Court of Appeal File No: COA-23-1355
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

RESPONDING FACTUM OF THE RESPONDENT BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

Date: 15 April 2024

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TO: THE SERVICE LIST

FACTUM

PART 1— OVERVIEW

1. This Application involves a request by Royal Bank of Canada that a receiver be appointed over Peace Bridge Duty Free Inc. ("**PBDF**") based on, among other things, the allegation that PBDF is in default of a lease dated 28 July, 2016 (the "**Lease**") between it and the Buffalo and Fort Erie Public Bridge Authority ("**PBA**").

2. This is an Appeal from the Order (the "**15 Dec 23 Order**") of the Honourable Madame Justice Kimmel made on 15 December, 2023 **[Appellant Appeal Book and Compendium ("AABC") Tab 2(a)]** on a Motion brought by PBDF against PBA seeking an Order that would have, effectively "cured" any monetary defaults default by PBDF under the Lease. Her Honour released Reasons for Decision dated 15 December, 2023 (the "**Reasons**") **[AABC Tab 3(a)]** and an Endorsement dated 12 February, 2024 **[AABC Tab 3(c)]**.

3. The Motion involved the interpretation of Art 18.07 of the Lease, which provides:

> *18.07 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 Premiers, the Respondent agrees to consult with the Tenant to discuss the impact of such introduction of or change in Applicable Laws to the Lease.*

and allegations by PBDF that PBA had breached Art 18.07 and its obligation to deal with PBDF in good faith.

4. Her Honour found that PBDF was not entitled to a remedy because: (a) it had not breached Art 18.07; and (b) 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 PBDF.

5. Her Honour's findings as to the applicable legal principles were correct. Her Honour's findings of fact were reasonably supported by the evidence. Her Honour's application of the law to the facts was not only reasonable, but correct.

PART 2—RELEVANT FACTS

6. The relevant facts are described in the Reasons and the Chronology of Dealings Between the Parties attached as Appendix 1 to the Reasons.

7. PBA disputes the following relevant factual assertions by PBDF:

(a) With respect to the assertion in para 8 to the effect that PBDF has been a "faithful and dependable tenant", PBA agrees that there were no materials defaults under the Lease prior to PBDF closing the duty free store in March of 2020.

(b) With respect to paragraphs 17 through, PBA does not dispute that the events took place on the dates identified, but does not accept that: (i) the facts are part of the "factual matrix" as that term is applied in the context of the interpretation of contracts; or (ii) the argument concerning those events included in the "facts" is accurate.

(c) With respect to the assertion concerning HST is para 28, there is only an HST overpayment if PBDF does not owe the full Base Rent.

(d) With respect to the assertion in para 33, what PBA acknowledged is accurately stated in the Reasons [**See Reasons paras 31, 48, 84]**, but not in this paragraph, which references only isolated excepts from the evidence and fails to reflect Her Honour's findings of fact based on the totality of the evidence.

(e) PBA does not agree with the assertion in para 36.

(f) With respect to para 37, PBA disputes that it demanded that PBDF sign the First Rent Deferral, but the negotiation of the First Rent Deferral is not relevant on the Appeal.

(g) With respect to para 38, PBA disputes that the First Rent Deferral allowed PBDF to remain closed, but the interpretation of the First Rent Deferral is not relevant on the Appeal.

(h) With respect to para 39, PBA disputes that it insisted that PBDF accept the Second Rent Deferral, but the interpretation of the Second Rent Deferral is not relevant on the Appeal.

(i) PBA disputes the allegation made in para 40.

(j) With respect to paras 41 through 43, PBA does not dispute that the referenced demands were made and the notices sent, but does not agree with PBDF's argument concerning the motives underlying the delivery of those demands and notices.

(k) Paras 44 through 49 contain only argument and no facts.

(l) Paras 50 through 55 do not accurately reflect Her Honour's factual findings and include argument.

PART 3—POSITION ON ISSUES

8. Justice Kimmel accurately described and summarized the issues that were before her as follows:

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

Issue 1: Did Kimmel J fail to give effect to (a) her finding that Art 18.07 gives rise to a substantive right/obligation to make adjustment to Base Rent; and (b) her conclusion that a Base Rent adjustment was warranted, by not ordering a remedy?

9. PBDF proceeds on the flawed premise that Her Honour's findings were such that it was entitled to a remedy. **[PBDF Factum paras 59-63]**

10. In general terms, PBDF argued before Justice Kimmel that:

(a) Art 18.07 of the Lease entitled it to: (i) a 100% abatement of Base Rent during the period it closed the duty free store on 21 March, 2020 as a result of the Border Restrictions (the "**Closure Period**") because it generated no sales during that period; and (ii) a further adjustment of Base Rent while its business recovered after the Border Restrictions eased and the duty free store was re-opened (the "**Ramp-up Period**");

(b) PBA breached Art 18.07 by not agreeing to provide PBDF with a 100% abatement of Base Rent during the Closure Period; and

(c) PBA breached 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 PBDF after Art 18.07 was triggered; and (d) based on PBA's breaches, the Court should intervene and order that PBA provide PBDF with a 100% abatement of Base Rent during the Closure Period. **[Reasons paras 15-21]**

11. PBA agreed with PBDF that Art 18.07 was "triggered" by the Border Restrictions **[Reasons paras 6 and 9]**, but argued that:

(a) Art 18.07 did not require that it provide PBDF with an abatement only that it consult with PBDF to discuss the impact of Border Restrictions on the Lease, which PBA conceded might entail an adjustment to the Base Rent payable by PBDF under the Lease; and

(b) it had complied with its obligations under Art 18.07 and offered to provide PBDF with a significant—50%--abatement of Base Rent during the Closure Period, but the parties had been unable to come to a negotiated resolution. **[Reasons paras 22-30]**

12. After carefully considering all of the evidence and the arguments, Her Honour found:

(a) the Border Restrictions resulted in an adverse effect on PBDF's business that triggered Art 18.07 and warranted some adjustment to the Base Rent;

(b) Art 18.07 did not entitle PBDF to a 100% abatement of Base Rent—what it requested be ordered—or require that PBA provide a 100% abatement of Base Rent; **[Reasons para 67-77 and 85]**;

(c) Art 18.07 required only that PBA engage in discussions with PBDF concerning the adverse impact the Border Restrictions had on the PBDF's business operations and offer some accommodations to the PBDF as a result; **[Reasons para 78]**;

(d) PBA complied with its obligation under Art 18.07 and in fact went further than was required by Art 18.07 **[Reasons para 78-87 and 159.2]**;

(e) PBA 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 PBDF after Art 18.07 was triggered **[Reasons para 159.3]**; and

(f) since there was no breach of Art 18.07 and no breach by PBA of its duty to act in good faith in the performance of its obligations under the Lease and the exercise of its discretion in its dealings and negotiations with PBDF, PBDF was not entitled to a remedy. **[Reasons, para 159.4]**

13. There is no inconsistency in Justice Kimmel's findings. While Her Honour found that some adjustment in Base Rent was warranted, she also found that:

(a) the amount of any adjustment to the Base Rent was, under Art 18.07, left to be negotiated by PBDF and PBA;

(b) PBA acted in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with PBDF after Art 18.07 was triggered and acted reasonably in offering PBDF a 50% abatement of rent to preserve the tenancy; and

(c) the failure of PBDF to accept reasonable offers made by PBA and its insistence on lease concessions that were not aimed at preserving the tenancy, including a 100% abatement of rent during the Closure Period, resulted in no remedy being available—i.e., compliance by PBA of its obligations under Art 18.07 to *"consult with [PBDF] to discuss the impact of [the Border Restrictions] to the Lease"* resulted in not remedy being available to PBDF or, as Her Honour wrote "No Breach, No Remedy for Breach".

14. Justice Kimmel specifically rejected PBDF's contention that Art 18.07 should be interpreted and applied to require a specific—100%—abatement of Base Rent during the Closure Period **[Reasons paras 77 and 85]** and found that all Art 18.07 required was that PBA engage in discussions with PBDF about the adverse effects that the Border Restrictions had on the Tenant's business operations and offer reasonable accommodations to PBDF based on those adverse effects **[Reasons paras 78 and 87]**.

15. PBDF focuses on the statement in para 65 of the Reasons to the effect that the parties agreed that Art 18.7 gives rise to substantive right/obligation to make adjustments. However, PBDF jumps to the conclusion that "adjustments" to the Rent payable under the Lease means an abatement of the Base Rent and ignores the finding in para 63 that the parties agreed that:

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

(b) Art 18.07 would be applied to address PBDF'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.

16. PBDF's argument as to what Art 18.07 could have said **[PBDF Factum para 61]** is not particularly relevant in the face of Her Honour's finding as to what Art 18.07 means.

17. PBDF's assertion that Justice Kimmel concluded in paragraph 159.1 of the Reasons that Art 18.07 "gives rise to a substantive right that provides for an adjustment to the Base Rent payable by PBDF in the circumstances of this case taking into consideration the extent of the Adverse Effect on [PBDF's] business" **[PBDF Factum para 62]** does not accurately reflect what Her Honour found at para 159.1 and ignores the other finding in para 159 to the effect that PBA did not breach Art 18.07 and, as a consequence, no remedy is available to PBDF. **[Reasons para 159]**

18. PBDF argues that Justice Kimmel declined to grant PBDF a remedy because she concluded: (a) there was an absence of "established benchmarks" to determine the amount of Base Rent to be paid during the Closure Period; and (b) she would have to "re-write" or "amend" the Lease to give effect to Art 18.07. **[PBDF Factum para 68]** This is not correct. Her Honour declined to provide PBDF with a remedy because she found PBDF was not entitled to a remedy.

19. PBDF's argument that the law of equity "will not suffer a wrong" **[PBDF Factum para 89 to 94]** ignores the fact that Justice Kimmel found that there was no "wrong" for equity to remedy. Her Honour found

that PBA: (a) complied with its obligations under Art 18.07; and (b) did not breach its duty to act in good faith in the performance of its obligations under the Lease and the exercise of its discretion in its dealings and negotiations with PBDF, and, as a result, no remedy was available to PBDF. **[Reasons para 159]**

20. There is no merit to PBDF that Justice Kimmel erred by declining to give PBDF a remedy because there were no "established benchmarks" in the Lease to assist the Court to determine what abatement should be granted to PBDF **[PBDF Factum para 68 to 85]**. PBDF ignores that Justice Kimmel did not give PBDF a remedy because she found that no remedy was available to PBDF because PBA: (a) had not breached Art 18.07; and had not acted in in good faith in the performance of its obligations and the exercise of its discretion in its dealings and negotiations with PBDF. **[Reasons para 159.2 and .3]**

21. Having found there was no breach(es) by PBA, Justice Kimmel found there was no remedy available to PBDF. **[Reasons, para 129 and 159.4.a]** The title for Issue #4 a) in the Reasons is clear in this regard: "No Breach, No Remedy for Breach".

22. The portion of the Reasons in which Her Honour addresses remedies—paras 130 to 157—is included to describe how the issue of remedies **would have been addressed** had PBA been found to have breached Art 18.07:

> *[129] Since I have not found that 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 of the court had found otherwise. However, I will briefly address the argument and how the court would have approached the remedial aspects of the breaches alleged.* **[Reasons para 129]**

Issue 2: Did Kimmel J fail to correctly apply the law of contract interpretation?

23. Arguments concerning Justice Kimmel's interpretation of the Lease can be found in a number of parts of the PBDF Factum under different headings, but this issue appears to relate primarily to the assertion

that Her Honour regarded Art 18.07 as being "subordinate" to other provisions in the Lease. **[PBDF Factum paras 64-67]**

24. There is no merit to the argument that Justice Kimmel erred in law in considering other clauses of the Lease when interpreting Art 18.07. **[PBDF Factum paras 64-67]** There is no dispute that Justice Kimmel correctly identified the principles applicable to the interpretation of the Lease. **[Reasons para 46]**

25. There is nothing in the Lease that indicates that Art 18.07 "overrides" the other provisions of the Lease—it does not, for example, say "Notwithstanding any other provisions of this Lease…." There is nothing in the Reasons to suggest that Her Honour "subordinated" Art 18.07 to the other provisions of the Lease. In interpreting Art 18.07, Justice Kimmel read the Lease as a whole, in a manner that gave meaning to all of its terms and avoided an interpretation that would render one or more of its terms ineffective. **[Reasons, paras 72 and 74-76]**

Issue 3: Did Kimmel J erred in law by failing to consider, as part of the factual matrix, discussions around the time Art 18.07 was added to PBDF's draft form of Lease, including representations by the PBDF about how that provision was to be applied?

26. There is no merit to the assertion Her Honour relied on outdated rules of construction to "diminish" the evidence of pre-contractual "representations" concerning Art 18.07 or erred in her consideration of the pre-contractual negotiations between PBDF and PBA concerning Art 18.07. **[PBDF Factum para 86-88]**

27. Her Honour considered PBDF's argument that the rule that contractual negotiations are not admissible "sits uneasily" next to the ratio in *Sattva*, and found:

> *[53] Even accounting for subsequent cases that have found that this passage of Sattva may open the door to consideration of parol evidence to inform how the contract would have been understood by a reasonable person at the time it was signed (see, for example: Corner Brook (City) v. Bailey, 2021 SCC 29, 17 B.L.R. (6th) 1, at paras. 56–57; and Huber Estate v. Murphy, 2022 BCCA 353, 46 R.P.R. (6th) 175, at paras. 33–367), in this case the evidence that the Tenant has tendered about*

the pre-contractual negotiations primarily relates to the understood objectives and principles of implementation of s. 18.07 of the Lease that the parties now agree upon for the most part.

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

...

[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...***[Reasons para 53, 54, 63 and 64]**

28. PBDF appears to argue that Justice Kimmel erred in interpreting the Lease because, PBDF argues, she concluded that she could not provide PBDF a remedy without re-writing or amending the Lease. **[PBDF Factum para 70]** As noted elsewhere in this Factum, Her Honour did not provide PBDF a remedy because she found that PBDF was not entitled to a remedy because there was no breach by PBA.

Issue 4: Did Kimmel J err by finding PBA did not breach its duty of honest performance by knowingly threatening to take actions to terminate the Lease when it knew such action would be unlawful?

29. This issue seems to be addressed in paras 95 to 106 of the PBDF Factum. PBDF concedes that to be successful, it must establish that Her Honour committed a palpable and overriding error or errors: (a) in finding that PBA acted in good faith; **[PBDF Factum paras 101-103]** and (b) in weighing the impact of COVID and the Border Restrictions on PBDF and PBA **[PBDF Factum paras 104-106]**.

30. A palpable and overriding error has been described as being in the nature not of a needle in a haystack, but of a beam in the eye. **[See *Hydro-Québec* v. *Matta*, 2020 SCC 37 (CanLII) and *Salomon* v. *Matte-Thompson*, 2019 SCC 14 (CanLII)]**

31. Palpable and overriding error is a highly deferential standard of review. As noted by the Supreme Court of Canada in *Hydro-Québec* v. *Matta*:

> *…An error is palpable if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is overriding if it has affected the result.* **[*Hydro-Québec* v. *Matta*, 2020 SCC 37 (CanLII) para 33]**

32. There is no merit to PBDF's assertion that Justice Kimmel made palpable and overriding errors: (a) in finding that PBA acted in good faith; **[PBDF Factum paras 101-103]** and (b) in weighing the impact of COVID and the Border Restrictions on PBDF and PBA **[PBDF Factum paras 104-106]**. What PBDF has identified "palpable and overriding errors" are simply points where it asserts Justice Kimmel should have decided matters differently based on the evidence and accepted PBDF's arguments.

33. All of the arguments made by PBDF in its Factum as to why it asserts Justice Kimmel erred in finding that PBA did not act in bad faith were considered by Her Honour. **[Reasons paras 93 and 94]**

34. PBDF relies on *2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc.* **[2021 ONSC 4649 (CanLII)]** to support the argument that Her Honour should have found that PBA acted in bad

faith by reaching out to another operator to determine if they would be willing to take over the Lease if PBDF vacated. **[PBDF Factum paras 97 and 101]**

35. *250* v *Princess Gate* involved a very complicated factual matrix and what appears to have been a difficult contractual relationship between the Defendant hotel (the "**Hotel**") and the Plaintiff food and beverage provider ("**250**") and a situation where the Hotel entered into a letter of intent and "serious negotiations" with a new food and beverage provider—referred to as "**Harlo**"--prior to formally terminating its agreement with 250. Justice Gilmore found that the Hotel's position with respect to why it entered into secretive negotiations with Harlo was "a ruse intended to justify the Hotel's secretive and intentional steps to rid itself of 250". **[*2505243 Ontario Limited o/a ByPeterandPaul.com* v. Princes Gate GP Inc., 2021 ONSC 4649 (CanLII), para 362]**

36. Her Honour considered PBDF's argument that PBA acted in bad faith by reaching out to the other operator and found that PBA 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. **[Reasons paras 100 and 101]** There is no basis for the Court of Appeal to reverse Her Honour's finding in this regard.

37. There is no merit to the assertion by PBDF that Her Honour found that PBA misled PBDF or acted dishonestly concerning the Second Deferral Agreement. **[PBDF Factum para 98]** Her Honour found:

> *[112] … 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.

38. Weighing the impact on the parties of COVID and the resulting Border Restrictions, involved the exercise of discretion on the part of Justice Kimmel. There is no suggestion by PBDF that Her Honour exercised her discretion based on the wrong principles or misapprehend the evidence. PBDF argues simply that Justice Kimmel should have put more weight on the impact that COVID and the Border Restrictions had on PBDF. The relevance of this to Her Honour's finding that PBA did not breach Art 18.07 or 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 PBDF after Art 18.07 was triggered is unclear. PBDF cannot establish that putting more weight on the impact COVID and the Border Restrictions had on PBDF would have changed Her Honour's decision.

PART 4—ADDITIONAL ISSUES

39. PBA raises no additional that are not identified in the PBDF Factum. However, PBDF raised in its Notice of Appeal a number of grounds for appeal that are not addressed in its Factum:

(a) Justice Kimmel erred by interpreting Art 18.07 in a manner that renders it meaningless and leads to a commercially unreasonable result because she found that Art 18.07 does not contemplate the intervention of the court if the parties are unable to reach a negotiated agreement; **[Notice of Appeal, AABC Tab 1 para 12]** and

(b) Justice Kimmel misinterpreted the law of part performance as it applies to contract interpretation and the remedies available to the Court arising from part performance by the parties to a contract. **[Notice of Appeal, AABC Tab 1 para 15]**

40. Justice Kimmel found (correctly) that she was required to interpret Art 18.07 so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. **[Reasons para 46]**

41. In *Guarantee Co. of North America v. Gordon Capital Corp*., the Supreme Court found that:

> *…commercial reality is often the best indicator of contractual intention in circumstances such as this. If a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain,* ***absent some explanation to the contrary***. (emphasis added) **[*Guarantee Co. of North America v. Gordon Capital Corp*., 1999 CanLII 664 (SCC), para 61]**

42. In his dissenting opinion in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, Justice Brown wrote: "While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided"… **[Resolute FP Canada Inc. v. Ontario (Attorney General), 2019 SCC 60 (CanLII) paras 142-144]** This statement was adopted by the British Columbia Court of Appeal in *Blackmore Management Inc.* v. *Carmanah Management Corporation* **[2022 BCCA 117 (CanLII)]**

43. The parties agreed that:

(a) the intention of Art 18.07 is to preserve the tenancy in the event of an unanticipated change in the Applicable Laws that has a temporary impact on PBDF's ability to pay rent; **[Reasons para 48]**

(b) the event of a change in Applicable Laws that materially and adversely impacted PBDF's business—sales—the parties would act reasonably and in good faith to make appropriate changes to the Lease, which may include changes to Base Rent; **[Reasons para 63.a]** and

(c) Art 18.07 would be applied to address PBDF'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. **[Reasons para 63.b]**

44. This is exactly how Justice Kimmel interpreted and applied Art 18.07. The fact that, in retrospect, PBDF wishes that the language of Art 18.07 obliged PBA to provide a specific rent abatement or allowed it to take a specific rent abatement does not result in Her Honour's interpretation of Art 18.07 as not providing PBDF with the right to a specific abatement being commercially absurd. The fact of the matter is that evidence established that what PBDF requested was that, in the event of a change in Applicable Laws that resulted in a material adverse impact on PBDF's business, PBA would be obliged to negotiate reasonably and in good faith with PBDF to determine if temporary lease concessions could be agreed to preserve the tenancy. **[See Reasons paras 31, 48, 84]**

45. Justice Kimmel specifically acknowledged that in interpreting the Lease, she was required to avoid commercial absurdity and found that no absurdity resulted from a finding that the Court was not able to grant a remedy unless it first found there was a breach by PBA of Art 18.07. **[Reasons paras 132-135]**

46. PBDF argued before Justice Kimmel that because PBA had offered as part of a global resolution that was never accepted by PBA to "ramp-up" Base Rent, the Court had jurisdiction to intervene and impose on PBA a 100% abatement of Base Rent for the Closure Period based on the argument that this offer constituted "part performance" of Art 18.07 such that PBDF ought to receive an equivalent abatement of Base Rent during the Closure Period, which PBDF asserted was 100%. **[Reasons para 151]**

47. Her Honour considered and rejected that argument as part of her consideration of what remedies **might have been available** had she found that PBA had breached Art 18.07 or its obligation to deal with PBDF in good faith. Her Honour found (correctly) that without prejudice negotiations cannot constitute part

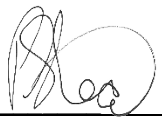
performance of a contract so as to provide the Court with jurisdiction to impose on the parties a resolution based on those negotiations:

> *[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.*

PART 5—ORDER REQUESTED

48. PBA requests that the Appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April 2024.



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SCHEDULE A

1. *Hydro-Québec v Matta*, 2020 SCC 37 (CanLII).
2. *Salomon v Matte-Thompson*, 2019 SCC 14 (CanLII).
3. *2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc.*, 2021 ONSC 4649 (CanLII).
4. *Guarantee Co. of North America v Gordon Capital Corp.*, 1999 CanLII 664 (SCC).
5. *Resolute FP Canada Inc. v Ontario (Attorney General)*, 2019 SCC 60 (CanLII).
6. *Blackmore Management Inc. v Carmanah Management Corporation*, 2022 BCCA 117 (CanLII).

SCHEDULE B

N/A

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

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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

CERTIFICATE RE WORD COUNT

I, Shuang Ren, lawyer for the Buffalo and Fort Erie Public Bridge Authority, certify that the word count of the Responding Factum of the Respondent Buffalo and Fort Erie Public Bridge Authority is 5107.

Date: 15 April 2024

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

ROYAL BANK OF CANADA
Applicant

-and-

PEACE BRIDGE DUTY FREE INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

RESPONDING FACTUM OF THE RESPONDENT BUFFALO & FORT ERIE PUBLIC BRIDGE AUTHORITY

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