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

ORAL HEARING COMPENDIUM OF THE RESPONDENT

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TAB A

Outline of Anticipated Oral Argument

Overview

- Seeking to properly apply 18.07 to give effect to rent abatement all parties acknowledge is appropriate.

Covid, changes in Applicable Laws, border closure catastrophic for duty free stores

- Respondent's government stakeholder responsible for changes in Applicable Laws.
- During Closure Period and Ramp Up Period,[1] paid "Normal Rent".
- Agreement in principle for Rent abatement during Ramp Up Period.
- Disagreement on abatement quantum for Closure Period.

Lease

- Foresight to negotiate 18.07 "safety valve" to protect/preserve tenancy. [48][2]
- Covid border restrictions engaged 18.07. [9, 31a.]
- 18.07 gives rise to substantive right/obligation to adjust Rent payable in these circumstances taking into consideration extent of Adverse Effect on Tenant's business. [65.b.]
- Each change in Applicable Laws triggered 18.07.
- Parties understood and intended 18.07 could result in rental adjustments based on impact to Tenant's business [6] and agreed Base Rent should be reduced to level Appellant could pay taking into consideration impact on sales. [51, 63, 71(2)]
- Despite Landlord acknowledgement that significant Rent abatement was appropriate, [24, 81.b] no Rent actually abated.
- Without rent abatement, 18.07 "safety valve" rendered meaningless.

Cross-Motion

- Identified cross-motion would interpret Lease in terms of Rent payable and would be binding for "all purposes". [3]
- Issues to be determined identified in paragraphs 66.1, 66.4.b.
    - Finding was that Adverse Effects on Tenant's business warranted some adjustment to the Base Rent. [159.1]
- Did not determine the adjustment. Instead, just encouraged parties to agree. [157]

Contractual Interpretation Errors

- Reliance on entire agreement (s.2.04) and no abatement (s.4.05(a)) clauses to defeat 18.07 and parties' intention. [72]
- Despite acknowledgement significant rent abatement appropriate not only for past rent, but future rent moving forward [81 b.], Reasons relied on 4.05 and 18.08 (wrongly reading in language of 18.08 to 18.07) to reject impact to Lease results in Rent abatement under 18.07. [76]
- "All or nothing" approach resulting in no "impact" to Lease, contrary to intention/purpose of "safety valve". [77]

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[1] Since May 2023, the Tenant has paid $333,333,33 plus HST per month by Court order.
[2] Numbers in [ ] refer to the paragraph number of December 15th, 2023 decision of the Honourable Justice Kimmel.

Amendment vs. applying 18.07

- Key error – Finding amendment to Lease required for abatement. [1]
- Finding necessary to "re-write" Lease for abatement, rather than simply applying 18.07 [149].
- Representations at contract formation 18.07 would address need for Rent abatement in appropriate circumstances.

Objective criteria

- Question to be answered is what is the "impact" to Lease of changes in Applicable Laws.
- Inherent uncertainty of "unanticipated" changes in Applicable Laws.
- Impact on sales is key. [63, 71(2)]
- Customized solution for "unanticipated" pandemic using safety valve Appellant had foresight to bargain for.
- Factual matrix assists interpretation of 18.07. *Molson Canada 2005 v. Miller Brewing Company*, 2013 ONSC 2758.
- Temporary adjustment to rent based on factors existing when 18.07 engaged. *Winsco Manufacturing Ltd. v. Raymond Distributing Co.*, 1957 CanLII 112.
- Lease predicated on Base Rent being 20% of sales.
- Range of outcomes was between Normal Rent and 50% of Base Rent.
- 18.07 does not say full Rent payable if no agreement on impact.
- Finding March 2023 offer was a "metric or benchmark" the Court could apply that the Landlord propounded to be reasonable.[157]

Failure to consider relevant factors

- Despite amendment by paragraph 2.1(a) of First Deferral allowing closure until non-essential travel restrictions lifted, Respondent issued defaults/threated enforcement.
- Notices of default demanding $7.1 million within days.
- Considered Unavoidable Delay (18.08) but not failure to provide a rent free extension period as in *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159.
- Respondent acting against financial interest seeking to terminate Lease.

Effect of the decision

- Fails to determine key issue – quantum of abatement required by 18.07, that was supposed be determined for "all purposes" remains uncertain, and will result in further disputes.

TAB 1

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).
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> …
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> [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

TAB 2

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

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 8th, 2021, the day before the U.S.-Canada border reopened for non-essential travel (with restrictions);

(c) November 9th, 2021 to September 30th, 2022, when the Canadian government discontinued vaccine requirement for entry and use of the ArriveCAN app;

(d) October 1st, 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 form 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 21st, 2020 to September 19th, 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 28th, 2016 for a further 15-year term commencing on November 1st, 2016 and ending on October 31st, 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 21st, 2020 to November 8th, 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 21st, 2020 until it was reopened on September 19th, 2021 ("**Closure Period**") in the expectation of the conditional easing restrictions on non-essential travelers into the U.S., which occurred on November 8th, 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 20th, 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 14th, 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 30th 2020, Duty Free and the Authority entered into a rent deferral agreement dated April 27th, 2020. When it expired, and the border closure continued to be extended, the parties entered into a further rent deferral agreement dated November 20th, 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 2nd, 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 27th, 2020 rent deferral agreement.

41. In doing so, the Authority has refused to acknowledge any impact on the Lease from the period beginning July 31st, 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 8th 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 31st, 2020 because of the eviction moratorium.

47. On November 21st, 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 14th, 2021 Order (as amended by Justice Penny's March 23rd, 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 being 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 19th, 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 Fee also gratuitously provided customs document processing services for truckers.

73. Duty Fee 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 10th 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 31st, 2021.

87. The Lease termination relief sought by the Authority with an unrestricted cash reserve of about US$77 million as comparted 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 12th, 2020 and November 13th, 2022; and

2. Such further and other material evidence as counsel may advise and this Honourable Court may permit.

Dated: November 13th, 2022

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

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Alexandra Teodorescu (LSO #63889D)
Email: ateodorescu@blaney.com

Lawyers for the Respondent

TAB 3

2.01 (rr) Definitions - for the definition of Tenant's Gross Sales

- use, from the current lease 1.01 Definitions (o) Tenant's Gross Sales

- and - "In the case of Ticket Sales it shall mean the net proceeds derived from the service and not the total of actual tickets sales."

Article V - add a confidentiality clause

6.02 - clarity on appealing property taxes - Tenant be allowed to contest property tax assessments, be responsible for fees, and have support of the landlord

17.01 (a) Event of Default - add wording so a clerical error won't trigger default
- "the Tenant fails to pay any Rent, that is of material nature, within15 days after receiving written notice from the Landlord"

For the calculation of the monthly rent payments. – use the Accumulated Basis Method (i.e. running total so there's not excess at end of the year)

Business disruption due to bridge closure:
In the event there is a closure or shutdown of the bridge due to any cause that such bridge closure lasts longer than 24 hours, the rent payable by the tenant shall be abated. The rent abatement only applies to the extent that the loss caused by the bridge closure is not covered by the tenant's business interruption insurance. For the purpose of this provision the abatement in rent is to be calculated on the per diem rate of base rent payable during the period of closure (i.e. $4,000,000 / 365 days).

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

TAB 4

Shea, Patrick

From: Karen L. Costa
Sent: July-19-16 11:47 AM
To: JIM PEARCE; jimp9999@gmail.com
Cc: Karen L. Costa; Ron Rienas
Subject: PBDF Lease
Attachments: Duty Free Shop Building Lease-EDC_LAW-1389402-v18B.PDF; Duty Free Shop Building Lease-EDC_LAW-1389402-v18.pdf

Importance: High

Hi Jim –

Please find attached a redlined (18B) copy and a clean copy of the Lease (18).

We reviewed the additional requests from yesterday and have accommodated the majority of your requests. There are a few, upon advice from counsel, that we will not consider.

- 15.04 – Roof Rights and quiet enjoyment. There is a quiet enjoyment clause in the lease. That is sufficient.
- Schedule D – it is not appropriate to include the actual RFP as an attachment to the lease. Your Proposal is included as a reference to the lease as the representations made in the Proposal were the basis for your group being selected as the successful Proponent. Including your Proposal as a Schedule to the lease provides assurance that the representations will be carried out.
- Business disruption due to bridge closure – the lease requires you to insure for the risk of business interruption (Section XI). Your broker should ensure you have the proper coverage for this risk. We will not include any rent abatement for an insurable risk.

You have also requested we have further discussions on the following topics:

1. Possible sharing the subsidizing of the rents payable by the food concessions – their gross sales are to be included in the calculation of Tenant Gross Sales as defined in Section 2.01 (ss)
2. Insurance clauses – we have agreed to have our insurance broker meet with you insurance broker so that they can help determine the proper insurance is carried. All insurance coverages will comply to the lease Section XI as it is currently written.
3. Lease discussion in the event of a catastrophic event – we reviewed the examples listed as catastrophic. We agree that changes in governmental regulations could materially impact the business and have added section 18.07 to the lease. All other events listed were are routine events at a border crossing.

Jim, we very much would like to get this wrapped up in the next few days so that the motion to approve the lease can be brought to our July board meeting. This will ensure that we are complying with the 30 day negotiation period as defined in the RFP. The 30 day period ends this week. In your proposal your group clearly indicated that you accepted the form of lease in the RFP as is with no changes. This fact was considered in the scoring of your proposal. The PBA has acted in good faith in considering your requests and has agreed to the vast majority of them. We consider our negotiations complete and the attached lease to be the final version.

I hope that your group can agree to execute the lease so that we can move forward for another 20 years.

Thanks!
Karen

Karen L. Costa, CPA
Finance Manager
Buffalo & Fort Erie Public Bridge Authority

100 Queen Street, Fort Erie, ON L2A 3S6 | 1 Peace Bridge Plaza, Buffalo, NY 14213
klc@peacebridge.com |T 905-994-3679| T 716-884-8638| F 905-871-9940 | F 716-884-2089

For up to the hour traffic conditions, visit mobile.peacebridge.com

TAB 5

agree that changes to regulation apply. We don't agree that the lease will specifically say that it will -- that the landlord will agree to amend, we're not going to agree to that specific language, but everything else here is covered by eighteen oh seven (1807)."

A. No, that's not what that says.

177. Q. You disagree with that?

A. I do.

178. Q. Okay.

A. Because if everything in this paragraph was supposed to be eighteen oh seven (1807) it would've been at eighteen oh seven (1807). You're trying to --...

179. Q. So you're saying ...

A. ... I feel like you're trying to take what we talked about at a meeting and imply a section in the lease that that's what the section of the lease means. The section of the lease, if that's what it meant it would state that.

180. Q. Well didn't -- isn't this what Mr. Pearce brought up with you?

A. Mr. Pearce brought up with me this whole list of things that they wanted rent abatement for in the lease, we said, "No, we are not providing rent

abatement."

181. Q. So you specifically said no to him in that meeting, you're telling me?

A. I cannot recall if I specifically ...

182. Q. Okay.

A. ... said no to him; however, I do have subsequent emails that were sent to him in 2016, in October, which with I do say that.

183. Q. Okay, so I'm talking about ...

A. There is no provision for the rent to be reduced from the minimum for any reason.

184. Q. Okay, that's after the lease is signed.

A. But before it commenced.

185. Q. Okay, so what I'm suggesting to you is Mr. Pearce came to you with this request and you -- you told him eighteen oh seven (1807) addresses your concern.

A. In this subsequent email, yes, that's what we said, "Eighteen oh seven (1807) addresses your concern related to changes in the regulatory environment."

186. Q. Okay. And did the Authority subsequently agree or offer to abate the Duty Free store's rent?

A. When?

187. Q. After covid started.

A. There was a proposal that was given sometime, I believe, late 2020 or in 2021 that did include a forgiveness of fifty percent (50%) of the back rent that was owed at that time.

188. Q. Okay. And was the -- did the Authority offer to abate rent or agree to abate rent of other leases, the other Duty Free store, the American Duty Free store lease?

A. I'm uncertain if I am able to discuss what terms are within a different third party ...

189. Q. Okay, well ...

A. ... regar -- regarding their lease. So I don't know what ...

190. Q. Your lawyer's ...

A. ... the rules are, ...

191. Q. ... here.

A. ... if I'm allowed to answer something ...

MR. STANEK: You're asking the questions. She probably knows better than I do.

MR. JONES:

192. Q. Right, so I'm asking you the question.

MR. STANEK: She says she's unsure. I don't know, go ahead.

A. There is a subsequent agreement that was made with the US Duty Free store that if they fulfil

TAB 6

RENT DEFERRAL AGREEMENT

THIS AGREEMENT made the 21st day of April, 2020.

BETWEEN:

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY
(the "**Landlord**")

AND

PEACE BRIDGE DUTY FREE INC.
(the "**Tenant**")

WHEREAS:

A. By a lease made July 28, 2016 between the Landlord and the Tenant, the Tenant leased from the Landlord certain premises (the "**Premises**") municipally known 1 Peace Bridge, Fort Erie, Ontario, for a term commencing November 1, 2016 and expiring October 31, 2031; and

B. Due to travel restrictions and economic hardships created across the world by the COVID-19 pandemic, the Tenant requests rent relief.

NOW THEREFORE THIS AGREEMENT WITNESSES in consideration of the covenants and agreements contained herein, and for other good and valuable consideration, the receipt of sufficiency whereof is hereby acknowledged, the parties agree as follows:

1. INTERPRETATION

1.1 **Expressions in Lease**: Unless expressly provided to the contrary in this Agreement, all terms defined in the Lease shall have the same meaning in this Agreement.

1.2 **Definitions and Interpretation**: The Lease is amended by adding the following definitions thereto:

"**Amortization Period**" means the one year period commencing on the Restart Date.

"**Suspension Date**" means April 1, 2020.

"**Deferred Rent**" means the Base Rent otherwise payable by the Tenant pursuant to the Lease during the Rent Deferral Period but for the terms of this Agreement.

"**Rent Deferral Period**" means the period commencing on the Rent Suspension Date to and including the earlier of:

i. July 31, 2020; or

ii. the last day of the month following the date that the Tenant has fully reopened the Duty Free Shop for business after the restrictions on non-essential travel between Canada and the United States are lifted (for greater clarity, a partial reopening to accommodate essential travel does not constitute a full reopening).

"**Required Conditions**" means:

i. the Tenant pays all Additional Rent throughout the Rent Deferral Period, including without limitation, all Operating Costs and Property Taxes;

ii. the Tenant does not seek benefit or protection of any statute for the benefit of bankrupt or insolvent debtors, including without limitation, a proposal, assignment or arrangement with its creditors or the repudiation or disclaimer of the Lease;

iii. there has not been a Transfer (as defined in section 14.01 of this Lease); and

iv. the Tenant strictly complies with all of the terms of the Lease and there is no Event of Default; and

v. the Tenant strictly complies with all of the terms of this Agreement (including without limitation, the representations and warranties herein).

"**Restart Date**" means the day immediately following the last day of the Rent Deferral Period.

2. RENT DEFERRAL

2.1 **Tenant's Representations and Warranties:** The Tenant represents and warrants to the Landlord the following:

(a) the Tenant temporarily closed its business at the Premises on or about March 21, 2020 and will fully re-open for business at the Premises as soon the restrictions on non-essential travel between Canada and the United States of America are lifted; and

(b) the Tenant has and will continue to use its best efforts to take advantage of all government programs offering financial relief from the effects of the COVID-19 pandemic, including without limitation, any income tax deferral or reduction, rent assistance, employee wage and benefit subsidies and the like, with a view to ensuring that the Tenant is and remains a financially viable business, and shall keep the Landlord apprised of the Tenant's efforts in this regard.

2.2 **Rent Suspension and Deferral:** Provided the Required Conditions are met both throughout the Rent Deferral Period and the Amortization Period, then notwithstanding anything in this Lease to the contrary, the Tenant's obligation to pay the Deferred Rent during the Rent Deferral Period shall be suspended and deferred and shall not be payable until the Restart Date. The Tenant shall, however, be bound by all the other terms and conditions of this Lease during the Rent Suspension Period. For the purpose of clarity, it is understood and agreed that if any of the Required Conditions are not met, the Tenant's right to suspend and defer payment of Deferred Rent during the Rent Suspension Period shall be immediately forfeited and withdrawn retroactive to the Rent Suspension Date and the Deferred Rent that would otherwise have been payable during the Rent Suspension Period to the date of such forfeiture shall be immediately due and payable together with interest thereon at the rate set forth in the Lease for non-payment of Rent, calculated from the date each such installment of Deferred Rent would otherwise have been payable pursuant to Lease but for this Agreement. Except as expressly

suspended and deferred in accordance with this section, the Tenant shall continue to pay all Rent in accordance with the Lease.

2.3 **Repayment of the Deferred Rent**: 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. The Tenant covenants and agrees that if at any time, any of the Required Conditions are not met, the Landlord's agreement to amortize the repayment of the Deferred Rent shall be deemed to have been immediately withdrawn and the Tenant shall immediately pay to the Landlord the then outstanding unamortized balance of the Deferred Rent together with interest thereon at the rate of 4% per annum.

3. ACKNOWLEDGEMENT

3.1 **Acknowledgement:** The Tenant confirms that, as of the date hereof, (a) the Landlord is not in default under any obligation of the Landlord under the Lease and (b) there are no disputes or claims outstanding by the Tenant against the Landlord in respect of any past billings, rental recoveries or other matters pertaining to the Lease.

4. NO AGREEMENT

4.1 This Agreement shall be deemed not to have been executed and delivered by the Landlord until:

i. this Agreement has been duly executed by all the other parties hereto and the Landlord has received at least one executed original hereof; and

ii. the Landlord has received payment of the sum of $3,000 plus the applicable HST thereon, being the estimated legal fees incurred by the Landlord in relation to the request for rent-relief and the preparation of this Agreement.

Until the aforesaid deliverables have been received by the Landlord, the Landlord may, at its sole option, by written notice to the Tenant, withdraw any agreement in respect of rent-relief and this Agreement shall be null and void and of no further force or effect.

5. AGREEMENT PART OF LEASE

5.1 **Agreement Part of Lease**: This Agreement shall be read in conjunction with the Lease and shall form a part thereof and all provisions of the Lease insofar as applicable and except as amended by this Agreement shall continue in full force and effect and shall be binding upon and shall enure to the benefit of the parties, their successors and permitted assigns.

5.2 **Further Assurances**: Each party shall at any time and from time to time, upon the request of the other party, execute and deliver such further documents and do such further acts and things as the other party may reasonably request to evidence, carry out and give full effect to the terms, conditions, intent and meaning of this Agreement.

5.3 **Counterparts**: This Agreement may be executed by the parties in separate counterparts each of which when so executed and delivered to all of the parties shall be deemed to be and shall be read as a single agreement among the parties.

[Signature Page Follows]

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement with effect on the date first set out on the first page of this Agreement.

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

Per: _____
Name: ■ Ron Rienas
Title: ■ General Manager

c/s

Per: _____
Name: ■
Title: ■

I/We have authority to bind the corporation

PEACE BRIDGE DUTY FREE INC.

Per: _____
Name: ■ G.G. O'HARA
Title: ■ PRESIDENT

c/s

Per: _____
Name: ■
Title: ■

I/We have authority to bind the corporation

TAB 7

GOWLING WLG

September 8, 2021

Via Registered Mail

Christopher M. Stanek
Direct +1 416 862 4369
christopher.stanek@gowlingwlg.com
File no. K0565679

Peace Bridge Duty Free Inc.
PO BOX 339 STN Main
Fort Erie, Ontario
L2A 5N1

1 Peace Bridge
Fort Erie, Ontario
L2A 5N1

Attention : Greg O'Hara and Jim Pearce

Dear Mr O'Hara and Mr. Pearce:

Re:' Buffalo and Fort Erie Public Bridge Authority and Peace Bridge Duty Free Inc.

Please find enclosed a Notice of Default, dated September 8, 2021 and Notice of Default pursuant to Subsection (19)2 of the *Commercial Tenancies Act*, dated September 8, 2021.

Sincerely,

Gowling WLG (Canada) LLP

Christopher M. Stanek

CMS:cc
Encls.

NOTICE OF DEFAULT

TO: PEACE BRIDGE DUTY FREE INC. (hereinafter called the "Tenant")
PO Box 339 STN Main
Fort Erie, ON L2A 5N1
Attn: Greg O'Hara / Jim Pearce

and to:

1 Peace Bridge
Fort Erie, ON L2A 5N1
Attn: Greg O'Hara / Jim Pearce

RE: A lease dated as of July 28, 2016 between Buffalo and Fort Erie Public Bridge Authority (the "**Landlord**") and the Tenant for premises (the "**Leased Premises**") comprising certain lands and the building located thereon all as more particularly described therein (the "**Lease**")

You have failed to pay Rent (as defined in the Lease) as and when due in accordance with the Lease. Further, you have failed to pay Rent as and when due in accordance with the *Canada Emergency Rent Subsidy* program administered by the *Canada Revenue Agency*.

As of today's date, your arrears of Rent amount to $5,931,389 (the "**Arrears**"), the details of which are set out in the attached Appendix 1. This is not acceptable and must be remedied immediately.

The Landlord requires payment of the Arrears ($5,931,389) in full, by certified funds, by 4:00 p.m. EST on September 17, 2021 delivered to the Landlord at 100 Queen Street, Fort Erie, Ontario L2A 3S6 to the attention of Karen Costa, Chief Financial Officer, failing which, the Landlord will have no choice but to resort to its remedies, both under the Lease and at law, without further notice to you, including without limitation, distraining (seizing and selling) your goods and applying the proceeds on account of the payment of the Arrears, or alternatively, re-entering the Leased Premises and terminating the Lease.

Finally, please be advised that no assets may be removed from the Leased Premises if the purpose of such removal is to defeat the Landlord's right to seize and sell those assets to satisfy the Arrears. If you do so, both you and any person who knowingly assists in this removal will be subject a penalty to be paid to the Landlord equal to double the value of the removed assets. We refer you to section 50 of the *Commercial Tenancies Act* in this regard.

The date of delivery of this notice shall be the date of its delivery to the Leased Premises, notwithstanding that a copy may be sent by registered mail, courier, facsimile or email to any other person or to the Tenant at any other address for the purposes of confirmation or courtesy only.

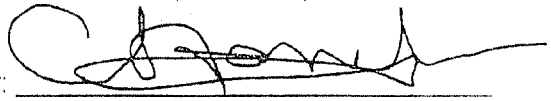
...2

We regret being compelled to send you this notice but you have left us with no alternative.

Govern yourself accordingly.

Dated at Toronto, Ontario, this 8th day of September 2021.

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY
by its solicitors,
GOWLING WLG (CANADA) LLP

Per: 
Christopher Stanek
Partner

APPENDIX 1

DETAILS OF ARREARS

Peace Bridge Duty Free
Details of Arrears
As of 9/7/2021

	Calculated Rent					Paid			CDN Outstanding September 7, 2021
	Base	Base rent HST	CAM (Operating)	CAM HST (Operating)					
1/20	$ -	$ -	$ -		$ -				
2/20	$ -	$ -	$ -		$ -				
3/20	$ -	$ -	$ -		$ -				
4/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333	$ 210,929	$ 122,504
5/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
6/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
7/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
8/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
9/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
10/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
11/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
12/20	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
1/21	$ 333,333	$ 43,333	$ 8,167	$ 1,062	$ 385,895	$ 9,229	$ 43,333		$ 333,333
2/21	$ 333,333	$ 43,333	$ 9,050	$ 1,177	$ 386,893	$ 10,287	$ 43,333		$ 333,273
3/21	$ 333,333	$ 43,333	$ 9,050	$ 1,177	$ 386,893	$ 10,167	$ 43,333		$ 333,393
4/21	$ 333,333	$ 43,333	$ 9,050	$ 1,177	$ 386,893	$ 10,227	$ 43,333		$ 333,333
5/21	$ 333,333	$ 43,333	$ 10,812	$ 1,406	$ 388,885	$ 12,218	$ 43,333		$ 333,333
6/21	$ 333,333	$ 43,333	$ 10,812	$ 1,406	$ 388,885	$ 12,218	$ 43,333		$ 333,333
7/21	$ 333,333	$ 43,333	$ 10,812	$ 1,406	$ 388,885	$ 12,218			$ 376,667
8/21	$ 333,333	$ 43,333	$ 10,812	$ 1,406	$ 388,885	$ 12,218			$ 376,667
9/21	$ 333,333	$ 43,333	$ 10,812	$ 1,406	$ 388,885				$ 388,885
Totals	$ 6,000,000	$ 780,000	$ 162,880	$ 21,174	$ 6,964,055	$ 171,837	$ 650,000	$ 210,829	$ 5,931,389

NOTICE OF DEFAULT PURSUANT TO SUBSECTION 19(2)
OF THE *COMMERCIAL TENANCIES ACT*

TO: **PEACE BRIDGE DUTY FREE INC.** (hereinafter called the "**Tenant**")
PO Box 339 STN Main
Fort Erie, ON L2A 5N1
Attn: Greg O'Hara / Jim Pearce

and to:

1 Peace Bridge
Fort Erie, ON L2A 5N1
Attn: Greg O'Hara / Jim Pearce

RE: A lease dated as of July 28, 2016 between Buffalo and Fort Erie Public Bridge Authority (the "**Landlord**") and the Tenant for premises (the "**Leased Premises**") comprising certain lands and the building located thereon all as more particularly described therein (the "**Lease**")

TAKE NOTICE that the Tenant is in breach of the following sections of the Lease:

"4.06 Letter of Credit

The Tenant covenants that, on or before the Commencement Date, the Tenant shall deliver to the Landlord an irrevocable and unconditional letter of credit or other form of cash collateral security satisfactory to the Landlord (the "Letter of Credit") in favour of Landlord issued by a Schedule 1 Canadian chartered bank in the amount of $50,000.00, which shall be held by the Landlord during the Term and any Extension Term. The Letter of Credit shall be in such form as is approved in advance by the Landlord. If at any time during the Term or any Extension Term, the Tenant defaults in the payment of any Rent or other amounts payable under this Lease or in the performance of any of its other obligations under this Lease or if this Lease is surrendered, terminated, disclaimed or repudiated whether by Landlord as a result of default of Tenant or in connection with any insolvency or bankruptcy of Tenant or otherwise, then Landlord at its option may, in addition to any and all other rights and remedies provided for in this Lease or at law, draw a portion of or all of the principal amount of the Letter of Credit, whereupon the proceeds thereof shall be applied to compensate Landlord for damages suffered by it as the result of Tenant's default, and the balance, if any, will be returned to the Tenant. If the Landlord draws all or part of the Letter of Credit, the Tenant shall provide the Landlord with a replacement Letter of Credit in the full amount of $50,000 upon written demand from the Landlord to do so. ..."

"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;..."

"17.01 Event of Default

An "Event of Default" shall be considered to have occurred when any one or more of the following happens:

...

(g) the Tenant abandons or attempts to abandon the Leased Premises or the Leased Premises remain vacant for ten (10) consecutive days or more without the prior written consent of the Landlord;"

The Tenant is in breach of the foregoing sections of the Lease in that:

(i) it has failed to provide the Landlord with a replacement Letter of Credit in the full amount of $50,000 upon written demand from the Landlord to do so;

(ii) it has not continuously and actively carried on the Permitted Use in the whole of the Leased Premises and it has not operated its business 24 hours a day, seven days a week, 365 days a year;

(iii) it abandoned the Leased Premises on or about March 24, 2020;

(iv) it has let the Leased Premises remain vacant for ten (10) consecutive days or more without the prior written consent of the Landlord; and

(v) it has failed to re-open the Leased Premises notwithstanding that a proposal issued by the Tenant and received by the Landlord on August 20, 2021 states that the Tenant is ready to re-open, and despite the Landlord's repeated requests for the Tenant to re-open.

As such, the current month's instalment of Rent (as defined in the Lease) and the next three (3) months' instalments of Rent became immediately due and payable pursuant to subsection 17.02(d) of the Lease.

Pursuant to the provisions of the Lease and subsection 19(2) of the *Commercial Tenancies Act*, the Tenant is hereby required to remedy the above noted breaches on or before 4 p.m. (local time) September 22, 2021 and is required to make money compensation to the Landlord in respect of the full amount of the current month's instalment of Rent together with the next three (3) months' instalments of Rent, plus legal fees and disbursements in the amount of $10,000,plus HST.

The Landlord hereby gives further notice that if the Tenant does not make such payments and remedy such defaults on or before 4 p.m. (local time) September 19, 2021, then, at any time thereafter and without further notice or demand to the Tenant, the Landlord intends to exercise its rights under the Lease or at law.

The date of delivery of this notice shall be the date of its delivery to the Leased Premises, notwithstanding that a copy may be sent by registered mail, courier, facsimile or email to any other person or to the Tenant at any other address for the purposes of confirmation or courtesy only.

Dated at Toronto, Ontario, this 8th day of September 2021.

BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY
by its solicitors,
GOWLING WLG (CANADA) LLP

Per: _____
Christopher Stanek
Partner

TAB 8

GOWLING WLG

21 March 2023

Sent by E-Mail *(dull11umn@blalley.com)*

E. Patrick Shea, LS!VI, CS Prof Corp
Direct 416-369"7399
patrick.shea@goWlingwlg.com

David T. Ullmann
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, ON MSC 3G5

Dear Mr. Ullmann:

Re: Rent Owing by Peace Bridge Duty Free Inc. ("PBDF")

The Board of Directors of the Buffalo and Fort Eric Public Bridge Authority (the **"Authority")** has met to consider your without prejudice proposal dated 13 March 2023.

Unfortunately, the proposal in your letter does not adequately address PBDF's ongoing default under the Lease dated 28 July 2016 (the **"Lease").**

Claim Against the Authority

We do not see PBDF's asse1tion that it has a claim against the Authority as having any merit. It is not a factor that the Authority has considered in dctermini11g what accommodation(s} will be provided to PBDP.

Should PBDF determine to pursue a claim against the Authority, that claim will be defended and the Authority is confident that PBDF will be found to owe the full arrears asserted by the Authority and that PBDF will be required to pay the minimum rent required by the Lease.

Counter-Proposal

The Authority is prepared to agree to amend the Lease as follows:

Back Rent

Seventy-five (75) per cent of rent owing byPBDF for the period to 1 November 2021 as calculated in accordance with the Lease shall be paid to the Authority within ninety (90) days execution of the amendment to the Lease.

We have considered the tax-related issues related to the Authority abating any material portion of the outstanding rent. While the Authority is prepared to consider a further abatement of up to 50%1, it is not prepared to provide a rent abatement only to have PBDF's ability to repay the amounts owing eroded by taxes payable by PBDF. Any taxes payable by PBDF as a result of any abatement of rent will have to be paid using funds contributed to PBDF by the shareholders or other financing.
[**PBDF Position: Accepted with amount to be paid to be $2,851,500, being 50% of the rent arrears for the period up to Nov 2, 2021**]

GOWLING WLG

Rent for 2021-2025 (from I November)

The Lease will be amended as follows:

- 2021 - Base rent of $2,000,000 or 20% of sales. whichever is greater. [**PBDF: Accepted**]
- 2022 - Base rent of $2,500,000 or 20% of sales, whichever is greater. [**PBDF: Accepted**]
- 2023 - Base rent of $3,000,000 or 20% of sales, whichever is greater. [**PBDF: Accepted**]
- 2024 - Base rent of $3,500,000 or 20% of sales, whichever is greater. [**PBDF: Accepted**]
- 2025 - Base rent of $4,000,000 or 20% of sales. whichever is greater.

[PBDF: ***For the Lease year ending Oct 31, 2026 and thereafter, our client slightly amends your proposal and offers that it be Base rent (which will be equal to previous year's rent until $4m rent is reached at which time the Lease resumes) or 20% of sales, whichever is greater.]***

Beyond 2025, current Lease terms apply and there will be no further amendments to the Lease. [**PBDF: Lease to contain two further 5 year options to 2041**]

All amounts owing for 2021, 2022 and 2023 will be paid to the Authority within sixty (60) days execution of the amendment to the Lease. [**PBDF: This payment cannot be made within 60 days. PBDF will pay $1,000,000 within 60 days of execution of the amendment to the Lease, $1,000,000 on the anniversary of that date, and the balance on the second anniversary of that date.**]

Food Service Tenant(s)

PBDF will, within sixty (60) days execution of the amendment to the Lease, sublet the food service space at market rates approved by the Authority. All rent will be payable to the Authority. **[PBDF: Will use its best efforts to find a replacement tenant once the settlement is finalized and the court proceeding is discontinued]**

Sincerely,

GOWLING WLG (CANADA) LLP

E. Patrick Shea, MStJ, LSM, CS
EPS:jm

55952047\1

TAB 8

be construed as consideration for Miller's commitment to a good faith negotiation. In this regard, the fact that the Licence Agreement established minimum value targets for the entire term of the agreement is relevant. It raises the question of what was intended by the words of s. 2.1(b). If the intention had been to do no more than agree to discuss a possible revision of the minimum volume targets in some or all of the remaining years of the agreement, the parties could have expressed such intention directly and more clearly. The wording chosen, however, is "negotiate", not "discuss". Moreover, s. 2.1(b) does not say that, failing agreement on any such reset, the provisions of the Licence Agreement as set out in s. 2.7 of Amendment No. 1 shall continue to apply. [page139]

[116] Second, although the Letter of Intent and Amendment No. 2 do not contain objective standards, it is possible that the factual matrix surrounding the formation of the Letter of Intent and Amendment No. 2 would supply such standards based on the discussions between Hembrock and Perkins, in particular.

[117] In this regard, I think the relevant time is the time of execution of Amendment No. 2 rather than any later date. It is clear that Miller concluded in the course of 2012 that it either did not want to reset the minimum volume targets or did not accept Molson's view of the basis on which minimum volume targets for MGD should be reset. However, the issue for the court is whether any understanding regarding the resetting of the minimum volume targets existed at the time of execution of Amendment No. 2 that would inform the interpretation of s. 2.1(b) thereof.

[118] While that is not certain, based on the evidence before the court, it is at least possible that a trial of the issue, including, in particular, the evidence of Hembrock and Perkins, as well as the leading participants in the working group sessions, may establish an understanding regarding objective standards for the determination of future minimum volume targets as of the date of execution of Amendment No. 2. I note that the language of the Letter of Intent, which contemplated resetting the minimum volume targets but did not refer to negotiations to do so, may suggest the existence of an understanding at that time regarding the approach to be adopted.

[119] Third, as Molson points out, there is a code for the determination a launch plan and investment plan for new Miller brands set out in s. 7(c)(iv) of the Licence Agreement. This is part of a larger provision which obligates Molson to launch new Miller brands under certain circumstances. The obligation of good faith negotiation in s. 2.1(b) may therefore be sufficiently certain in respect of negotiations regarding new branch launches to be enforceable. At the least, given the summary nature of this proceeding, it is not possible for the court to conclude that the provision is unenforceable in this respect. To the extent that a court concluded that s. 2.1(b) is enforceable in respect of brand launches, it may support the conclusion that the parties intended the provision to be legally enforceable in its entirety, given the language in the Letter of Intent referred to above.

[120] Lastly, as a matter of contractual interpretation, it may be appropriate to interpret s. 2.1(b) of Amendment No. 2 against the backdrop of an intention of the parties to preserve the goodwill of the current, and long-standing, contractual relationship between them if reasonably possible, as Cumming J. found in *Canada Trustco*. This issue of contractual interpretation would [page140] be informed by a more complete examination of the factual matrix at the time of execution of Amendment No. 2 than is possible in the current proceeding.

TAB 10

> neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted.

In executory contracts for the purchase and sale of goods, where the parties are silent as to price, the law has, from early times, supplied the want of agreement as to price, by inferring that the parties intended to sell and to buy at a reasonable price: Hoadley v. M'Laine (1834), 10 Bing. 482; Ashcroft et al. v. Morrin (1842), 4 Man. & G., 450, 11 L.J.C.P. 265; Christie v. Burnett (1886), 10 O.R. 609.

Such a provision is now embodied in The Sale of Goods Act, R.S.O. 1950, c. 345, s. 9, which also provides that the price in a contract of sale may be determined by the course of dealings between the parties. Sections 27 and 28 of the same Statute further imply terms as to the time and place of delivery and payment where the agreement is silent thereupon.

Such a case must, however, be distinguished from that of the incomplete contract, in which the parties have stipulated as to price or delivery, but have failed to incorporate such stipulation into their written contract, where the law requires the agreement to be reduced to writing; for an implied agreement is ineffective to abrogate an express one. It must also be distinguished from the case where the written contract expressly provides for or contemplates future negotiations as to the fixation of price or the terms of payment. House v. Brown (1907), 14 O.L.R. 500, is a case illustrative of this. Caution must be exercised, however, in the application of such decisions prior to the introduction into Ontario of The Sale of Goods Act in 1920.

Under some circustances, an agreement to make a contract is enforceable in law: Hillas and Co. Limited v. Arcos Limited, supra; Northern Ontario Power Company, Limited et al. v. Lake Shore Mines Limited, [1944] O.R. 83, [1944] 2 D.L.R. 20, 56 C.R.T.C. 331.

I do not consider the agreement in the instant case, however, to be merely an agreement to make a contract. 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: see Campbell v. Mahler (1918), 43 O.L.R. 395 at p. 398; Upton v. Eligh (1904), 3 O.W.R. 219 at p. 220.

The decision of the Court of Appeal in England in W.T. Lamb & Sons v. Goring Brick Company Limited, [1932] 1 K.B. 710, is an important one as bearing upon the issues in the case at bar. In that case, the defendant, a manufacturer of bricks and certain other building materials, by agreement in writing, appointed the plaintiffs as sole selling agents of all bricks and other materials manufactured at its works for a period of three years and afterwards continuous, subject to twelve months' notice by either party. The contract, which was a short one, further provided that the price which the plaintiffs were to pay to the defendant for its bricks and other materials was to be mutually agreed upon from time to time and was to be based upon a figure which would allow the plaintiffs not less than 10% on the current market price to builders. It also

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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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

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