

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

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent

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

REVISED AND RESTATED FACTUM OF BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

(Motion Returnable 5 January 2023)

Date: 23 December 2022

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TO: THE SERVICE LIST

REVISED AND RESTATED FACTUM

(Motion Returnable 5 January 2023)

I accept that the impact of COVID-19 and the restrictions on retail businesses that followed can be taken into account when setting the terms of relief for forfeiture....I do not, however, accept that the economic impact of COVID-19 can be taken as a basis for fundamentally altering the remedy from one of relief from forfeiture to one imposing new terms in the lease. [Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., [2022 ONCA 585](#) (CanLII), para 52]

I have come to the conclusion that the purpose of s. 65.1 is to provide a commercial enterprise with the opportunity to continue operations while working toward a reorganization but at the same time to give creditors obligated to continue to supply goods, services or the use of leased property some protection that payments ordinarily due during the proposal period will not be wiped out or reduced to pro rata unsecured claims in the event of an ultimate bankruptcy.... It seems to me to be inconsistent with such purpose to require the supplier of such goods and services or use of leased property to commence possibly lengthy and expensive litigation to collect the amounts for which the court has determined that immediate payment should be made. Cosgrove-Moore Bindery Services Ltd (Re), [2000 CanLII 22377](#) (ON SC), paras 10 and 11]

PART I—THE MOTIONS

1. This is a Motion by Buffalo and Fort Erie Public Bridge Authority (the “**Authority**”) for an Order as set out in the Notice of Motion dated 5 October 2022.

PART II—FACTS, LAW AND ARGUMENT

A. Background Facts

2. The Authority is the owner and operator of the Peace Bridge in Fort Erie, Ontario. Pursuant to a Lease dated as of 28 July 2016 (the “**Lease**”), the Authority leased certain premises to PBDF for a duty free store on the Canadian side of the Peace Bridge. [Affidavit of Ron Rienas sworn 7 September 2022 (“**Rienas 7 Sept 22 Aff**”), paras 4 and 6 (Master D115)]

3. The Authority asserts that PBDF has defaulted under the Lease.

4. Royal Bank of Canada (“**RBC**”) is a secured creditor of PBDF. The assertion by the Authority that PBDF defaulted resulted in an additional default under the applicable agreement(s) between PBDF and RBC.

[Affidavit of Jim Pearce sworn 12 December 2021 (“Pearce 12 Dec 21 Aff”), para 60 (Master D136)]

5. RBC brought this Application seeking to have a receiver appointed over PBDF’s assets and property.

[Pearce 12 Dec 21 Aff, paras 61-64 (Master D137), and Rienas 7 Sept 22 Aff, paras 16 and 17 (Master D116 and D117)]

6. PBDF proposed the adjournment of RBC’s Application so that it could try to reach a commercial resolution with the Authority:

I believe that, given more time, a commercial resolution can be reached with the Landlord reflecting a fair compromise to both parties. I believe our ability to make a proposal that will be found to be credible and reasonable by the Landlord will be enhanced by the passage of time as the business, which was once a very profitable business, returns to form over the next few months. **[Pearce 12 Dec 21 Aff, para 72 (Master D139)]**

7. The Authority did not object to providing PBDF with a reasonable period of time to make a proposal to the Authority. It has, however, been over 12 months and there has been no proposal for a commercial resolution provided by PBDF.

8. On 14 December 2021, the Court appointed MSI Spargel Inc. (the “**Monitor**”) as “monitor” of PBDF to protect RBC’s interests pending the return of this Application. **[Rienas 7 Sept 22 Aff, para 17 (Master D117) and Appointment Order dated 14 December 2021]**

9. The Appointment Order includes the “standard” provisions that: (a) prevent creditors from exercising remedies to recover debts owing as at 14 December 2021; and (b) restrict the exercise of contractual remedies provided PBDF paid for goods and services provided after 14 December 2021. **[Appointment Order, paras 9 and 11]**

10. The Lease requires that PBDF pay minimum annual rent of \$4MM per annum—\$333,333 per month. **[Lease, Art 4.02, Rienas 7 Sept 22 Aff, para 9 (Master D116), Pearce 12 Dec 21 Aff, para 18 (Master D127) and Affidavit of Ron Pearce sworn 13 November 2022 (“Pearce 13 Nov 22 Aff), para 40 (Master B-1-642)]** In September of 2021, PBDF began to, unilaterally and over the Authority’s objection, pay 20% of its gross sales to the Authority instead of the minimum rent required by the Lease. **[Pearce 13 Nov 22 Aff, para 54 (Master B-1-645) and Letter of 14 Jan 22, Affidavit of Ron sworn 5 December 2022 (“Pearce 5 Dec 22 Aff”), Exhibit A (Master B-1-666)]**

11. Prior to 14 December 2021, there was engagement between PBDF and the Authority concerning the impact that COVID had on PBDF’s business. **[Rienas 26 Nov 22 Aff, paras 17-29 (Master D473–D476)]** During these engagements, the Authority rejected requests by PBDF that the Lease be amended to provide for only percentage rent, but agreed to reduce the minimum rent payable by PBDF for a number of years. **[Rienas 26 Nov 22 Aff, para 21 (Master D474) and Letter of 14 Jan 22, Pearce 5 Dec 22 Aff, Exhibit A (Master B-1-666)]**

12. On 30 December 2021, in response to a request that the Authority agree to ADR, the Authority advised PBDF:

All of the proposals made by your client to date provided that your client will only pay a small portion of the arrears each month out of future revenue over a significant period of time. That is not acceptable to our client. Your client is a party to a binding Lease that our client is entitled to rely upon. Your client is in default and owes substantial arrears. Any proposal must include a provision for the repayment of the arrears and go-forward rent supported by a detailed business plan and personal guarantees from individual(s) with financial means and/or third-party security. Once we have seen such a proposal with this supporting information, we are prepared to re-visit whether there is room for settlement and whether a mediator may be able to assist with any negotiations. **[Rienas 26 Nov 22 Aff, paras 22 and 23 (Master D474-D475)]**

13. PBDF did not provide the Authority with a proposal or a business plan subsequent to 14 December 2021. **[Rienas 26 Nov 22 Aff, para 24 (Master D475) and Pearce 5 Dec 22 Aff, para 37 (Master B-1-925)]**

PBDF has also refused to provide the Authority with financial information **[Pearce 13 Nov 22 Aff, para 64 and 65 (Master B-1-647-B-1-648)]** and has had its cash flow projections sealed.

14. On 7 January 2022, the Monitor was advised that PBDF was unilaterally paying rent equal to 20% of sales and that this was not in accordance with the Lease. **[Rienas 7 Sept 22 Aff, para 20 (Master D117)]**

15. The Authority notified PBDF multiple times subsequent to 14 December 2021 that it was not accepting only percentage rent **[Rienas 7 Sept 22 Aff, para 32 (Master D119) and Brief of Exhibits Tab 5 (Master D445)]**

16. The Authority, relying on Art 2.17 of the Lease, did not take immediate steps to exercise its rights under the Lease based on the fact that PBDF was “short-paying” rent to provide PBDF with time to develop a proposal to address the impacts of COVID and because there was a Provincial moratorium on the eviction of commercial tenants, that might have impacted the Authority even if the Authority was not restricted by the Appointment Order.

17. The Provincial moratorium that restricted the eviction of commercial tenants was lifted in April of 2022. **[Rienas 7 Sept 22 Aff, paras 33 and 34 (Master D119)]** After giving PBDF a reasonable time to present a proposal, on 26 July 2022, the Authority advised the Monitor and PBDF that it would be seeking to exercise its remedies under the Lease based on the failure of PBDF to pay minimum rent after 14 December 2021. **[Rienas 7 Sept 22 Aff, para 35 (Master D120) and Brief of Exhibits Tab 9 (Master D464)]** PBDF did not present a proposal and continued to pay only percentage rent.

18. On 2 August 2022, the Authority (again) advised PBDF as to what it considered acceptable in terms of a commercial resolution. **[Rienas 7 Sept 22 Aff, para 37 (Master D120) and Brief of Exhibits Tab 10 (Master D467)]** PBDF did provide a substantive response and did not deliver any proposal whatsoever.

19. PBDF now owes the Authority over \$8.4MM in unpaid rent. **[See, for ex, Letter of 9 Aug 22, Pearce 5 Dec 22 Aff, Ex Z (Master B-1-805)]** Since 14 December 2021, over \$1.2MM has become owing by PBDF to the Authority as a result of the failure of PBDF to pay minimum rent in accordance with the Lease. **[See Pearce 5 Dec 22 Aff, Ex B (Master B-1-941)]**

20. Subsequent to 14 December 2021, PBDF: (a) kept RBC current; and (b) provided RBC with an addition \$850K in cash collateral. **[See Oct 22 Cash Flow, Pearce 13 Nov 22 Aff, Ex L (Master B-1-736) and para 63 (Master B-1-647)]**

21. As at 31 October 2022, PBDF: (a) had year-to-day sales of over \$8.6MM, EBTA of almost \$2MM and net income of over \$1.2MM; (a) had over \$2.3MM of available cash, not including the almost \$1.5MM segregated for the benefit of RBC. **[PBDF Financials, Pearce 13 Nov 22 Aff, Ex L (Master B-1-737)]**

B. Lease Provides for Minimum Rent of \$333,333

22. The “normal” rent is the rent payable by PBDF as per the Lease is defined in Art IV of the Lease. **[Lease, Art IV—Rent (Master D158)]**

23. PBDF’s proposal to the Authority in 2016 offered \$4MM in minimum rent. **[Lease, Pearce 12 Dec 21 Aff, Ex A (Master D232)]** PBDF’s argument that the rent it pays is somehow tied to sales has no merit. The Lease requires that PBDF pay \$333,333 per month in rent no matter what its monthly gross sales. Only the rent that PBDF is required to pay in excess of the minimum rent is tied to sales. **[See Lease, Art 4.03 (Master D158 and D159)]**

24. The Lease requires that PBDF pay minimum monthly rent of \$333,333 on the first day of each month. **[Lease, Art 4.02 (Master D158)]** PBDF filed documents with the Federal government in support of its request for COVID-related financial support confirming that the monthly rent payable to the Authority was \$333,333.

[Pearce 12 Dec 21 Aff, Exhibit E (beginning at Master D261)]

25. There is no dispute that PBDF has not been paying \$333,333 per month since 14 December 2021 and has, instead, been paying to the Authority 20% of its gross sales. **[Pearce 5 Dec 22 Aff, Ex B (Master B-1-941)]** There is also no dispute that the Authority objected to PBDF paying only percentage rent **[See Rienas 26 Nov 22 Aff, paras 3 and 4 (Master D378)]** and that the PBDF has been aware that the Authority was reserving its rights. **[Wolf E-mail of 9 June 2022, Pearce 13 Nov 22 Affidavit, Exhibit K (Master B-1-730)]**

26. The only issues on this Motion are whether: (a) the Appointment Order permits PBDF to unilaterally pay only percentage rent because it was breaching the Lease and paying only percentage rent on 14 December 2021; or (b) as a result of the Government's legislative response to COVID, Art 18.07 of Lease entitles PBDF to unilaterally decide what rent that it pays to the Authority or entitles PBDF to demand an amendment to Art 4.02;

C. Para 11 of the Appointment Order

27. The Authority has both a contractual and a statutory right to terminate the Lease based on PBDF's failure to pay rent. **[Commercial Tenancies Act, R.S.O. 1990, c. L.7 ("CTA"), s. 18(1). See also Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., [2022 ONCA 585](#) (CanLII), para 32]**

28. The Authority is not taking issue with the failure of PBDF to pay rent prior to 14 December 2021. That debt obligations is subsumed in the insolvency of PBDF and subject to para 9 of the Appointment Order. The sole issue on this Motion is the failure of PBDF to pay the minimum rent required by the Lease after 14 December 2021 and para 11 of the Appointment Order, which says:

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

29. Paragraph 11 serves the same effective purpose as s. 65.1 of the BIA—it preserves the value of PBDF's business by preventing suppliers from terminating their agreements based on the failure of PBDF to pay for goods, services or leased property supplied prior to 14 December 2021, so long as payment is made going forward. **[See BIA, s. 65.1]**

30. The inability of the Authority to exercise remedies under the Lease is premised on the *status quo* being maintained *vis-a-vis* the amount owing to the Authority—the Authority is entitled to be paid rent in accordance with the Lease from and after 14 December 2021 so that new debt will not accrue. **[See *Cosgrove-Moore Bindery Services Ltd (Re)*, [2000 CanLII 22377](#) (ON SC), *Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, [2010 BCCA 469](#) (CanLII) and *Quest University Canada (Re)*, [2020 BCSC 921](#) (CanLII)]**

31. The failure of PBDF to pay rent in accordance with the Lease after 14 December 2021 justifies the termination of a Lease. ***Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd.*, [2010 BCCA 469](#) (CanLII) and *Durham Sports Barn Inc. (Re)*, [2020 ONSC 5938](#) (CanLII)**

32. PBDF asserts that it has paid the “normal price of charges” as required by para 11 because it had unilaterally began “short-paying” rent in September of 2021 and has continued that practice subsequent to 14 December 2021. That argument is not tenable. It simply cannot be the case that the practice of “short-paying” rent for three months (3) over the objection of the landlord in the context of a five (5) year tenancy

results in the “short” payment becoming the “normal” rent payable by the tenant. The phrase “***provided in each case the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Debtor***” in an order is not intended to permit a debtor to continue to breach a lease because it had been breaching the lease over the objection of the landlord when the order was made.

33. The intention of para 11 is to balance the interests of RBC, the Authority and PBDF’s other suppliers by preserving the *status quo*—so long as no further amounts become owing, PBDF’s suppliers are required to supply goods and services so that PBDF’s business can be operated and value preserved for the benefit of RBC. The *quid pro quo* for RBC getting the benefit of the on-going supply of goods and services to PBDF despite the pre-14 December 2021 defaults by PBDF is that the suppliers will get paid.

34. If PBDF’s interpretation of para 11 is correct, then a supplier who was not being paid, or was being short-paid, as at the date a receiver was appointed would be forced to continue to supply goods or services for the ultimate benefit of the secured creditor(s) without being paid or without being paid in full—the supplier would be subsidizing the secured creditor(s) recovery.

35. The term “normal prices or charges” must refer to the objectively-determinable and **contractually agreed** price payable for the goods or services. In the case of a tenancy, it must refer to the rent payable in accordance with the applicable lease. This was the approach adopted in *101297277 Saskatchewan Ltd. v Copper Sands Land Corp.* [[2022 SKQB 39](#) (CanLII)] in connection with an identical provision in an order appointing a receiver. [See also *Boutiques San Francisco Inc., Re*, [2004 CanLII 16649](#) (QC CS), paras 96-105]

36. While it took place in the context of a CCAA, exactly what PBDF is asking for—that it be permitted

to not pay the Authority what is owing in accordance with the Lease while it has use of the leased premises— was found to be unfair in *Quest University Canada (Re)* [2020 BCSC 921 (CanLII)].

37. If the Lease contemplated an adjustment formula, the Court would be entitled to determine the rent payable by PBDF based on that formula. [See *101297277 Saskatchewan Ltd. v Copper Sands Land Corp.*, 2022 SKQB 39 (CanLII), para 37] Similarly, if the Lease contemplated an adjustment based on a reduction in traffic or legislative changes, then the Court might be required to determine whether the amount being paid by PBDF accords with that contemplated adjustment. There are, however, no such provisions in the Lease. The only provision that PBDF points to is Art 18.07 and, as set out below, that provision does not mandate an adjustment to the rent payable by PBDF or permit PBDF to unilaterally adjust the rent that it pays under the Lease.

38. In *Citizens Bank of Rhode Island v. Paramount Holdings Canada Company* this Court rejected the idea that the identical provision in an order appointing a receiver contemplated the continuation of a pre-order payment practice that had been adopted by the debtor, but that was not [provided for in the applicable agreements [*Citizens Bank of Rhode Island v. Paramount Holdings Canada Company*, 2008 CanLII 12706 (ON SC), paras 31 and 33 aff'd, 2008 ONCA 891 (CanLII)]

39. The situation the PBDF has put before the Court is what the Supreme Court commented on in 9354-9186 *Québec inc. v. Callidus Capital Corp.* in terms of fairness.

The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation. [9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII), para 75]

40. The Authority's exposure has increased by over \$1.2MM since 14 December 2021 while RBC's exposure has reduced by a corresponding amount due to PBDF's failure to pay rent as required by the Lease.

41. This is not a case where PBDF does not have the money to pay the Authority. PBDF has chosen to preserve substantial—unreasonable—cash reserves for the benefit of RBC.

42. While PBDF has been “short paying” the Authority, by 31 October 2022 it has accumulated cash reserved of over \$2.3MM, not including the almost \$1.5MM set aside for RBC. **[PBDF Financials, Pearce 13 Nov 22 Aff, Ex L (Master B-1-737)]** There is no dispute that unless PBDF establishes that it is entitled to an abatement over \$8.4MM, it is insolvent and will end up in receivership or bankruptcy. When this situation plays out and PBDF is ultimately placed into receivership or becomes bankrupt, any additional amounts owing to the Authority as a result of PBDF not paying rent in accordance with the Lease will be unrecoverable and the \$2MM that PBDF has accumulated as a result of not paying the Authority will go to the benefit of RBC.

43. The reference by Mr. Pearce to the fact that the Appointment Order does not have a provision similar to that included in CCAA orders that permit a debtor to pay rent twice-monthly as opposed to at the beginning of the month is a red herring. **[Pearce 5 Dec 22 Aff, para 45 (Master B-1-926)]** This is not a CCAA reorganization and there was no request by PBDF to vary the Lease to provide for the payment of rent twice monthly as opposed to on the 1st of the month.

D. Article 18.07 of the Lease—Covenant to Consult not Amend

44. PBDF’s argument appears to be that because PBDF’s offer in 2016 to pay minimum rent of \$4MM was based on what PBDF projected it’s gross annual sales would be going forward, Art 18.07 should be interpreted as entitling PBDF to have Art 4 of the Lease amended to remove the requirement that PBDF pay minimum rent based on the impact that the Government’s legislative response to COVID has had on PBDF’s financial performance.

45. Whatever the impact that the Government's legislative response to COVID has had on PBDF's financial performance, Article 18.07 does not oblige the Authority to agree to vary the Lease in any way and does not entitle PBDF to an amendment to the Lease. It is a covenant to consult. Article 18.07 says

*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**.* (emphasis added)

46. PBDF's interpretation of Art 18.07 as requiring more than just that the Authority consult and to include a covenant to agree to an amendment to Art 4 of the Lease is not tenable.

47. The purpose of interpretation is not to rewrite the parties' contract or to relieve one of them from the consequences of an improvident contract. When interpreting a contract, the Court

- (a) presumes that the parties have intended what they have said in the contract;
- (b) construes the contract as a whole, in a manner that gives meaning to all of its terms and avoids any interpretation that render one or more of its terms ineffective;
- (c) 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; and
- (d) should interpret a contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. **[Shaun Developments Inc. v.**

***Shamsipour*, [2018 ONSC 440](#) (CanLII) aff'd, [2018 ONCA 707](#) (CanLII). See also *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, [2022 ONSC 5922](#) (CanLII), paras 28-33]**

48. There is no reasonable interpretation of the words used by the parties in Art 18.07 that gives PBDF the right to a lease amendment to provide for only percentage rent or that obliges the Authority to agree to PBDF's demand that the Lease be amended in any way.

49. While the surrounding circumstances are relevant, the Court cannot use them to deviate from the text of the Lease such that the Court effectively creates a new agreement. The only evidence of "surrounding circumstances" that can be relied upon consists of objective evidence of the background facts at the time of the Lease was signed—knowledge that was or reasonably ought to have been within the knowledge of both parties in 2016. [***Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) (CanLII)**] Evidence of what happened after the Lease was signed is not admissible. [***Shewchuck v. Blackmont Capital Inc.*, [2016 ONCA 912](#) (CanLII), para 41]**

50. There is no dispute with respect to the factual matrix surrounding Art 18.07. To secure the Lease and the right to operate the duty free, PBDF offered to pay the Authority minimum rent of \$4MM per year and to assume the risk that the duty free would not perform financially. [***Lease, Sch D (Master D232)***] PBDF was aware at the time that traffic over the Peace Bridge was declining. [***Lease, Sch D (Master D221 and D222)***] The Authority would not guarantee the traffic over the Peace Bridge and PBDF wanted to have the ability to consult with the Authority in the event that there were legislative changes that impact its business. [***Pearce 5 Dec 22 Aff, para 6 (Master B-1-916)***]

51. PBDF had ample opportunity to put in any other evidence of "surrounding circumstances" that it believes might be relevant and did not.

52. The hearsay opinion evidence of Dennis Tobin of Blaney McMurtry in the Pearce 5 Dec 22 Aff **[Pearce 5 Dec 22 Aff, para 21 (Master B-1-920)]** as to the intention of Art 18.07 and what Art 18.07 means is not admissible. What PBDF's lawyers want Art 18.07 to say or believe that it should say is irrelevant and cannot be considered by the Court when interpreting Art 18.07. The Court cannot read into Art 18.07 what isn't there. If the parties had contemplated that the requirement to pay minimum rent would cease to apply based on the happening of some event or that there would be an adjustment to the minimum rent, they would have said that. **[See, for example, *Windsor-Essex Catholic District School Board v. 231846 Ontario Limited*, [2021 ONSC 3040](#) (CanLII) and *North Star Grill Ltd. v. Mundi North Enterprises Ltd.*, [2020 BCPC 243](#) (CanLII)]**

53. There is no reasonable basis upon which the Court can conclude that Art 18.07 requires the Authority to amend the Lease to adjust the minimum rent, let alone remove entirely the requirement that PBDF pay minimum rent.

54. Art 18.07 is a covenant to consult.

55. In *Lakeland College Faculty Association and Board of Governors of Lakeland College*, the Court wrote:

[37] The words "consult" and "consultation" have received judicial consideration in a number of contexts, in legislation and in contracts. The following principles can be gleaned from them: consultation involves,

- 1. a fact-specific analysis to determine whether, under the circumstances, the measures taken do in fact constitute consultation;*
- 2. a duty upon the decision maker to fully inform the other side of its own position, as well as to fully inform itself of the position of the other;*

3. *an opportunity for both sides to be heard and to state the factors they feel should guide the decision.*

[38] In summary, a consultation should involve a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information. (citations omitted) [Lakeland College Faculty Association and Board of Governors of Lakeland College, [1998 CanLII 29705 \(AB CA\)](#), para 37 and 38]

56. There is no requirement that “consultation” take place only by way of face-to-face meetings.

57. Any suggestion by Mr. Pearce’s assertion that the Authority did not consult with PBDF is simply not supported by the Record. The evidence is clear that the Authority engaged in meaningful consultations with PBDF and the even met the Frontier Duty Free Association at the request of PBDF. **[See Rienas 26 Nov 22 Aff, paras 17-29 (Master D473–D476) and Letter of 14 Jan 22, Pearce 13 Nov 22 Aff, Ex A (Master B-1-666)]**

58. PBDF cannot complain that the Authority has not been ‘fully informed’ or that it has not had an opportunity to be ‘fully heard’. Subsequent to 14 December 2021, PBDF did not provide the Authority with a proposal or a business plan and has confirmed that it will not provide the Authority with financial information. **[Pearce 13 Nov 22 Aff, paras 64 and 65 (Master B-1-647)]**

59. Any argument that the Authority has not engaged in sufficient consultation with PBDF is a red herring. PBDF’s efforts have not been focussed on consultation with the Authority, but on: (a) having FDFA lobby the New York and Canadian Governments to direct the Authority’s board to give lease concessions to PBDF; and (b) lobbying Members of Parliament to put pressure on the directors appointed by the Canadian Government to renegotiate the Lease. **[E-mail of 10 March 2022, Pearce 13 Nov 22 Aff, Ex K (Master B-1-731)]**

60. PBDF’s argument that each time there was a change or evolution in the Government’s legislative response to COVID, the Authority was required to engage in fresh consultation with PBDF to amend the

Lease based on each of those changes is without merit. As the Government eased or repealed legislative responses to COVID the “effect” on PBDF’s business operations was not adverse but favourable. Art 18.07 is only triggered by a “materials adverse effect” on PBDF’s business operations.

61. Assuming Art 18.07 can somehow be interpreted as requiring the Authority to negotiate an amendment to the Lease, any such amendment would have to relate to the impact of the Government’s legislative response to COVID as opposed to making the terms of the Lease more favourable to PBDF. The evidence is that the Authority has engaged in good faith negotiations to provide PBDF temporary amendments to the Lease to address the impact of the COVID.

62. As at January of 2022, the parties were apart on two (business) issues: (a) the minimum rent payable under the Lease for November and December of 2021, and 2022; and (b) the waiver of rent arrears that accumulated from 1 April of 2020 to 1 November 2021. The Authority had agreed to temporarily reduce the minimum rent and to increase it back to \$4MM over a number of years. PBDF wants Art 4 of the Lease amended to permanently remove the obligation to pay minimum rent. The Authority had agreed to a 50% rent waiver with the remaining rent being repaid over fixed period with interest and backed by either security or guarantees. PBDF wants at least a 75% waiver with the remaining rent repaid without interest over the term of the Lease without security or guarantees. **[See Letter of 14 Jan 22, Pearson 5 Dec 22 Affidavit, Ex A (Master B-1-666)]**

63. PBDF has provided no evidence that indicates that what the Authority has offered is, from a business perspective, unreasonable or unfair. The projections and financials that PBDF has chosen provide indicate that PBDF is (and will be) able pay the minimum rent required by Art 4 of the Lease and is generating sufficient profits that it can repay 50% of the rent arrears owing. **[See PDF Proposal, Pearce 5 Dec 22 Aff, Ex A (Master B-1-937) and PBDF Financials, Pearce 13 Nov 22 Aff, Ex L (Master B-1-737)]** It is entirely

reasonable for a creditor who is waiving 50% of a debt owing by a closely-held company so that the company can continue to carry business for the benefit of its shareholders to require security or a guarantees.

64. It is unclear how PBDF can argue that what the Authority has offered does not ‘consider the economic realities’ of PBDF’s business as disclosed to the Authority and the Court for the purposes of this Motion. The only financial information that PBDF has placed into the Record indicates that it can pay the \$1.2MM in minimum rent that it owes from 14 December 2021 and that the business will support the minimum rent required by the Lease—as at 31 October 2022 PBDF is generating about \$1.2MM in sales per month, had EBITA of \$1.9MM and had over \$3.2MM in cash reserves, in addition to the about \$1.5MM in cash set aside for RBC. **[Pearce 13 Nov 22 Aff, Ex FF (Master B-1-898) and Pearce 5 Dec 22 Aff, Ex B (Master B-1-941) and Ex L (Master B-1-737)].**

65. It is clear that PBDF is seeking is not really an accommodation to address the impacts of the Government’s legislative response to COVID, but to have the Lease amended to address potential future Government legislative responses to another pandemic and to increase PBDF’s profitability by removing the requirement that it pay minimum rent. **[Pearce 13 Nov 22 Aff, para 115 (Master B-1-661)]**

66. In summary, PBDF and the Authority agree that there have been (temporary) changes to Applicable Laws and that those changes have impacted PBDF’s business. PBDF and the Authority have engaged in consultation with respect to the impact of the Canadian Government’s legislative response to COVID on PBDF’s business and the Authority has considered the information provided by PBDF and determined that it is prepared to share the financial impact of COVID with PBDF. What the Authority is prepared to offer is not enough for PBDF and PBDF is insisting on greater financial concessions than the Authority is prepared to provide. That fact scenario does not justify, based on the terms of the Lease, the Superior Court exercising jurisdiction to vary the Lease to give PBDF what it wants or to give PBDF leverage to try to force the Authority

to agree to give PBDF what it wants by increasing the Authority's financial exposure should PBDF fail financially.

E. Other Provisions of the Lease

67. Whether considered independently or together with Article 18.07, there are not other provisions in the Lease that support the assertion by PBDF that the Authority is contractually obliged to agree to amend the Lease to remove the requirement that PBDF pay minimum rent.

i. Obligation to Pay Rent—Articles 4.01 and 4.05

68. Article 4.01 of the Lease says:

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.....

69. Article 4.05 of the Lease says:

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); (emphasis added)

ii. No Amendment—Article 2.17

70. Article 2.17 of the Lease says:

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.

71. There is no factual dispute that there is no signed amendment to the Lease that provides for PBDF to pay percentage only rent—neither the First Rent Deferral nor the (unsigned) Second Rent Deferral provide

for percentage only rent.

72. There is also no dispute that the Authority repeatedly advised PBDF that it was not agreeing that PBDF could pay rent equal to only 20% of its sales. [See **Rienas 7 Sept 22 Aff, paras 29 and 32 (Master D118 and D119)**]

iii. Covenant to Act Reasonably—Article 2.15

73. Article 2.15 of the Lease says

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.

74. In *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, the Court rejected an argument that a contractual obligation to act reasonably obliged a counterparty to an agreement to reduce fees based on the impact of COVID. [*Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, [2022 ONSC 5922](#) (CanLII), paras 372, 482 and 483]

75. PBDF cannot identify any provision of the Lease that has been engaged and that provides for the exercise is discretion by the Authority. A request by PBDF for a variation of the Lease does not trigger Art 2.15. [*Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, [2022 ONSC 5922](#) (CanLII), paras 480-485]

76. There is no evidence upon which the Court could conclude that what the Authority has offered to PBDF is anything but reasonable and, in fact, generous having regard to the information that PBDF has disclosed. The projections that PBDF provided in August of 2021 projected that PBDF would be able to pay over \$3MM in rent in 2022, while still generating \$330K in net income. [August 2021 PBDF Proposal,

Pearce 5 Dec 22 Aff, Ex A (Master B-1-936 and B-1-937)] While the parties were unable to come to terms on a temporary reduction in rent for 2022, the evidence in the Record is that the Authority was prepared to agree to a reduction in the minimum rent payable by PBDF until 2025. **[Letter of 14 Jan 22, Pearce 13 Nov 22 Aff, Ex A (Master B-1-666)]** PBDF's year-to-date financial dated 31 October 2022 indicate that PBDF can pay the \$1.2MM in minimum rent owing from 14 December 2021 and still retaining \$1.5MM for RBC and a **\$1.1MM cash reserve**. **[PBDF Financials, Pearce 23 Nov 22 Aff, Ex L (Master B-1-737)]**

iv. Force Majeure—Article 18.8

77. Article 18.08 of the Lease says:

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.

78. There is no evidence that PBDF was legally required to close the duty free. In *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP* [\[2022 ONSC 5922 \(CanLII\)\]](#), the Court found that the fact that a company voluntarily ceased to carry on business during COVID for its own financial reasons does not trigger the force majeure clause in the applicable agreement.

79. Even if it was triggered, Art 18.08 does not excuse PBDF from paying rent in accordance with the Lease. **[Braebury Development Corporation v. Gap (Canada) Inc., [2021 ONSC 6210 \(CanLII\)](#) and *Windsor-Essex Catholic District School Board v. 231846 Ontario Limited*, [2021 ONSC 3040 \(CanLII\)](#)]**

v. Accommodations are not Waivers or Amendments—Article 2.17

80. Article 2.17 of the Lease says:

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.

81. Article 2.17 prevents PBDF from relying on estoppel by convention or waiver based on the fact that the Authority did not seek to enforce its right to receive minimum rent. **[See *KL Solar Projects LP v. Independent Electricity System Operator*, [2019 ONSC 6501](#) (CanLII) aff'd, *Grasshopper Solar Corporation v. Independent Electricity System Operator*, [2020 ONCA 499](#) (CanLII), *Roberts v ZoomerMedia Limited*, [2016 ONSC 1567](#) (CanLII) aff'd, [2017 ONCA 327](#) (CanLII) and *Susin v. TD Waterhouse Discount Brokerage*, [2020 ONSC 959](#) (CanLII)]**

82. The purpose of Art 2.17 is to provide the Authority with the ability to give PBDF “room” without prejudicing its rights under the Lease.

83. In December of 2021, PBDF proposed the adjournment this Application and agreed to the appointment of the Monitor so that it could try to reach a commercial resolution with the Authority. **[Pearce 12 Dec 21 Aff, para 72 (Master D139)]** In the hopes that PBDF was serious about reaching a commercial resolution, the Authority did not aggressively pursue its default remedies to provide PBDF with an opportunity to come forward with a proposal. However, any accommodation given by the Authority to PBDF was given in reliance on Art 2.17 of the Lease **[Rienas 7 Sept 22 Affidavit, para 29 (Master D118)]** and the Authority repeatedly advised PBDF that it was not agreeing the PBDF could pay percentage only rent. **[Rienas 7 Sept 22 Aff, para 32 (Master D119), and Brief of Exhibits Tab 8 (beginning at Master D457)]** PBDF was aware that the Authority was reserving its rights to seek to terminate the Lease and evict PBDF. **[E-mail of 9 June 2022, Pearce 13 Nov 22 Aff, Ex K (Master B-1-730)]**

F. Common Law Duty of Good Faith and Fair Dealing

84. There is no basis upon which the Court could reasonable find that the Authority has acted contrary to community standards of honesty, reasonableness or fairness in its dealings with PBDF such that the Authority ought to be ordered to agree to vary the Lease to remove the requirement that PBDF pay minimum rent. [See *Arton Holdings Ltd. v. Gateway Realty Ltd.*, [1991 CanLII 2707 \(NS SC\)](#) aff'd, [1992 NSCA 70 \(CanLII\)](#)]

85. As noted in *Bahsin v. Hrynew* [\[2014 SCC 71 \(CanLII\)\]](#):

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith....

...

*[73]...I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one’s contractual performance.... (citations omitted) [Bhasin v. Hrynew, [2014 SCC 71 \(CanLII\)](#), paras 65, 70 and 73. See also *C.M. Callow Inc. v. Zollinger*, [2020 SCC 45 \(CanLII\)](#)]*

86. Most recently, in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* [\[2021 SCC 7 \(CanLII\)\]](#), the Supreme Court found:

[70] The touchstone for measuring whether a party has exercised a discretionary power in good faith is the purpose for which the discretion was created. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place. Perforce, the exercise of power consonant with purpose may be thought of as undertaken fairly and in good faith on the parties’ own terms. As such, barring issues such as unconscionability...that exercise is best understood, as a general matter, to be insulated from judicial review as a matter of fairness....

[73] I hasten to say that the role of the courts is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective. The common law recognizes that “[c]ompetition between businesses regularly involves each business taking steps to promote itself at

the expense of the other. . . . Far from prohibiting such conduct, the common law seeks to encourage and protect it” As a general matter, good faith should not be used as a pretext for scrutinizing motive. (citations omitted) [**Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District**, [2021 SCC 7](#) (CanLII), paras 4, 6, 70 and 73]

87. In determining what it is prepared to agree in terms of providing financial assistance to PBDF, the Authority has demonstrated appropriate regard for PBDF’s legitimate interests as a tenant and made reasonable—generous in fact—proposal(s) to PBDF. The fact that PBDF wants greater concessions from the Authority does not give rise to breach by the Authority of any obligation to act in good faith or deal fairly with PBDF. As noted by the Supreme Court in *Wastech Services*, the Authority is not obliged to subordinate its own interest as a landlord to those of PBDF and accede to the demands of PBDF and its shareholder(s). [**Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District** [2021 SCC 7](#) (CanLII), para 6]

88. The Authority has never misled PBDF in its dealings with respect to the impact of COVID. The Authority has done nothing that would even suggest that it was accepting or acceding to PBDF’s unilateral payment of percentage only rent. In his e-mail to the Monitor of 9 June 2022, Mr Wolf confirms his understanding that the Authority was reserving its rights. [9 Jun 2022, **Pearce 13 Nov 22 Aff, Ex K (Master B-1-730)**]

89. Finally, the duty of good faith and fair dealing goes both ways. PBDF owed a duty to deal with the Authority in good faith and fairly. [See **1117304 Ontario Inc. (Harvey’s Restaurant) v. Cara Operations Limited**, [2008 CanLII 56704](#) (ON SC)] PBDF has clearly not acted in good faith or fairly with the Authority since at least 14 December 2021 and has taken advantage of the Authority’s willingness to provide PBDF and its shareholders with an opportunity to develop a proposal to deal with the financial impact of COVID.

90. PBDF’s strategy in terms of dealing with the Authority is clear from the e-mails from its lawyers to the Monitor and its lawyers:

Blaney is of the view that the court attendance should be deferred for 3-4 months (with the right to return it earlier at any parties (sic) initiative to allow (sic) PBDF/MOT and FDFA initiatives to play out.... This preserves the stay which is fundamental to a resolution of the tenancy issue. [9 Jun 2022 E-mail, Pearce Affidavit, Exhibit K (Master B-1-730)]

The [Authority's] options are quite limited—either negotiate a [lease amending agreement] or attempt to obtain judicial authorization to terminate the lease when all stays expire. [10 Mar 2022 E-mail, Pearce Aff, Ex K (Master B-1-732)]

G. Para 9 of the Appointment Order

91. Paragraph 9 of the Appointment Order says:

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

92. Properly interpreted, the stay imposed by para 9 of the Appointment Order applies to the enforcement of creditor remedies as opposed to contractual remedies, which is addressed by para 11. The Authority is not seeking to enforce any debt obligations owing by PBDF as at 14 December 2021.

93. Assuming, however, that para 9 is interpreted so imposing an additional restriction on the exercise by the Authority of its remedies under the Lease, there are proper grounds for the stay imposed by para 9 to be lifted.

94. There is no statutory test for lifting a stay imposed by para 9 of the Appointment Order. In comparable circumstances, the Courts have considered the totality of the circumstances and the relative prejudice to the debtor and the creditor. [See *Industrial Alliance Insurance and Financial Services Inc. v Wedgemount Power Limited Partnership*, [2018 BCSC 723 \(CanLII\)](#)] The Courts have also referred to s. 69.4 of the BIA. Under s. 69.4, the Bankruptcy Court is required to consider: (a) whether the party seeking relief will suffer

material (objective) prejudice by the continued operation of the stay; or (b) there are other equitable grounds for granting the requested relief. [*Alberta Energy Regulator v Lexin Resources Ltd.*, [2019 ABQB 23](#) (CanLII), *Saskatchewan Immigrant Investor Fund Inc. v Windermere Properties Ltd.*, [2019 SKQB 153](#) (CanLII) and BIA, s. 69.4]

95. Assuming that the minimum rent required by the Lease is payable, there is clear prejudice to the Authority. The Authority has no security. Any debt owing by PBDF is very likely unrecoverable. [See **Pearce 13 Nov 22 Aff, para 121 (Master B-1-662)**] Any additional rent that has become owing by PBDF based on its failure to pay minimum rent has increased the Authority's exposure to financial loss. This is exactly precisely the situation that the Supreme Court of Canada found resulted in unfairness. [*9354-9186 Québec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#) (CanLII), para 75]

96. The argument that because PBDF's sales have increased from what they were on 14 December 2021 and the Authority is, as a result, receiving more money each month the Authority is not being prejudiced has not merit. All that is happening is the prejudice to the Authority is caused by PBDF "short-paying" rent is increasing less rapidly. Every month that goes by the (unrecoverable) debt owing by PBDF to the Authority increases. The prejudice to the Authority will only be reduced when PBDF: (a) begins to pay the minimum rent required by the Lease; **and** (b) starts repaying the "short" payment of rent from 14 December 2021.

97. While PBDF has significant financial reserves, those reserves are not for the purpose of providing financial support to PBDF, but for the purpose of maintaining the Peace Bridge. [**Rienas 26 Nov 22 Aff, para 35 (Master D477)**]

98. As at 31 October 2022: (a) PBDF had a year-to-day sales of over \$8.6MM, EBTA of almost \$2MM and net income of over \$1.2MM; (a) PBDF had over \$2.3MM of cash in the bank, not including the almost \$1.5MM segregated for the benefit of RBC. [**Pearce 13 Nov 22 Aff, Ex L (Master B-1-737)**] There is no

evidence from PBDF that over \$1MM in cash reserves—what would be left after the Authority is paid the minimum rent owing from 14 December 2022—are not sufficient to meet PBDF’s cash flow requirements.

99. Assuming that PBDF is not entitled to pay only percentage rent, RBC cannot argue prejudice results from PBDF being required to pay minimum rent from 14 December 2021.

100. The consequences of requiring that PBDF comply with its contractual obligations from 14 December 2021 cannot constitute “prejudice”, especially given that the evidence that PBDF has placed into the Record indicates that it has more than sufficient cash reserves to pay the required minimum rent. PBDF’s argument that it will suffer “extreme prejudice” if the Authority is permitted to exercise its remedies ignores the fact that PBDF can avoid that prejudice entirely by simply using \$1.2MM of the \$2.3MM it has in cash reserves to pay what is owing to the Authority—problem solved.

H. Rights under the *Commercial Tenancies Act*

101. Subsection 20(1) of the CTA does not contemplate rent reductions or rent abatements being part of an order granting relief from forfeiture. [*Hudson’s Bay Company ULC Compagnie de la Baie D’Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, [2022 ONCA 585](#) (CanLII), paras 43 and 45]

102. PBDF seem to argue, relying on *Hudson Bay v. Oxford*, that the Court has jurisdiction to temporarily adjust the amount of rent or timing for the payment of rent. There is no dispute that the Court has that jurisdiction under s 20 of the CTA. The exercise of that jurisdiction is, however, dependent on the adjustment being necessary and a proper balancing of the interest of the landlord and the tenant to permit the Tenant to preserve the tenancy—it is based on the tenant being able to ultimately pay what it owes. In this case, it would be an error for the Court to permit PBDF to not pay minimum rent in circumstances where it can clearly afford to pay minimum rent currently owing from 14 December 2021—PBDF has over \$4.8MM of cash in the

bank--and where PBDF “temporarily” not paying minimum rent exposes the Authority to increased financial losses for the benefit of RBC.

I. No “Building Blocks”

103. *Target Canada Co (Re)* [2016 ONSC 316 (CanLII)] has no application. There are no ‘building blocks’ leading to a reorganization. The Appointment Order was made to permit PBDF to try to negotiate a commercial resolution with the Authority and that has not happened. The Authority cannot be faulted for giving PBDF an opportunity to propose an acceptable commercial resolution or for the fact that PBDF did not propose a commercial resolution for 10 months. Moreover, PBDF was not any point led to believe that the Authority was agreeing to accept only percentage rent. The Authority advised PBDF that it was not agreeing that PBDF could pay rent equal to only 20% of its sales. [See *Rienas 7 Sept 22 Aff*, paras 29 and 32 (Master D118 and D119)] And PBDF was aware that the Authority was reserving its rights to seek to terminate the Lease and evict PBDF. [E-mail of 9 June 2022, *Pearce 13 Nov 22 Aff*, Ex K (Master B-1-730)]

J. PBDF has Dragged its Feet

104. PBDF accuses the Authority of dragging its feet by not being aggressive in terms of coming to Court to seek permission to exercise remedies under the Lease, but conveniently ignores that: (a) the Court made the Appointment Order at the request of PBDF to provide PBDF with the opportunity to try to reach a commercial resolution with the Authority; (b) PBDF did not put forward any proposal for a commercial resolution and has refused to provide the Authority with financial information all the while demanding that the Authority engage in ADR; and (b) PBDF did not raise the issues that it now wants to raise by way of “Cross-Motion” to further delay the Authority from exercising its remedies until the Authority served this Motion.

K. Conclusion

105. Since 14 December 2021, PBDF has demonstrated no real desire to reach a commercial resolution with the Authority and seems content to continue to “short-pay” the Authority under the protection of the Appointment Order while it builds its cash reserves for the benefit of RBC.

106. If PBDF wants more time to reach a commercial resolution or seek relief from forfeiture, it can pay the minimum rent required by the Lease and make a proposal to the Authority. Holding the Authority hostage by an order that was supposed to provide PBDF with a short period of time to try to reach a commercial arrangement with the Authority is not the answer.

PART III—ORDER REQUESTED

107. The Authority respectfully requests that its Motion be granted and its costs paid by PBDF on a complete indemnity basis in priority to RBC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of December 2022.

E. Patrick Shea

E. Patrick Shea
GOWLING WLG (CANADA) LLP
Lawyers for Buffalo and Fort Erie Public Bridge Authority

SCHEDULE A

Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., [2022 ONCA 585](#) (CanLII)

Cosgrove-Moore Bindery Services Ltd (Re), [2000 CanLII 22377](#) (ON SC)

Canadian Petcetera Limited Partnership v. 2876 R Holdings Ltd., [2010 BCCA 469](#) (CanLII)

Quest University Canada (Re), [2020 BCSC 921](#) (CanLII)]

Durham Sports Barn Inc. (Re), [2020 ONSC 5938](#) (CanLII)

101297277 Saskatchewan Ltd. v Copper Sands Land Corp., [2022 SKQB 39](#) (CanLII)

Boutiques San Francisco Inc., Re, [2004 CanLII 16649](#) (QC CS)

101297277 Saskatchewan Ltd. v Copper Sands Land Corp., [2022 SKQB 39](#) (CanLII)

Citizens Bank of Rhode Island v. Paramount Holdings Canada Company, [2008 CanLII 12706](#) (ON SC) aff'd, [2008 ONCA 891](#) (CanLII)

9354-9186 Québec inc. v. Callidus Capital Corp., [2020 SCC 10](#) (CanLII)

Shaun Developments Inc. v. Shamsipour, [2018 ONSC 440](#) (CanLII) aff'd, [2018 ONCA 707](#) (CanLII)

Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP, [2022 ONSC 5922](#) (CanLII)

Sattva Capital Corp. v. Creston Moly Corp., [2014 SCC 53](#) (CanLII)

Shewchuck v. Blackmont Capital Inc., [2016 ONCA 912](#) (CanLII)

Windsor-Essex Catholic District School Board v. 231846 Ontario Limited, [2021 ONSC 3040](#) (CanLII)

North Star Grill Ltd. v. Mundi North Enterprises Ltd., [2020 BCPC 243](#) (CanLII)]

Lakeland College Faculty Association and Board of Governors of Lakeland College, [1998 CanLII 29705](#) (AB CA)

Braebury Development Corporation v. Gap (Canada) Inc., [2021 ONSC 6210](#) (CanLII)

KL Solar Projects LP v. Independent Electricity System Operator, [2019 ONSC 6501](#) (CanLII) aff'd, *Grasshopper Solar Corporation v. Independent Electricity System Operator*, [2020 ONCA 499](#) (CanLII)

Roberts v ZoomerMedia Limited, [2016 ONSC 1567](#) (CanLII) aff'd, [2017 ONCA 327](#) (CanLII)

Susin v. TD Waterhouse Discount Brokerage, [2020 ONSC 959](#) (CanLII)

Arton Holdings Ltd. v. Gateway Realty Ltd., [1991 CanLII 2707](#) (NS SC) aff'd, [1992 NSCA 70](#) (CanLII)

Bahsin v. Hrynew [[2014 SCC 71](#)] (CanLII)

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District [2021 SCC 7](#) (CanLII)

1117304 Ontario Inc. (Harvey's Restaurant) v. Cara Operations Limited, [2008 CanLII 56704](#) (ON SC)

Industrial Alliance Insurance and Financial Services Inc. v Wedgemount Power Limited Partnership, [2018 BCSC 723](#) (CanLII)

Alberta Energy Regulator v Lexin Resources Ltd., [2019 ABQB 23](#) (CanLII)

Saskatchewan Immigrant Investor Fund Inc. v Windermere Properties Ltd., [2019 SKQB 153](#) (CanLII)

Target Canada Co (Re), [2016 ONSC 316](#) (CanLII)

SCHEDULE B

Bankruptcy and Insolvency Act, RSC 1985, c B-3

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

- (a) the insolvent person is insolvent; or
- (b) a notice of intention or a proposal has been filed in respect of the insolvent person.

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

- “(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed.”

...

- (4) Nothing in subsections (1) to (3) shall be construed
 - (a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed;
 - (b) as requiring the further advance of money or credit; or
 - (c) [Repealed]

...

(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

...

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate

in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

...

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

...

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Commercial Tenancies Act, RSO 1990, c L.7

20 (1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or application in the Superior Court of Justice brought by the lessee, apply to the court for relief, and the court may grant such relief as, having regard to the proceeding and conduct of the parties under section 19 and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just.

...

(4) Where the proceeding is brought to enforce a right of re-entry or forfeiture for non-payment of rent and the lessee, at any time before judgment, pays into court all the rent in arrear and the costs of the proceeding, the proceeding is forever stayed.

...

81 (1) Despite anything in this or any other Act, a judge shall not order a writ of possession that is effective during the non-enforcement period that applies in respect of a tenancy referred to in subsection 80 (1) or (2) if the basis for ordering the writ is an arrears of rent.

...

82 No landlord shall exercise a right of re-entry in respect of a tenancy referred to in subsection 80 (1) or (2) during the applicable non-enforcement period.

83 (1) If a landlord exercised a right of re-entry during the period that begins on October 31, 2020 and ends immediately before the day subsection 1 (1) of Schedule 5 to the Protect, Support and Recover

from COVID-19 Act (Budget Measures), 2020 comes into force, the landlord shall, as soon as reasonably possible,

- (a) restore possession of the premises to the tenant unless the tenant declines to accept possession; or
- (b) if the landlord is unable to restore possession of the premises to the tenant for any reason other than the tenant declining to accept possession, compensate the tenant for all damages sustained by the tenant by reason of the inability to restore possession.

(2) If a landlord restores possession of a premises to a tenant under subsection (1), the tenancy is deemed to be reinstated on the same terms and conditions unless the landlord and the tenant agree otherwise.

...

86 (1) A landlord who contravenes section 82 or 84 or who fails to comply with clause 83 (1) (a) or section 85 is liable to the person aggrieved for any damages sustained by the person aggrieved as a result of the contravention or non-compliance.

(2) For greater certainty, subsection (1) applies in addition to any other remedy available by law to the person aggrieved.

ROYAL BANK OF CANADA
Applicant

-and-

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

PEACE BRIDGE DUTY FREE INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FACTUM OF
BUFFALO & FORT ERIE PUBLIC BRIDGE AUTHORITY

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