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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

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

SUPPLEMENTARY APPLICATION RECORD

(returnable January 29, 2024)

January 15, 2024

AIRD & BERLIS LLP
Barristers & Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Sanjeev P. R. Mitra (LSO # 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Applicant, Royal Bank of Canada

INDEX

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TAB 1

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SUPPLEMENTARY AFFIDAVIT OF BENJAMIN PAUL GARDENT
(sworn January 15, 2024)

I, **BENJAMIN PAUL GARDENT**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS**:

1. I am a Senior Manager in the Special Loans & Advisory Services Department (the "**Special Loans Group**") of Royal Bank of Canada ("**RBC**"). RBC is a secured creditor of Peace Bridge Duty Free Inc. (the "**Debtor**"), the respondent herein, and I am responsible for management of the Debtor's accounts and credit facilities with RBC. As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and, in all such cases, believe it to be true.

PURPOSE

2. This affidavit (this "**Affidavit**") is sworn in further support of the pending receivership application against the Debtor, which is now returnable on January 29, 2024. This Affidavit is sworn further to the affidavit of my RBC colleague, Christopher Schulze, sworn December 2, 2021 (the "**Original Affidavit**").

DEVELOPMENTS SINCE THE ORIGINAL AFFIDAVIT

3. On or about December 13, 2021, the Debtor proposed an adjournment of the receivership application to permit the Debtor to reach a commercial resolution with its landlord, The Buffalo and Fort Erie Public Bridge Authority (the "**Landlord**").

4. On December 14, 2021, on the consent of each of RBC, the Debtor and the Landlord, the receivership application was adjourned to January 17, 2022, subject to: (i) appointing msi Spergel inc. ("**Spergel**") as the Debtor's monitor (the "**Monitor**"); and (ii) imposing a stay of proceedings in favour of the Debtor and its assets, property and undertakings (the "**Stay**"). The Stay prevents the Landlord from distraining against the Debtor's goods or terminating the Debtor's lease while RBC's receivership application is adjourned (i.e., both the Landlord and RBC are stayed).

5. The return of the receivership application has been extended several times, but always subject to the Monitor's appointment and the Stay.

6. I understand that the Debtor did not resolve matters with the Landlord, and that the Court declined to provide rent relief to the Debtor. A copy of the Court's reasons dated December 15, 2023 is attached as **Exhibit "A"** hereto (the "**Decision**"). I understand that the Debtor has appealed the Decision (the "**Appeal**"). A copy of the notice of appeal is attached as **Exhibit "B"** hereto.

7. In light of the Decision, I understand that the receivership application is now returnable on January 29, 2024, and that the parties have agreed that the Stay will remain in place until such date. In this regard, the Court confirms (at paragraph 160 of its Decision) "*the Landlord's undertaking not to take any enforcement steps pending the return of the Receivership Application* …"

8. Below is a breakdown of amounts owed to RBC as at January 15, 2024 (excluding professional fees and expenses, accruing interest, and the HASCAP loan):

Lease Line (including HST)	$3,008,661.17
Letters of Guarantee	$575,900.00
VISA Facilities	$13,237.85
TOTAL	**$3,597,799.02**

9. The Debtor has devoted significant financial resources fighting a losing battle with the Landlord. Attached hereto as **Exhibit "C"** is a copy of the Debtor's costs submissions on its motion with the landlord.

10. At this stage, RBC remains concerned that the Landlord will terminate the Debtor's lease or distrain against the Debtor's goods if a receiver is not appointed on January 29, 2024. Even if the Stay is continued to prevent the Landlord from doing this while the Appeal plays out, RBC is concerned about its collateral being eroded to fund the Appeal. The Monitor has confirmed to RBC that the Debtor failed to meet its cash-on-hand projection of approximately $2.387 million for the year ended December 31, 2023. The Monitor has confirmed to RBC that the Debtor's actual cash-on-hand was approximately $2.072 million for the year ended December 31, 2023, being a

negative variance of approximately $315,000. The Monitor has also confirmed to RBC that the Debtor forecasts its cash position to continue to deteriorate by a further amount of approximately $440,000 between December 31, 2023 and February 3, 2024.

11. Indeed, since the Stay was imposed approximately two years ago, the Debtor has failed to meet its financial covenants to RBC under the Credit Agreement (as defined in the Original Affidavit). Attached collectively as **Exhibit "D"** hereto are the non-tolerance/non-waiver letters sent to the Debtor by RBC, through counsel, as a result of this repeated failure. Despite being advised in the first of these letters that the Debt Service Coverage ratio had not been respected for the fiscal year ended December 31, 2021 (calculated based on reporting made in 2022, being the first year of the Stay) and that this default needed to be remedied by no later than the end of the fiscal year ended December 31, 2022 (calculated based on reporting made in 2023, being the second year of the Stay), the default was not so remedied.

12. Accordingly, even putting aside the significant ongoing dispute between the Debtor and the Landlord (which cannot be put aside), the Debtor is still not meeting its obligations to RBC under the Credit Agreement. It has also not honoured the formal demand for payment or entered into arrangements satisfactory to RBC. It has not resolved matters with the Landlord in terms of current rent or arrears.

13. RBC has advised the Debtor (through counsel) on multiple occasions during the approximately two-year Stay that RBC's preference is to be indefeasibly repaid so that the receivership application need not proceed. A copy of the most recent communication in this regard dated January 2, 2024, together with the out-of-office automated response, is attached as **Exhibit "E"** hereto.

14. At this stage, RBC believes that its only reasonable and prudent path forward is to take any and all steps necessary to protect the Property (including, without limitation, the Debtor's interest in the lease) by having a receiver appointed, and it is within RBC's rights under the Security (as defined in the Original Affidavit) to do so.

15. This Affidavit is made in support of the within application, and for no other or improper purpose whatsoever.

SWORN by Benjamin Paul Gardent at the City of Toronto, in the Province of Ontario, before me on this 15th day of January 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for taking affidavits, etc.

Calvin Peter Horsten, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires June 14, 2025.

BENJAMIN PAUL GARDENT

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

SUPPLEMENTARY AFFIDAVIT OF BENJAMIN PAUL GARDENT (sworn January 15, 2024)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Sanj Mitra (LSO # 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for Royal Bank of Canada

TAB A

Attached is Exhibit “A”

Referred to in the

AFFIDAVIT OF BEN GARDENT

Sworn before me

this 15th day of January, 2024

Calvin Peter Horsten, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires June 14, 2025.

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

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: ROYAL BANK OF CANADA, Applicant

AND:

PEACE BRIDGE DUTY FREE INC., Respondent

BEFORE: Kimmel J.

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

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

Leanne Williams, for the Monitor

HEARD: November 1, 2 and 3, 2023

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

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

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

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

Procedural History

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

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

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

The Lease Dispute

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

> 18.07 Regulatory Changes

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

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

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

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

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

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

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

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

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

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

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

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

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

The Positions of the Parties

The Tenant's Position

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Landlord's Position

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

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

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

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

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

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

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

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

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

Matters that the Parties Agree Upon

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

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

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

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

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

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

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

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

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

The Lease

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

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

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

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

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

The Facts

The Parties

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

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

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

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

Previous Findings of this Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Detailed Factual Chronology

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

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

The Rent that has Been Paid by the Tenant

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

Basic Principles of Contract Interpretation

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

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

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

Factual Matrix, Parol Evidence and the Landlord's Objections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Issues

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

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

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

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

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

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

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

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

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

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

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

4. What remedy is available to the Tenant?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. What is the duty of good faith?

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

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

[89] These will each be addressed in turn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[104] Ms. Hutcheson also opines that:

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

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

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

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

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

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

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

c. *The Demands and Proposals*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) No Breach, No Remedy for Breach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Outcome

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

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

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

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

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

4. No Remedy is granted:

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

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

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

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

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

Costs

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

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

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

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

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

KIMMEL J.

Date: December 15, 2023

APPENDIX 1

CHRONOLOGY OF DEALINGS BETWEEN THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 2

(LEASE EXCERPTS)

2.01 Definitions

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

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

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

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

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

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

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

2.04 Entire Agreement

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

2.15 Reasonableness

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

2.17 Amendment and Waiver

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

4.01 Covenant to Pay

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

4.02 Base Rent

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

4.03 Percentage Rent

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

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

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

…

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

4.05 Rent and Payments Generally

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

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

9.02 Conduct and Operation of Business

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

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

18.07 Regulatory Changes

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

18.08 Unavoidable Delay

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

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

Forecasted Sales ($ million)

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

TAB B

Attached is Exhibit “B”

Referred to in the

AFFIDAVIT OF BEN GARDENT

Sworn before me

this 15th day of January, 2024

Calvin Peter Horsten, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires June 14, 2025.

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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent
(Appellant)

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

NOTICE OF APPEAL

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

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

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

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

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

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

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

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

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

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

THE GROUNDS OF APPEAL are as follows:

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

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

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

to which she concluded that:

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

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

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

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

Errors relating to the interpretation of the Lease

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

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

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

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

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

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

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

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

Errors relating to reasonableness and the exercise of good faith

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

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

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

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

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

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

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

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

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

Other errors

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

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

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

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

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

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

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

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

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

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

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

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

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

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

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

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

Date: December 27th, 2023

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

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John Wolf (LSO #30165B)
Tel: (416) 593-2994
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Tel: (416) 593-2997
Email: bjones@blaney.com

Lawyers for the Respondent (Appellant)

TO:

GOWLING WLG
100 King St. W.,
Suite 1600
Toronto, ON M5X 1G5

Christopher Stanek
Tel: (416) 862-4369
Fax: (416) 862-7661
Email: christopher.stanek@gowlingwlg.com

Patrick Shea
Email: patrick.shea@gowlingwlg.com

Lawyers for Buffalo and Fort Erie Public Bridge Authority (Respondent in the Appeal)

AND TO: **MSI SPERGEL INC.**
505 Consumer Road
Suite 200
Toronto, ON M2J 4V8

Mukul Manchanda
Tel: (416) 498-4314
Fax: (416) 494-7199
Email: mmanchanda@spergel.ca

Proposed Receiver

AND TO: **AIRD & BERLIS LLP**
Brookfield Place
181 Bay Street,
Suite 1800
Toronto, ON, M5J 2T9

Sanj Mitra (LSO #37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSO #66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Applicant

AND TO: **DEPARTMENT OF JUSTICE**
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, ON, M5H 1T1

Email: AGC-PGC.TORONTO-TAX-FISCAL@JUSTICE.GC.CA

Lawyers for the Minister of National Revenue

AND TO: **MINISTRY OF FINANCE**
Ministry of the Attorney General (Ontario)
Civil Law Division - Legal Services Branch
6-33 King St West
Oshawa, Ontario, L1H 8H5

Steven Groeneveld (LSO # 45420I)
Tel: 905 431 8380
Fax: 905 436 4510
Email: steven.groeneveld@ontario.ca

AND TO: **MINISTRY OF FINANCE**
Ministry of the Attorney General (Ontario)
Collections Branch – Bankruptcy and Insolvency Unit
6-33 King St West
Oshawa, Ontario, L1H 8H5

Email: insolvency.unit@ontario.ca
Tel.: 1 866 668-8297

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

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

Applicant Respondent (Appellant)

Email addresses for service recipients:
christopher.stanek@gowlingwlg.com
patrick.shea@gowlingwlg.com
smitra@airdberlis.com
jnemers@airdberlis.com
mmanchanda@spergel.ca
AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca
steven.groeneveld@ontario.ca
insolvency.unit@ontario.ca

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

NOTICE OF APPEAL

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

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John Wolf (LSO #30165B)
Tel: (416) 593-2994
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Tel: (416) 593-2997
Email: bjones@blaney.com

Lawyers for the Respondent (Appellant)

TAB C

Attached is Exhibit “C”

Referred to in the

AFFIDAVIT OF BEN GARDENT

Sworn before me

this 15th day of January, 2024

Calvin Peter Horsten, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires June 14, 2025.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

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

AMENDED COST SUBMISSIONS OF PEACE BRIDGE DUTY FREE INC.

Date: ~~November 23rd~~, December 1st, 2023	**BLANEY MCMURTRY LLP** Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5 **David T. Ullmann (LSO #42357I)** Tel: (416) 596-4289 Email: dullmann@blaney.com **John Wolf (LSO #30165B)** Email: jwolf@blaney.com **Brendan Jones (LSO #56821F)** Email: bjones@blaney.com Lawyers for the Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

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

AMENDED COST SUBMISSIONS

1. The Tenant, if successful, seeks its costs of this motion and the related procedural steps leading to the motion. The Tenant's partial indemnity costs are ~~$422,570.13~~ $409,387.33, including disbursements and HST; and its substantial indemnity costs are in the sum of ~~$653,704.09~~ $640,521.29, including disbursements and HST. The Tenant's cost outline is attached at **Tab 1**.

These proceedings were caused by the Authority's overly aggressive enforcement tactics

2. During the border closure caused by the Covid-19 pandemic, the Authority was aware that almost all Canadian land border duty free stores were closed and the Tenant was unable to generate any revenues.

3. From the outset of the pandemic when it demanded immediate payment of April 2020 Rent because it took the position (that is subsequently abandoned) that there was "no provision for delay or abatement of rent"[1], the Authority adopted a strategy of attempting to impose its terms on the Tenant, rather than engaging in meaningful cooperative discussions taking into consideration the catastrophic economic realities facing duty-free stores during the border closure and subsequent reopening period as contemplated by subsection 18.07 of the Lease.

[1] April 1st, 2020 email from Ron Rienas to Greg O'Hara, Exhibit "D" of Jim Pearce's February 13th, 2023 Affidavit.

4. The Authority's actions against the Tenant culminated in delivering a notice of default threatening Lease termination when it knew it could not lawfully terminate the Lease as a result of the Ontario eviction moratorium; and then doubling down on its actions by telling RBC that it intended to exercise its remedies under the default provisions of the Lease.[2]

5. While the action of delivering a notice of default may not have been strictly unlawful, the Authority's threat to terminate the Lease, while failing to disclose to either the Tenant or RBC that there was an ongoing eviction moratorium under Part IV of the *Commercial Tenancies Act*, was intended to, and did in fact, cause the Tenant and RBC to act to protect themselves and resulted in these proceedings.

6. The Authority's actions could only be either: (a) a "bluff" to mislead RBC and the Tenant about imminent Lease termination; or (b) it planned on intentionally disregarding the eviction moratorium and terminating the Lease.

7. To be clear, there is no legal requirement and therefore no reason to deliver a formal monetary default notice other than to create an Event of Default under subsection 17.1 of the Lease, and thereby put the Landlord in a position to lawfully (but for subsection 18.07) terminate the Lease pursuant to subsection 17.2 of the Lease.

8. BUT FOR the Landlord's tactical Lease enforcement actions, these proceedings would not have been brought in this Court, under this process. While there may still have been a dispute about rent and the interpretation of subsection 18.07 of the Lease, that dispute could have proceeded in a more cost-efficient venue.

9. The Landlord, after inducing RBC's enforcement action through its misleading default notice, then caused additional costs to be incurred, first, through an unsuccessful motion to lift the stay, that it brought for the express purpose of seeking to terminate the Lease, and second, withholding documents that resulted in a contested productions motion.

The Tenant made reasonable efforts to compromise by retroactively offering to pay amounts that ought not to be payable by reason of subsection 18.07

10. As particularized below and in the Offer Brief attached at **Tab 2,** Tenant made a series of reasonable offers to the Authority that were designed to preserve the tenancy; and were informed and tempered by the

[2] November 21st, 2021 email from Chris Stanek to Sanj Mitra, Exhibit "G" to the November 13th, 2022 affidavit of Jim Pearce.

situation that existed at the time in terms of the bridge traffic, the Tenant's ability to generate sales and revenue.

11. The parties ultimately agreed on what the impact of subsection 18.07 of the Lease ought to be on Base Rent for the reopening period, which was based on 20% of sales with a minimum Base Rent level informed by anticipated sales levels that would allow the Tenant to pay rent based on a gross sales-to-rent ratio of approximately 20%. However, the parties were unable to agree on an amount which reflected the impact on sales for the closure period, and as a result the parties were unable to reach a settlement in respect of the closure period.

12. While the Tenant offered to make significant compromises during the border closure period, and in its view, offered to agree to essentially all the material terms of the Authority's demands in terms of quantum and timing (which was only possible by relying on cooperation from the bank as economic conditions improved). In exchange for offering to pay $2.852 million more than it believes was payable during the closure period, the Tenant requested a modest 3.5-year term extension to the term in order to recoup some of its losses (in contrast to the two 5-year extension options granted to the Authority's US duty-free tenant Duty Free Americas ("**DFA**")).

13. For its part, the Authority demanded payment of professional fees in a sum equal to the professional fees incurred by the Tenant. The inclusion of such an unreasonable condition, seemingly to try to gain a windfall payment, is consistent with the Authority's course of conduct throughout. It tries to project that it is reasonable, while at the same time trying to extract a benefit to which it has no entitlement or ability to be paid.

The Court has discretion on the issue of costs

14. The Court has discretion to award costs incidental to a proceeding pursuant to s.131 of the *Courts of Justice Act*, and *Rule* 57.01(1) enumerates a list of factors to be taken into consideration in exercising that discretion. In particular, *Rule* 57.01(1)(d) considers the importance of the issues. From the Tenant's perspective the issue to be determined on this motion could not be more important, since the determination of the motion will largely determine whether the Tenant continues to exist.

15. Modern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* 1999 CanLII 2052 (ON C.A.), at para. 22.

16. Costs awards, at the end of the day, should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties": see *Boucher v. Public Accountants Council for the Province of Ontario* 2004 CanLII 14579 (ON C.A.), at para. 24.

The Authority's conduct

17. The Court is familiar with the practice that costs are typically awarded on a partial indemnity scale unless there is an offer to settle under rule 49.10 or a party engages in reprehensible or egregious conduct worthy of sanction by the Court in the form of elevated costs on a substantial indemnity basis. *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, at para. 28-31.

18. The following actions/omission and "hardball" tactics of the Authority led to additional costs being incurred and/or are relevant to the cost factors set out in *Rule* 57.01(1):

(a) Delivering invalid notices of monetary and non-monetary default and intentionally threatening to terminate the tenancy when it was unlawful to do so (see *Rule* 57.01(1)(f) and (i));

(b) Unsuccessfully bringing a motion to lift the stay for the purpose of seeking to terminate the Lease (a copy of the Tenant's cost submissions from that motion are attached as **Tab 3)** (see *Rule* 57.01(1)(e) and (i));

(c) Failing to make proper disclosure pursuant to the April 4th, 2023 endorsement. Further the documents the Authority did produce were partly in a tabbed brief and partly in an unorganized "dump" of emails on a USB stick. This inadequate disclosure led to an adjournment of examinations and a motion (see *Rule* 57.01(1)(e));

(d) Failing to identify documents over which privilege was claimed, then improperly asserting solicitor client privilege over the November 20th, and December 17th, 2020 board meeting minutes to conceal that the board unconditionally approved the Second Rent Deferral Agreement; and giving misleading evidence about the board not approving the Second Rent Deferral (see *Rule* 57.01(1)(f);[3]

(e) Giving inaccurate evidence to purportedly show it did not favour DFA over the Tenant, which was contradicted by the DFA lease documents that it initially refused to disclose (see *Rule* 57.01(1)(f));[4]

[3] Rienas Transcript Exhibit 5. Costa Transcript p. 74, q. 302, p. 78, q. 320 and p. 90, q. 367

[4] Para. 40 of Mr. Rienas' November 26th, 2022 affidavit. After being ordered to disclose DFA's lease, it admitted there was no agreement to temporarily defer DFA's rent in 2021. There was no agreement in place at the time of Mr. Rienas' November 26th, 2022 affidavit, as the Sixth Amending Agreement was not signed until December 21st, 2022.

(f) The failure to disclose records led to a contested disclosure hearing and further documents being disclosed, including the DFA lease (see *Rule* 57.01(1)(e) and (f));

(g) Bringing a further motion for leave to issue a notice of default or notices of default that served entirely no purpose and ultimately was not argued, although the Tenant did have to incur costs responding to it (see *Rule* 57.01(1)(f)); and

(h) Refusing to acknowledge that subsection 18.07 of the Lease was a "safety valve" that could result in adjustments to rent payable by the Tenant, which was a key issue in dispute, until it delivered its factum (see *Rule* 57.01(1)(g)).

Settlement offers

19. A brief of offers was provided at the hearing for this motion. The final two settlement proposals were redacted from the brief. For the purposes of cost submission, a complete unredacted copy of the brief of offers is provided for the Court's consideration.

20. It should be noted that when the Tenant's business conditions improved that allowed the Tenant to increase its offer to try to save its business (even though the Authority's demands for payment were in respect of the period of time when the business was closed). The Tenant did everything in its power to try to reach a resolution, including its final offer, which was more than it could afford to pay from available company funds. That offer would have required cooperation from RBC to fund as RBC is currently holding material additional cash collateral under this court process, which cash would be required to perform the settlement.

21. In the Tenant's view it acceded to almost all the Authority's requests with the exception firstly of their requirement that the Landlord retain the anticipated HST refund resulting from overpayment of HST that the Authority sought to appropriate (the Tenant "with a gun to its head" begrudgingly offered in its final offer to allow to the Authority to have half of the HST refund); and secondly the Authority's demand that the Tenant pay the Authority's professional fees in the sum equal to what the Tenant paid its own professionals (rather than relating its costs to what it actually incurred). In the interest of reaching a resolution, the Tenant offered to pay the Landlord $200,000 for professional fees even though the Tenant was the aggrieved party.

22. The Tenant requested a modest 3.5 year term extension to the term in order to recoup the significant payment it offered to the Landlord (in contrast to the two 5-year extension options granted to the Authority's US duty-free tenant). The Authority did not agree to any term extension for the Tenant, despite demanding payment of over 50% of Rent during the closure period, and well over that amount when the HST refund and professional fees demands are taken into consideration. The Tenant's request for a 3.5 year extension

to the term of the Lease (with full Rent paid during that extension) is also reasonable in light of the fact the border was closed for non-essential travel for 547 days, and the business continues to be affected during the reopening period; and in light of the Ontario Court of Appeal's decision in *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159, which held that a force majeure clause similar to the one in the Lease resulted in the extension of the term for an equal amount of time as the force majeure period, and no rent is payable during the extension of the term.

Additional costs incurred by the Tenant because of the Authority's actions

23. In addition to the legal costs incurred by the Tenant as a result of these proceedings, the Tenant also was required to fund the following professional fees relating to the monitor/receivership proceedings that were directly caused by the Landlord's notice of default and subsequent advice to RBC's counsel that the Landlord had decided to enforce its remedies under the Lease. Those pleadings and filings formed part of the record throughout at the various case conferences and motions.

24. It is not clear to the Tenant whether these costs are recoverable from the Authority as disbursements or whether they would be recoverable separately by a damages claim. The information about these professional fees actually incurred is being provided to the Court in the event these expenses are disbursements relevant to the issue of costs. At the very least they reflect the economic burden the Tenant has had to carry in order to respond to the Landlord's actions.

(a)	RBC legal costs:	$118,410.97;
(b)	Monitor legal costs:	$73,482.59;
(c)	Monitor (up to May 2023):	$95,717.22;
(d)	Total	$287,610.78

Date: ~~November 24th~~, December 1st, 2023

David

88

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

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

Email address of recipient: See Service List

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AMENDED COST SUBMISSIONS OF PEACE BRIDGE DUTY FREE INC.

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

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John Wolf (LSO #30165B)
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Email: bjones@blaney.com

Lawyers for the Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BEETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

AMENDED COST OUTLINE OF THE RESPONDENT FOR AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS
(For Motion Held November 1 to 3, 2023)

	PARTIAL INDEMNITY SCALE *	SUBSTANTIAL INDEMNITY SCALE **
TOTAL FEES (INCLUDING HST)	$384,327.75	$615,461.71
TOTAL DISBURSEMENTS (INCLUDING HST)	$25,059.58	$25,059.58
TOTAL	**$409,387.33**	**$640,521.29**

*Partial indemnity is calculated at 50% of actual fees billed. **Substantial indemnity is calculated at 80% of actual fees billed.

STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers/clerks:

Name of Lawyer/	Role	Fees	Years of Experience	Year of Call
David T. Ullmann (DTU)	Lawyer	$675 2022 $750 2023	24	1999
John C. Wolf (JCW)	Lawyer	$795 2022 $700 2023	34	1989
Brendan Jones (BJ)	Lawyer	$485 2022 $495 2023	14	2009
Cristina Fulop (CF)	Lawyer	$325	2	2021
Ines Ferreira (IF)	Lawyer	$325	2	2021
Steven Kelly (SK)	Lawyer	$335	0	2023
Ariyana Botejue (AB)	Law Clerk	$175 2022 $200 2023	N/A	N/A

THE HOURS SPENT, THE RATES SOUGHT FOR COSTS

1. CASE CONFERENCE OCTOBER 6, 2022			
LAWYER/LAW CLERK	TIME	PARTIAL INDEMNITY SCALE*	SUBSTANTIAL INDEMNITY SCALE**
DTU @ $675 per hour	2.3	$775.10	$1,242.00
AB @ $175 per hour	1.6	$160.00	$224.00
SUBTOTAL:		$935.10	$1,466.00
HST:		$121.56	$190.58
TOTAL:		**$1,056.66**	**$1,656.58**

2. SCHEDULING HEARINGS NOVEMBER 29 AND 30, 2022			
LAWYER/LAW CLERK	TIME	PARTIAL INDEMNITY SCALE*	SUBSTANTIAL INDEMNITY SCALE**
DTU @ $675 per hour	18.6	$6,268.20	$10,044.00
JCW @ $795 per hour	8.5	$3,374.50	$5,406.00
SUBTOTAL:		$9,642.70	$15,450.00
HST:		$1,253.55	$2,008.50
TOTAL:		**$10,896.25**	**$17,458.50**

3. CASE CONFERENCE DECEMBER 9, 2022			
LAWYER/LAW CLERK	TIME	PARTIAL INDEMNITY SCALE*	SUBSTANTIAL INDEMNITY SCALE**
DTU @ $675 per hour	5.1	$1,718.70	$2,754.00
JCW @ $795 per hour	11.1	$4,406.70	$7,059.60
AB @ $175 per hour	7.6	$661.20	$1,064.00

SUBTOTAL:	$6,786.60	$10,877.60
HST:	$882.25	$1,414.08
TOTAL:	**$7,668.85**	**$12,291.68**

4. CROSS-MOTION AND LIFT STAY MOTION JANUARY 5, 2023 (ADJOURNED)			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $675 per hour	79.3	$26,724.10	$42,822.00
JCW @ $795 per hour	55.2	$21,914.40	$35,107.20
JCW @ $700 per hour	10	$3,500.00	$5,600.00
BJ @ $485 per hour	91.6	$22,167.20	$35,540.80
BJ @ $495 per hour	2.4	$592.8	$950.40
AB @ $175 per hour	2	$174.00	$280
SUBTOTAL:		$75,072.50	$120,300.40
HST:		$9,759.42	$15,639.05
TOTAL:		**$84,831.92**	**$135,939.45**

5. CASE CONFERENCE JANUARY 19, 2023			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $750 per hour	10	$3,750.00	$6,000.00
JCW @ $700 per hour	2.9	$1,015.00	$1,624.00
BJ @ $495 per hour	4.4	$1,086.80	$1,742.40
SUBTOTAL:		$5,851.80	$9,366.40
HST:		$760.73	$1,217.63
TOTAL:		**$6,612.53**	**$10,584.03**

6. MEDIATION MARCH 27-28, 2023			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $750 per hour	37.3	$13,987.50	$22,380.00
JCW @ $700 per hour	24.9	$8,715.00	$13,944.00
SUBTOTAL:		$22,702.50	$36,324.00
HST:		$2,951.32	$4,722.12
TOTAL:		**$25,653.82**	**$41,046.12**

7. CASE CONFERENCE APRIL 4, 2023			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $750 per hour	38.8	$ 14,550.00	$ 23,280.00
JCW @ $700 per hour	21	$ 7,350.00	$ 11,760.00
BJ @ $495 per hour	12.5	$ 3,087.50	$4,950.00
AB @ $200 per hour	.2	$ 40.00	$32.00
SUBTOTAL:		$25,027.50	$40,022.00
HST:		$3,253.57	$5,202.86

TOTAL:	**$28,281.07**	**$45,224.86**

8. DOCUMENT PRODUCTION APRIL TO SEPTEMBER, 2023 (DISCOVERY)			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $750 per hour	16.2	$6,075.00	$9,720.00
JCW @ $700 per hour	3.9	$1,365.00	$2,184.00
BJ @ $495 per hour	11.5	$2,840.00	$4,554.00
IF @ $325	5.5	$891.00	$1,430.00
AB @ $200 per hour	8.1	$810.00	$1,296.00
SUBTOTAL:		$11,981.00	$19,184.00
HST:		$1,557.53	$2,493.92
TOTAL:		**$13,538.53**	**$21,677.92**

9. EXAMINATIONS MAY TO SEPTEMBER 2023 (DISCOVERY)			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $750 per hour	20	$7,500.00	$12,000.00
JCW @ $700 per hour	20	$7,000.00	$11,200.00
BJ @ $495 per hour	191.5	$ 47,300.50	$75,834.00
IF @ $325 per hour	37.7	$6,107.40	$ 9,802.00
CF @ $325 per hour	20.2	$ 3,272.40	$ 5,252.00
SUBTOTAL:		$71,272.40	$114,088.00
HST:		$9,265.41	$14,831.44
TOTAL:		**$80,445.71**	**$128,919.44**

10. CASE CONFERENCE JUNE 14 AND 15, 2023			
LAWYER/LAW CLERK	**TIME**	**PARTIAL INDEMNITY SCALE***	**SUBSTANTIAL INDEMNITY SCALE****
DTU @ $750 per hour	5.5	$2,062.50	$3,300.00
JCW @ $700 per hour	1.9	$665.00	$1,064.00
BJ @ $495 per hour	17.45	$4,310.15	$6,910.20
AB @ $200 per hour	1.2	$120.00	$192.00
SUBTOTAL:		$7,157.65	$11,466.20
HST:		$930.49	$1,490.60
TOTAL:		**$8,088.14**	**$12,956.80**

11. CROSS MOTION JULY 25, 2023 (ADJOURNED)			
LAWYER/LAW CLERK	TIME	PARTIAL INDEMNITY SCALE*	SUBSTANTIAL INDEMNITY SCALE**
DTU @ $750 per hour	64.6	$24,225.00	$38,760.00
JCW @ $700 per hour	34.8	$12,180.00	$19,488.00
BJ @ $495 per hour	58.75	$14,511.25	$23,265.00
	SUBTOTAL:	$50,916.25	$81,513.00
	HST:	$6,619.11	$10,596.69
	TOTAL:	**$57,535.36**	**$92,109.69**

12. CASE CONFERENCE SEPTEMBER 6, 2023			
LAWYER/LAW CLERK	TIME	PARTIAL INDEMNITY SCALE*	SUBSTANTIAL INDEMNITY SCALE**
DTU @ $750 per hour	30	$11,250.00	$18,000.00
JCW @ $700 per hour	14.3	$5,005.00	$8,008.00
BJ @ $495 per hour	21.3	$5,261.10	$8,434.80
SK @ $335 per hour	7	$1,172.50	$1,876.00
	SUBTOTAL:	$22,688.60	$36,318.80
	HST:	$2,949.51	$4,721.44
	TOTAL:	**$25,638.11**	**$41,040.24**

13. CROSS MOTION NOVEMBER 1-3, 2023 (HELD)			
LAWYER/LAW CLERK	TIME	PARTIAL INDEMNITY SCALE*	SUBSTANTIAL INDEMNITY SCALE**
DTU @ $750 per hour	30	$11,250.00	$18,000.00
JCW @ $700 per hour	15	$ 10,500.00	$ 16,800.00
BJ @ $495 per hour	30	$ 7,410.00	$ 11,880.00
AB @ $200 per hour	10	$1,000.00	$1,600.00
	SUBTOTAL:	$30,160.00	$48,280.00
	HST:	$3,920.80	$6,276.40
	TOTAL:	**$34,080.80**	**$54,556.40**

DISBURSEMENTS

Type	HST Charged	No HST	**TOTAL**
Conference calls	$93.40		
Photocopying	$2,106.80		
Binding/Tab Charges	$152.51		
Court Filing*		$659.00	
Scanning	$548.00		
~~Agents Fees~~	~~$11,666.19~~		
Parking	$10.00		
Travel & Mileage	$160.80		
Court Reporter	$674.50		
Expert Reports - MDD	$4,664.64		
Expert Reports - MDD	$4,183.36		
Expert Reports - JCWG	$8,999.43		
SUBTOTAL BEFORE TAX	~~$33,259.63~~ $21,593.44		
HST	~~$4,323.75~~ $2,807.14		
SUBTOTAL	~~$37,583.38~~ $24,400.58	$659.00	
			~~**$38,242.38**~~ **$25,059.58**

*Disbursements exempt of HST

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred and claimed.

Date: ~~November 24th~~, December 1st , 2023

David T. Ullmann

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

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

Email address of recipient: See Service List

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AMENDED COST OUTLINE OF THE RESPONDENT FOR AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS
(For Motion Held November 1 to 3, 2023)

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

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John Wolf (LSO #30165B)
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Email: bjones@blaney.com

Lawyers for the Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

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

REPLY COST SUBMISSIONS OF PEACE BRIDGE DUTY FREE INC.

Date: December 1st, 2023	**BLANEY MCMURTRY LLP** Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto, ON, M5C 3G5 **David T. Ullmann (LSO #42357I)** Tel: (416) 596-4289 Email: dullmann@blaney.com **John Wolf (LSO #30165B)** Email: jwolf@blaney.com **Brendan Jones (LSO #56821F)** Email: bjones@blaney.com Lawyers for the Respondent

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and –

PEACE BRIDGE DUTY FREE INC.

Respondent

Reply Costs Submissions of Peace Bridge Duty Free Inc.
(For motion held November 1 to 3, 2023)

1. Regarding the Authority's lift stay motion heard on January 5th, 2023, the Tenant does not agree with the Authority's statement at paragraph 3 of its submissions that there was no successful party. The Authority initiated the motion and did not obtain any of the relief sought in its notice of motion. The court directed the parties to attend a mediation that the Tenant requested, and the Authority resisted. The Tenant incurred significant costs because of the Authority's unsuccessful motion and should be entitled to recover its costs.
2. Regarding paragraphs 6 to 8 of the Authority's cost submissions regarding the July 25th-26th, 2023 hearing for the Tenant's production motion and the Authority's non-monetary default motion, the Authority is mistaken in its statement that the Tenant prepared no affidavit. The Tenant prepared a full motion record on notice to the Authority relating to the Authority's deficient productions. This included an affidavit affirmed by Cristina Fulop on July 19th, 2023. The Tenant was successful obtaining relief on all three issues in its

notice of motion (with modified relief in respect of the board of director's communications). The motion should not have been necessary. It was only required because of the Authority's lack of disclosure/cooperation, which was consistent with the Authority's "hardball" approach throughout these proceedings.

3. The Authority brought no procedural motion on July 25th-26th, 2023 in relation to the matters argued at the hearing.
4. The Authority's suggestion that it obtained relief from the July 25th-26th, 2023 hearing is exaggerated. There were issues discussed during argument about the Tenant's recently discovered backup data that contained Tenant emails that were believed to be recoverable and the Authority's letter containing pre-mature examination questions that were ultimately included in the endorsement.
5. The Authority's motion for leave to serve notices of non-monetary default served no purpose other than to increase costs of these proceedings. The Tenant had to respond to the motion, and ultimately because the motion served no purpose, it was adjourned without being considered by the Court.
6. At paragraph 15, the Authority criticizes the Tenant for not providing any insight into what the Tenant thought would be reasonable in terms of costs. However, the Authority also did not provide the Tenant with any insight into what it thought was reasonable.
7. The costs outlines show that more time was spent by the Tenant's lawyers on certain steps, which is to be expected as the moving party. However, because of the significantly higher hourly rates of the Authority's counsel, the difference in the actual costs incurred is reduced. The additional time spent by the Tenant's lawyers was also, at least in part, due to

the Authority's incomplete disclosure resulting in time being spent trying to identify what had been withheld.

Amended Costs Submissions and Outline

8. It has come to the Tenant's attention that the expert fee invoices were double counted as agent fees. Accordingly, the Tenant is submitting Amended Costs Submissions (Tab 1) and an Amended Cost Outline (Tab 2) to correct that error.

ALL OF WHICH IS HEREBY SUBMITTED ON DECEMBER 1st, 2023, BY:

David T. Ullmann and Brendan Jones

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

ROYAL BANK OF CANADA
Applicant

and

PEACE BRIDGE DUTY FREE INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

Reply Costs Submissions of Peace Bridge Duty Free Inc.
(For motion held November 1 to 3, 2023)

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

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Email: dullmann@blaney.com

John Wolf (LSO #30165B)
Email: jwolf@blaney.com

Brendan Jones (LSO #56821F)
Email: bjones@blaney.com

Lawyers for the Respondent

TAB D

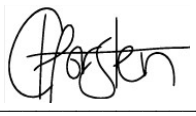
Attached is Exhibit “D”

Referred to in the

AFFIDAVIT OF BEN GARDENT

Sworn before me

this 15th day of January, 2024



Calvin Peter Horsten, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires June 14, 2025.

AIRD BERLIS

Sanjeev P. R. Mitra
Direct: 416.865.3085
E-mail: smitra@airdberlis.com

February 1, 2023

VIA EMAIL (DUllmann@blaney.com)

Peace Bridge Duty Free Inc.
c/o Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5

Dear Mr. Ullmann:

Re: Credit Agreement dated July 20, 2018, as amended on July 5, 2021 and October 8, 2021 (collectively, the "Agreement") between Royal Bank of Canada (the "Lender") and Peace Bridge Duty Free Inc. (the "Borrower")

As you know, we are counsel for the Lender in respect of the above-referenced Agreement. Unless otherwise defined, all capitalized terms in this letter are defined as they are under the Agreement.

Based upon the information provided by the Borrower to the Lender, the Borrower has failed to achieve a Debt Service Coverage ratio of not less than 1.25:1 as calculated as at the end of its fiscal year ending December 31, 2021. The foregoing constitutes a default of its financial covenant in the Agreement which is not acceptable to the Lender and which will not be tolerated or waived by the Lender.

The Lender expects that the Borrower will have remedied this default by no later than the end of the Borrower's fiscal year ending on December 31, 2022. The Bank expects to receive the audited financial statements of the Borrower for fiscal 2022 by no later than March 31, 2023.

The Lender hereby reserves all its rights and remedies in connection with the foregoing.

Yours truly,

AIRD & BERLIS LLP

Sanjeev P. R. Mitra
SPRM/jn
cc: Client (via email)

51967001.2

AIRD BERLIS

Sanjeev P. R. Mitra
Direct: 416.865.3085
E-mail: smitra@airdberlis.com

June 1, 2023

VIA EMAIL (DUllmann@blaney.com)

Peace Bridge Duty Free Inc.
c/o Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5

Dear Mr. Ullmann:

Re: Credit Agreement dated July 20, 2018, as amended on July 5, 2021 and October 8, 2021 (collectively, the "Agreement") between Royal Bank of Canada (the "Lender") and Peace Bridge Duty Free Inc. (the "Borrower")

We write further to our letter of February 1, 2023 wherein we wrote to your client regarding its failure to achieve its minimum Debt Service Coverage financial covenant. A copy of the foregoing letter is attached hereto for ease of reference.

Based upon the information provided by the Borrower to the Lender for the fiscal year ending December 31, 2022, the Borrower has again failed to achieve a Debt Service Coverage ratio of not less than 1.25:1 as calculated as at the end of its fiscal year ending December 31, 2021. The Borrower has achieved a Debt Service Coverage ratio of only -0.10:1 . The foregoing constitutes a continuing default of the financial covenant in the credit agreement which is not acceptable to the Lender and which will not be tolerated or waived by the Lender.

Absent a resolution with the landlord and an acceptable plan to bring the Borrower back into compliance with its obligations under the credit agreement, we will be relying upon this event of default in connection with the Receivership application which is scheduled to be heard September 22, 2023

The Lender hereby reserves all its rights and remedies in connection with the foregoing.

Yours truly,

AIRD & BERLIS LLP

Sanj Mitra

Sanjeev P. R. Mitra
SPRM/jn
cc: Client (via email)

53239166.1

TAB E

Attached is Exhibit “E”

Referred to in the

AFFIDAVIT OF BEN GARDENT

Sworn before me

this 15th day of January, 2024

Calvin Peter Horsten, a
Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires June 14, 2025.

From: Sanjeev Mitra <smitra@airdberlis.com>
Sent: Tuesday, January 2, 2024 4:29 PM
To: David Ullmann (dullmann@blaney.com)
Cc: Sanjeev Mitra; Jeremy Nemers
Subject: FW: Service - Appeal - Royal Bank of Canada v Peace Bridge Duty Free - CV-21-00673084-00CL

David we have your materials.

We understand that the company failed to meet its projections by the end of the year in terms of the cash balance. As we have previously advised, the bank would prefer to be repaid in full at this stage. If not, we will be providing you with a supplementary affidavit. We would like to know when you would like to conduct cross examinations or at least set the time aside as the hearing is scheduled for January 29, 2024.

Thanks

Sanj

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

T 416.865.3085
E smitra@airdberlis.com

Aird & Berlis LLP

From: Ariyana Botejue <ABotejue@blaney.com>
Sent: Friday, December 29, 2023 11:22 AM
To: Stanek, Chris <Christopher.Stanek@gowlingwlg.com>; Patrick.Shea@gowlingwlg.com; Sanjeev Mitra <smitra@airdberlis.com>; Jeremy Nemers <jnemers@airdberlis.com>; mmanchanda@spergel.ca; AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca; steven.groeneveld@ontario.ca; 'Insolvency.Unit@ontario.ca' <Insolvency.Unit@ontario.ca>
Cc: David T. Ullmann <DUllmann@blaney.com>; John C. Wolf <jwolf@blaney.com>; Brendan Jones <BJones@blaney.com>; Ines Ferreira <IFerreira@blaney.com>
Subject: RE: Service - Appeal - Royal Bank of Canada v Peace Bridge Duty Free - CV-21-00673084-00CL

All,

Further to my email of yesterday, please see attached documents which were accepted for filing today by the Court of Appeal, along with new Court of Appeal file number.

Thank you,

Ariyana Botejue
Legal Assistant to Stephen Gaudreau & David Ullmann

abotejue@blaney.com
416-593-1221 ext. 4777

From: Ariyana Botejue
Sent: Wednesday, December 27, 2023 1:52 PM
To: Stanek, Chris <Christopher.Stanek@gowlingwlg.com>; 'Patrick.Shea@gowlingwlg.com' <Patrick.Shea@gowlingwlg.com>; 'Sanjeev Mitra' <smitra@airdberlis.com>; Jeremy Nemers <jnemers@airdberlis.com>; 'mmanchanda@spergel.ca' <mmanchanda@spergel.ca>; 'AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca' <AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca>; 'steven.groeneveld@ontario.ca' <steven.groeneveld@ontario.ca>; 'Insolvency.Unit@ontario.ca' <Insolvency.Unit@ontario.ca>
Cc: David T. Ullmann <dullmann@blaney.com>; John C. Wolf <jwolf@blaney.com>; Brendan Jones <BJones@blaney.com>; Ines Ferreira <IFerreira@blaney.com>
Subject: Service - Appeal - Royal Bank of Canada v Peace Bridge Duty Free - CV-21-00673084-00CL

To the Service List,

Attached, please find our client's Notice of Appeal and the Appellant's Certificate Respecting the Evidence appealing the decision of Justice Kimmel, all of which is hereby served upon you pursuant to the *Rules of Civil Procedure* and *Court of Appeal Procedure*.

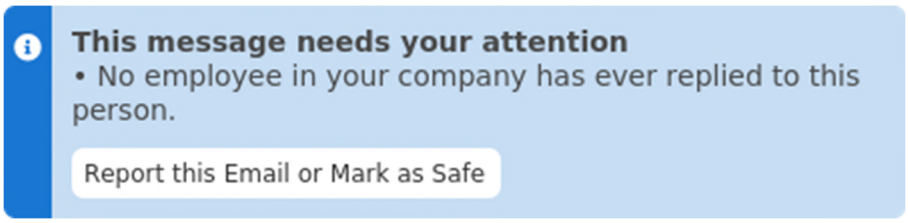
Thank you,

Blaney McMurtry LLP 2 Queen Street East | Suite 1500 Toronto, Ontario M5C 3G5

Ariyana Botejue
Legal Assistant to Stephen Gaudreau & David Ullmann

abotejue@blaney.com
416-593-1221 ext. 4777
Blaney.com

From: David T. Ullmann <DUllmann@blaney.com>
Sent: Tuesday, January 2, 2024 4:31 PM
To: Sanjeev Mitra <smitra@airdberlis.com>
Subject: Automatic reply: Service - Appeal - Royal Bank of Canada v Peace Bridge Duty Free - CV-21-00673084-00CL



1

I am on vacation and returning January 9, 2024, with limited access to emails.

TAB 2

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

PEACE BRIDGE DUTY FREE INC.

Respondent

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

SERVICE LIST
(as at January 12, 2024)

TO:	**AIRD & BERLIS LLP** Brookfield Place 181 Bay Street, Suite 1800 Toronto, ON M5J 2T9 **Sanj Mitra (LSO #37934U)** Tel: (416) 865-3085 Fax: (416) 863-1515 Email: smitra@airdberlis.com **Jeremy Nemers (LSO #66410Q)** Tel: (416) 865-7724 Fax: (416) 863-1515 Email: jnemers@airdberlis.com *Lawyers for the Applicant*

AND TO:	**MSI SPERGEL INC.** 505 Consumer Road Suite 200 Toronto, ON M2J 4V8 **Mukul Manchanda** Tel: (416) 498-4314 Fax: (416) 494-7199 Email: mmanchanda@spergel.ca *Monitor and Proposed Receiver*
AND TO:	**THORNTON GROUT FINNIGAN LLP** Suite 3200, 100 Wellington St. W. P.O. Box 329 Toronto-Dominion Centre Toronto, ON M5K 1K7 **Leanne M. Williams** Tel: (416) 304-0060 Fax: (416) 304-1313 Email: lwilliams@tgf.ca *Lawyers for the Monitor and Proposed Receiver*
AND TO:	**PEACE BRIDGE DUTY FREE INC.** 1 Peace Bridge Plaza Fort Erie, ON L2A 5N1 *Respondent*
AND TO:	**BLANEY MCMURTRY LLP** 2 Queen Street East, Suite 1500 Toronto, ON M5C 3G5 **David T. Ullman** Tel: (416) 596-4289 Fax: (416) 594-2437 Email: dullmann@blaney.com *Lawyers for the Respondent*

AND TO:	**GOWLING WLG** 100 King St. W., Suite 1600 Toronto, ON M5X 1G5 **Christopher Stanek** Tel: (416) 862-4369 Fax: (416) 862-7661 Email: christopher.stanek@gowlingwlg.com **Patrick Shea** Tel: (416) 369-7399 Fax: (416) 862-7661 Email: patrick.shea@gowlingwlg.com *Lawyers for Buffalo and Fort Erie Public Bridge Authority*
AND TO:	**ATTORNEY GENERAL OF CANADA** **Department of Justice Canada** **Ontario Regional Office, Tax Law Section** 120 Adelaide Street West, Suite 400 Toronto, ON **Diane Winters** Tel: (647) 256-7459 Email: diane.winters@justice.gc.ca
AND TO:	**MINISTRY OF FINANCE (ONTARIO)** Legal Services Branch 6th Floor – 33 King Street West Oshawa, ON L1H 8H5 Email: insolvency.unit@ontario.ca

EMAIL ADDRESS LIST

smitra@airdberlis.com; jnemers@airdberlis.com; dullmann@blaney.com; christopher.stanek@gowlingwlg.com; patrick.shea@gowlingwlg.com; diane.winters@justice.gc.ca; insolvency.unit@ontario.ca; mmanchanda@spergel.ca; lwilliams@tgf.ca

46681279.2

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

Applicant

Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

SUPPLEMENTARY APPLICATION RECORD
(returnable January 29, 2024)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Sanj Mitra (LSO # 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Applicant, Royal Bank of Canada