

**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

**NOTICE OF CROSS-MOTION**

**THE MOVING PARTY, PEACE BRIDGE DUTY FREE INC. (“Duty Free”)**, will make a cross-motion before a Judge of the Ontario Superior Court of Justice (Commercial List) to be heard with or immediately before or after a motion brought by the Buffalo and Fort Erie Public Bridge Authority’s (“**Authority**”) seeking to lift the existing judicial stay and for leave to terminate Duty Free’s commercial lease, or as soon after that time as the motion can be heard.

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

**THE MOTION IS FOR:**

1. An order staying the Authority’s motion seeking to terminate the Lease (defined below) in respect of any alleged default under the Lease until a determination is made with respect how the Lease is impacted by the Border Restrictions, and what amount of Base Rent, if any, Base Rent is payable under the Lease.

2. A declaration that the U.S.-Canada border restriction legislation and related regulations and requirements as a result of the Covid-19 pandemic (“**Border Restrictions**”), individually and collectively, amount to an “unanticipated introduction of or a change in any Applicable Laws” that caused a material Adverse Effect on Duty Free’s business operations at the Leased Premises, thereby engaging subsection 18.07 of the Lease.

3. A declaration the Authority had and has an ongoing obligation to consult with Duty Free about the impact of the U.S.-Canada Border Restrictions (as they evolved individually and collectively) would and continue to have on the Lease, and to reasonably reconsider the impacted terms of the Lease, including Article IV of the Lease dealing with Base Rent.

4. A declaration the Authority breached subsection 18.07 of the Lease by failing to enter into reasonable, or any, discussions with Duty Free about the impact of the Border Restrictions as they evolved, individually and collectively, on Base Rent payable under the Lease to the date of this motion.

5. A declaration in respect of whether any Base Rent is due and payable under the Lease, and if so, a determination of the amount owing, specifically with respect to the following periods impacted by introduction and changes in Applicable Laws due to the Covid-19 pandemic:

- (a) The Canada Emergency Commercial Rent Assistance (“**CECRA**”) program period from April to September 2020;
- (b) From October 2020 to November 8<sup>th</sup>, 2021, the day before the U.S.-Canada border reopened for non-essential travel (with restrictions);

- (c) November 9<sup>th</sup>, 2021 to September 30<sup>th</sup>, 2022, when the Canadian government discontinued vaccine requirement for entry and use of the ArriveCAN app;
- (d) October 1<sup>st</sup>, 2022 to the date to be determined when the U.S. border reopens for unvaccinated travellers.

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

7. An order for damages resulting from the Authority's breach of the Lease, including breach of section 18.05 (Quiet Enjoyment), and failing to provide the main inducement under the Lease to Duty Free, which was the ability to carry on the only Permitted Use, being the operation of a duty-free shop, at the Leased Premises for the period from March 21<sup>st</sup>, 2020 to September 19<sup>th</sup>, 2021.

8. An order for damages payable by the Authority to Duty Free resulting from the Authority's wrongful threat of eviction during the non-enforcement period under Part IV of the *Commercial Tenancies Act*, that caused this receivership application and all expenses and other damages arising from that application.

9. An order directing the parties to attend a mediation.

10. A sealing order in respect of Duty Free's financial information disclosed in support of the cross-motion.

11. An order directing how Base Rent payable will be calculated in the event of a future pandemic and subsequent Border Restrictions.

12. Costs of this motion on a substantial indemnity basis.
13. Such further and other relief as counsel may request or as this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

**The Parties and the tenancy**

1. Capitalized terms if not defined in this notice of cross-motion and supporting affidavit are as defined in the Lease.
2. Duty Free operates a duty-free shop on the Ontario side of the Peace Bridge at the border between Fort Erie, Ontario and Buffalo, New York ("**Leased Premises**"), which it leases from the Authority. Duty Free has been operating the duty-free shop continuously since 1986, and in those thirty-five plus years, has paid the Authority an amount estimated to be in excess of \$84 million in total basic rental payments.
3. Prior to the COVID-19 pandemic, and for more than three decades, Duty Free operated a retail duty-free store that was open 24 hours a day, 365 days a year, and employed approximately 90 staff.
4. The Duty Free and the Authority entered into its most recent lease with respect to the Leased Premises on July 28<sup>th</sup>, 2016 for a further 15-year term commencing on November 1<sup>st</sup>, 2016 and ending on October 31<sup>st</sup>, 2031, subject to Duty Free's right to extend the Lease for a further five years ("**Lease**").

5. Base Rent payable under the Lease is by a formula predicated upon twenty percent (20%) of Duty Free's Gross Sales, together with a minimum rent of \$4 million per annum paid monthly (subject to a calculation set out in subsection 4.03 of the Lease).

6. In conjunction with entering into the Lease, Duty Free invested more than \$6 million to refurbish the Leased Premises, which investment forms the basis of RBC's lending facility, being the subject of the receivership application.

7. The Authority is a statutory entity created by New York State legislation and the Government of Canada legislation pursuant to *An Act Respecting the Buffalo and Fort Erie Public Bridge Company*, SC 1934, c 63. It is governed by a 10-member Board of Directors consisting of five appointed members from New York State and five appointed members from Canada.

8. Upon termination of the rights, powers and jurisdiction of the Authority under the applicable legislation, the property acquired or held by it within Canada becomes the property of His Majesty in right of Canada, and the property within New York State becomes under the jurisdiction as the New York State legislature may designate. Those governments are the de facto landlord of Duty Free's Lease as they are the beneficial owners of the property constituting the Leased Premises.

9. The Authority effectively represents the interests of its stakeholders, the Canadian and New York State governments in respect of the Peace Bridge and other assets under ownership, and as an "agent having jurisdiction", the Authority is a "Government Authority" as defined in paragraph 2.01(t) of the Lease:

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

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

### **The Lease**

11. The Lease expressly requires the Authority to consult with Duty Free about the impact of the introduction of or change in any Applicable Laws causing a material adverse effect on the Lease and to act reasonably in the exercise of its discretion.

### **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.** [emphasis added]

**2.01(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.** [emphasis added]

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

## **2.15 Reasonableness**

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

12. The Authority failed to comply with its obligations noted above.
13. Duty Free is required by subsection 9.04 the Lease to comply with all Applicable Laws and keep its Licence in good standing, which it has done.

### **Impact of the Border Restrictions on Duty Free**

14. In responding to Covid-19, Government Authorities rightfully prioritized public health over the interests of commercial business; and in doing so Governmental Authorities imposed significant restrictions, including the Border Restrictions, to the detriment of private businesses.
15. The Peace Bridge border crossing was closed to non-essential traffic from March 21<sup>st</sup>, 2020 to November 8<sup>th</sup>, 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 Peace Bridge, virtually eliminating all Duty Free's potential customers.
16. Duty Free's retail store was closed from March 21<sup>st</sup>, 2020 until it was reopened on September 19<sup>th</sup>, 2021 ("**Closure Period**") in the expectation of the conditional easing restrictions on non-essential travelers into the U.S., which occurred on November 8<sup>th</sup>, 2021.

17. The Authority, as a Government Authority and/or representative of its legal and beneficial stakeholders (the Canadian and New York State governments) is directly or indirectly responsible for Applicable Laws, including the Border Restrictions, that caused a material Adverse Effect to Duty Free's business at the Leased Premises and that give rise to an obligation to reconsider relevant Lease terms, including the calculation of Base Rent.

18. The Border Restrictions were not caused by, nor in any way within the control of Duty Free.

19. The Authority expressly acknowledged in the April 20<sup>th</sup>, 2020 rent deferral agreement the obvious impact of Covid 19 as the reason for deferral:

“...travel restrictions and economic hardships created...by the Covid 19 pandemic...”

**Government Authorities' assistance programs fail to address land border duty free shops**

20. Canadian Government Authorities recognized the urgency of the need to support private businesses that were harmed by the restrictions as the continued and evolved. In doing so, the Authority's stakeholder, the Canadian Government, rushed to design emergency commercial rent relief programs intended to allow businesses to “get through” the emergency and “cover costs” so they would be positioned for a strong recovery when the emergency passed.

21. Duty Free applied for every available Government Authority emergency program in respect of commercial rent assistance, including CERS and the Tourism and Hospitality Recovery Program, for the benefit of the Authority, and has paid all sums received to the Authority.



22. The Government Authority's emergency rental assistance programs unfortunately entirely failed to account for the unique and vulnerable land crossing duty-free stores that pay high rent to operate in a highly regulated industry that is almost entirely dependent on pleasure travellers crossing the Canadian land border, and duty-free stores were amongst the hardest hit by the Government Authorities' own public health and related travel restrictions.

23. The Authority was not eligible to participate in the CECRA (Canada Emergency Commercial Rent Assistance) program.

24. The Authority refused to follow the Canadian government's direction from the Treasury Board to all federal landlords not eligible for CECRA (by reason of the rushed program's eligibility requirements) and which were directed to align commercial rent obligations with core CECRA program criteria, meaning that tenants' rental obligations during the CECRA program were reduced by 75%.

25. The CERS (Canadian Emergency Rent Subsidy) program followed CECRA.

26. CERS was designed to provide a further monthly emergency rent subsidy of up to 90% of the commercial rent payable by tenants for the hardest hit businesses that were forced to temporarily close by public health order, as Duty Free was. However, like CECRA, CERS was designed without regard to Duty Free's unique Lease situation. The CERS eligible commercial rent expenses per location was limited to \$75,000/month, and as such the CERS program was entirely inadequate to address the unique circumstances of land border duty-free stores in general, and specifically Duty Free, which ordinarily had a Base Rent obligation of \$333,333/month.

27. As a result Duty Free, instead of receiving a monthly emergency subsidy equal to 90% of its commercial rent expense, received only approximately 15% of monthly Base Rent ordinarily payable under the Lease, which sum was entirely inadequate to address the financial impact of the emergency restrictions imposed upon it.

28. Duty Free could not generate any net income during the Closure Period. It could not pivot to online sales or curbside pickup, as other retail businesses could during the pandemic, by reason of the absence of eligible customers and the highly regulated nature of duty-free shops.

29. While the other retail businesses were coming out of the Covid-19 pandemic beginning in 2021, Duty Free's retail business continued to be (and remains) severely impacted due to ongoing cross-border emergency restrictions, including vaccine requirements, the ArriveCan app requirement, and lack of cross-border traffic, particularly motor coach traffic and pleasure travellers.

30. Sales at Duty Free are currently incapable of consistently being able to pay Base Rent, let alone 50 % of arrears sought by the Authority of about \$4 million.

31. The Authority in its capacity as Governmental Authority and/or by reason of its stakeholders being the Canadian and New York governments is responsible, or at least indirectly bears responsibility, for the emergency Border Restrictions and has an obligation to mitigate against their financial impact on Duty Free by reasonably reconsidering the Duty Free's Rent obligations under the Lease, during any impacted emergency period.

32. Instead, the Authority has steadfastly and repeatedly refused in writing to meet with Tenant or its representatives including in any without prejudice dispute resolution process.

33. The Authority acknowledges in its Notice of Motion and in the affidavit of Ron Rienas that the amount of Base Rent due and payable by the Lease is uncertain by reason of the factual matrix noted in the motions.

34. The Authority has filed exhibit evidence that appears to indicate it is willing to concede 50% of Base Rent due to December 14<sup>th</sup>, 2021, implicitly acknowledging that Border Restrictions had a material Adverse Effect on Duty Free.

### **The Authority's Conduct**

35. Initially when the emergency border closure was extended from 30 days to June 30<sup>th</sup> 2020, Duty Free and the Authority entered into a rent deferral agreement dated April 27<sup>th</sup>, 2020. When it expired, and the border closure continued to be extended, the parties entered into a further rent deferral agreement dated November 20<sup>th</sup>, 2020.

36. The Authority now disputes the enforceability of the second rent deferral agreement, despite agreeing on its terms, preparing the agreement for execution at the expense of Duty Free, accepting Duty Free's executed version of the agreement and at all material times conducting itself as though the second deferral agreement was in force.

37. The Authority has not honestly performed its contractual obligations under subsection 18.07 of the Lease by consulting reasonably and in good faith, and discussing with Duty Free the impact to the Lease of the various emergency Border Restrictions imposed by Governmental Authorities from time to time, and the resultant adjustment of Base Rent to reflect a reasonable cost of occupancy having regard to gross rent as a percentage of occupancy costs ("GROC").

38. Instead of complying with its contractual obligation to reasonably discuss Lease amendments, the Authority has taken an unreasonable rights-based approach by seeking to strictly enforce contractual terms related to Base Rent against Duty Free and/or seek concessions from Duty Free despite the fact that the Authority and its stakeholders' emergency Border Restrictions completely eliminated the benefit Duty Free bargained for under the Lease during the periods of Border Restrictions and thereafter; and despite knowing or ought to have known that its demands were at all material times and remain incapable of being honoured by reason of absence of Canadian side Peace Bridge travellers and/or Duty Free sales.

39. Duty Free states the Authority is not acting "reasonably" when it demands ongoing payment of Base Rent and 50% of arrears of Base Rent, which on any objective analysis of Duty Free's Gross Sales cannot be paid.

40. Despite the Authority's contractual obligation to consult with Duty Free regarding the impact of the evolving Border Restrictions on the Lease and to act reasonably in exercising its discretion as Border restrictions evolved; and despite filing in evidence a letter from counsel dated August 2<sup>nd</sup>, 2022 purporting to conditionally abate 50% of Base Rent during the Closure Period; the Authority, in the affidavit of Ron Rienas, takes the inconsistent position that full Base Rent (and all arrears of Base Rent payable in the absence of Border Restrictions) are payable after the expiry of the April 27<sup>th</sup>, 2020 rent deferral agreement.

41. In doing so, the Authority has refused to acknowledge any impact on the Lease from the period beginning July 31<sup>st</sup>, 2020 onward, despite the recital in the second deferral agreement drafted by the Authority, which recites the material impact of Covid 19, and the parties' course

of conduct during and following the expiration of that second deferral agreement, that the Authority now seeks to resile from.

42. The Authority arbitrarily gave preferential treatment to its other Peace Bridge duty free tenant, the U.S. duty-free store. The Authority agreed to accept percentage rent only on an indeterminant basis and to defer all arrears of annual minimum rent to a later date.

43. The Authority may have had access to Canadian business interruption insurance paid for by Duty Free as part of its Operating Costs. The Authority has not disclosed whether it has applied for, or received the proceeds of any insurance policies it may have obtained at Duty Free's expense.

44. The Authority is the only Canadian land border duty-free store landlord that has refused to engage with the Frontier Duty Free Association ("**FDFA**") in a meaningful dispute resolution discussions or processes with respect to its tenancy.

45. The Authority is the only FDFA member landlord to threaten lease termination as a result of inability of a land border duty-free store to pay full rent as a result of Covid-19 and the massive financial hardship from Border Restrictions that were disproportionately visited on land border duty-free stores. Further the Authority is the only landlord to seek to terminate a Canadian duty-free store lease.

46. The Authority's September 8<sup>th</sup> 2021 notice of monetary default threatened to terminate the Lease for non-payment of rent, despite its actual knowledge of the eviction moratorium in Ontario under Part IV of the *Commercial Tenancies Act*, and the sworn evidence of its

representative that it was providing an indulgence to Duty Free after July 31<sup>st</sup>, 2020 because of the eviction moratorium.

47. On November 21<sup>st</sup>, 2021, the Authority, through counsel, wrongfully advised Duty Free's bank, RBC, of a right of Lease termination that it intended to exercise with the intention of causing a receivership proceeding in the expectation of somehow receiving more Rent, despite having actual knowledge of the eviction moratorium in Ontario under Part IV of the *Commercial Tenancies Act*, that expressly prohibited termination of the Lease during the non-enforcement period.

48. The Authority is the only FDFA member landlord to communicate with a FDFA member's creditor/bank.

49. Pursuant to Canada Border Services Agency Memorandum D4-3-2, in the event a receiver is appointed, the receiver is not permitted to operate a duty-free store unless permission is requested to and granted by the Canada Border Services Agency.

50. It is unlikely a receivership appointed by RBC would obtain authorization continue the day-to-day operations of the duty-free shop (whether or not they meet the requirements of the Canada Border Services Agency).

51. Rather, any receiver is expected to shut down the business, return product to suppliers to the extent possible and liquidate the balance of the inventory offsite.

52. RBC has never indicated that any receiver imposed by it would operate Duty Free, and no information related to the day to day operations and staffing of Duty Free has ever been requested.

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

54. The Authority refused to follow the Treasury Board of Canada directive that federal departments and agencies who are landlords that are not eligible to participate in the CECRA program should provide rent reduction to their commercial tenants in alignment with the CECRA intent and core criteria, even after being advised that another land border duty free landlord had provided the equivalent 75% rent reduction.

55. The Authority has wrongfully and maliciously asserted as a ground for terminating the Lease that Duty Free has not paid all Covid-19 related emergency commercial rent assistance to the Authority, despite Duty Free having provided the Authority with all necessary documentation to determine that it has in fact received all Duty Free's Covid-19 related emergency rent assistance.

56. The Authority waived its right to rely on its September 2020 notice of monetary default by reason of its acceptance from the date Duty Free re-opened for retail sales of Base Rent payments equal to 20% of Gross Sales, plus Additional Rent, and its express or implied intention to continue the tenancy pursuant to the principle of waiver of forfeiture.

### **Receivership proceeding**

57. At the time of Justice Pattillo's December 14<sup>th</sup>, 2021 Order (as amended by Justice Penny's March 23<sup>rd</sup>, 2022 Order) appointing the monitor ("**Appointment Order**"), Duty Free had paid to the Authority as Rent the greater of 20% of its Gross Sales (as provided for by section 4.03 of the Lease) and any rent assistance received from the government (CERS and the Tourism and Hospitality Recovery Program).

58. The greater of 20% of the Tenant's Gross Sales and any government rent support, along with Additional Rent, has been the "normal payment practice" by Duty Free since the onset of the Covid-19 pandemic ("**Normal Rent**") and as at the date of the Appointment Order.

59. The Appointment Order that was provided in draft to the Authority's counsel in advance of the hearing and does not include a "pay rent" provision requiring payment of full Base Rent that is typically included in insolvency orders where the debtor is required to pay full post-filing rent in strict compliance with a lease.

60. The Authority approved the Appointment Order with its requirement to pay Normal Rent.

61. Duty Free has maintained the status quo by continuing to pay Normal Rent, and is not in default of the Appointment Order.

62. Justice Penny received and approved the monitor's first and second reports, and granted proposed amendments to the Appointment Order. Justice Penny confirmed that cash flow projections also support the conclusion that the business is viable until the proposed return date. The Authority received notice of the monitor's motion, including the monitors second report, and raised no objections to the continuation of the status quo as ordered by Justice Penny.

63. The Authority has not prior to its motion ever sought to modify the Appointment Order.

64. During the stay period, Duty Free has been paying RBC regularly in accordance with its secured lending agreement, and has been paying all Normal Rent.



65. Duty Free is in compliance with the Appointment Order as amended and there is no prejudice to any stakeholders by maintaining the status quo while the issue of what Base Rent is payable is determined.

**Duty Free's good faith conduct**

66. Duty Free's retail store was closed from the outset of the Covid-19 pandemic until September 19<sup>th</sup>, 2021 due to the Border Restrictions and emergency public health regulations.

67. Since the onset of the Covid-19 Border Restriction there have been no payments made to Duty Free's shareholders.

68. Greg O'Hara, the only principal of Duty Free that receives a salary, has deferred his annual salary of \$60,000 per annum in its entirety to date.

69. Duty Free has paid HST on the full amount of Base Rent, as opposed to HST on Normal Rent, at the demand of the Authority, resulting in an overpayment of HST.

70. Despite the Lease that limits the Permitted Use of the Lease Premises to the "operation of a duty-free shop and related services", when the retail store was ordered closed, the Authority operated washroom facilities at the Leased Premises for approximately seven (7) months. The Authority then pivoted and demanded by notice of alleged Lease default in November 2020, that Duty Free open at its own expenses restroom facilities for truckers and essential workers.

71. Duty Free, despite being closed for business, complied and maintained staff to gratuitously operate a public restroom with janitorial service for the benefit of the Authority and its stakeholders to keep the Peace Bridge operational for essential workers, despite the Authority

and its stakeholders' Border Restrictions completely prohibiting Duty Free from generating any retail sale income.

72. While the retail store was closed, Duty Free also gratuitously provided customs document processing services for truckers.

73. Duty Free paid Additional Rent throughout the pandemic, and since reopening its retail store, Duty Free has in good faith paid all Normal Rent.

74. Duty Free adjusted its accounting practices and accelerated payment of its installments of Normal Rent in response to the Authority's request for payment on the first day of each month (made by way of alleging that payment of Normal Rent on or about the 10<sup>th</sup> day of each month was a default under the Lease, which the Authority would rely upon).

75. Duty Free has provided the Authority with all required information about CERS and the Tourism and Hospitality Recovery Program funds that it received.

76. Duty Free has cooperated with the monitor, including phone calls with counsel and by providing two written reports of the steps it was taking in furtherance of its business.

77. Duty Free delivered its 2021 audited financial statements to the Authority in accordance with the Lease.

78. Duty Free's Gross Sales have increased from 0% to about 60% to 65% of pre-Covid sales.

**Lease termination is economically disastrous for all**

79. Duty Free's Gross Sales have been trending upward, especially in recent months since the Canadian side border has begun to reopen and it anticipates Gross Sales will continue to increase as bridge traffic returns to pre-Covid-19 pandemic levels. In this regard it is generally anticipated that the American restrictions on unvaccinated travellers will be lifted shortly.

80. If the Lease were to be terminated it will result in Duty Free and its shareholders losing their entire investment made of a three-decade period, including the over \$6 million recently incurred to upgrade the Leased Premises that was completed just months before the pandemic, as well as its normal going concern sale value.

81. Lease termination will result in all Duty Free staff losing their employment.

82. Operating a duty-free store requires a licence and is highly regulated, as such, in the event of termination of the Lease, there would likely not be an immediate replacement tenant, and there will likely be significant economic losses to all parties, including the Authority and Duty Free's suppliers' whose sales will evaporate. The public will be deprived of a Canadian duty-free store on the Peace Bridge for a period of time.

83. There is no corresponding benefit to the Authority as it will not recover any alleged Base Rent arrears from a prospective tenant. It will have to find a new licenced tenant and negotiate a new lease based on current sales and corresponding market rents and the new reality of reduced cross-border traffic.

84. According to FDFA, Duty Free by the Lease pays the highest rent of any land border duty-free store and the highest percentage of sales.

85. It is extremely unlikely any replacement tenant would pay GROC of 20% like Duty Free has and will continue to do.

86. The Authority has written off the alleged Base Rent arrears annually at its fiscal year end, and had unrestricted cash or cash equivalents of US\$77 million on hand as of December 31<sup>st</sup>, 2021.

87. The Lease termination relief sought by the Authority with an unrestricted cash reserve of about US\$77 million as compared to the utter destruction of Duty Free, and resulting loss to its shareholders, employees and suppliers is entirely disproportionate.

88. It is also inequitable for the Lease to be terminated for failure to pay Base Rent at the same time the Authority offered rent deferral to its U.S. duty-free tenant.

89. The inequity of the Lease termination is compounded by the Authority's stakeholder's causation of the material Adverse Effect sustained by Duty Free, the failure to enact emergency commercial rent subsidy programs to materially sustain Duty Free during the emergency, and the Authority's own actions and omissions.

## **Legislation**

90. *An Act Respecting the Buffalo and Fort Erie Public Bridge Company*, SC 1934, c 63.

91. *Commercial Tenancies Act*, RSO 1990, c L.7

92. Rules 2.01, 37, 57 of the Rules of Civil Procedure.

93. Such other grounds that counsel shall advise.

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

1. The Affidavits of Jim Pearce, sworn December 12<sup>th</sup>, 2020 and November 13<sup>th</sup>, 2022; and
2. Such further and other material evidence as counsel may advise and this Honourable Court may permit.

**Dated:** November 13<sup>th</sup>, 2022

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Lawyers for the Respondent

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

B E T W E E N:

**ROYAL BANK OF CANADA**

Applicant

- and -

**PEACE BRIDGE DUTY FREE INC.**

Respondent

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

**SERVICE LIST  
(as at November 13, 2021)**

<b>TO:</b>	<p><b>AIRD &amp; BERLIS LLP</b> Brookfield Place 181 Bay Street, Suite 1800 Toronto, ON M5J 2T9</p> <p><b>Sanj Mitra (LSO #37934U)</b> Tel: (416) 865-3085 Fax: (416) 863-1515 Email: <a href="mailto:smitra@airdberlis.com">smitra@airdberlis.com</a></p> <p><b>Jeremy Nemers (LSO #66410Q)</b> Tel: (416) 865-7724 Fax: (416) 863-1515 Email: <a href="mailto:jnemers@airdberlis.com">jnemers@airdberlis.com</a></p> <p><i>Lawyers for the Applicant</i></p>
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<b>AND TO:</b>	<p><b>BLANEY MCMURTRY LLP</b> Barristers &amp; Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5</p> <p><b>David T. Ullmann</b> (LSO #42357I) Email: <a href="mailto:dullmann@blaney.com">dullmann@blaney.com</a></p> <p><b>John Wolf</b> (LSO #30165B) Email: <a href="mailto:jwolf@blaney.com">jwolf@blaney.com</a></p> <p><b>Brendan Jones</b> (LSO #56821F) Email: <a href="mailto:bjones@blaney.com">bjones@blaney.com</a></p> <p><b>Alexandra Teodorescu</b> (LSO #63889D) Email: <a href="mailto:ateodorescu@blaney.com">ateodorescu@blaney.com</a></p> <p>Lawyers for the Respondent</p>
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**ROYAL BANK OF CANADA**

and

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

**PEACE BRIDGE DUTY FREE INC.**

Applicant

Respondent

Email address of recipient: See Service List

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

Proceeding commenced at Toronto

**NOTICE OF MOTION**

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