace Bridge Duty Free Inc. ("**Duty Free**"). As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and belief, and, in all such cases, believe it to be true.

2. Capitalized terms not defined in the affidavit have the same meaning as in the Lease (as defined below).

3. Having reviewed the application record of the Royal Bank of Canada ("**RBC**"), and based on my involvement in this matter, it is my understanding that RBC is acting out of concern that our landlord will shortly take steps to terminate the lease. Duty Free is not in monetary default

with RBC and had entered into a forbearance with RBC, which was terminated over concerns with the landlord. Absent RBC's concerns about the landlord terminating our lease, I believe that RBC would not be bringing a receivership application.

4. I make this affidavit in support of Duty Free's request to have the receivership application adjourned to allow for more time for good faith negotiations with the landlord and RBC to reach an acceptable resolution. If negotiations stall and the landlord continues to dispute that its enforcement rights are stayed under Part IV of the *Commercial Tenancies Act* (the "**Act**"), Duty Free seeks an opportunity to bring an application for an order enjoining the landlord from taking any enforcement steps in accordance with the Act.

Background

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

6. By lease dated July 28, 2016, Duty Free leased the Leased Premises from the Buffalo and Fort Erie Public Bridge Authority (the "**Landlord**") for a fifteen (15) year term commencing on November 1, 2016 and ending on October 31, 2031, subject to Duty Free's option to extend for an additional period of five (5) years through 2036 (the "**Lease**"). The terms of the Lease were amended by rent deferral agreements, which are further detailed below. Attached as **Exhibit "A"** is a copy of the Lease.

7. The Landlord is an international entity created by the State of New York and the Government of Canada. It is governed by a 10 member Board of Directors consisting of five members from New York State and five members from Canada.

8. As the name suggests, Duty Free operates a land border duty free shop with 26,000 square feet of retail space from the Leased Premises. The retail store sells alcohol, tobacco and other products such as fragrances, cosmetics, jewelry and sunglasses. Other services provided at the store include currency exchange, motor coach parking and travel services, such as processing customs paperwork for truck drivers. The duty-free store is located at the border crossing with Buffalo, New York, which is the main north-south travel corridor between Canada and the United States.

9. Before the pandemic, the duty free shop would at times have more than 500 customers in the store, with approximately 60% of customers from Canada and 40% from the United States. Particularly during busy travel times, the store would be at capacity and the parking lot full of buses and cars. The duty free shop is a destination retail store for Western New York State. Duty Free has also done extensive marketing campaigns to bring tourists to Canada, including bus tour companies from Asia and Southern United States. Duty Free was awarded second place as the Best Land Border Store in the Americas and was a finalist in the Best Land Border store in the world.

10. Prior to the COVID-19 pandemic, the retail store also had a full-service Tim Hortons on site, but it closed in August 2020. There is currently no food vendor in the Leased Premises.

11. The duty free store is typically open 24 hours a day and 365 days a year, although the store's hours were impacted by the pandemic. The business previously employed approximately 90 staff, including cashiers, product specialists/buyers, customer service, sales staff, supervisors, marketing professionals, and support staff in replenishment, customs paperwork, inventory and cash control. Forty employees were full-time staff, including myself. All staff live locally and all

functions are performed at the store location. The Fort Erie store is one of the busiest stores in the 49th Parallel and is steady from mid-March through to December.

12. The pandemic, and particularly the border closures between Canada and the United States, greatly impacted Duty Free's business. The land border was closed between March 2020 and August 2021 for all non-essential travel. The retail store entirely closed on or about March 21, 2020 and was partially reopened on September 19, 2021. Canada only reopened its land border to fully vaccinated Americans on August 9, 2021, and the United States did not re-open its border to Canadian travelers until November 8, 2021.

13. When the retail store was closed for approximately a year and a half, Duty Free maintained staff to secure the Leased Premises. Washroom facilities were opened for truckers and essential workers in the Spring of 2020. Since the store reopened to retail customers in mid-September 2021, the business has approximately 20 employees and is operating at 30% capacity as compared to pre-pandemic levels.

14. In addition to the duty free store operating from the Leased Premises, Duty Free also operates a duty free shop and convenience store at the Hamilton International Airport by way of a lease with Hamilton International Airport Limited. Inventory for the Hamilton store is shipped from the Leased Premises. There are no issues with the lease or the landlord relating to the Hamilton Airport location.

Tenant Improvements to the Leased Premises

15. Duty Free was the successful bidder in a request for proposal ("**RFP**") process initiated by the Landlord prior to entering into the Lease. As part of the RFP, Duty Free was required to and

agreed that it would undertake significant capital improvements to the Leased Premises. As a result, Duty Free undertook a major renovation of the Leased Premises, including reconfiguring the space with new entrance and exit ways, redoing the stucco and exterior, installing a new roof, gutting the interior and putting in new floors, ceiling, and walls, and fixing the parking lot. The renovation work started in August 2018 and finished in May 2019. During the renovation, the duty free shop operated at half capacity because we renovated half of the store at a time.

16. The renovations were significant in scale and cost Duty Free over $6 million. As will be explained in greater detail below, Duty Free obtained financing from RBC in the amount of approximately $4.2 to fund the project. In addition, Duty Free invested more than $1.8 million of company assets into the improvements.

The Fort Erie Tenancy

17. Under the Lease, Duty Free agreed to pay Base Rent, Percentage Rent and Additional Rent. As a result, the Rent payable is tied to Duty Free's Gross Sales.

18. The amount payable for Base Rent and Percentage Rent are set out in subsections 4.02 ad 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 statues, laws, by-laws, regulations, **ordinances and requirement of governmental and other public authorities having jurisdiction over or in respect of the Leased Premises or the Property**, or any portion thereof, and all amendments thereto at any time and from time to time, and including but not limited to the Environmental Laws. (emphasis added).

Rent Deferral Agreements

23. Duty Free's revenues relied heavily on a retail duty-free store that catered exclusively to members of the public that are crossing the Canada-US border, and the pandemic had a profound impact on its business, particularly during the year and a half that the border was closed to non-essential travel.

24. On April 27, 2020, Duty Free entered into a rent deferral agreement prepared by the Landlord due to travel restrictions and economic hardship created by the Covid-19 pandemic. A copy of the April rental deferral agreement is attached hereto and marked as **Exhibit "B"**.

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

26. The first agreement expired on July 31, 2020. The parties continued to act as if the agreement had been extended.

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

28. Duty Free executed the second deferral agreement and delivered it to the Landlord in accordance with the Landlord's request on November 19, 2020. The Landlord has not yet delivered an executed copy of the agreement to us. A copy of the second rental deferral agreement is attached hereto and marked as **Exhibit "C"**. The parties have conducted themselves in accordance with the rental deferral agreement since November 19, 2020.

29. Notwithstanding that under the rent deferral agreement the Rent Deferral Period ended on March 31, 2021 and the Restart Date was April 1, 2021, the Canada-US border remained closed

and the retail duty-free store remained closed. Again, the parties continued to act as if the agreement had been extended.

30. During all Rental Deferral Periods, Duty Free paid all Additional Rent in accordance with its obligation under the rent deferral agreements.

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

32. Duty Free continued to make payments and the Landlord continued to accept payment under the terms as set out in the rent deferral agreements. Duty Free also paid to the Landlord all government subsidies for rent, as set out below. It was my understanding that the parties agreed to continue these arrangements until the border reopened. The Landlord did not raise any objection until it demanded immediate payment of all Deferred Rent plus three months' accelerated rent on September 8, 2021, some 13 days before Duty Free opened for business.

Duty Free Participated in CERS

33. Duty Free participated in the government programs designed to assist small businesses that were affected by Covid-19 with rent payments.

34. In or about October 2020, the Canadian government announced the Canada Emergency Rent Subsidy ("**CERS**") that provided a subsidy to cover part of eligible commercial rent for small businesses impacted by Covid-19 to be administered in several four (4) week periods. The CERS program applied retroactively starting September 27, 2020, and ran until October 23, 2021.

35. Duty Free applied for and was approved for CERS. Duty Free obtained rent assistance under CERS between September 25, 2020 through to October 23, 2021, when the program was completed. A summary of the timing and amounts of funds received by Duty Free related to CERS is attached hereto and marked as **Exhibit "D"**.

Landlord Delivers Notices of Default

36. On September 8, 2021, the Landlord provided Duty Free with two Notices of Default, one relating to purported monetary defaults and one relating to non-monetary defaults. A copy of the Notices of Default are attached as Exhibit "G" to the Affidavit of Christopher Schulze, sworn December 2, 2021 ("**Schulze Affidavit**").

37. The monetary default sought payment of approximately $5.9 million of rent arrears 9 days later, which represented the full amount of all unpaid Rent. The Landlord threatened to seize our property and/or terminate the Lease if this payment was not made.

38. The monetary Notice of Default asserts that Duty Free's arrears at the time were $5,931,389, despite the fact that the Deferred Rent was to be payable in equal installments over a two-year period (as set out in the amortization schedule in subsection 2.3 of the November rent deferral agreement). There had been no previous Notice of default or allegation of an Event of Default. Duty Free disputes the accuracy of the amount of arrears of Rent identified in the monetary Notice of Default and takes the position that the Notice of Default is invalid.

39. The second Notice of Default was a non-monetary default alleging that Duty Free breached the Lease by not being open for business 24 hours a day, 7 days a week, 365 days a year, and also alleged Duty Free had abandoned the Leased Premises in March 2020. The notice further said that

Duty Free breached the Lease by being closed for 10 consecutive days without the prior consent of the Landlord. Finally, the notice alleged that Duty Free did not provide a replacement letter of credit after the Landlord, without notice and contrary to the parties' course of conduct to that point, applied Duty Free's full $50,000 letter of credit toward Rent even though the Canada-US border and the duty free shop had not re-opened. The Landlord demanded payment in 14 days of three month's accelerated rent, being about $1.2 million dollars plus $10,000 of legal expenses and more taxes.

40. The total amount demanded to be paid by certified cheque in 14 days under the two Notices of Default exceeded $7 million and the Duty Free was not yet open for business.

41. Regarding the second (non-monetary) notice of default, Duty Free has restored the $50,000 letter of credit and reopened the duty-free store, thus curing the non-monetary defaults, to the extend they were *bona fide* defaults.

42. Since re-opening for business on September 19, 2021, in addition to Additional Rent and CERS payments, Duty Free has made the following payments to the Landlord, which represent 20% of gross sales: $19,533 for September rent paid; $61,600 for October rent; and $109,400 for November rent. Unfortunately, as of November 2021, traffic across the bridge and Duty Free's gross sales remain down approximately 70-60% from pre-Covid-19 levels.

Duty Free Subject to Eviction Moratorium under the Act

43. Duty Free advised the Landlord that, as a result of qualifying for CERS, it was protected by the eviction moratorium mandated by the Ontario government as set out in the Act. Duty Free further advised the Landlord that it had applied for, been approved to receive and did receive CERS

payments, which had all been paid to the Landlord as rent. In total, Duty Free paid $220,161.00 in CERS payments to the Landlord before September 20, 2021. Duty Free also provided the Landlord with retroactive CERS approval notices. These sums are in addition to the monthly payments of Additional Rent made during the deferment period.

44. Copies of letters between Duty Free and its Landlord in regards to the Notices of Default and Duty Free's CERS payments are attached hereto and marked as **Exhibit "E"**.

45. Duty Free and the Landlord entered into without prejudice negotiations to try and settle issues related to the Notice of Default and the Lease. These negotiations have not resulted in an agreement at this time.

46. Duty Free continued to qualify for and receive CERS payments after September 2021. Most recently, Duty Free was approved for CERS claim period 14 (September 26, 2021 to October 23, 2021) on November 8, 2021. Attached as **Exhibit "F"** is a copy of the CERS approval notice from CRA dated November 8, 2021.

47. On November 12, 2021, I provided evidence of Duty Free's CERS approval to the Landlord by sending a copy of the CERS approval notice to the Landlord by email. Attached as **Exhibit "G"** to this Affidavit is a copy of my email to the Landlord dated November 12th, 2021.

48. As a result of Duty Free receiving CERS up to the last CERS period, I believe that the Landlord cannot take any steps to terminate the Lease or take possession of the inventory at the store because of the eviction moratorium under the Act.

Licenses to Operate the Duty Free Store

49. Duty Free is authorized by the Liquor Control Board of Ontario ("**LCBO**") to buy and sell alcohol. Alcohol sales amounts to approximately 50% of the company's business. Spirits are typically re-stocked on a weekly basis, and wine is purchased bi-weekly. New orders for alcohol products for the Spring and Fall of 2022 need to be organized through the LCBO in the next month or two. Attached hereto and marked as **Exhibit "H"** is a copy of the Land Border Duty Free Shop Authorization between the LCBO and Duty Free.

50. Duty Free also holds two licenses from the Canada Border Services Agency ("**CBSA**") which provides it with authority to operate the duty free stores at its two locations. The CBSA license for the Hamilton Airport location, which expires on April 30, 2027 is attached hereto and marked as **Exhibit "I"**. The CBSA license for the Leased Premises is valid until January 25, 2025 and is attached hereto and marked as **Exhibit "J"**.

51. The CBSA licenses are non-transferrable. It is my understanding that the store cannot be operated by a trustee in bankruptcy or receiver. This is being further reviewed by our counsel. The CBSA contacted me following service by the receiver to ascertain if, despite the application to appoint a receiver, we were continuing to operate. Attached hereto and marked as **Exhibit "K"** is a copy of the e-mail I received from the CBSA in regards to the appointment of a receiver.

52. As mentioned above, December is typically a top month for sales due to holiday travel between Canada and the United States. We expect that business will continue to improve because the Canadian government has recently lifted testing requirements for travellers returning to Canada. As of December 8th, fully vaccinated Canadian travelling to the United States for 72 hours

or less do not need to have a pre-entry test. In addition, there is a Buffalo Bills home game in December, which attracts tourists to Buffalo and is an extremely busy time for the store.

53. Given the complexities of dealing with the inventory in a highly regulated environment and the fact that December is a particularly busy month, it would be extremely difficult for a Receiver to manage the business, were it even allowed to do so. Obtaining key product, such as wine and spirits, while overseeing sales and navigating the CBSA requirements in December will be challenging for a party that is not familiar with the procedures between the CBSA and Duty Free.

54. Given the foregoing, my belief is that a Receiver appointed over the business is more likely to shut down the business than to operate it, at least initially. I note that the application materials provided by RBC do not say they intend for the Receiver to operate the business, nor do they say they intend to continue the employment of the staff.

Credit Facilities with RBC

55. Duty Free obtained financing from the Royal Bank of Canada ("**RBC**") pursuant to the terms of a credit agreement dated July 20, 2018, as amended on July 5, 2021 and October 8, 2021 (collectively, the "**Credit Agreement**"). A copy of the Credit Agreement is attached as Exhibit "D" to the Schulze Affidavit.

56. The Credit Agreement provided Duty Free access to the following facilities:

a. Facility #1: $900,000 revolving demand facility by way of Royal Bank Prime loans and Royal Bank US Base Rate loans;

b. Facility #2: $575,900 revolving demand facility by way of letters of guarantee;

c. Facility #3: $5,000,000 revolving lease line of credit by way of leases; and

d. VISA Business credit card to a maximum of $300,000.

57. As set out above, Duty Free financed renovations of the Leased Premises by way of borrowings against the revolving lease line of credit.

58. Duty Free has always had a productive and open relationship with RBC. Duty Free kept RBC apprised of issues it was facing during the COVID-19 pandemic and provided it with business plans and other financial reporting in a timely fashion, as required under the Credit Agreement.

59. Duty Free has made all payments to RBC when due and has continued to pay amounts owing in accordance with the terms of the Credit Facilities up to now.

60. As a result of the land border being closed between March 2020 and August 2021 (in the case of Americans entering Canada) and November 2021 (in the case of Canadians travelling to the United States), the duty free shop was closed to retail customers between March 2020 and September 2021. Since Duty Free had no sales revenue during this time, it was offside of its financial covenants under the Credit Agreement. On July 2, 2021, RBC sent Duty Free a letter indicating that it was aware of the company's plan to remedy the default by December 31, 2021, but took no further steps, which are appreciated. A copy of the July 2nd letter is attached hereto and marked as **Exhibit "L"**.

61. However, after the Landlord issued its Notice of Default on September 8, 2021, RBC made demand and sent a Notice of Intention to Enforce Security on September 23, 2021. A copy of the demand letter is attached as Exhibit "H" to the Schulze Affidavit.

62. On October 8, 2021, RBC and Duty Free entered into a Forbearance Agreement. The Forbearance Agreement was set to expire on the earlier of either January 4, 2022 or an "Intervening Event," which included if the Landlord purported to terminate the Lease or levy distress against the company's assets. A copy of the Forbearance Agreement is attached as Exhibit "D" to the Schulze Affidavit.

63. We allowed for the inclusion of this "Intervening Event" because we believed that the landlord was stayed from acting during the forbearance period due to the moratorium under the Act.

64. On November 23, 2021, RBC terminated the Forbearance Agreement on the grounds that Duty Free had failed to deliver by no later than November 15, 2012, "evidence that an arrangement satisfactory to the Lender, in its sole discretion, has been entered into between the Borrower and the Landlord in respect of the Lease and the defaults thereunder to ensure that the Landlord will not terminate the Lease before the end of its current term." A copy of RBC's termination letter is attached hereto and marked as **Exhibit "M"**.

65. I have reviewed the Schulze Affidavit and it appears that the termination notice was sent following an e-mail from counsel for the Landlord to counsel for RBC indicating that the parties have been unable to resolve their issues and that the Landlord "intends to exercise its remedies under the default provisions of the Lease." However, the letter does not mention that negotiations were still on-going at that time and RBC did not provide Duty Free with time to cure the default.

Duty Free a Viable Business

66. Under the Forbearance Agreement, Duty Free provided monthly cash flow statements to RBC for the months of October and November 2021. Cash flow statements from October to December are attached hereto and marked as **Exhibit "N"**.

67. The cash flows demonstrate the Duty Free is currently a viable business and will continue to stay that way as long as border restrictions stay the same. Indeed, in November, the business was profitable due to higher than expected sales revenue and lower than expected costs, and because Duty Free paid rent at 20% of sales to the Landlord.

68. As mentioned above, we expect that December will be a busy month for sales, especially because the testing requirements for short-term vaccinated travellers have reduced. I believe it is likely we will see an improvement in respect of our projections for December. I am hopeful that the business has weathered the worst of the pandemic and we can look forward to a continued increase in travellers and, therefore, customers at the Fort Erie land border.

69. However, terminating the lease will destroy the business. Since duty free stores can only be operated at airports or land borders, there are very few opportunities to conduct business elsewhere in Ontario. Duty Free spent approximately one year and more than $6 million making significant improvements to the Leased Premises. It continued to secure the Leased Premises during the time when the land border was closed to non-essential travel and has reopened its retail store as quickly as possible once the border reopened. Having endured the challenges of the COVID-19 pandemic, it is not appropriate to now allow the Landlord to terminate the Lease, thereby precipitating RBC's receivership application, when an eviction moratorium is in place and the business' cash flow supports its continued operation.

70. Furthermore, terminating the Lease would also compromise Duty Free's ability to operate the duty free shop at the Hamilton Airport, which is otherwise in good standing with its landlord and the CBSA, because Duty Free ships inventory from its Leased Premises to the Hamilton location.

71. On December 8, 2021, the Duty Free retained Blaney McMurtry LLP ("**Blaney**") as local specialist counsel to assist in this matter. Blaney offered on December 10th to enter into negotiations with the Landlord. The Landlord replied that it was available for a meeting on Monday morning. A copy of the e-mail correspondence discussing a meeting is attached hereto and marked as **Exhibit "O"**.

72. I believe that, given more time, a commercial resolution can be reached with the Landlord reflecting a fair compromise to both parties. I believe our ability to make a proposal that will be found to be credible and reasonable by the Landlord will be enhanced by the passage of time as the business, which was once a very profitable business, returns to form over the next few months.

SWORN (OR AFFIRMED) remotely by way of video conference by Alexandra Teodorescu stated as being located in the City of Oshawa, Province of Ontario, on this 12th day of December, 2021, in accordance with O.Reg. 431/20, Administering the Oath or Declaration remotely.

A Commissioner for Taking Affidavits,
Alexandra Teodorescu

JIM PEARCE

Signature:

Email: jimp@dutyfree.ca

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

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)

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Lawyers for the Respondent

This is the Confidential Exhibit “B” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

This is Exhibit “C” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

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

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

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

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

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023

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

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

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

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

Procedural History

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

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

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

The Lease Dispute

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

> 18.07 Regulatory Changes

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

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

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

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

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

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

[11] The Tenant invoked s. 18.07 of the Lease in April 2020. The discussions initially were centered around on two Rent Deferral Agreements (defined below). After the Tenant's duty free store re-opened in September 2021 the Landlord and the Tenant began to focus the discussions and negotiations on the rent to be paid by the Tenant both during the Closure Period and going forward. Proposals were exchanged. The parties attended a court ordered mediation in March of 2023. Their discussions and negotiations continued until at least August of 2023.[1] No agreement was reached.

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

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

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

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

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

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

The Positions of the Parties

The Tenant's Position

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

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

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

a. From very early on in the Closure Period and throughout, the Landlord continued to make demands for immediate (or very short term) payments of Base Rent accruing;

b. While the Tenant maintains that a demand for any amount of Base Rent during the Closure Period was unreasonable, even when the Landlord moderated its position and asked for a portion of the Base Rent accruing due during the Closure Period, the amounts demanded in the early offers were unreasonable and, even when the amounts were reduced, the proposed payment terms in all of the Landlord's offers were unreasonable;

c. The Landlord threatened enforcement of its remedies (including remedies that were eventually rendered unlawful by a Province-wide statutory moratorium, such as taking possession of the Leased Premises and terminating the Lease); and

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

[18] The Tenant now asks the court to make the following orders[3]:

a) An order that, having applied section 18.07 and considering the adverse effects that the Border Restrictions had on the Tenant's sales, the rent actually payable by the Tenant during the Closure Period was equal to 20% of sales [which were zero], plus all additional rent and government assistance and that nothing further is owing for the Closure Period by the Tenant.

b) An order that having applied section 18.07 and considering the adverse effects the Border Restrictions had and continue to have on the Tenant's sales, the Ramp Up schedule accepted in paragraphs 41 and 44 of the factums of the Tenant and the Landlord respectively, reflects the reasonable application of section 18.07 to the circumstances of this case in the Ramp Up period and that the parties are to comply with that schedule for the payment of rent to and until the Lease year commencing Nov 1, 2026, when the schedule has no further impact.

c) An order that having applied a) and b) to the amounts actually paid, any overpayment by the Tenant should be set off by the Tenant against rent next due and any underpayment should be repaid to the Landlord in a reasonable period of time having regard to the ability to pay.

[19] The Tenants ask, in the alternative to b) above, that the court determine (based on the evidentiary metrics in the record[4]) and order the terms upon which rent is to be paid for the Closure Period, whether those be as last proposed by the Tenant or as last proposed by the Landlord, or such other terms as the court deems just. In paragraph 6 of the Cross-Motion, the Tenant asks, in the event

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

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

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

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

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

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

The Landlord's Position

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

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

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

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

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

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

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

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

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

Matters that the Parties Agree Upon

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

a. The Border Restrictions and associated regulations (that were initially enacted on March 21, 2020 and subsequently extended and expanded) were unanticipated changes in Applicable Laws that caused a material adverse effect on the Tenant's business operations at the Leased Premises and triggered s. 18.07 of the Lease.

b. The Tenant closed its duty free store on March 21, 2020. While the parties do not agree upon whether the Tenant was required to close its store, there is no suggestion that it was unreasonable for the Tenant to have done so. All but two of the Canadian side land border crossing duty free stores closed around the same time. The two that remained open had unique reasons for doing so.

c. The Tenant was within its rights to invoke s. 18.07 of the Lease in April 2020.

d. The purpose of s. 18.07 of the Lease is to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on the Tenant's ability to pay rent.

e. Under s. 18.07 the Landlord was required to consult with the Tenant to discuss the impact of the Border Restrictions.

f. The parties commenced discussions in April 2020 about the rent to be paid by the Tenant while its duty free store was closed but were not able to reach an agreement.

g. It would be appropriate to afford the Tenant some Rent concessions under s. 18.07 as a result of the Border Restrictions.

h. In making any decision with respect to Lease concessions to be made in favour of the Tenant as a result of the Border Restrictions, the Landlord was required to be reasonable and act in good faith.

The Lease

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

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

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

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

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

The Facts

The Parties

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

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

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

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

Previous Findings of this Court

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

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

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

a. The Tenant's business was materially and adversely affected by the COVID-19 travel restrictions introduced by the Canadian and United States governments in March 2020. The land border was closed for over a year to all non-essential travel, until August 9, 2021 (on the Canadian side) and November 8, 2021 (on the American side). The re-opening of the border in August 2021 was gradual. The border restrictions were lessened but not entirely eliminated at that time. [para. 4]

b. The Tenant closed the duty-free store on March 21, 2020. It partially re-opened on or about September 19, 2021.

c. Shortly after the initial COVID-19 travel restrictions were introduced, the Landlord and Tenant entered into an initial rent deferral agreement dated April 27, 2020 [the "First Deferral Agreement"]. Under this deferral agreement, the Tenant agreed to pay Additional Rent throughout the Rent Deferral Period (as defined in that agreement), including without limitation, all operating costs and property taxes. The "Deferred Rent" was to eventually be repaid, with interest on specified terms. This agreement also obligated the Tenant to apply for and take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including rent assistance etc. [para. 14]

d. The rent deferral agreement allowed the Tenant to defer paying the Base Rent until the expiry of the Rent Deferral Period on July 31, 2020. Thereafter, the parties attempted to negotiate a new rent deferral agreement [the "Second Deferral Agreement"], but that was never finalized. The Landlord indicated to the Tenant in November 2020 that it was looking for greater assurances about the unpaid (deferred portion of) Rent dating back to April 2020 and going forward. [para. 15]

e. In the meantime, the Tenant continued to pay what it had agreed to pay under the April 2020 rent deferral agreement. As a result, very little Rent was paid by the Tenant (aside from basic utilities and taxes) in this timeframe since the Tenant was not earning any revenue and took the position that, despite there being no new rent deferral agreement, the terms of the first rent deferral agreement continued to apply. [para. 16]

f. The Landlord did not agree to this and reserved its rights (relying upon, *inter alia*, the non-waiver provisions contained in s. 2.17 of the Lease). However, for much of the relevant time while this Lease dispute was pending the Landlord was not in a position to enforce certain of its rights due to legislation that had been put in place to protect

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

g. After the Tenant re-opened the duty-free store in September 2021, the Tenant continued to pay the Additional Rent it had been paying (e.g. utilities and taxes) and also began to pay rent equal to 20% of its gross sales. [para.18]

h. The Landlord asserted that the Tenant was in default of its obligations under the Lease. That triggered an event of default under the Tenant's credit facilities and resulted in this application by the Royal Bank of Canada ("RBC"), the largest secured creditor of PBDF, for the appointment of a receiver over PBDF's assets and property. The application was adjourned on terms that included the appointment of a monitor instead of a receiver, by order of this court dated December 14, 2021 (the "Appointment Order"). [para. 6]

i. The Tenant entered into a Credit Amending and Forbearance Agreement made as of October 8, 2021 with the RBC (the "Forbearance Agreement"). The preamble to that agreement stated that the Tenant had requested the bank to forebear "so that the Borrower has the opportunity to remain in business with a view to curing all defaults (including, without limitation, curing all defaults under the Lease, as defined herein)". [para. 19]

j. The Landlord was not a signatory to the Forbearance Agreement. Under that agreement, the Tenant agreed to deliver, by no later than November 15, 2021, evidence satisfactory to the RBC that an agreement had been entered into with the Landlord concerning the defaults under the Lease to ensure that the Landlord would not terminate the Lease before the end of its current term. [para. 20]

k. The Landlord and Tenant exchanged proposals in October 2021 in an attempt to reach an agreement about past due and continuing Rent owing. The Landlord rejected the Tenant's request to eliminate Base Rent from the Lease and to eliminate most of the Rent arrears for Base Rent. It offered various alternatives to reduce and/or defer the Base Rent payable. No agreement was reached by November 15, 2021. [para. 21]

l. The RBC terminated the Forbearance Agreement and commenced this application for the appointment of a receiver. [para. 22]

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

m. After the Appointment Order was made, the Tenant continued to pay the Additional Rent and further rent based on 20% of gross sales by way of direct deposit. The Landlord continued to indicate that this was not sufficient and had not been agreed to. [para. 26]

n. The attempts to negotiate a business resolution to the dispute that arose between the Landlord and Tenant about the Rent payable from and after March 21, 2020 did not result in an agreement. [para. 5]

o. One of the purposes of the Appointment Order was to afford the Tenant more time to try to reach a commercial resolution of the Lease dispute with the Landlord. With no resolution after almost a year, this [lift stay] motion was brought by the Landlord by a Notice of Motion dated October 5, 2022. [para. 7]

p. The negotiations to date have been paralyzed by each side's pre-conceptions of what an acceptable business solution would entail. These pre-conceptions have prevented any meaningful negotiation regarding the past Rent payable and Rent to be paid going forward under the Lease. While there is no requirement to mediate, the limited communications between the Landlord and the Tenant have been to some extent at cross purposes and might have more success if facilitated through a skilled intermediary. While not the Landlord's first choice, when asked, the Landlord indicated it would attend a mediation if the court so ordered. [para. 53]

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

Detailed Factual Chronology

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

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

The Rent that has Been Paid by the Tenant

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

a. Since March of 2020, PBDF paid all Additional Rent owing under the Lease to the Authority, in the sum of approximately $10,800 per month, including during the Closure Period.

b. Since reopening its retail store, PBDF has paid (over and above the Additional Rent), on a without prejudice basis, the greater of all COVID-related rent assistance it was eligible for and received or 20% of its monthly Gross Sales.

c. PBDF applied for every government program in respect of commercial rent assistance available to it and paid all sums received to the Landlord as Rent. However, the rental assistance programs available to PBDF represented a small percentage of full Rent payable under the Lease.

d. The Rent Deferral Agreements provided: "Repayment of the Deferred Rent shall commence on the Restart Date. The aggregate amount of Deferred Rent together with interest thereon at the rate of 4% per annum shall be amortized over the Amortization Period and repaid by the Tenant in equal consecutive monthly instalments on the first day of each month from and including the Restart Date, without abatement or set-off, in the same manner as Rent."

e. Even though the Second Deferral Agreement was not signed by the Authority, PBDF operated as if Rent had been deferred as contemplated by the Second Rent Deferral Agreement and continued to pay the Additional Rent and remit the COVID-19 subsidies that it received to the Landlord.

f. However, PBDF did not comply with the First or the Second Deferral Agreements in terms of repaying to the Authority the rent deferred thereunder after the expiry of the Rent Deferral Period on March 31, 2021.

g. Taking into account what was paid by PBDF to the Authority during the Closure Period, the amount of Deferred Rent that accrued under the Lease but was not paid during the period April 2020 to September 2021 was $5.7 million.

h. At the request of the Authority in or about July 2022, PBDF paid the HST on 100% of Base Rent payable under the Lease, amounting to $43,000 per month from April 2020. The HST payments were remitted to the CRA.

i. Various interim without prejudice arrangements were put in place regarding the payment of Rent by the Tenant during the course of this application after it was commenced in December 2021, with the result that:

    i. For the first Ramp Up Period (November 2021 to October 2022) the Tenant paid percentage rent in amount of $1,977,217 (there was also an upward sales adjustment of $2,119), plus a further government subsidy payment of $16,412 for that period, which amounts to approximately $2 million.

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

Analysis

Basic Principles of Contract Interpretation

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

> [8] … The leading contract interpretation case from the Supreme Court of Canada, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, provides the following guidance (at paras. 47-48 and 57-58, with reference to various principles and authorities):
>
> a. the overriding concern is to determine the mutual objective intent of the parties and the scope of their understanding as expressed in the words of the contract;
>
> b. the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract;
>
> c. the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;
>
> d. the meaning of the words can be derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by it. The meaning of the document is not necessarily the same thing as the dictionary meaning of its words; the meaning of the document is what the parties using the words against the relevant background would reasonably have understood those words to mean;
>
> e. the court should have regard to the surrounding circumstances and the factual matrix when interpreting a written contract;
>
> f. the surrounding circumstances should consist only of objective evidence of the background facts at the time of the execution of the

> contract; that is, facts that were known or reasonably ought to have been within the knowledge of both parties at or before the date of contracting;
>
> g. in a commercial contract the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the nature of the relationship between the parties both before and after the contract is entered into, the context, and the market in which the parties were operating; and
>
> h. the surrounding circumstances (factual matrix) should never be allowed to overwhelm the words of the agreement and should not be used to deviate from the text such that the court effectively creates a new agreement.
>
> [9] The respondent also relies on recognized contract interpretation principles that have been developed in the context of contracts between commercial parties and recently summarized in the case of *Shaun Development Inc. v. Shamsipour*, 2018 ONSC 440, 94 R.P.R. (5th) 15, at para. 46, affirmed, 2018 ONCA 707, 94 R.P.R. (5th) 44:
>
> a. the court presumes that the parties have intended what they have said;
>
> b. the court construes the contract as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> c. the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties;
>
> d. the court should interpret a contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity;
>
> e. extrinsic evidence may be resorted to in order to clear up an ambiguity; and
>
> f. while the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

Factual Matrix, Parol Evidence and the Landlord's Objections

[47] Considerable evidence and written and oral submissions were devoted to assisting the court in the interpretation of s. 18.07 of the Lease. Much of this focus was on the factual matrix, which is understood "to include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made." See *Weyerhaeuser*

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

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

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

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

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

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

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

2021 SCC 29, 17 B.L.R. (6th) 1, at paras. 56–57; and *Huber Estate v. Murphy*, 2022 BCCA 353, 46 R.P.R. (6th) 175, at paras. 33–36[7]), in this case the evidence that the Tenant has tendered about the pre-contractual negotiations primarily relates to the understood objectives and principles of implementation of s. 18.07 of the Lease that the parties now agree upon for the most part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Issues

[65] Since the parties agree that s. 18.07 of the Lease:

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

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

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

[66] The following issues remain to be determined, having regard to the positions of the parties[8]:

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

2. Did the Landlord breach s. 18.07 of the Lease?

3. Did the Landlord fail in its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered?

    i. Was the Landlord working with the Tenant to try to preserve the Tenancy or with the ulterior motive of terminating the Lease?

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

ii. Were the Landlord's demands, proposals and other dealings with the Tenant unreasonable?

4. What remedy is available to the Tenant?

a. If the Landlord breached its duty of good faith and/or s. 18.07 of the Lease, is the Tenant's only recourse to claim damages and/or seek relief from forfeiture?

b. Is it open to the court to determine what, if any, Base Rent is owing for the Closure Period and the terms on which it should be paid[9], and if so, what is the appropriate amount for the Tenant to pay before the Ramp Up Period and on what terms?

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

ii. If the Landlord has not breached its duty of good faith and/or s. 18.07 of the Lease.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. its conduct in making various rent relief offers was in furtherance of s. 18.07 of the Lease.

b. there was an impact to the Lease, and that a significant rent abatement was appropriate, not only for past rent, but future rent moving forward.

c. the magnitude of the adverse impact on the business would influence what level of consideration would be given to the Tenant in response to changes in regulations.

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

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

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

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

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

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

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

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

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

a. What is the duty of good faith?

b. Was the Landlord working with the Tenant to try to preserve the Tenancy or with the ulterior motive of terminating the Lease?

c. Were the Landlord's demands, proposals and other dealings with the Tenant unreasonable?

[89] These will each be addressed in turn.

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

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

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

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

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

> interests of the contracting partner. Like the duty of honest performance observed in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, the duty recognized here is one that applies in a manner Cromwell J. referred to as doctrine in *Bhasin*, i.e., the duty applies regardless of the intentions of the parties (*Bhasin*, at para. 74).
>
> …
>
> [77] I add, however, the following comment as a general guide. For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement - e.g., matters relating to "operative fitness, structural completion, mechanical utility or marketability" - the range of reasonable outcomes will be relatively smaller (Greenberg, at p. 762). For contracts that grant discretionary power "in which the matter to be decided or approved is not readily susceptible [to] objective measurement - [including] matters involving taste, sensibility, personal compatibility or judgment of the party" exercising the discretionary power - the range of reasonable outcomes will be relatively larger (Greenberg, at p. 761). I emphasize, however, that this comment should operate as a general guide, not a means to categorize unreasonableness.

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

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

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

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

b. The November 20, 2020 resolution of the Board of Directors of the Authority approving the Second Deferral Agreement, which the Landlord then did not sign despite this approval, and instead used as leverage to try to extract an immediate payment from the Tenant in respect of the Deferred Rent, which demand the Board only later approved after it had already been made.

c. The removal from the December 17, 2020 Board minutes of any reference to the Board's resolution "THAT in the event of default by Peace Bridge Duty Free, and subject to legal review, staff be authorized to negotiate lease terms with the 2nd bidder in the June 2016 RFP process" out of concern that "should this end up in court the last paragraph appears pre-determinative and could be construed as the PBA having a plan to oust PBDF. What happens in the event of default can be determined by the Board at a later date." This is compounded by the Landlord's acknowledgement that it did later reach out to that second-place bidder sometime in August of 2021.

d. Applying the Tenant's security deposit to the outstanding Base Rent and demanding that it be replenished.

e. An internal email dated March 21, 2021 between the Landlord's CFO (Ms. Costa) and General Manager (Mr. Rienas) contemplating what the Landlord's options might be if the Tenant does not re-open the store and an agreement is not reached on Back Rent, including the possibility of eviction once the restrictions had been lifted, because of a concern that the Tenant was intending to engage in a long, drawn out re-negotiation of the Lease.

f. An internal email dated March 31, 2021 between Ms. Costa and Mr. Rienas speculating about the *Commercial Tenancies Act* eviction moratorium and the Landlord's course of action in light of it.

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

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

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

b. A duty of honest contractual performance does not impose obligations of loyalty or trust. It is not a fiduciary duty. It does not mean that parties cannot legitimately take advantage of bargains they have reached. But it does mean that parties must not lie or knowingly mislead each other (*Bhasin*, paras. 60 and 65);

c. Tethering the good faith analysis to a consideration of what was reasonable according to the parties' own bargain tends to prevent the analysis from "veering into a form of ad hoc judicial moralism or 'palm tree' justice." (*Wastech*, para. 74.); and

d. Honest performance requires that the exercise of contractual discretion he carried out in a manner consistent with the purposes for which it was granted. Said another way. that it be carried out reasonably. The assessment of reasonableness may be expressed in the following question: was the exercise of discretion unconnected to the purpose for which the contract granted discretion? If the answer is yes, then the exercise of discretion has not been carried out in good faith. (*Wastech*, para. 69).

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

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

b. From its internal March 21, 2021 email, in which Ms. Costa elaborated upon the financial concerns that the Landlord was facing:

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

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

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

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

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

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

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

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

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

[104] Ms. Hutcheson also opines that:

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

b. PBDF appears to be paying the highest gross sales-to-rent ratio in the Canadian Duty Free sector, based on her discussions with Jim Pearce of PBDF and the absence of any statistical data to the contrary. According to Mr. Pearce, and based on the hearsay evidence of Mr. Pearce, Ms. Hutcheson suggests that the standard currently being achieved in Canada in the duty free sector for gross sales-to-rent ratios ranges from 10% to 16%.

c. Compared to the average gross sales-to-rent ratio in the Canadian retail sector which ranges from 6 to 10%, the Base Rent obligations of PBDF at 157.3% in 2020, 251.2% in 2021, and 36.96% in 2022 are 3.7 to 41.9 times higher.

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

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

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

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

c. *The Demands and Proposals*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) No Breach, No Remedy for Breach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in an exclusive supply agreement, "The parties did not intend further negotiations as to terms before it was to come into effect, but rather that it was to become a complete obligation *eo instanti*, leaving certain details, as a matter of practical necessity, for adjustment as circumstances required during the lifetime of the contract" (at para. 34 in the online version). I do not find this case to be particularly helpful or analogous as it arose in a different context, and s. 18.07 of the Lease clearly did intend for further discussions and negotiations by its express terms.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Outcome

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

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

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

2. The Landlord did not breach s. 18.07 of the Lease by refusing to agree to abate all Base Rent otherwise payable during the Closure Period. Section 18.07 does not require that the Base Rent be adjusted based on a fixed percentage of the Tenant's sales or revenues or that it be reduced to a level that guarantees a minimum level of profitability to the Tenant.

3. The Landlord did not breach its duty to act in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with the Tenant after s. 18.07 was triggered. The Landlord has not been found to have been acting with the ulterior motive of terminating the Lease. Nor were the Landlord's demands, proposals and other dealings with the Tenant unreasonable having regard to the acknowledged objective of attempting to preserve the tenancy and when considered in the context of the dealings between the parties and the evolution of their positions over time.

4. No Remedy is granted:

    a. Given that there is no finding of breach by the Landlord, there is no need for the court to decide what remedy might have been available to the Tenant if there had been a finding of breach.

    b. Without the parties having agreed at the time of contracting as to how such determination could be made, and in the absence of any established benchmarks, the court cannot determine and impose upon the parties an amount of Base Rent to be paid by the Tenant during the Closure Period, or terms upon which it is to be paid, that are different from what the Lease requires. The court cannot re-write or amend the Lease for the parties, nor can it force the parties to do so. Nor is that level of intervention by the court necessary in order to implement and give commercial meaning and effect to s. 18.07 of the Lease. Section 18.07 was implemented over the course of the three

years of consultations and negotiations; it is not rendered meaningless just because the parties have not been able to reach an agreement.

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

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

Costs

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

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

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

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

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

KIMMEL J.

Date: December 15, 2023

APPENDIX 1

CHRONOLOGY OF DEALINGS BETWEEN THE PARTIES

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

a. When the Canada-US border was closed to non-essential traffic in March of 2020, PBDF closed the duty free store. PBDF did not discuss closing the duty free store with the Authority or advise that it was closing the store until after it had done so.

b. The Authority did not initially agree to defer payment of Rent for April of 2020. On April 1, 2020 the **Landlord wrote to the Tenant indicating that there was no provision for abatement of Rent in the Lease and that the Landlord was requiring payment of rent in accordance with the Lease terms**.

c. PBDF thereafter invoked s. 18.07 in a letter dated April 3, 2020 and requested a meeting to discuss the unprecedented situation.

d. A meeting was arranged and took place on April 11, 2020. Following that meeting, the Landlord sent a draft of the First Deferral Agreement on April 16, 2020 that provided for a Rent Deferral Period that would expire on July 31, 2020 (the "Deferral Date").

e. The Tenant responded with a counter-proposal on April 21, 2020, by which it asked for an option to extend the Deferral Date out as far as April 2021 if the border had not opened to non-essential travel and the traffic levels had not substantially recovered by then.

f. The Landlord responded to the Tenant's suggested changes to the First Deferral Agreement the same day, April 21, 2020, noting among other things that **the Landlord is not a bank and if the Tenant requires additional assistance it should be looking to traditional financial institutions.**

g. At the Tenant's request, its counter-proposal for the First Deferral Agreement was put to the Authority's Board and rejected. Instead, the Board approved the version that the Landlord had provided. The Tenant was advised of this on April 24, 2020.

h. Following a period of non-communication from the Tenant, the Landlord sent an email to the Tenant on May 6, 2020 with the following demand: "As you no longer appear to be interested in the rent deferral agreement that the PBA Board approved on April 24, 2020, please submit the April 1, 2020 and May 1, 2020 rent payments as required by the lease. **Failure to do so by the close of business tomorrow will result in the PBA initiating formal default proceedings under article 17.01 of the lease.**"

i. The Tenant sent back the signed First Deferral Agreement to the Landlord on May 6, 2020 with a cover email indicating that there was still a need for further discussions about the implications.

j. On August 18, 2020, the Tenant wrote to the Landlord, noting that the First Deferral Agreement had expired and suggested that the Deferral Date should be extended until the month after the border is fully re-opened.

k. On October 29, 2020 the Landlord wrote to the Tenant about the need for a new deferral agreement and various other matters.

l. The Landlord followed up two weeks later on November 13, 2020 with a draft of the Second Deferral Agreement, noting the Tenant's lack of response to the October 29, 2020 email and various defaults by the Tenant under the Lease and stating: "Failure to respond by November 18, 2020 to this e-mail and my earlier e-mail of October 29, 2020 describing how you will address the issues raised in both e-mails **will result in the PBA issuing a formal notice of default in the manner prescribed by Article 18.03**."

m. On November 16, 2020 the Tenant responded, asking why it had become urgent after the Landlord had waited months to send the draft Second Deferral Agreement. The Tenant also commented substantively that the Deferral Date should be extended to expire on March 31, 2021 rather than December 31, 2020, then only a few weeks away.

n. The Authority amended the proposed draft Second Deferral Agreement to extend the Deferral Date from April 1, 2020 to March 31, 2021 (or earlier if the Tenant's duty free store opened earlier) and to allow for a two year payback after re-opening. This draft Second Deferral Agreement was approved by its Board by a resolution on November 20, 2020. That day, General Manager of the Landlord, Mr. Rienas, wrote to the Tenant stating: "The Board has tentatively approved the rent deferral agreement conditional on getting greater assurances as to receiving unpaid rent. As you know, zero rent has been paid since April 1, 2020. To that end the Authority is requesting the financial information requested in Articles 16.03 a), b) and c) of the lease. Please provide by no later than Tuesday November 25."

o. The Tenant's 2019 financial statements and an HST reimbursement were also requested by the Landlord and the Tenant provided those to the Landlord on November 23, 2020.

p. PBDF signed the Second Deferral Agreement in November 2020, but the Authority did not.

q. After having received on December 8, 2020 certain financial and other information that the Landlord had requested from the Tenant, Mr. Rienas wrote on December 9, 2020 to provide comments on what had been received and advised the Tenant's representative (Mr. Pearce) that: "[**the Authority] is not prepared to be PBDF's bank and are not prepared to defer all of the rent payments till March 31, 2021.**

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

r. On December 17, 2020, the Board resolved to demand a partial rent payment from PBDF in the amount of $1 million by December 31, 2020 and to develop with legal counsel a rent repayment schedule and associated guarantees of full payment.

s. On December 21, 2020, **the Landlord demanded that the Tenant pay $1 million of the Rent that had been deferred under the Deferral Agreements by December 31, 2020 and a further $2.13 million in deferred Rent on a schedule to be agreed, and demanded that the Tenant start paying the full Base Rent under the Lease as of January 1, 2021.**

t. The Tenant wrote to the Landlord on December 23, 2020 requesting the opportunity to discuss an extension of the rent deferral and the expected payment schedule.

u. The Landlord wrote back to the Tenant on December 29, 2020 explaining it was "fully aware of the business challenges during the Covid-19 pandemic" and had taken those into consideration in the offer it made on December 21, 2020.

v. On December 30, 2020 the Tenant sent a further response, noting certain objections and making it clear that the Tenant was not in a position to make the short term payments that had been demanded by the Landlord. The Tenant indicated it would provide the Landlord with its business plan by January 15, 2021 and suggested that a meeting be arranged thereafter.

w. On January 15, 2021, PBDF provided financial projections to the Authority and made proposals to the Authority to address: (i) Rent payable under the Lease going forward; and (ii) repayment of the deferred rent by PBDF. This business plan was accompanied by the Tenant's sales projections. The Tenant's projections showed that it would become profitable in the short term if the Lease was amended as the Tenant was suggesting, predicated upon a permanent reduction in the Base Rent payable.

x. On January 19, 2021, the Authority advised the Tenant that the "proposed financial business plan of eliminating Base Rent and moving to only % rent is unacceptable. It also ignores all the rent currently owed to the Peace Bridge Authority (PBA). Even in the rent deferral agreement that expired on July 31, 2020, PBDF agreed to pay deferred rent with Interest over time. Your plan is also silent on accessing federal government relief programs like the Business Credit Availability Program (BCAP) and the Highly Affected-Sectors Credit Availability Program (HASCAP)." The Authority further noted that the minimum Base Rent of $4 million was a key factor in the Tenant's RFP proposal having been selected and that it was "not prepared to alter the basis upon which the concession awarded. To do so would be unfair to the other bidders in the procurement process."

y. On March 25, 2021, the Tenant referenced its previous proposal and cash flow projections (and provided new ones that were substantively the same as the previous ones, but extended over a longer projection period and some numbers rounded) and asked for a mediation or more formal meeting with the Landlord to discuss them. The parties exchanged further letters between April 1 and 13, 2021, at which time the Landlord indicated that it wanted to wait to meet until the Tenant could provide its audited financial statements, which had been delayed.

z. The Tenant provided further financial information to the Landlord on May 6, 2021. The parties met on May 13, 2021 and the Tenant indicated that it needed time to meet with RBC and provide its next proposal. The Landlord asked for it by June 1, 2021.

aa. The Tenant's formal proposal was eventually delivered, but not until August 21, 2021. The proposal sought an abatement of all rent from March 21, 2020 until the Tenant's duty free store re-opened and then a switch to percentage rent only (no minimum Base Rent) after the store opened, and various other terms. This was accompanied by financial projections from the Tenant that were consistent with the previous ones it had provided.

bb. The Landlord acknowledges it reached out sometime in August 2021 to the prospective tenant that had put in the second place response to the RFP in 2016 to see if they would still be interested in operating a duty free store on the Canadian side of the Peace Bridge. Nothing came of this.

cc. **On September 8, 2021, the Authority issued notices of default**, for both monetary and non-monetary defaults by the Tenant, stating that it would exercise its remedies under the Lease arising from the alleged defaults, all of which arose during the Closure Period.

dd. Those notices resulted in a default by PBDF under its creditor facilities with the RBC.

ee. PBDF reopened the Canadian duty free store shortly after these notices of default were received in September 2021.

ff. On September 20, 2021 the Tenant sent the Landlord proof that it had applied for government assistance under the Canada Emergency Rent Subsidy ("CERS"), and confirmed amounts received under CERS had been remitted to the Landlord. The Tenant's CERS applications were based on the full monthly minimum Base Rent payable under the Lease ($333,333.33).

gg. On September 30, 2021 the Tenant advised the Landlord that it would be making a further proposal to address Rent during Closure Period by October 15, 2021.

hh. In the meantime, the Tenant and the RBC entered into the Forbearance Agreement dated October 8, 2021 that contemplated that PBDF would reach a resolution with the Authority to preserve the Lease by November 15, 2021.

ii. Although the Landlord was not privy to the Forbearance Agreement when it was being negotiated and signed, that agreement authorized the RBC to communicate directly with the Landlord, and the RBC did so.

jj. On October 15, 2021 the Tenant made a further proposal to the Landlord, in which the Tenant for the first time offered to pay $2 million in Base Rent for the Closure Period over the full and extended term of the Lease without interest (to be paid off in monthly installments commencing on January 15, 2023). The Tenant also proposed a schedule for payments to Ramp Up to annual Base Rent of $4 million over time, and a five-year extension of the Lease term from its current end-date of October 2031 to October 2036. This proposal also asked for an amendment to the rent terms to remove the requirement that sub-leases to food service pay 20% of their sales.

kk. This was countered by the Landlord on October 26, 2021. The Landlord offered a different Ramp Up for future rent, and proposed that 50% of the unpaid rent from the Closure Period ("Back Rent") be paid upon execution of the amendment to the Lease, with any HST credits received to be applied to the remaining Back Rent outstanding. The Landlord agreed that the Lease could be amended to allow for food service sub-tenant rents to be at market rates, approved by, and payable to, the Landlord. No extension of the Lease term was agreed to.

ll. The Tenant made a further counter proposal on November 16, 2021. The Tenant asked for certain adjustments to the Landlord's proposed Ramp Up regarding future rent, and agreed to pay Back Rent of $2 million, to be treated as a no-interest loan paid off in monthly installments commencing on November 15, 2022 and continuing to October 15, 2036, upon the provisos that: (i) the Lease be amended to grant the Tenant "two options to extend the term for two additional periods of five years each"; and (ii) confirmation from the Landlord that all other amounts owing as Back Rent are waived, including those rents subject to the rent deferral agreement dated April 27, 2020. The Tenant also asked that the HST payments/repayments be handled in the normal course rather than as part of any agreement regarding Back Rent. The Tenant agreed to the Landlord's proposed amendments regarding the food service sub-tenants.

mm. No agreement was reached. The failure of PBDF to reach a resolution with the Authority by November 15, 2021 triggered a default under the Forbearance Agreement with RBC.

nn. The Landlord's counsel wrote to RBC on November 21, 2021 stating: "I am writing to advise that our client has been unable to resolve issues concerning the default of its tenant, Peace Bridge Duty Free Inc., **and our client intends to exercise its remedies under the default provisions of the Lease**. As you have previously requested, please accept this correspondence as advance notice of our client's intention."

oo. RBC brought this Application seeking to appoint a receiver in December 2021. In response to this application, PBDF requested from the court further time to reach a commercial resolution with the Authority. On December 14, 2021, the Appointment

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

pp. The Landlord wrote to the Tenant on August 2, 2022 reminding it of the "offer to provide an abatement equal to 50% of the unpaid rent that accumulated during PBDF's COVID-related shutdown … conditional on there being an arrangement in place … concerning payment of the remaining 50%. We wish to be clear that our client is not prepared to grant an abatement of more than 50% and is not required to justify that business decision to PBDF." It was also noted that if the Tenant wished "to present a proposal for the payment of the remaining 50% of the unpaid rent that accumulated during PBDF's COVID-related shutdown, we require that it do so within 15 business days. Any such proposal must provide for regular monthly payments against the arrears over a maximum of 24 months and must include either a third-party guarantee from a solvent guarantor or security. Detailed going-forward financial modelling for the business and specifics with respect to any security or guarantee, including proof of the guarantor's solvency, must be included with any proposal."

qq. The Landlord entered into a lease amending agreement with the tenant for the US duty free store at the Peace Bridge in late 2022, effective January 1, 2023. The original lease for the US duty free store had a built-in rent abatement because monthly rent was based on the previous year's revenue. The US duty free tenant did not have a minimum base rent amount payable. The U.S. duty free store never closed. Its lease amending agreement required payment of some of the rent that had been deferred under its lease, for the period April 1, 2020 to December 31, 2022 during which the Landlord agreed to waive 80% of the rent that was otherwise payable. The Tenant agreed to repay its share of this deferred rent over five years with interest and was given the option for an additional 10 years of lease extension.

rr. On March 13, 2023 the Tenant made a proposal to the Landlord pursuant to the court's direction in advance of the court ordered mediation, which did not offer anything for Back Rent. The Tenant did so on the basis that it was not prepared to abandon its litigation position that nothing was payable by it during the Closure Period (subject to receiving the Landlord's mediation position and to further negotiation at the mediation), for the period from December 2021 to the date of any settlement of the litigation. What the Tenant offered was to forgo its damages claims and to waive its right to pursue its litigation costs for this period. For the Go Forward Period (after any settlement), the Tenant proposed a permanent amendment to the Lease to provide for minimum Base Rent of $2.5 million (instead of $4 million) with Percentage Rent over and above that based on different sales levels than currently provided for in the Lease. This proposal also contemplated releases on both sides including directors, officers, shareholders etc.

ss. On March 21, 2023 the Landlord made a counter-proposal to the Tenant for payment of 75% of the rent accruing due during the Closure Period up to November 1, 2021 to be paid within 90 days (with some alternatives offered to address tax considerations) and a further adjustment to the proposed Ramp Up from 2021 to 2025 (with amounts due from prior periods covered by the Ramp Up, in 2021, 2022 and 2023 to be paid

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

tt. On August 22, 2023 the Tenant made a further proposal to the Landlord with reference back to the Landlord's proposal of March 21, 2023 and providing supporting calculations, in which the Tenant offered to pay $2,851,500, being 50% of the rent arrears for the period up to November 2, 2021 ($1 million within 60 days, $1 million a year later and the balance two years later) and agreed to most of what the Landlord proposed for the Ramp Up, with small adjustments and more time to pay amounts past due. This proposal provided for an amendment to the Lease to add two five-year Lease extension options. The Tenant asked for more time to secure the sub-leases to food service providers. This was a time limited offer that was open until the then anticipated hearing date of the Cross-Motion on September 19, 2023.

uu. On September 26, 2023 the Landlord made its last proposal to the Tenant, which was Without Prejudice and is not in evidence.

vv. On October 13, 2023 the Tenant made its last proposal to the Landlord which was Without Prejudice and is not in evidence.

APPENDIX 2

(LEASE EXCERPTS)

2.01 Definitions

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

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

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

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

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

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

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

2.04 Entire Agreement

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

2.15 Reasonableness

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

2.17 Amendment and Waiver

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

4.01 Covenant to Pay

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

4.02 Base Rent

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

4.03 Percentage Rent

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

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

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

…

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

4.05 Rent and Payments Generally

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

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

9.02 Conduct and Operation of Business

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

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

18.07 Regulatory Changes

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

18.08 Unavoidable Delay

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

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

Forecasted Sales ($ million)

Year	1	2	3	4	5	6	7	8	9	10
Sales	26.3	29.8	30.5	31.3	32.1	32.9	33.7	34.5	35.4	36.3

This is Exhibit “D” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent
(Appellant)

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

NOTICE OF APPEAL

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

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

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

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

2. That the application of subsection 18.07 of the Lease results in rent payable under the Lease for the period of April 2020 to October 2021 ("**Closure Period**") equal to either:

   (a) full Additional Rent and the greater of all COVID-related rent assistance it was eligible for and received or 20% of its monthly Gross Sales ("**Normal Rent**"); or

   (b) an amount that the Court shall order be determined by way of a reference to be held before the Superior Court of Justice.

3. That the Base Rent payable during the Ramp Up Period is as set out in the schedule at paragraph 12 of the December 15th, 2023 reasons for decision of the Honourable Justice Kimmel.

4. That the Respondent pay costs of this appeal and the costs of the proceedings before the Honourable Justice Kimmel on such scale as is determined to be just by this Court; and

5. Such further and other orders as to this Honourable Court may seem just.

THE GROUNDS OF APPEAL are as follows:

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

6. The Motion Judge erred in that she identified the first issue in the cross-motion to be determined by the Court as:

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

to which she concluded that:

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

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

7. The Motion Judge found that subsection 18.07 of the Lease gives rise to a substantive right/obligation to make adjustments to the Rent payable by the Appellant in the circumstances of this case, taking into consideration the extent of the Adverse Effect on the Appellant's business; and found that the Respondent acknowledged that there was an impact to the Lease, and that a significant rent abatement was appropriate, not only for past rent, but future rent moving forward; but the Motion Judge erred by failing to grant the Appellant any remedy to give effect to the admitted intention of the parties that the application of subsection 18.07 of the Lease required a significant rent abatement.

8. Having found that the Landlord conceded that subsection 18.07 of the Lease was a "safety valve" to protect the Appellant, the Motion Judge erred in granting no remedy to the Appellant.

Errors relating to the interpretation of the Lease

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

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

10. The Motion Judge erred by failing to consider pre-contractual representations by the Respondent of how subsection 18.07 of the lease would be interpreted as part of the factual matrix.

11. The Motion Judge erred by relying on language in subsections 4.05 and 18.08 of the Lease, to reject the Appellant's interpretation that Base Rent must be abated during the Covid-19 closure period, notwithstanding that subsection 18.07 of the Lease overrides those provisions when it is engaged.

12. The Motion Judge erred by interpreting subsection 18.07 of the Lease in a manner that renders it meaningless and leads to a commercially unreasonable result. In particular, the Motion Judge held that the outcome, if the parties could not reach a resolution in their negotiations, was that the clause provides no relief to the Appellant, despite also finding that the purpose of the clause was to provide relief to the Appellant.

13. The Motion Judge erred by failing to consider the factual matrix and existing circumstances that provide objective criteria for determining the impact on the Lease of the changes in Applicable Laws.

14. The Motion Judge erred by misinterpreting the law and finding that the parties intended further negotiations regarding the changes in Applicable Laws before the Lease came into effect, since it was impossible for the parties to know at time the Lease was signed that the Covid-19 pandemic or changes in Applicable laws would happen almost four years later.

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

Errors relating to reasonableness and the exercise of good faith

16. The Motion Judge erred by failing to consider that the Respondent and the Appellant amended the Lease to allow for the Appellant's duty-free store to remain closed until the Canada-U.S. border reopened when considering the reasonableness of the Respondent's actions, including issuing defaults and demanding the Appellant reopen the store under threat of Lease enforcement.

17. The Motion Judge failed to consider that the Respondent issued default notices it knew were unlawful to act on to intimidate the Appellant during the Ontario eviction moratorium.

18. Having found that the Respondent's stakeholders (the Canadian and New York State governments) were responsible for the changes in Applicable Laws that triggered subsection 18.07 of the Lease, the Motion Judge erred by giving the Respondents the higher degree of discretion allowed to ordinary commercial parties to pursue their own self-interest, when evaluating the reasonableness of the Respondents "hardball" negotiating tactics.

19. The Motion Judge erred by finding that without prejudice offers made by the Respondent were reasonable, despite the fact that they were impossible for the Appellant to accept, and came with significant conditions, including a requirement for third parties with whom there was no privity of contract, to provide personal guarantees while the border was closed.

20. The Motion Judge erred by failing to consider the vastly different treatment afforded by the Respondent to its other land border duty free store tenant that was similarly impacted by the Border Restrictions.

21. The Motion Judge misunderstood and misinterpreted the evidence regarding the Appellant's submissions regarding how the objective standard of profitability could be used to assess reasonableness of the Respondent's actions. At no time did the Appellant submit to the Court that it was required to protect the profitability of the business. The Appellant asked the court to focus on allowing the business to survive the pandemic, not for it to be profitable during it (which it manifestly was not in any event).

22. The Motion Judge failed to consider that the Respondent intentionally advised Royal Bank of Canada that it would terminate the Lease with the ulterior motive of triggering this receivership application by Royal Bank of Canada in order to indirectly terminate the Lease, when it knew it was unlawful to do so directly by reason of Part IV of the *Commercial Tenancies Act*.

23. The Motion Judge correctly concluded that if the Respondent was acting for the ulterior motive of seeking to terminate the Lease, rather than acting to preserve it, would not have been acting in good faith, but the Motion Judge made a palpable and overriding error by failing to consider that the totality of the Respondent's actions that were in furtherance of this ulterior motive.

24. The Motion Judge failed to hold the Respondent responsible for its failure of honest performance of the Lease.

Other errors

25. The Motion Judge erred by depriving the Appellant of the benefit of the "safety valve" it bargained for in respect of subsection 18.07 of the Lease by effectively finding that a mere four month deferral of rent from April 1st, 2020 to July 31st, 2020 (and no abatement of rent) is the only relief that the Appellant will receive arising from the Covid-19 pandemic and resulting changes in Applicable Laws that shut down its business for 18 months, and that the Respondent acknowledges will adversely affect the business for a total of 6.5 years.

26. The Motion Judge failed to understand the expert evidence and misapplied it.

27. The Motion Judge erred by on the one hand rejecting the Appellant as an expert for giving financial projections, but on the other hand giving undue weight to the Appellant's projections of future sales made in the midst of the Covid-19 pandemic to accept the position of the Landlord, which error was compounded by the fact the Motion Judge had actual evidence before her of actual sales and performance during the period covered by the projections, which demonstrated the error in those projections and that they should not have been relied on by the Court.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

28. This is an appeal from a final order of a judge of the Superior Court of Justice, *Courts of Justice Act*, s. 6(1)(b). As such, the route of this appeal is dictated by the *Courts of Justice Act* and the Appellant has an appeal as of right.

29. The style of cause in this proceeding recognizes that these proceedings arose as an interim measure, ordered by the Ontario Superior Court of Justice pending the return of a receivership application by Royal Bank of Canada. However, it is not a receivership. The receivership application has not been heard and no receivership has been commenced. The Appointment Order expressly states that this matter is not a receivership under the *Bankruptcy and Insolvency Act* ("***BIA***") and is a proceeding under the *Courts of Justice Act*.

30. The motion being appealed was heard in this proceeding with the Royal Bank of Canada style of cause as a matter of convenience, as expressly stated in paragraph 3 of the December 15th, 2023 reasons for decision of the Honourable Justice Kimmel.

31. In the alternative, if the Court determines that this matter is governed by the *BIA*, the Appellant states that leave is not required for the commencement of this appeal pursuant to ss. 193 (a) – (c) of the *BIA* as:

(a) The matters raised in the within appeal involve future rights, including the continuation of the Lease, which has an initial term that runs until 2031;

(b) The decision is likely to affect other cases of a similar nature in the bankruptcy proceeding because the determination of the rent payable under the Lease for the affected periods will be a key factor in relation to the Respondent's express intention to terminate the Lease, a possible future lift stay motion, and a possible motion to grant relief from forfeiture or to determine the proper amount of rent payable as these proceedings continue; and,

(c) Rent payable and the costs payable under the Lease that is the subject of the appeal greatly exceeds ten thousand dollars.

32. In the alternative, if leave is required under section 193(e) of the *BIA*, the Appellant seeks leave to appeal the Order, and asks that the leave application be heard at the same time as the appeal.

33. It is appropriate that leave be granted because the appeal:

(a) Is of general importance to the practice of bankruptcy/insolvency matters and/or to the administration of justice as a whole;

(b) Is *prima facie* meritorious; and,

(c) Would not unduly hinder the progress of the herein proceedings.

Date: December 27th, 2023

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

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

Applicant Respondent (Appellant)

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steven.groeneveld@ontario.ca
insolvency.unit@ontario.ca

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

NOTICE OF APPEAL

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Email: bjones@blaney.com

Lawyers for the Respondent (Appellant)

This is Confidential Exhibit “E” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

This is Confidential Exhibit “F” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

This is Exhibit “G” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	MONDAY, THE 17TH
	)	
JUSTICE PATTILLO	)	DAY OF JANUARY, 2022

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

AMENDED ORDER
(appointing Monitor)

THIS APPLICATION, made by Royal Bank of Canada ("**RBC**") for an Order pursuant to 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 a monitor (in such capacity, the "**Monitor**") without security, of Peace Bridge Duty Free Inc. (the "**Debtor**"), was heard this day via Zoom videoconference because of the Covid-19 pandemic.

ON READING the affidavit of Christopher Schulze sworn December 2, 2021 and the exhibits thereto, and the affidavit of Jim Pearce sworn December 12, 2021 (the "**Pearce Affidavit**") and the exhibits thereto, and on hearing the submissions of counsel for RBC, the Debtor, the Buffalo and Fort Erie Public Bridge Authority (the "**Authority**") and such other counsel as were present, no one appearing for any other stakeholder although duly served as

appears from the affidavit of service of Eunice Baltkois sworn December 3, 2021, and on reading the consent of Spergel to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of this application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 101 of the CJA, Spergel is hereby appointed Monitor, without security, of the Debtor with the powers, rights and duties further set out herein. This Order and the appointment of the Monitor does not constitute a finding by this Court that the Debtor is insolvent.

3. **THIS COURT ORDERS AND DECLARES** that:

(a) the Monitor shall not take possession or control, nor shall it be deemed to have taken possession or control, of the Debtor's business or the assets, property or undertaking of the Debtor (the "**Property**"), and that the Debtor shall retain all operational control of their Property, business and operations;

(b) the Monitor shall not be and shall not be deemed to be a receiver for purposes of subsection 243(1) of the Bankruptcy and Insolvency Act (the "BIA") or under any other statute;

(c) the Monitor shall have none of the obligations of a receiver under Part XI of the BIA, other than section 247, and for greater certainty it shall not send notice of its appointment or this order to the Superintendent in Bankruptcy or to the known creditors of the Debtor; and

(d) the appointment of the Monitor shall not be and shall not be deemed to be a change of control of the Debtors.

MONITOR'S POWERS

4. **THIS COURT ORDERS** that the Monitor is hereby empowered and authorized, but not obligated, to act at once and, without in any way limiting the generality of the foregoing, the Monitor is hereby expressly empowered and authorized, but not obligated, to do any of the following where the Monitor considers it necessary or desirable:

(a) to monitor the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to take physical inventories of the Property as may be necessary or desirable;

(c) to monitor the business of the Debtor;

(d) to report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property or the business of the Debtor and such other matters as may be relevant to the proceedings herein;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including without limitation those conferred by this Order;

(f) to monitor receipts and disbursements of the Debtor;

(g) to report to, meet with and discuss with such affected Persons (as defined below) as the Monitor deems appropriate on all matters relating to the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(h) to monitor and report on the status of negotiations between the Debtor and the Authority; and

(i) subject to the limitations in section 3 of this Order, to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

5. **THIS COURT ORDERS** that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Monitor.

6. **THIS COURT ORDERS** that all Persons, including but not limited to Canada Border Services Agency and Canada Revenue Agency, shall be authorized to share information, with the Monitor, provided the Debtor shall be entitled to request and receive copies of all such information from the Monitor.

NO PROCEEDINGS AGAINST THE MONITOR

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Monitor except with the written consent of the Monitor or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Monitor or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. **THIS COURT ORDERS** that all rights and remedies against the Debtor, the Monitor or affecting the Property are hereby stayed and suspended except with the written consent of the Monitor or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE MONITOR

10. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Monitor or leave of this Court.

CONTINUATION OF SERVICES

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Debtor, or as may be ordered by this Court.

CASL

12. **THIS COURT ORDERS** that any and all interested stakeholders in this proceeding and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in this proceeding, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to such other interested stakeholders in this proceeding and their counsel and advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

LIMITATION ON THE MONITOR'S LIABILITY

13. **THIS COURT ORDERS** that the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by section 14.06 of the BIA or by any other applicable legislation.

MONITOR'S ACCOUNTS

14. **THIS COURT ORDERS** that the Monitor and counsel to the Monitor shall be paid their reasonable fees and disbursements by the Debtor upon presentation of such accounts to the Debtor, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Monitor and counsel to the Monitor shall also be entitled to and are hereby granted a charge (the "**Monitor's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings limited to the amount of $100,000, and that the Monitor's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

15. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

16. **THIS COURT ORDERS** that prior to the passing of its accounts, the Monitor shall be at liberty to apply the monies received from the Debtor pursuant to paragraph 14 of this Order against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Monitor or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

SERVICE AND NOTICE

17. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 of the *Rules of Civil Procedure* (the "**Rules**") this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules. Subject to Rule 3.01(d) of the Rules and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission.

18. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Monitor is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

19. **THIS COURT ORDERS** that exhibit N will be removed from the Pearce Affidavit as filed and the Debtor shall file a copy of that exhibit with the Court in a sealed envelope which shall be sealed until a further order of this Court. Parties to the Service List in possession of that exhibit as served shall treat it as sealed by this Court, pending a further order of this Court.

20. **THIS COURT ORDERS** that Confidential Appendix "1" to the First Report of the Monitor, dated January 14, 2022 shall be sealed and kept confidential pending further order of this Court.

21. **THIS COURT ORDERS** that the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

22. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as a trustee in bankruptcy of the Debtor.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

25. **THIS COURT ORDERS** that RBC shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of RBC's security or, if not so provided by RBC's security, then on a substantial indemnity basis to be paid by the Debtor with such priority and at such time as this Court may determine.

26. **THIS COURT ORDERS** that the balance of the relief sought by RBC in this application be and is adjourned until March 23, 2022 at noon (one-hour hearing), provided, however that the Debtor satisfies the following conditions at all times:

(a) the Debtor shall continually replenish its inventory to ensure that at no time does the total book value of its inventory go below $1,175,000;

(b) the Debtor shall ensure that at no time does the cash balance in the Debtor's account administered by RBC (the "**Account**") go below $850,000 (the "**Minimum Balance**"); and

(c) the Debtor provides the Monitor and RBC the following information:

(i) on a bi-weekly basis, an updated projected cash flow statement; and

(ii) on a monthly basis, an income statement and balance sheet along with a variance analysis disclosing actual results to the projections with an explanation of any variance.

27. **THIS COURT ORDERS** that RBC be and is hereby authorized to place a hold on the Account in the amount of the Minimum Balance.

28. **THIS COURT ORDERS** that any interested party, including, without limitation, RBC and the Debtor, may apply to this Court to vary or amend this Order or discharge the Monitor on not less than seven (7) days' notice to the Monitor, the Debtor, RBC and any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Pattillo, J.

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

Applicant

Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AMENDED ORDER
(appointing Monitor)

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Lawyers for Royal Bank of Canada

46118042.1

46905307.2
47156399.2
47196914.2

This is Confidential Exhibit “H” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

This is Exhibit “I” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

From: Sanjeev Mitra
To: David T. Ullmann
Cc: Sanjeev Mitra; Gardent, Ben; Jeremy Nemers
Subject: RE: RBC and Peace Bridge
Date: Sunday, January 14, 2024 10:33:50 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png

David, my client is always happy to speak to the borrower. The account manager is Ben Gardent who is copied. He can be reached at 416-974-1935. I would suggest that your client arranges a time convenient by email to speak if they want to connect.

Notwithstanding the foregoing, the bank wishes to be repaid in full which we have repeatedly advised you.

Absent the foregoing we are proceeding with the receivership application. Our materials will follow as we are addressing final comments. We should finalize a litigation timetable. Please let me know if you wish to conduct crosses and when you intend to do that.

Thanks

Sanj

Sanjeev Mitra, B.Sc., LL.B.

T 416.865.3085
E smitra@airdberlis.com

Aird & Berlis LLP

From: David T. Ullmann <DUllmann@blaney.com>
Sent: Thursday, January 11, 2024 3:57 PM
To: Sanjeev Mitra <smitra@airdberlis.com>
Cc: 'Jim Pearce' <JimP@dutyfree.ca>; Greg O'Hara <gohara@dutyfree.ca>
Subject: RBC and Peace Bridge

Further to our without prejudice call yesterday, which was appreciated, the principals of my client (copied) would like to reach out to the Special Loans banker in charge of this matter to schedule a meeting to discuss a possible resolution. If the Bank is amenable to that, can you please provide contact details for the appropriate party and I will forward it to my client? I will not be attending the meeting as it will be a clients only meeting. Let me know.

Regards,

From: Sanjeev Mitra
To: David T. Ullmann
Cc: Sanjeev Mitra; Jeremy Nemers
Subject: RBC Loans to Peace Bridge
Date: Friday, January 19, 2024 3:11:22 PM
Attachments: image001.png

David, your client advised our client that they were very close to finalizing a settlement with the debtor. They have asked the bank whether a portion of the cash collateral being held by the bank could be used to fund such a settlement.

The bank believes that the funding for the settlement should come from external sources rather from the cash collateral being held by the bank. If any of the company resources are to be used, the bank will need to have a report from the monitor to confirm that using the funds in the company will not impact the ongoing viability of the business or prevent it from achieving the covenants in the credit agreement.

Please send me a copy of the settlement documentation so we can understand the terms of the proposed settlement.

Thanks

Sanj

Sanjeev Mitra, B.Sc., LL.B.

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E smitra@airdberlis.com

Aird & Berlis LLP | Lawyers
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This is Exhibit “J” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

From:
To:
Subject:
Date:
Attachments:

From: Shea, Patrick <Patrick.Shea@gowlingwlg.com>
Sent: January 18, 2024 9:02 AM
To: David T. Ullmann <DUllmann@blaney.com>; Brendan Jones <BJones@blaney.com>; John C. Wolf <jwolf@blaney.com>
Subject: RE: You have not responded....

Thank you. To be clear, any offer must reflect the passage of time and the amount now owing, including interest. Our client will also expect any offer to provide for 100% reimbursement for all of the the cost incurred by the Authority as a result of the litigation strategy employed by your client.

E. Patrick Shea, KC, LSM, CS (he/him)
Partner
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patrick.shea@gowlingwlg.com

Gowling WLG (Canada) LLP
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100 King Street West
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Canada

gowlingwlg.com

From: David T. Ullmann <DUllmann@blaney.com>
Sent: January-18-24 8:54 AM
To: Shea, Patrick <Patrick.Shea@ca.gowlingwlg.com>; Brendan Jones <BJones@blaney.com>; John C. Wolf <jwolf@blaney.com>

Cc: 'Jim Pearce' <JimP@dutyfree.ca>; Greg O'Hara <gohara@dutyfree.ca>
Subject: RE: You have not responded....

Good Morning Patrick

Sorry for not responding sooner. I was waiting until I had all my variables figured out (which I still do not have) before I did so but I should have said as much to you. Also, I have been under pressure the last 10 days with two hotly contested unrelated matters, the second of which is in court this morning. I should have more time after today and be more available.

The state of play is this. With respect to your client, I acknowledge there is no outstanding offer. My client is interested in making an offer to yours and has asked us to prepare one. I do not think that will have any impact on the receivership proceedings, but in any event it is not being prepared for that purpose. I realize that your client has not committed to any position in respect of what it may or may not accept, but I do think we have exchanged enough offers to have a pretty good feel for what is reasonable here. We were also waiting for the costs decision, which has also added certainty as to what is required on that front. Payment of those costs would be part of our clients offer.

My client is also intending to perfect its appeal and we are working towards that. As you say, we have until the end of the month for that (or more precisely Jan 29 although in my experience the OCA is not rigid about these dates as they are with the date for filing the notice of appeal, which we met).

The issue which is delaying us making an offer to your client is this. Your client has made it repeatedly clear that a gating issue for your client is that our client should make an offer which sees effectively immediate payment (or 30 days from settlement which if effectively the same thing). Our clients are working towards that. However, the issue which we are dealing with is the terms under which the bank will or will not return to us the funds which they are holding as additional security in this process and whether or not the bank can prevent us from using the funds on hand in addition to those funds to pay your client. In this regard, you might find it unusual, but your client's interests and ours may end up being aligned. Said differently, our clients ability to make an acceptable offer to your client may depend on whether or not the Bank can seize or restrict all the company's cash. We say it cannot, but that is perhaps to be decided on Jan 29 if we cannot otherwise agree. You may find yourselves in

the position of supporting our position at that motion. We will see.

As such, we intend to continue to negotiate with the Bank. I can advise you that our clients met directly with the Bank yesterday to attempt to find a way forward.

In the interim however, we will prepare to respond to the receivership motion, while hoping a resolution can be reached with the Bank which allows us the funds we believe we need to settle with your client.

Regards,

David

David T. Ullmann
Partner

dullmann@blaney.com
T 416-596-4289 | F 416-594-2437

From: Shea, Patrick <Patrick.Shea@gowlingwlg.com>
Sent: January 18, 2024 7:35 AM
To: David T. Ullmann <DUllmann@blaney.com>; Brendan Jones <BJones@blaney.com>; John C. Wolf <jwolf@blaney.com>
Subject: You have not responded....

Good morning;

We have sent multiple e-mails and had no response whatsoever. We have now heard that your client may have advised RBC that there will be a resolution with our client to preserve the tenancy. I want to be clear: there are no offers on the table, there are no pending settlement discussions and I have confirmed with our client that your client has not made any outreach whatsoever.

As I have previously advised, the unfortunately litigation strategy adopted by your client has destroyed the relationship and, while nothing is impossible, a last minute offer that will be relied upon to try to delay the receivership or to justify an extension of the time to perfect your client's appeal will not be viewed favourably by our client.

E. Patrick Shea, KC, LSM, CS (he/him)
Partner
T +1 416 369 7399
patrick.shea@gowlingwlg.com

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Suite 1600, 1 First Canadian Place
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From: Shea, Patrick
Sent: January-11-24 2:11 PM
To: 'David T. Ullmann' <DUllmann@blaney.com>
Subject: RE: Perfecting Appeal

We have not had a response. Just so you are aware, the arrears (with interest) are now at over $14MM.

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From: Shea, Patrick
Sent: January-10-24 1:12 PM
To: David T. Ullmann <DUllmann@blaney.com>
Subject: Perfecting Appeal

I think the deadline for perfecting the appeal is 29 January 2024…the same day the receivership

application is returnable. Can you please let us know whether you will be perfecting the appeal? I have not yet heard from you as to what your client's intentions are with respect to the receivership.

E. Patrick Shea, KC, LSM, CS (he/him)
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This is Exhibit “K” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

Blaney McMurtry LLP | Lawyers
2 Queen Street East | Suite 1500
Toronto, Ontario M5C 3G5
T 416-593-1221
W Blaney.com

David T. Ullmann
Partner
D: 416-596-4289 E: DUllmann@blaney.com

January 24th, 2024

Via Email patrick.shea@gowlingwlg.com and 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 20th, 2016 ("Lease")

And Re: Royal Bank of Canada v. Peace Bridge Duty Free Inc. (CV-21-00673084-00CL)

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 then 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

David T. Ullmann
DTU/gf

cc: John C. Wolf and Brendan Jones

Proposed Settlement Terms with PBDF and PBA
dated January 24th, 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 31st, 2026, Base Rent will be payable in accordance with the Lease.

  Notwithstanding the foregoing, any over-payment of rent by PBDF up to October 31st, 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.

This is Exhibit “L” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

From:
To:
Subject:
Date:
Attachments:

From: Gardent, Ben <ben.gardent@rbc.com>
Sent: Monday, January 15, 2024 9:24 AM
To: Jim Pearce
Cc: Greg O'Hara
Subject: RE: Peace Bridge Duty Free

Hi Jim,

Thanks for your note.

We are always happy to meet with clients; however, we do want to make sure you are aware of the Bank's expectations, given recent developments around PBDF. The Bank wishes to be repaid in full which we have repeatedly advised your counsel Mr Ullman. Absent the foregoing we are proceeding with a receivership application.

Wednesday would work best for a meeting, as I have good availability most of the day. Unfortunately our corporate offices are not open to the public, so we will need to hold the meeting via Webex. Let me know what time works best and I can send out a Webex booking.

Regards,

Ben Gardent | Senior Manager | Special Loans and Advisory Services

Royal Bank of Canada | 20 King Street West, 2nd Floor, Toronto, ON M5H 1C4

T: 416-974-1935| E-mail: ben.gardent@rbc.com

From: Jim Pearce <JimP@dutyfree.ca>
Sent: Friday, January 12, 2024 2:46 PM
To: Gardent, Ben <ben.gardent@rbc.com>; Greg O'Hara <gohara@dutyfree.ca>
Subject: Peace Bridge Duty Free

[External]/[Externe]

Hello Ben, hope all is going well.

We were wondering if you would be available to meet with Greg and myself to discuss all things PBDF-RBC. The duty free landscape is once again very encouraging and we would like to update you on the business and our company.

If you had some time on Monday or Tuesday, that would be great and we would prefer to come to your offices.

Best,

Jim Pearce

Peace Bridge Duty Free

This is Confidential Exhibit “M” referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

This is Confidential Exhibit "N" referred to in the Responding Affidavit of Jim Pearce sworn remotely this 24th day of January 2024.

Commissioner for Taking Affidavits (or as may be)

Ines Ferreira

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

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

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Lawyers for the Respondent

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

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

NON-CONFIDENTIAL RESPONDING MOTION RECORD OF PEACE BRIDGE DUTY FREE INC.
(Returnable January 29, 2024)

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